

No. 21-15883

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR FOOD SAFETY, et al.,

Plaintiffs-Appellants,

v.

THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEES

BRIAN M. BOYNTON

Acting Assistant Attorney General

STEPHANIE M. HINDS

United States Attorney

DANIEL TENNY

DANIEL WINIK

Attorneys, Appellate Staff

Civil Division, Room 7245

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530

(202) 305-8849

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUE	1
PERTINENT STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE	1
A. Statutory Background.....	1
B. Regulatory Background.....	4
C. Procedural History.....	7
SUMMARY OF ARGUMENT	10
STANDARD OF REVIEW.....	12
ARGUMENT	13
THE AGENCY REASONABLY DENIED THE PETITION TO FORBID ORGANIC CERTIFICATION OF HYDROPONIC SYSTEMS.....	13
A. The Organic Foods Production Act Does Not Clearly Require That Crops Be Grown In Soil To Be Certified Organic.....	13
B. Plaintiffs’ Non-Statutory Arguments Are Meritless And Inapposite.....	24
CONCLUSION	30
STATEMENT OF RELATED CASES	
CERTIFICATE OF COMPLIANCE	
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Center for Food Safety v. Perdue</i> , 527 F. Supp. 3d 1130 (N.D. Cal. 2021)	9, 10, 21, 23
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	23, 24
<i>Compassion Over Killing v. FDA</i> , 849 F.3d 849 (9th Cir. 2017)	12, 13, 23, 29
<i>Corrigan v. Haaland</i> , 12 F.4th 901 (9th Cir. 2021)	12
<i>Crow Tribal Housing Authority v. U.S. Department of Housing & Urban Development</i> , 781 F.3d 1095 (9th Cir. 2015)	13, 23
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	12, 23
<i>National Mining Association v. Mine Safety & Health Administration</i> , 599 F.3d 662 (D.C. Cir. 2010)	13, 23
<i>NLRB v. SW General, Inc.</i> , 137 S. Ct. 929 (2017)	20
<i>Northern Plains Resource Council, Inc. v. Surface Transportation Board</i> , 668 F.3d 1067 (9th Cir. 2011)	29

Statutes:

Organic Foods Production Act of 1990, 7 U.S.C. § 6501 <i>et seq.</i>	1
7 U.S.C. § 6501	1, 14
7 U.S.C. § 6501(2)	21
7 U.S.C. § 6501(3)	21
7 U.S.C. § 6502(4)	17, 20
7 U.S.C. § 6503	1, 15
7 U.S.C. § 6503(c)	2
7 U.S.C. § 6504	2, 28
7 U.S.C. § 6504(1)	2, 14

7 U.S.C. § 6504(2)	2, 14
7 U.S.C. § 6504(3)	2, 3, 14, 15
7 U.S.C. § 6508	2, 9, 14, 22
7 U.S.C. § 6508(a)	2, 14
7 U.S.C. § 6508(b)	2, 22
7 U.S.C. § 6508(b)-(c)	14
7 U.S.C. § 6508(c)	3, 22
7 U.S.C. § 6512	3, 10, 11, 18, 22
7 U.S.C. § 6513	15
7 U.S.C. § 6513(a)	3
7 U.S.C. § 6513(b)	11, 17, 28
7 U.S.C. § 6513(b)(1)	3, 11, 16, 19
7 U.S.C. § 6513(f)	17
7 U.S.C. § 6513(g)	3
7 U.S.C. § 6518	2
7 U.S.C. § 6518(a)	2
7 U.S.C. § 6518(b)	2
7 U.S.C. § 6519	24
7 U.S.C. § 6521(a)	4
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1

Regulations:

7 C.F.R. pt. 205	4, 15
7 C.F.R. § 205.2	5, 15, 25
7 C.F.R. § 205.102	26
7 C.F.R. § 205.200	5, 26, 27
7 C.F.R. § 205.202	26
7 C.F.R. §§ 205.202-207	26, 27
7 C.F.R. § 205.203	5, 26
7 C.F.R. § 205.205	26
7 C.F.R. § 205.207	5
7 C.F.R. §§ 205.236-240	27
7 C.F.R. § 205.237	5
7 C.F.R. § 205.400(a)	5
7 C.F.R. § 205.400(b)	5

Rule:

Fed. R. App. P. 4(a)(1)(B) 1

Legislative Materials:

135 Cong. Rec. 29,411 (1989)20
S. 1896, 101st Cong. (1989).....20
S. Rep. No. 101-357 (1990) 18, 19, 20, 21

Other Authorities:

Oxford English Dictionary Online, <https://www.oed.com/view/Entry/9698> (last visited Feb. 10, 2022).....27
National Organic Program,
62 Fed. Reg. 65,850 (Dec. 16, 1997) 4
National Organic Program,
65 Fed. Reg. 13,512 (Mar. 13, 2000) 4
National Organic Program,
65 Fed. Reg. 80,548 (Dec. 21, 2000) 4
National Organic Program; Nominations for Task Force Members,
80 Fed. Reg. 12,422 (Mar. 9, 2015) 6

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.