In the United States Court of Appeals for the First Circuit

No. 04-1379

ARTHUR HARVEY,

Plaintiff/Appellant,

v.

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant/Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

BRIEF OF *AMICI CURIAE* RURAL ADVANCEMENT FOUNDATION INTERNATIONAL-USA, CENTER FOR FOOD SAFETY, AND BEYOND PESTICIDES IN SUPPORT OF PLAINTIFF/APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Rural Advancement Foundation International-USA, Center for Food Safety, and Beyond Pesticides are all not-for-profit corporations.

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Dated: June 14, 2004

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STATEMENT OF IDENTITY OF *AMICI CURIAE*, THEIR INTERESTS IN THE CASE, AND SOURCE OF AUTHORITY

As identified in the Motion for Leave to File a Brief of *Amici Curiae*, the Proposed *Amici Curiae* are Rural Advancement Foundation International-USA, Center for Food Safety, and Beyond Pesticides (collectively, "Proposed *Amici Curiae*").

The interest of Proposed *Amici Curiae* in this case arises out of their commitment to an organic agriculture that is both environmentally sound and economically viable. Proposed *Amici Curiae* strongly support the rule-making process as a prerequisite of public participation and transparency in the ongoing implementation of the National Organic Program. However, they are concerned that the regulations at issue in this case reflect a fundamental disregard for limits on the scope of authority delegated to the Secretary under the Organic Foods Production Act.

Proposed *Amici Curiae* do not write to express their views about what the policies guiding the National Organic Program ought to be. They recognize this court is not the proper forum for expressing their views. Proposed *Amici Curiae* submit this brief because of a fundamental commitment to good government process, knowing that this court need not rule upon the merits of the Secretary's policies, but upon whether the Secretary's regulations are consistent with the law.

Proposed *Amici Curiae* believe that the Secretary's use of the rule-making process to cloak departures from the law in legitimacy threatens the integrity of the entire National Organic Program. Organic food depends for its continued success upon its reputation for meeting consumer expectations. Put simply, consumers cannot tell if food is organic by looking at it in the store. They must be able to rely upon organic certification, as indicated by the USDA Organic seal of the National Organic Program, to indicate whether a product meets their expectations.

Proposed *Amici Curiae* believe that consumers and farmers will not accept "exceptions" to the law, and that their reaction to these exceptions could deliver a fatal blow to the organic market. Any lessening in the integrity of the National Organic Program and of the USDA Organic seal will have a deleterious effect upon the options in the marketplace for the farmer and consumer members of Rural Advancement Foundation International-USA, Center for Food Safety, and Beyond Pesticides. Finally, Proposed *Amici Curiae* submit this brief to urge the court, if it finds in favor of Harvey on one or more of the counts, to strive to fashion a remedy that will minimize disruption to the organic marketplace.

INTRODUCTION

In the decades following the efforts of the pioneers of modern organic farming in the 1930's and 1940's, practitioners of organic farming reached a substantial consensus on basic principles of organic food production. Farmers, grocers,

consumers, and health and environmental groups agreed that organic agriculture and organic food production was made up of an integrated and interrelated group of management practices. They agreed that organic agriculture was a low-input system that relied upon on-farm practices such as crop rotation and compost application to build soil fertility and disrupt pest cycles, in contrast to high-input conventional agriculture which looks to synthetic fertilizers and pesticides to address these farm management challenges.

When the Organic Food Production Act (*hereinafter* "the OFPA" or "the Act") was passed in 1990, Congress recognized that organic food production was an enterprise that had developed primarily in the private sector. Congress strove to reflect the consensus that already had been achieved in the organic community, rather than "reinvent the wheel." S. Rep. No. 101-357 at 291 (1990) *reprinted in* 1990 U.S.C.C.A.N. 4656 at 4945. Congress affirmed these basic principles of organic agriculture, as when the Senate Report accompanying the OFPA stated that, "[o]rganic food is produced using sustainable production methods that rely primarily on natural materials." 1990 U.S.C.C.A.N. at 4946. Commenting on the need to limit departures from the general rule favoring natural materials and prohibiting synthetic substances, the Senate Report noted that, "The committee does not intend to allow the use of many synthetic substances. The legislation has been carefully written to prevent widespread exceptions or 'loopholes' in the

organic standards which would circumvent the intent of this legislation." 1990 U.S.C.C.A.N. at 4952. Affirming the interrelated nature of organic crop and organic livestock production, the Senate report stated that, "The Committee felt strongly that organically produced feed should be required for livestock." 1990 U.S.C.C.A.N. at 4956.

Congress also sought to create mechanisms within the OFPA that would allow organic farming and food handling to continue to evolve. As a consequence, Congress left some gaps in the law. Congress specified the public, participatory process that was to be used to fill in the remaining details of the requirements of the organic certification program authorized by OFPA. In addition to formal rule-making, that process included appointment by the Secretary of a 15-member National Organic Standards Board ("NOSB") to develop a proposed "National List" of (1) natural substances prohibited in organic farming and food handling, (2) synthetic substances allowed in organic farming and (3) non-synthetic substances allowed in organic food handling, even if not organically produced. 7 U.S.C. §§ 6517 and 6518. The NOSB was also to make recommendations to the Secretary on other aspects of organic program.

This case was brought by Plaintiff-Appellant Arthur Harvey (*hereinafter* "Harvey") against Defendant-Appellee (*hereinafter* "Secretary" or "USDA") soon after the regulations took effect. Harvey alleged that nine provisions of the

National Organic Program regulations were inconsistent with the Act. Following cross-motions for summary judgment, a magistrate in U.S. District Court for the District of Maine issued a recommendation that summary judgment be granted in favor of USDA on counts 1-8, and in favor of Harvey on Count 9. The district court judge issued a final order ruling in favor of USDA as to Count 9 and concurring with the recommendations and reasoning of the magistrate with respect to the first eight counts. Harvey appealed as to counts 1, 2, 3, 5, 6, 7, and 8. *Amici Curiae* submit this brief in order to provide assistance to the court with respect to counts 3, 7 and 1.

Count 3 involves Harvey's claim that a regulation allowing the use of synthetic substances in organic processed foods, without limiting the allowed use to synthetic substances required under the food safety laws named in the Act, is in conflict with the Act.

Count 7 involves Harvey's claim that a regulation allowing dairy animals to be fed 80% organic feed during nine months of the year prior to sale or labeling of the milk or milk products as organic is in conflict with the Act.

Count 1 involves Harvey's claim that a regulation allowing the use of "any" non-organically produced agricultural product in organic processed food is in conflict with the Act.

Amici Curiae believe that the rulings in the judge's order and the magistrate's recommended decision with respect to counts 1, 3, and 7 were in error. The regulations exceed the Secretary's authority and undermine the clear intent of Congress.

ARGUMENT

I. The Secretary's Rule-making Authority Does Not Extend to the Adoption of Regulations that are Inconsistent with the Act.

Under the OFPA, Congress has delegated substantial rulemaking authority to the Secretary of Agriculture. 7 U.S.C. § 6521. However, that delegation is limited to carrying out the mandates of the Act. The Secretary has no authority to adopt regulations that are in conflict with the Act. Nor does the Secretary possess the authority to create "exceptions" to the Act.

The seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984) made a sharp distinction between instances where Congress has itself made a policy decision, and instances where Congress has left a gap for the agency charged with implementing the law to supply a reasonable construction of the statute. *Chevron* established that:

> [W]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, 467 U.S. at 842-43.

In performing the first part of a *Chevron* analysis, courts must look first to the plain meaning of the statute, drawing its essence from the "particular statutory language at issue, as well as the language and design of the statute as a whole." *Strickland v. Commissioner, Maine Dept. of Human Services*, 48 F.3d 12, 16 (1st Cir. 1995) (*quoting K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *accord Dunn v. Secretary of Agric.*, 921 F.2d 365, 366-367 (1st Cir. 1990)).

This court has further explained its application of *Chevron* step one in the following manner:

> [T]he question whether Congress has spoken on a particular question involves two smaller steps. We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. If no such readily apparent meaning springs from the statute's text, we next examine the legislative history, albeit skeptically, in search of an unmistakable expression of congressional intent. And if, at that stage, the statute itself, viewed in connection with the statutory design and the legislative history, reveals an unequivocal answer to the interpretive question, the court's inquiry ends.

Id. at 17.

As this court has noted, "It is transpicuously clear that, under *Chevron*, no deference is due if Congress has spoken directly to the question." *Passamaquoddy Tribe v. Maine***,** 75 F.3d 784, 793 (1st Cir. 1996) (citing *Strickland*, 48 F.3d at 16).

Because the relevant statutory language concerning Counts 3 and 7 is plain and unambiguous, these matters fall under *Chevron* step one.

A. The Regulation Allowing Use of the Term Organic to Describe Food that Has Been Processed Using Synthetic Substances Is Unlawful.

One instance in which the regulation departs from the clear statutory requirements was raised by Harvey in Count 3 before the district court. Count 3 challenges regulations allowing certain synthetic substances for use in handling organic foods.

1. The Act Prohibits the Use of Synthetic Substances in Organic Food Handling, with Narrow Exceptions Not Pertinent Here.

The district court ruled in favor of the Secretary on Count 3. Referring to Harvey's argument that 7 U.S.C. § 6510(a)(1) prohibits all use of synthetic substances in handling organic food, the magistrate opined,

> I simply cannot agree with his position given the contemporaneous enactment of § 6517 anticipating the possibility of some exemptions and the discussion of the Secretary's discretion in this area in the Senate Report. *See* S. Rep. 101-357, *reprinted in* 1990 U.S.C.C.A.N. 4943, 4952-53.

App. at 113-14, Recommended Decision at 12-13. As is explained below, the district court erred in adopting the magistrate's reasoning because the provisions in the OFPA demonstrate Congress's intent to reserve to itself the decision about the categories of substances that may be exempted from the prohibition, and 7 U.S.C.

§ 6517 in fact sets forth the only permissible categories of exemptions from the prohibition.

The OFPA provides that, in order to be sold or labeled as an organically produced agricultural product, the agricultural product shall "have been produced and handled without the use of synthetic chemicals, except as otherwise provided *in this title*." 7 U.S.C. § 6504(1) (*emphasis added*). Rather than delegating it to the Secretary, the plain language of OFPA reserves to Congress the authority to "provide otherwise." Indeed, the OFPA does provide two narrow exceptions to the prohibition on use of synthetic substances in organic food handling. *See* 7 U.S.C. §§ 6510(a)(7) and 6519(f) (noting that OFPA does not supersede the requirements of certain other enumerated food safety laws). These exceptions are not at issue in this case. *See* Appendix to the Brief of Arthur Harvey, Plaintiff-Appellant ("App.") at 145 (Final Order at 1, footnote 1); App. at 143-44 (Plaintiff's Motion to Narrow).

To the extent the district court construed 7 U.S.C. § 6517, the provision of the OFPA which sets forth the process for establishing the National List of allowed and prohibited substances, as simply "anticipating some exemptions," and granting the Secretary discretion as to the nature of those exemptions, its opinion is unsupported by the language of the statute and the legislative history. In pertinent part, 7 U.S.C. § 6517(c) provides that,

> The National List may provide for the use of substances in an organic *farming* or *handling* operation that are otherwise prohibited under this title only if —
>
> . . .
>
> (B) the substance--
>
> (i) is used in *production* and contains an active *synthetic* ingredient in the following categories: copper and sulfur compounds; toxins derived from bacteria; pheromones, soaps, horticultural oils, fish emulsions, treated seed, vitamins and minerals; livestock parasiticides and medicines and production aids including netting, tree wraps and seals, insect traps, sticky barriers, row covers, and equipment cleansers;
>
> (ii) is used in *production* and contains *synthetic* inert ingredients that are not classified by the Administrator of the Environmental Protection Agency as inerts of toxicological concern; or
>
> (iii) is used in *handling* and is *non-synthetic* but is not organically produced; and
>
> (C) the specific exemption is developed using the procedures described in subsection (d).

7 U.S.C. § 6517(c) (*emphasis added*).

In the section establishing the National List, as in the OFPA as a whole, there are provisions that are particular to organic food *production*, used in the Act to mean growing or producing food. *See* 7 U.S.C. § 6502(18). There are also provisions that are particular to organic food *handling*, used in the Act to mean selling, processing, or packaging agricultural products. *See* 7 U.S.C. § 6502(8). The overall provision barring the use of synthetics in producing or handling agricultural products labeled organic is reiterated in the statutory provision governing organic food handling in particular. 7 U.S.C. § 6510(a)(1). That no

exceptions to the prohibition on the use of synthetic substances in food handling contained in 7 U.S.C. § 6517 is clear and unambiguous.

In § 6517(c), Congress established two narrow categories of exemptions for *synthetic* substances to be allowed for use in organic food *production*, and one category of exemption for *non-synthetic* (but not organically produced) substances to be allowed for use in organic food *handling*. 7 U.S.C. § 6517(c)(1)(B). The phrase at the beginning of 7 U.S.C. § 6517(c) that introduces the exemptions contemplates that some otherwise prohibited substances may be authorized for use in organic food handling. However, the exemption created by the Act is narrow; it only authorizes the National Organic Standards Board and the Secretary to allow limited use of *non-synthetic* substances, even if they are not organically produced, in organic food handling. 7 U.S.C. § 6517(c)(1)(B)(iii). The Act provides no exception for *synthetic* substances to be used in organic food *handling*, beyond the use necessary to comply with food safety laws specified in the Act. 7 U.S.C. §§ 6510(a)(7) and 6519(f). The magistrate's recommendation, therefore, is contrary to the Act.

The magistrate's recommended decision blurred the statutory distinctions between organic food production and organic food handling, and the nature of the exemptions statutorily available in each of these. The magistrate's decision did not adhere to step one of *Chevron*, which requires that courts determine the meaning of

statutes from the "particular statutory language at issue, as well as the language and design of the statute as a whole." *Strickland*, 48 F.3d at 16 (internal citations omitted).

Moreover, it is consistent with canons of statutory construction, particularly the doctrine of *expresio unius est esclusio alterius*, to conclude that in creating one exemption for substances allowed in organic food handling, Congress intended to exclude other possible exceptions. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) (explaining that when Congress enumerates exceptions, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (explaining that statutory exceptions are to be construed "narrowly in order to preserve the primary operations of the provision" and quoting *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) for the proposition that to "extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.").

2. The Regulation Allowing the Use of Synthetic Substances in Food Handling, Beyond the Use Necessary to Comply with Specific Food Safety Laws, is Inconsistent with the Act.

The decision regarding what types of synthetic substances may be exempt from the general prohibition on their use in organic food production and handling is expressly reserved to Congress under the OFPA. The general prohibition

governs "except as otherwise provided in this title." 7 U.S.C. § 6504. The challenged regulation, 7 C.F.R. § 205.600(b), which sets forth criteria for inclusion on the National List for "processing aid[s] or adjuvant[s]," and 7 C.F.R. § 205.605(b), which lists allowed synthetic substances in organic food handling, would be lawful only if explicitly provided for by Congress in the Act.

Congress' intent that no synthetic substances are to be allowed in organic food handling, other than the statutorily-prescribed exceptions, which permit use of synthetic substances in organic food handling when required under certain named food safety laws, is clear. 7 U.S.C. §§ 6510(a)(7) and 6519(f). For all other synthetic substances, "Congress has directly spoken to the precise question at issue . . . the intent of Congress is clear, [and] that is the end of the matter." *Chevron,* 467 U.S. at 482. In *United States v. Mead Corp*., the Supreme Court held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. 218, 226-27(2001). In some instances within OFPA, Congress delegated general authority to the Secretary, but in the case of exceptions to the prohibition on use of synthetic substances, it did not.

Amici Curiae acknowledge that reasonable people can disagree about the merit of the policy position taken by the Congress. Placing strict limitations upon the use of synthetic substances may play a technology forcing role, as food handlers search for natural substances or biological and mechanical processes to achieve desired results. On the other hand, advocates of more lenient limitations could argue that some synthetic substances have a long history of use without adverse effects upon the environment and human health, and are convenient and inexpensive to use. This court need not determine which is the wiser policy, but only whether Congress has spoken to this issue. Because Congress has spoken to the issue, that is the end of the matter. Synthetic substances may not be used in handling organic foods beyond the narrow exceptions expressly contained in OFPA.

B. The Regulation Allowing Milk from Dairy Animals Not Fed Organic Feed During the Entire Twelve Months Prior to Sale to Be Labeled Organic Is Unlawful.

Another instance in which the regulation departs from the clear statutory requirements was raised by Harvey in Count 7 before the district court. Count 7 challenges a regulation allowing dairy animals to be given feed that is only 80% organic for nine of the twelve months preceding sale of the animals' milk or milk products with an organic label.

1. The OFPA Requires that Organic Livestock be Given Organic Feed.

The district court ruled in favor of the Secretary with respect to Count 7. The magistrate's reasoning is difficult to understand. The magistrate notes,

> The Secretary states that 'the Rule is avowedly an exception to the Act and the rest of the Rule in this respect.' (Def.'s Reply & Cross Mot. at 35). She offers no justification for this change . . . .

App. at 130, Recommended Decision at 29. Yet on the next page, the magistrate states,

> The Secretary argues that OFPA is at least ambiguous, perhaps silent, with respect to what the feed standards should be for organic dairy animals in the twelve-month period leading up to the sale of milk.

App. at 131, Recommended Decision at 30. The magistrate's recommended decision does not appear to resolve this tension.

In what seems to be meant to be the recommended holding, the magistrate states,

> Rule 205.237(a) is a reasonable interpretation of the sections because it requires that organic livestock be fed a total feed ration composed of agricultural products . . . that are organically produced and, if applicable, organically handled.

App. at 131-132, Recommended Decision at 30-31. This "holding" is perplexing, because Harvey did not challenge the livestock feed regulations at 7 C.F.R. § 205.237, but USDA's departure from those general requirements for dairy animals that originated in a conventionally managed herd contained in 7 C.F.R.

§ 205.236. In the end, the magistrate appears to agree that 7 C.F.R. § 205.236 creates an "exception" to the Act, and that "the Secretary may have been cow-towing to cow farmers," but that the departure from the Act is excused by the Secretary's utilization of "proper procedures." App. at 132-133, Recommended Decision at 31-32.

Under governing U.S. Supreme Court precedent, *i.e.*, *Chevron*, as well as under First Circuit precedent, the magistrate's tolerance for "exceptions" to the Act is unsupportable. As this court has said, "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Strickland*, 48 F.3d at 17. As *Amici Curiae* explain below, the OFPA answers the interpretive question.

In general, the OFPA requires that organic livestock be managed organically not just from birth, but even before birth. *See* 7 U.S.C. § 6509(b) (requiring that animals brought onto an organic farm for breeding purposes must not be in the last third of gestation). Livestock is defined for purposes of the OFPA as "any cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food, fish used for food, wild or domesticated game, or other nonplant life." 7 U.S.C. § 6502(11) ("Livestock"). This broad definition encompasses dairy animals such as cows, goats, and sheep.

One essential aspect of organic livestock management under the OFPA is the provision stating that for a farm to be certified as an organic farm with respect to the livestock produced by the farm, the producers "shall feed livestock organically produced feed that meets the requirements of OFPA." 7 U.S.C. § 6509(c). The combined effect of the two provisions requiring both organic management from the last third of gestation and explaining that organic management involves feeding organic feed to the livestock is of particular concern for dairy farmers, especially those seeking to make the transition from conventional farming to organic farming.

Amici Curiae offer the following brief discussion of the practical challenges faced by conventional dairy farmers who seek to convert their dairy farming operations to organic, in the hope that it will aid the court in resolving this count. An understanding of the practical difficulties of "whole herd conversion," as the process of adopting organic management practices for an entire dairy operation is known within the organic community, may help illuminate the policy decisions made by Congress in the OFPA, as well as the controversy surrounding the "exception" to the statute contained in 7 C.F.R. § 205.236.

Dairy animals, especially dairy animals who are managed with access to pasture as required under the National Organic Program, generally have a much longer productive lifespan than other livestock. This creates economic and management challenges for conventional farmers who wish to transition to the use

of organic practices in their dairy operations. If the provision requiring organic management for the entire life of the animal applied to dairy animals, it would be particularly burdensome for dairy farmers seeking to transition to organic production.

An existing conventional dairy herd is likely to include animals of varying ages and a variety of productive years remaining. For a farmer who may have expended substantial resources in breeding or buying and then caring for a herd of dairy animals for several years to be completely foreclosed from retaining any of those animals in the organic herd would make the transition to organic production cost-prohibitive for many farmers.

The OFPA sets forth a statutory guideline for dairy livestock that states,

> A dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with [the Act] for not less than the 12-month period immediately prior to the sale of such milk and milk products.

7 U.S.C. § 6509(e)(2). The statutory guideline for dairy animals modifies the general rule that organic livestock is to be managed organically from the last third of gestation. 7 U.S.C. § 6509(b). It facilitates whole herd conversion, as well as, potentially, addition of conventionally-raised animals to an organic dairy herd.

The foregoing discussion should make plain that the statutory language in 7 U.S.C. § 6509(e)(2) reduces the *timeframe* during which organic management is

required, but does not alter the *content* of the requirements of organic management, including the requirement that organic livestock be fed organically produced feed contained in 7 U.S.C. § 6509(c).

The statutory distinction between dairy animals and other organic livestock on the one hand, and between the time period during which organic management practices must be applied and the content of those organic management practices may be fleshed out with the aid of an example. A one-year-old pig raised on a conventional farm can never become organic. The pig falls under the general rule that organic livestock must be managed organically from the last third of gestation. A one-year-old cow raised on a conventional farm *may* become organic. The cow falls under the statutory exception that allows dairy animals to be managed organically for one year prior to sale or labeling of the milk or milk products as organic. The statutory exception for the duration of the time period during which the dairy animal must be under organic management practices, however, does nothing to modify the nature of the requirements of organic livestock management, including the requirement that all organic livestock be fed organic feed.

2. The Regulation Allowing 80% Organic Feed for Dairy Animals During Much of the Year Before Sale of the Milk as Organic is Inconsistent with the Act.

The OFPA specifically delegates certain authority to the Secretary to develop regulations for organic livestock and livestock products. 7 U.S.C. § 6509(f). The

Act grants discretion to the Secretary over whether and in what circumstances animal drugs may be used and the products from the animal still be labeled organic, whether and in what circumstances physical alterations may be performed on organic livestock, and what living conditions must be provided for organic livestock. But the regulation at 7 C.F.R. § 205.236(a)(2) exceeds that delegation of authority. Before the district court, the Secretary admitted that the regulation which permits producers to feed dairy animals feed that is 80% organic for nine of the twelve months prior to sale of the milk and milk products as organic is "avowedly an exception" to the Act. App. at 130, Recommended Decision at 29 (citing Def's Reply & Cross Mot. at 35).

The Secretary's litigation posture is consistent with the language of the regulation, which states in pertinent part:

> (a) Livestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching: *Except*, That:
> . . .
> (2) Dairy animals. Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic: *Except*, That, when an entire, distinct herd is converted to organic production, the producer may:
> (i) For the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from land included in the organic system plan and managed in

> compliance with organic crop requirements; and
> (ii) Provide feed in compliance with § 205.237 for the final 3 months.
> (iii) Once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation.

7 C.F.R. § 205.236 (*emphasis in original*).

The Secretary cannot now plausibly argue that 7 C.F.R. § 205.236(a)(2) merely interprets 7 U.S.C. § 6509, when the challenged regulatory text clearly identifies the provision allowing dairy animals to be fed 80% organic feed during three-quarters of the year-long transition to organic production as an *exception* to the rule requiring that organic livestock be fed organic feed as one component of organic management. Section 205.236 simply is not written as an interpretation of the meaning of the statutory term "organic feed" in the context of whole herd conversion, so the question of whether such a regulation would pass muster under *Chevron* is not before this court.

Amici Curiae are deeply concerned that USDA appears to understand, yet openly flout, the limits on the delegation of authority that has been granted to it by the Congress. The OFPA left many gaps and policy decisions to be filled by the Secretary, following consideration of the recommendations of the NOSB and comments from the public via rule-making. When the Secretary crossed the line from filling gaps left by Congress to creating "avowed exceptions" to the

requirements enacted by Congress, the Secretary exceeded her authority. That some members of the public expressed support for provisions to lessen the economic hardship of "whole herd conversion" for dairy farmers beginning organic production during the rule-making process does not excuse the Secretary's exceeding her authority.

The prefatory comments to the final rule state that the "whole herd conversion" rule was included so that newcomers to organic production would be able to take advantage of opportunities similar to those that that were available to those who converted to organic dairy production under existing certification standards. 65 Fed. Reg. 80,548 (2000), 80,569-80,570. During the comment period, there was some debate within the organic community as to whether "whole herd conversion" provisions, with or without more lenient feed requirements, actually benefited small family farmers, or whether they merely facilitated the entry into the organic sector of large producers eager to participate in a lucrative market, but which might ultimately exert downward pressure on the price received for producing organic milk by increasing the supply and lowering the standards. The relative merits of the different underlying policies, however, are irrelevant to the court's inquiry of whether the Secretary exceeded her authority under *Chevron*.

This claim should be decided under *Chevron*, step 1. However, even if this court were to reach step 2 of the Chevron analysis, *Amici Curiae* submit that the

challenged regulation is not a reasonable construction of the statute. *Chevron* step 2 provides that:

> [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 843.

The challenged regulation treats producers who avail themselves of the more lenient feed provisions under the regulations differently from the way it treats those who may have taken advantage of similar provisions in private and state government certification programs prior to implementation of the National Organic Program regulations. Producers who take advantage of the whole herd conversion provision after October 21, 2002, must raise all future additions to the herd organically from the last third of gestation—in accordance with the general statutory rule for organic livestock. But the regulation allows those who converted to organic production prior to implementation of the regulations routinely to add conventionally-raised dairy animals to their herds, provided they manage those animals organically for twelve months prior to selling or labeling the milk or milk products as organic—in accordance with the statutory exception for dairy animals.

Treating organic dairy farmers differently based upon when they became organic dairy farmers does not serve the statutory purpose of consistent national organic standards expressed in 7 U.S.C. § 6501. It is, in any event, inconsistent

with 7 U.S.C. § 6509(c). As this court has noted, "It is transpicuously clear that, under *Chevron*, no deference is due if Congress has spoken directly to the question." *Passamaquoddy*, 75 F.3d at 793.

II. When Possible, The National Organic Program Regulations Should Be Construed in Such a Way as to Render them Consistent with the Act.

The regulations discussed above permit only one reading, a reading that is inconsistent with the statute. However, where the challenged regulations permit more than one construction, principles of judicial restraint suggest that the regulations should be construed in such a way as to avoid conflict with the statute. This can be done, for example, with the claim raised by Harvey in Count 1 before the district court. Count 1 dealt with whether the challenged regulation allowed "any" non-organically produced agricultural product to be used in organic food production.

In general, the OFPA requires that any natural substance used in organic food production and handling be organically produced. 7 U.S.C. § 6504. In handling an agricultural product that is to be labeled organic, the OFPA states that the handler shall not:

> add any ingredients that are not organically produced . . . unless such ingredients are included in the National List and represent not more than 5 percent of the weight of the total finished product (excluding salt and water).

7 U.S.C. § 6510(a)(4). Thus, non-organically produced ingredients may be used if they are included on the National List and if they represent not more than 5 percent of the weight of the product.

The challenged regulation, 7 C.F.R. § 205.606, states:

> The following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s)) " only in accordance with any restrictions specified in this section.
>
> Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form.
> (a) Cornstarch (native)
> (b) Gums -- water extracted only (arabic, guar, locust bean, carob bean)
> (c) Kelp -- for use only as a thickener and dietary supplement
> (d) Lecithin -- unbleached
> (e) Pectin (high-methoxy)

7 C.F.R. § 205.606. *Amici Curiae* believe that the regulation should properly be construed to mean that "any" nonorganically produced agricultural product may be *reviewed* for possible inclusion in the National List, in accordance with all of the procedural safeguards required by the Act, and that only those products specifically recommended for inclusion on the National List by the NOSB and indeed individually listed by the Secretary are in fact included in the National List. The word "any" should be interpreted both in light of the words "the following" and in light of the structure of the Act and the regulations, which require

individualized and specific review of substances prior to inclusion on the National List. 7 U.S.C. §§ 6510(a)(4) and 6517(b).

The following statement from an opinion of this court provides helpful guidance, though the comment addresses techniques for analyzing statutory provisions. In *United States v. Rivera*, 131 F.3d 222, 225 (1st Cir. 1997) (en banc), this court noted: "'the cardinal rule that a statute is to be read as a whole . . . , since the meaning of statutory language, plain or not, depends on context.'" (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993). Similarly, the Supreme Court cautions against "looking at statutory terms in isolation." *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). These principles for statutory construction seem appropriate for the construction of regulations as well. The regulatory use of the term "any" should be read in light of the use of the phrase "the following" in the same regulatory provision, and of the entire regulation as a whole.

Before the district court, the Secretary implied (though the magistrate found that "equivocation" puzzling) that only the five substances specifically listed were considered to be on the National List and permitted for use under the provision. App. at 110, Recommended Decision at 9, fn. 2. While *Amici Curiae* support the reading of the regulation apparently adopted by the Secretary in the course of the litigation, and the Secretary's half-hearted suggestion was enough to satisfy the magistrate judge, it should not be enough to satisfy this court.

Many courts and have noted that an agency's litigation posture is not entitled to deference. For example, the Massachusetts district court has stated, "an agency's litigating position, which is in the nature of a 'post hoc rationalization' rather than the result of the official exercise of rule-making authority is not entitle to *Chevron* deference. *United States v. National Amusements, Inc.*, 180 F.Supp.2d 251, 260 n.5 (D.Mass. 2001) (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988) and *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). As one authority on administrative law has noted, "Statements of agency lawyers in briefs and oral arguments are particularly unreliable evidence of an agency's policy, given the powerful incentive for lawyers to take any position that is likely to further their clients' interests in a case and the uneven level of supervision of the work product of agency lawyers." Richard J. Pierce, Administrative Law Treatise, § 3.5 (4th ed. 2002).

A declaratory judgment is needed to establish the legal meaning and effect of 7 C.F.R. § 205.606. Harvey submitted evidence tending to show that handlers and accredited certifying agents believe that "any" nonorganically produced nonsynthetic substance may be used under this regulation, whether or not it has been screened by the NOSB and placed on the National List. A declaratory judgment is appropriate because there is widespread confusion about the

regulation, and handlers and accredited certifying agents should not be subject to enforcement action for good faith reliance upon the regulation.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court find in favor of Plaintiff-Appellant.

Dated: June 14, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2004, two copies of the foregoing Brief of *Amici Curiae* on Behalf of Rural Advancement Foundation International-USA, Center for Food Safety, and Beyond Pesticides were served by United States mail upon:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of *Amici Curiae* complies with the type-volume requirements of Fed. R. App. P. 32(a)(7) in following manner: the Brief was prepared using Microsoft Word 2003. It is proportionally spaced using Times New Roman font in 14-point type and contains 6,371 words. The contents of the Brief of *Amici Curiae* in the above-captioned case are contained on the enclosed diskette. This diskette has been scanned by Symantec AntiVirus Corporate Edition, and no viruses were found.

_____

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