[Not yet scheduled for oral argument]

No. 12-5075

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nick Koretoff, et al.,

Plaintiffs-Appellants,

v.

Tom Vilsack, Secretary of Agriculture,
United States Department of Agriculture,

Defendant-Appellee.

Appeal from the United States District Court
For the District of Columbia
Case No. 1:08-CV-01558 (EHS)

BRIEF FOR APPELLANTS
(Joint Appendix Deferred)

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July 6, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nick Koretoff, et al.,

v.

Case No. 12-5075

Tom Vilsack, Secretary of Agriculture, United States Department of Agriculture.

Certificate as to Parties, Rulings, and Related Cases

In accordance with Cir. Rules 26.1 and 28(a)(1), Appellants certify:

A. **Parties.** Plaintiffs-Appellants are: Nick Koretoff, John Bayer, James E. Bremner, Mark McAfee, John Pryor and Paula Echabarne, and Vista Livestock Company. The following plaintiffs in the district court did not appeal: Cynthia Lashbrook, John Larkin, Stepanian Farms, Inc, and Dan Hyman. The following original plaintiffs withdrew from the litigation, or were foreclosed from pursuing their claims, after this Court's ruling in *Koretoff v. Vilsack*, 614 F.3d 532 (D.C. Cir. 2010): Stan Barth; Leslie Barth, Valley Almond Huller, Inc., Michael Barnard; Harmon Beckner; Hendrik Feenstra; Purity Organics, Inc.; Lynn Pekarek; and Sam Cabral.

Defendant-Appellee is Tom Vilsack, Secretary of Agriculture, United States Department of Agriculture.

No party appeared as *amicus curiae* in the district court or to date in this Court.

Rule 26.1 Disclosure Statement: Plaintiffs- Appellants are almond growers. Original plaintiffs also included almond handlers and retailers. None of the parties is a publicly traded company, or is owned by a parent company or by a publicly-traded company that has 10% or more ownership interest.

B. **Rulings Under Review**: Rulings and decisions entered by District Court that are at issue on appeal, and by USDA in the underlying agency proceeding, are:

United States District Court for the District of Columbia,
By Judge Helen S.Huvelle

Doc. No.	Entry Date	Description
57	01-18-12	Memorandum Opinion, *Koretoff v. Vilsack*, 2012 WL 130744 (D.D.C. Jan. 18, 2012).
58	01-18-12	Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment.

United States Department of Agriculture,
By Lloyd C. Day, Administrator, Agricultural Marketing Service

Final Rule, 72 Fed. Reg. 15021 (March 30, 2007).

C. **Related Cases**: This Court previously decided justiciability issues on plaintiffs' complaint. *Koretoff v. Vilsack*, 614 F.3d 532 (D.C. Cir. 2010). Counsel for appellants is not aware of any related cases currently pending before this Court or any other court.

Respectfully submitted,

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July 6, 2012

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GLOSSARY OF ABBREVIATIONS
Circuit Rule 28(a)(3)

AAA – Agricultural Adjustment Act of 1933, 7 U.S.C. §601 *et seq.*

ABC – Almond Board of California, a semi-autonomous industry board responsible, with AMS, for administering the Order regulating the marketing of Almonds Grown in California.

AMA – Agricultural Marketing Act of 1946, 7 U.S.C. §1621, *et seq.*

AMAA – Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §601 *et seq.*, incorporating provisions of the AAA of 1933.

AMS – Agricultural Marketing Service, an agency of USDA responsible for agricultural marketing programs including the AMAA and AMA.

APA – Administrative Procedure Act.

AR – Administrative Record of notice and comment rulemaking as certified by AMS and the ABC to the district court.

Doc. – Document as identified by number in the Docket Report of the district court, case #: 1:08–cv–01558–ESH.

ERS – Economic Research Service, an agency of USDA responsible for analysis of and reports on agriculture programs, issues, and policies.

FDA – Food and Drug Administration, an agency of the Department of Health and Human Services responsible for regulation of food safety and labeling standards.

FMO – Federal Marketing Order, a set of regulations governing marketing of agricultural commodities under the AMAA.

FPA – Food Production Act of 1917, a World War I statute providing authority for quality inspection, certification and standardization of agricultural commodities by USDA.

FQSC – Food Quality and Safety Committee of the Almond Board of California.

FSIS – Food Safety and Inspection Service, an agency of USDA responsible for food safety and labeling regulation of meats, poultry and egg products.

F&V – Fruit(s) and Vegetable(s). F&V Programs is an organizational unit of AMS responsible for marketing programs for fruits, vegetables and specialty crops, including tree nuts.

PPO – Propylene oxide, a chemical used as a fumigant, insecticide, fuel additive, and sterilizer.

USDA – United States Department of Agriculture.

Plaintiff-appellants, California almond growers, filed suit for relief from a USDA Marketing Order rule that prohibits their high-quality raw almonds from reaching U.S. consumers.

STATEMENT OF JURISDICTION

The lower court's jurisdiction was invoked under 5 U.S.C. §702 (agency action), 28 U.S.C. §1331 and 28 U.S.C. §1337 (federal question), and 28 U.S.C. §§2201 (declaratory judgment). Following a ruling by this Court that the claims of the grower-plaintiffs are justiciable, *Koretoff v. Vilsack*, 614 F. 3d 532 (D.C. Cir. 2010), the lower court granted summary for USDA on the merits on January 18, 2012.[1] A timely Notice of Appeal was filed on March 16, 2012.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

Pertinent parts of the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §601, *et seq.*, the Agricultural Marketing Act of 1946 ("AMA of 1946"), 7 U.S.C. §1621, *et seq.*, related statutes and agency regulations, are contained in the Statutory Addendum.

[1] Memorandum Opinion ("Mem. Op."), District Court Docket Entry, Document ("Doc.") 57 [JA___], and Order, Doc. 58 [JA __]

STATEMENT OF ISSUES

The marketing of "Almonds Grown in California" has been regulated by USDA since 1950. 7 C.F.R. Part 981 ("Almond Order"). Agriculture Marketing Orders may be issued to regulate the marketing of farm crops only after on-the-record hearings, AMAA §§608c(3)-(4), and approval by producers (growers), AMAA §§608c(8),(9) and (19). Horticulture Marketing Orders may contain only specific regulatory provisions, and "no others." AMAA §608c(6). Provisions allowed include seasonal marketing limitations based on "total quantity" or "any grade, size, or quality" of the commodity produced. AMAA §608c(6)(A). For 70 years, USDA applied "grade, size, or quality" limits only to inherent attributes of the commodity.

As authority for the contested 2007 processing rule, USDA relied on a 1976 Almond Order provision that permitted the Almond Board to establish marketing limits based on the quality of the almonds produced during the crop year. 7 C.F.R. §981.42(b). The 1976 Almond Order provision, in turn, relied on authority in AMAA §608c(6)(A).

The issues on appeal are:

1 In 2007, USDA adopted an Almond Order rule that requires almonds marketed domestically to be pasteurized by heat or chemical process, before sale to U.S. consumers, without regard to the inherent attributes of almonds to be processed. 72 Fed. Reg. 15021 (Mar. 30, 2007). Does the 2007 almond processing rule exceed USDA's authority for farm product "quality" limitations under §608c(6)of the AMAA?

2 The 2007 processing rule was adopted by USDA without a hearing or grower referendum, as required by the AMAA for Marketing Order changes. USDA said that the 2007 processing rule was not a change in the Almond Order, but merely an implementation of 7 C.F.R. §981.42(b), adopted in 1976. That provision allows "minimum quality and inspection requirements applicable to almonds to be handled or to be processed into manufactured products" during "any crop year." Is the 2007 almond processing rule valid notwithstanding the failure of USDA to hold a hearing and to secure grower approval as required by AMAA §§608c(3)-(4), (8)-(9) and (19).

3 Marketing Orders without a corresponding Marketing Agreement may only be issued if the Secretary determines that the Marketing Order "is the only practical means of advancing the interests

of the producers…." 7 U.S.C. §608c(9). Although there has been no Almond Marketing Agreement since 1996, the Secretary did not make an "only practical means" determination to support the 2007 processing rule, nor to ratify the Almond Order's 1976 quality control provision. Did the district court abuse its discretion by refusal to consider plaintiffs' §608c(9) claim on grounds of waiver, and, if so, is the processing rule or quality control provision at issue valid notwithstanding the absence of any "only practical means" determination?

These issues are important questions of first judicial impression.[2]

STATEMENT OF THE CASE

Growers (and other plaintiffs) filed their Amended Complaint in December 2008 to challenge USDA's 2007 almond processing rule. (Doc. 9). The complaint alleged that USDA, by its Agricultural Marketing Service ("AMS"), (1) acted outside of the limited AMAA authority for

[2] As observed by Endres, Bryan and Nicholas Johnson, *United States Food Law Update…*, 7 J. Food L. & Pol'y 135, 145-47 (Spring 2011), this case may resolve the authority granted to USDA by the term "quality" in the AMAA, and "has policy implications that reach far beyond the tree-nut industry…." *See also,* Nauheim, David A., *The Humble Almond: Why Congress Should Institute the Precautionary Principle to Guide Regulation of Environmental Toxins and Food Additives* 3 Liberty U.L Rev.145 (Spring 2009).

agricultural commodity "quality" restrictions (2) acted beyond the authority for quality control in the Almond Order, and (3) disregarded AMAA-mandated procedures.

The district court initially dismissed the complaint, without entertaining oral argument, on a subject matter jurisdiction motion filed by USDA. Following remand by this Court confirming the justiciability of almond growers' claims,[3] the lower court considered cross-motions for summary judgment on the merits (Docs. 46 – 55). The lower court, again without oral argument, granted USDA's motion on all issues of statutory construction, regulatory construction, and statutory procedure. Mem. Op., Doc. 57 [JA__].

STATEMENT OF FACTS

A. Statutory Background for Marketing Orders and Agricultural Product Quality Regulation by AMS.

(1) Historical Setting of Marketing Orders and Quality Limits Authorized in 1935.

USDA's marketing agreements and orders for agricultural commodities are a unique species of industry self-regulation, combined with federal regulatory muscle, authorized by the Agricultural

[3] *Koretoff v. Vilsack*, 614 F. 3d 532 (DC Cir. 2010).

Marketing Agreement Act of 1937, as amended, 7 U.S.C. §601 *et. seq.* AMS has responsibility for the AMAA and other farm product marketing laws. 7 C.F.R. §2.79.

The AMAA evolved from a crisis in farm commodity prices beginning in the 1920's. Efforts were made by farmers acting collectively to balance supply with demand and raise prices by self-regulation. Produce cooperatives tried to raise commodity prices by agreements to limit the quantity or quality of produce marketed. These efforts failed because some farmers declined to participate, undermining the pricing objectives of cooperating farmers or enjoying a free ride by sharing in the benefits of self-regulation without sharing in the burdens.[4]

[4] Powers, Nicholas John, ERS, USDA, *Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops* (Agric. Economic Report No. 629, March 1990), at 1 - 4 (Doc. 46-3, pp. 36-39 of 82); Neff and Plato, ERS, USDA, *Federal Marketing Orders and Federal Research and Promotion Programs: Background for1995 Farm Legislation* (AER No. 707, May 1995), at 2 (Doc. 46-3, p. 74 of 82); and AMS, USDA, *A Review of Federal Marketing Orders for Fruits, Vegetables, and Specialty Crops: Economic Efficiency and Welfare Implications* (AER No. 477, Nov. 1981) at 4 (Doc. 46-3, p. 20 of 82). *See also,* Edward V. Jesse, *Social Welfare Implications of Federal Marketing Orders for Fruits and Vegetables* (USDA. Economics, Statistics, and Coop. Service, July 1979) http://hdl.handle.net/2027/uva.x030378490 at 2.

In response to the free-rider problem, the Agricultural Adjustment Act of 1933 ("AAA") authorized Marketing Agreements between farmers, handlers, and USDA. The Marketing Agreements, in turn, were enforced on non-participants by USDA-issued licenses.[5]

The potential benefit of the AAA of 1933 and related legislation was undermined by adverse court decisions, culminating in the Supreme Court's May 1935 opinion in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which held that the National Industrial Recovery Act unconstitutionally delegated legislative power to the Executive Branch by failure to define the parameters of regulatory authority.

In response to *Schechter Poultry* and other court decisions, Congress amended the AAA in August 1935 to describe and limit USDA's authority in greater detail.[6] The term used for mandatory regulation was changed from "license" to "order." The 1935 AAA amendments contain the basic text and authority for marketing agreements and orders in place today, allowing specified kinds of farm

[5] Act of May 12, 1933, 48 Stat. 31, Agricultural Adjustment Act ("AAA of 1933"). Section 8(2) of the AAA of 1933, 48 Stat. 34, authorized marketing agreements, and section 8(3), 48 Stat. 35, authorized licensing.

[6] Act of August 24, 1935, 49 Stat. 750, *et seq*.

product marketing controls and "no others." [7] 7 U.S.C. §608c(5)-(6). In further Congressional response to court opinions,[8] the marketing agreement and order provisions of the AAA of 1935 were reenacted and incorporated in the AMAA of 1937.[9] The three forms of industry-initiated regulation authorized by the AMAA are as follows:

— *Marketing Agreements*, employed without any corresponding Marketing Order, not expressly limited for content, but enforceable only against signatories. 7 U.S.C. §608b.

— *Marketing Agreements with corresponding Orders*, by 7 U.S.C. §608c(8) procedure, are expressly limited to certain stated provisions, and "no others," 7 U.S.C. §608c(6). These Agreements with Orders may be enforced against the dissenting minority, but must first be approved by a 2/3 majority of producers and agreed to by a 50% majority of

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[7] *Id.*, 49 Stat. 753 – 54; H.R.Rep. No. 1241, 74th Cong., 1st Sess., 8 (1935), *quoted in Zuber v. Allen*, 396 U.S. 168, 183 n. 16 (1969). "The viability of the [AAA] licensing scheme was jeopardized" by the *Schechter Poultry* decision. "With its agricultural marketing program resting on quicksand, Congress moved swiftly to eliminate the defect of overbroad delegation and to shore up the void in the agricultural marketing provisions. Section 8(3) of the 1933 Act was amended in 1935 and the pertinent language has been carried forward without significant change into §8c of the present Act". *Zuber v. Allen,* 396 U.S. at 175-76.

[8] *See, Zuber v Allen*, 396 U.S. at 201.

[9] Act of June 3, 1937, 50 Stat. 246.

handlers. The provisions of a Marketing Agreement are identical to the regulatory provisions of a Marketing Order.

— *Marketing Orders without a corresponding Marketing Agreement,* also limited by §608c(6), may be issued, even if handlers do not agree, if the Secretary finds that the Marketing Order is the "only practical means" of advancing producer (farmer) interests, and is approved by a 2/3 majority of producers. 7 U.S.C. §608c(9). The provisions of a Marketing Order are identical to the provisions of the Marketing Agreement offered to but rejected by handlers.

Fruit and Vegetable ("F&V") Marketing Orders are published in Title 7 of the Code of Federal Regulations, Chapter IX (Marketing Agreements and Orders; Fruits, Vegetables, Nuts), from Part 905 (citrus fruits) to Part 993 (dried prunes).

Provisions (sections) of Marketing Orders adopted after hearing and producer approval are identified by CFR Part and Marketing Order subpart. *E.g.*, Subpart – Order Regulating Handling, 7 C.F.R §§981.1 - .92 (Almonds Grown in California). Rules to implement existing Marketing Order provisions are published as a subpart, following the Marketing Order, with a three-digit section number. *E.g.,* Subpart –

Administrative Rules and Regulations, 7 C.F.R. §§981.401 - .481. Such rules are not subject to hearing or producer approval, but follow ordinary notice and comment rulemaking. Confusion sometimes results by interchangeable use of the words "rule" and "regulation" to refer to Marketing Order provisions as well as implementing rules.

Provisions expressly authorized for fruit and vegetable Marketing Orders include regulated limits on the marketing of horticultural commodities by quantity and by "any grade, size, or quality thereof," 7 U.S.C. §608c(6)(A)-(E), commonly referred to as quantity or volume control, and quality control. [10] Whether by a percentage of the crop supply, a less valuable product size, or a sub-standard part of the supply, the goal is to improve market prices paid to farmers by keeping a part of the crop from reaching consumers. *Walter Holm & Co. v. Hardin,* 449 F.2d 1009, 1011-12 (D.C. Cir. 1971). This authority to keep some of the crop from the market originated in the AAA of 1935, was

[10] AMS, *Review of FMOs* (fn. 4, *supra*) at 21-25; Neff, *FMO Background 1995* (fn. 4, *supra*) at 3-4; Manley, William T., Deputy Administrator, AMS, USDA *Marketing Orders, A Discussion of their Advantages and Disadvantages,* (Excerpted Remarks on Jan. 20, 1984 published in U.C. Davis, Egg Economics Update #36, Aug 1984).) at 1-2 (Pl. App. II at 78-79), Doc. 46-3, p. 78 of 82.

incorporated in the AMAA of 1937, and was restated in amendments to the AMAA in 1947.[11]

(2) Procedures for Marketing Order Promulgation.

Marketing Agreements and Marketing Orders are largely controlled by industry stakeholders. As described by an AMS Deputy Administrator, "producers and handlers devise, adopt, administer, amend or terminate an order." "In practice, an industry decides the basic kind of program needed, then modifies an existing order to suit." USDA's role is to guide, enforce and monitor program operations.[12]

Quasi-adjudicatory procedures of 5 U.S.C. §§556 and 557 of the APA, including hearings on the record, govern decision-making on F&V orders and most amendments. The APA requirements, along with the

[11] Act of August 1, 1947, P. L. No. 305, 61 Stat. 707. Section 2 of P.L. No. 305 restated the pre-existing text of 7 U.S.C. §608c(6)(A)-(E) which contains authority for (A) seasonal marketing limitations, (B) seasonal purchase allotments, (C) seasonal marketing allotments, (D) control of surplus production, and (E) pooling of revenues from reserve supplies of covered agricultural products, in each case by "grade, size, or quality."

[12] Manley, Marketing Order Discussion (fn. 10, *supra*), at 1, 3; Neff, *FMO Background 1995* (fn. 4, *supra*.) at 1 (describing F&V orders as industry-initiated and self-governed); Powers, *FMOs* (fn. 4, *supra*) at 4-5.

AMAA's stakeholder approval requirements, [13] are incorporated in the agency's Rules of Practice, 7 C.F.R. §§900.1 – 900.18.

Marketing Orders cannot become effective just because an agency has demonstrated and explained that regulation is a good idea. Marketing Orders or amendments must first be approved by producers representing at least a 2/3 majority. 7 U.S.C. §§608c(8)-(9), (12) and (19); 7 C.F.R. §900.14.

For F&V Marketing Order amendments, growers express their approval by ballot on individual proposed amendments. In 1996, for example, almond growers approved 19 of 23 USDA-recommended amendments that then became part of the Almond Order. 61 Fed. Reg. 32917, 21918 (June 26, 1996).

Marketing Orders approved by USDA must also be submitted to handlers, who have the opportunity to sign corresponding marketing agreements. If 50% or more of handlers (by product volume) so agree, the Marketing Order is also a marketing agreement. 7 U.S.C. §§608c(8). If the requisite handler majority does not agree, a Marketing Order

[13] 7 U.S.C. §§608c(3)-(4), (8)-(9), (17). In 2008 Congress authorized notice and comment rulemaking for some Marketing Order amendments. 7 U.S.C. §608c(17)(E); 73 Fed. Reg. 49307, 49310 (Aug. 21, 2008), amending 7 C.F.R. §900.43. Grower approval is still required.

may nevertheless be issued if the Secretary of Agriculture determines that: (1) handlers' refusal to agree "tends to prevent the effectuation of the declared policy" of the AMAA, and (2) the issuance of an order without handler approval is "the only practical means of advancing" the interests of producers. 7 U.S.C. §608c(9).

(3) Industry Administration of F&V Marketing Orders.

Produce industry influence and control of F&V Marketing Orders continues after regulatory promulgation. Local administration of F&V Marketing Orders is vested in semi-autonomous committees or boards representing producers (farmers) and handlers of the regulated commodity. The Almond Board of California consists of 10 members, representing growers, cooperative associations, and handlers. 7 C.F.R. §§981.30-.33. F&V Order Boards are responsible for administration of the order "in accordance with its terms and provisions," and may "make rules and regulations to effectuate… such order." 7 U.S.C. §608c(7)(C).

Rules "to effectuate" Marketing Order provisions are adopted by AMS upon recommendation of the industry board, by notice and

comment rulemaking.[14] These rules typically involve details for quantity or quality controls to apply in a crop or marketing season, based upon estimates of crop supply and demand characteristics.

Most F&V Marketing Orders authorize seasonal controls for products that do not meet certain quality standards.[15] Quality limitations usually incorporate U.S. Grade standards under the Agricultural Marketing Act of 1946 ("AMA of 1946"),[16] and predecessor statutes. Marketing Order quality requirements may also be for product attributes not contained in U.S. Grade standards, or for which there is no standardized Grade.[17] The rationale for quality controls is to

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[14] The almond processing rule at issue in this case was adopted by notice and comment rulemaking. The vast bulk of the supporting record ("AR") filed with the Court by USDA in this case (Doc. 43, filed 6/27/11) consists of meetings, studies, correspondence, and other materials in Almond Board files developed in the course of almost three years before the notice of proposed rulemaking was published by AMS. USDA is now required to complete the process of informal rulemaking within 45 days after an industry committee request. 7 U.S.C. §608c(1).

[15] *E.g.*, 76 Fed. Reg. 27852 (May 13, 2011) (limiting annual quantities of western spearmint oil); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 163-65 (1963) (describing season to season revisions of Avocado Marketing Order quality control standards).

[16] Act of August 14, 1946, Pub. L. No. 733, Title II, 60 Stat. 1082, 1087-91, *codified at* 7 U.S.C. §1621, *et seq.*

[17] For example, the original almond order in 1950 provided its own quality standards for marketable almonds. 7 C.F.R. §§909.11-.12 (1951) (definitions for inedible and edible kernels), and §909.65(b) (1951) (grade requirements for surplus almonds), published in 15 Fed. Reg. 4993, at 4994, 4997 (1950)(Doc. 46-4

keep off-grade or substandard farm products from the market, and thereby improve market prices for higher quality products that reach wholesalers, retailers and consumers.[18]

(4) Agricultural Product Quality Regulation, Inspection, and Standardization Functions of AMS.

Primary responsibility in USDA for quality regulation of most farm products lies with the AMS. 7 C.F.R. §2.79. The umbrella statute for quality standards and quality inspection and standardization of farm products for the past 65 years is the Agricultural Marketing Act of 1946 ("AMA of 1946"). 7 U.S.C. §1621, *et seq.* AMS explains that "USDA quality standards are based on measurable attributes that describe the value and utility of the product," and that standardized grades "provide the produce industry with a uniform language for describing the quality and condition of commodities in the marketplace" (AMS webpage, Doc. 46-5, pp. 4-5 of 97).

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pp. 30, 33). And the kiwifruit Marketing Order includes a misshapen fruit tolerance that is not in kiwi standardized grades. 7 C.F.R. § 920.302(b).

[18] AMS *Review of FMOs* (fn. 4, *supra*.) at 21: Neff, *FMO Background 1995* (fn. 4, *supra*.) at 4; Manley, *Marketing Order Discussion* (fn. 10, *supra*). Powers, Nicholas J, ERS, USDA, *Federal Grade Standards for Fresh Produce – Linkages to Pesticide Use* (Agric. Info. Bul. No. 675, Aug. 1993) at 10 (Doc. 46-5, p. 41).

Regulations promulgated by AMS for quality inspection, certification and standardization of produce are contained in 7 C.F.R Part 51. AMS regulations define "condition," "grade," and "quality" of farm products.[19] These definitions are consistent with USDA's farm product quality policies for nearly a century.[20]

(5) A Brief History of Federal Farm Product Quality Laws.

AMS programs for standardization, inspection, certification, and verification of the quality of farm products evolved from trade practices and laws in the early 1900's. General quality inspection and grade authority started with the Food Production Act of 1917 ("FPA)".[21]

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[19] 7 C.F.R. §51.2: "Condition'' means the relative degree of soundness of a product which may affect its merchantability and includes those factors which are subject to change and may result from, but not necessarily limited to, age, improper handling, storage or lack of refrigeration.

''Grade'' means a class or rank of quality.

''Quality'' means the combination of the inherent properties or attributes of a product which determines its relative degree of excellence.

[20] In the first volume of the Federal Register, USDA defined "quality" under a statutory predecessor to the AMA of 1946: "*Quality* in a product is a combination of its inherent properties which determines its relative degree of excellence." 1 Fed. Reg. 2126 (Dec. 10, 1936)(meat grading and inspection certification regulations).

[21] Act of Aug. 10, 1917, 40 Stat. 273. A narrative history is provided in Powers, *Federal Grade Standards* (fn. 18, *supra*.) at 1, in Dimitri, Carolyn, *Agricultural Marketing Institutions: A Response to Quality Disputes*, 1 Journal of Agricultural

The language of the FPA became a template for yearly appropriations authority over quality inspection, certification and grade standardization of farm products between 1918 and 1953, as codified in the U.S. Code at 7 U.S.C. §414 (1934 – 1953 Editions).

By 1934, USDA had established 54 quality standards for fruits and vegetables, making it possible for most produce transactions to rely on federal grades for quality inspection, verification and certification.[22] The yearly appropriations authority in former 7 U.S.C. §414 was referred to as the "Farm Products Inspection Act." [23]

In 1955, however, Congress repealed 7 U.S.C. §414 (1954) as part of amendments to the AMA of 1946.[24] Since that time, the act under which AMS has promulgated and amended farm product quality and inspection standards has been the AMA of 1946, 7 U.S.C. §1621 *et seq.*[25]

& Food Industrial Organization, Article 17. (2003) at 11-13, and in USDA's YEARBOOK OF AGRICULTURE for 1940 (pp. 667-683) and 1954 (pp. 142-211).

[22] Dimitri, *Quality Disputes*, fn. 21, *supra.*

[23] 7 C.F.R. Part 51 (1938 Ed.); 1 Fed. Reg. 654 (Aug. 1936); 7 C.F.R. Part 51 (1948 Ed.); 6 Fed. Reg. 6817 (Dec. 31, 1941); 7 C.F.R. §51.2(a)(1949 Ed.); 7 C.F.R. §51.3 (1954 Ed.); 16 Fed. Reg. 5447 (June 8, 1951)(Proposed standards for almonds).

[24] Act of August 9, 1955, Pub. L. 272, 69 Stat. 533.

[25] E.g., 7 C.F.R. §51.2(a)(1958 – 2012 Editions)(defining "act" as the AMA of 1946 "or any other act of Congress conferring like authority."); *see also*, U.S.

As of 2008, AMS had promulgated more than 312 USDA quality standards for fruits, vegetables and specialty crops.[26]

Quality standards identify favorable and unfavorable attributes that may be observed on sampling and inspection of a product. Attributes may be external or internal, large or microscopic, obvious or subtle, and include such things as dirt, rot, insect infestation, viral, bacteriological and mold or fungal defects.[27] Inspection, certification, and verification of quality attributes are ordinarily done by federal or state inspectors under the supervision of AMS. Such inspection and certification is not limited to products for which AMS has established grade standards. It may also include other quality attributes identified by an inspection applicant, or for products for which there are no grade standards, including those in contract terms, state standards, foreign standards, and in marketing agreements.[28]

Government Manual, 2007 at 109-110 (explaining AMS's inspection, grading and standardization of agricultural products for quality factors).

[26] AMS - Quality Standards webpage (Doc. 46-5, pp. 3-7 of 97).

[27] Powers, *Grade Standards* (fn. 18, *supra.)* at 5 – 10.

[28] AMS also provides laboratory testing services for "microbiological, physical, chemical, and biomolecular analyses on agricultural commodities" including pathogen bacteria. 75 Fed. Reg. 17281 - 89 (Apr. 6, 2010). For example, AMS samples and tests eggs for salmonella. 7 C.F.R §94.3.

B. The Marketing Agreement and Order Regulating the Marketing of Almonds Grown in California.

(1) History of the Almond Marketing Order and its Almond Quality Rules.

In 1949, Congress added "almonds" as a commodity that could be subject to 7 U.S.C. §608c Marketing Orders.[29] In 1950 the Almond Order was first promulgated to help 8,800 almond growers deal with a surplus of production.[30] The Order was originally designed to control the quantity of almonds marketed, but also included almond quality controls in the definitions for "inedible kernel" and "edible kernel," and in attributes of surplus almonds held in storage. [31] During the following year, 1951, U.S. Grade standards for almonds were first promulgated by USDA. 16 Fed. Reg. 7195-97 (July 24, 1951).

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[29] Act of June 29, 1949, Pub. L. No. 63 Stat. 282 (adding filberts and almonds to the agricultural commodity lists in 7 U.S.C. §§ 608c(2) and (6)).

[30] 15 Fed. Reg. 3623-24 (June 9, 1950)(USDA's almond order recommended decision) (reproduced in Doc. 46-4, pp. 3-26 of 120); 15 Fed. Reg. 4993 (Aug. 4, 1950) (determination of grower and handler approval, and issuance of final rules), reproduced in Doc. 46-4 at 29.

[31] 7 C.F.R. §§909.11-.12 (1951) (definitions for inedible and edible kernels), and §909.65(b) (1951) (grade requirements for surplus almonds), published in 15 Fed. Reg. at 4994, 4997 (Doc. 46-4, pp. 30 and 33). The defined quality specifications excluded almonds deemed to be "generally unacceptable" and followed "accepted trade practice and experience…." 15 Fed. Reg. at 3626 (Doc. 46-4, p. 6).

In 1976 the Almond Marketing Agreement and Order was amended, following hearing, referendum approval by growers, and execution of marketing agreements by handlers. The amendment authorized seasonal quality controls for almonds by limiting the marketing of inedible kernels, as defined in U.S. Grade Standards or Board modifications thereof. [32] The Board was also authorized, for any crop year, to adopt quality control rules for "outgoing" almonds by identifying undesirable attributes (such as aflatoxin) in addition to inedible attributes defined in Grade Standards at the time. 41 Fed. Reg. at 22078 [JA __]; 7 C.F.R. §981.42(b)(1977). .

A handler majority, by executing marketing agreements, endorsed the original 1950 Almond Marketing Order, and amendments to the Order for 45 years thereafter. However, in 1996 almond handlers refused to sign the accompanying marketing agreement by the requisite 50% majority, although growers approved by the requisite 2/3 majority. The almond order amendments in 1996 and thereafter were adopted by

[32] 41 Fed. Reg. 22075 (June 1, 1976) (final decision) Doc. 46-4 pp. 39-48 [JA__], and 41 Fed. Reg. 26852 (June 30, 1976) (determination of grower and handler approval, and issuance of final rules), Doc. 46-4, pp. 50-52 [JA___].

USDA with the additional finding that the "amendatory order" was "the only practical means" of advancing almond growers interests. [33]

Almond Order provisions adopted prior to 1996, including the quality limitations authorized in 1976, have not been ratified by "only practical means" determinations. Nor was the 2007 processing rule supported by an "only practical means" determination.

(2) The 2007 Almond Processing Rule at Issue.

In 2001 and 2004 some almonds originating from California were found to be contaminated by salmonella, an "extremely rare" occurrence.[34] The Almond Board encouraged growers and handlers to take voluntary action to avoid salmonella contamination. In mid-

[33] 61 Fed. Reg. at 32919 (1996), Doc. 46-4 p. 88; 73 Fed. Reg. 45153, 45156 (Aug. 4, 2008), Doc. 46-4, pp. 117-120. The agency did not in 1996, nor in 2008, express the additional determination, required by 7 U.S.C. §608c(9), that the refusal of handlers to sign marketing agreements "tends to prevent the effectuation of the declared policy" of the act.

[34] Salmonella in almonds is "extremely rare," according to a May 2004 Almond Board of California press release. (Administrative Record, AR 001609, Doc. 43-30, Page 81 of 91.) Salmonella bacteria, the most common source of food-borne illness, originate in animal waste. Salmonella in non-meat food products such as fruits and vegetables, though unusual, may occur by contact with animal waste or cross-contamination in the field, during harvest, during processing or packing, during any handling of the product, or in a consumer's kitchen. FSIS, USDA, http://www.fsis.usda.gov/factsheets/salmonella_questions_&_answers/index.asp (last modified May 25, 2011, accessed June 24, 2012). In scientific convention, "*Salmonella*," a proper Latin name for the bacteria genus, is in italics.

2004, the Almond Board began consideration of mandatory Marketing Order rules, as a food safety measure, to require that all California almonds be processed by pasteurization or chemicals to reduce the potential for salmonella contamination.[35]

A preliminary issue confronting AMS was whether a mandatory pasteurization process was lawful or authorized for the Marketing Order.[36] After several meetings with AMS representatives and USDA counsel, the Board was informed in July 2004 of USDA's opinion that the proposed mandatory treatment plan was authorized, and could be implemented by notice and comment rulemaking under existing "outgoing quality standards" in 7 C.F.R. §981.42(b) of the Almond Order.[37]

From mid-2004 to mid-2006, the Almond Board and its sub-committees worked with AMS and industry representatives to develop a

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[35] Certified Administrative Record (AR), Doc. #43: June 3, 2004, meeting minutes of the Almond Board's Food Quality and Safety Committee ("FQSC") (AR 001580), Doc. 43-30, p. 52.

[36] *Id.*

[37] June 10, 2004, FQSC meeting minutes (AR 001561),Doc. 43-30, p. 33; July 11, 2005, Almond Board Action Plan Update (AR 000895), Doc. 43-20, p.4. The rationale by which the agency concluded that the AMAA and §981.42(b) authorized the proposed mandatory processing rule is not contained in USDA's administrative record.

final food safety proposal for mandatory pasteurization processing of all California almonds.[38] An initial proposal for pasteurization of all almonds, as a food safety measure, was approved by the Board and submitted to USDA in February 2006.[39] In August 2006, after six months of comment to and deliberation by the Board and its Committees, the Board approved a revised proposal, for submission to USDA.[40] Notice of the proposed rule was published by AMS in December 2006, with 45 days allowed for comment. 71 Fed. Reg. 70683 (Dec. 6, 2006).

The final rule, issued by the AMS Administrator, was published in 72 Fed. Reg. 15021 (Mar. 30, 2007), Doc. 46-4 at 93 [JA __]. The administrator's decision made very few findings of the agency, reciting instead the recommendations, beliefs, conclusions, and comments of the

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[38] 72 Fed. Reg. 15021, 15029 (Mar. 30, 2007); *E.g.*, Letter of April 5, 2005, from Robert C. Keeney, Deputy Administrator, F&V Programs, AMS, USDA, to Richard Waycott, President and CEO, ABC, responding to an early draft of the ABC's proposed food safety regulations. AR 000965-66, Doc. 43-20, pp. 74-75.

[39] 72 Fed. Reg. at 15029, 15031; ABC minutes, Feb. 3, 2006, AR 565-80, Doc. 43-12, pp. 38 – 53.

[40] 72 Fed. Reg. at 15022, 15029; ABC minutes, Aug 22, 2006: AR 000237 – 39, Doc. 43-5, pp 74- 76; ABC Almond Action Plan, September 2006,AR 000222 Doc. 43-5, p 59; ABC Rule Task Force, Final Review, as amended 9/7/06, AR 000192 – 221, Doc. 43-5, pp. 29 – 58.

rule proponent – the Almond Board of California.[41] The final rule required raw almonds to be processed by heat pasteurization or chemically treated with propylene oxide ("PPO"), to reduce the potential for salmonella contamination.[42]

The final rule was targeted at a small percentage of the almond crop used for domestic sale as unprocessed, raw almonds. Almonds marketed to processors, a majority of domestic use, do not require a prior pasteurization process. Almonds for export, about 70% of crop production, are exempted if shipped in packaging bearing an "unpasteurized" label.[43] This exemption responded to foreign buyers' objections to the Board's plan based on shelf-life degradation of almonds treated with moist heat pasteurization, and food safety prohibitions in

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[41] *E.g.*, 72 Fed. Reg. at 15025 ("the Board recommended…," "the Board was concerned…"); 15026 ("the Board estimates…," "according to the Board…"); 15028 ("the Board considered…," "the Board believes…," "the Board concluded that testing alone was not a viable alternative."). In a few instances, the Administrator expressly concurred with the Board's assertions. *Id.* at 15033 ("The Board concluded that transshipments could be a problem. USDA concurs with the Board."). The Administrator's only express finding was that the rule "will tend to effectuate the declared policy of the Act." *Id*.

[42] 72 Fed. Reg. at 15023 and 15034, amending 7 C.F.R. §981.442(b)(1).

[43] 72 Fed. Reg. at 15025, 15035; 7 C.F.R §981.442(b)(6).

the European Union and in Canada on use of PPO,[44] a probable carcinogen.[45] A comment that proposed to allow domestic consumers to have an informed choice by labeling of raw almonds as "non-pasteurized," however, was rejected by AMS. AMS explained that mandatory labeling at the consumer level was beyond USDA's authority in the AMAA.[46]

In response to comments that questioned the authority of AMS to impose a mandatory pasteurized process rule, AMS tersely maintained

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[44] Comments to the Almond Board and AMS during 2006 by the Combined Edible Nut Trade Association in the European Union, by the Confectionery Manufacturers of Canada, by the Confectionary Manufacturers of Australia, and by the Japan Nut Association (reproduced, respectively, at AR 000296-300, Doc. 43-7, pp. 12-16; AR 000531-32, Doc. 43-12, pp. 4-5; AR 000291-92, Doc. 43-7, pp. 7-8 ; and AR 000287-88, Doc. 43-7 pp. 3-4). The Board also heard suggestions for exemption of organic almonds and small-volume handlers, but these proposed exemptions were rejected. AR, Doc. 43-5, pp. 40, 53; Doc. 43-19, p. 7; Doc. 43-20, p. 50-88; Doc. 43-30 pp. 23-24, 32, 35-36.

[45] The final AMS decision acknowledged that PPO use in food is prohibited in the E.U. and Canada. 72 Fed. Reg at 15031. PPO is listed as a probable carcinogen by the U.S. EPA, http://www.epa.gov/ttn/atw/hlthef/prop-oxi.html , and by HHS since 1991. National Toxicology Program, Department of Health and Human Services, REPORT ON CARCINOGENS (12th Ed., 2011) pp. 367-68, http://ntp.niehs.nih.gov/ntp/roc/twelfth/profiles/PropyleneOxide.pdf .

[46] 72 Fed. Reg. at 15032. A non-pasteurized warning label for fresh juice and cider is required by FDA rules, 21 C.F.R. §101.17(g), to inform consumers of a pathogen risk from fresh products. Similarly, FDA's FOOD CODE (2009), §3-603.11, recommends restaurant menu pathogen risk warnings for raw and under-cooked meat and seafood, such as sushi, rare steak, and oysters on the half-shell. http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/default.htm

that the proposed rule was authorized as a "quality control" measure by Section 981.42(b) of the Almond Marketing Order.[47] The AMS Administrator concluded that the rule "will help ensure that quality almonds are available for human consumption" and that "consumers receive a good quality product." [48]

In May of 2007, a few weeks after he issued the final processing rule, the AMS Administrator elaborated in testimony before a subcommittee of the House Agriculture Committee. The Administrator acknowledged that "AMS is not a food safety agency," and "food safety policy and the establishment of food safety standards are not within AMS's mandate." [49] He explained that inspection and grading for food product quality attributes is distinct from food safety inspection, but some adverse quality attributes such as the presence of mold, insects, and foreign material also relate to food safety. The

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[47] 72 Fed. Reg. at 15022, 15026, 15031 (A commenter "questioned the authority to impose" a pasteurization process requirement by this rulemaking. AMS responded that "USDA is implementing this rulemaking action under the quality control authority contained in the almond Marketing Order.").

[48] *Id*. at 15021 and 15031.

[49] Day, Lloyd, Administrator, AMS, USDA, Statement Before the Subcommittee on Horticulture and Organic Agriculture, House Committee on Agriculture, May 15, 2007, Doc. 46-5, pp. 74 and 78 of 97.

Administrator maintained that the final almond processing rule was another example of such quality regulation.[50]

The effective date for pasteurization process requirements of the final rule was September 1, 2007. 72 Fed. Reg. at 15021.

The 2007 mandatory processing rule for almonds grown in California was the first occasion since 1935, when Marketing Orders were authorized by Congress, that the marketing of an agricultural commodity under the AMAA was pre-conditioned on processing of the commodity, and "quality" was applied without regard to an inherent attribute of the farm product.

C. Proceedings before the District Court after Remand.

Prior to the mandatory processing rule, grower plaintiffs devoted their efforts to produce raw almonds for a niche market of consumers that seek natural, raw, organic and unprocessed foods. This market, and the premium farm price received for high quality raw almonds, was

[50] *Id.* Doc. 46-5, pp. 76-77. After the almond growers brought this action, a new AMS Administrator further elaborated, in testimony to another House committee, that the almond processing rule was made "solely to improve product marketability." Rayne, Pegg, Administrator, AMS, USDA, Statement Before the Subcommittee on Domestic Policy, House Oversight and Government Reform Committee (July 29, 2009) at 5 (Doc. 46-5, p. 92 of 97).

lost to almond grower plaintiffs after the rule became effective. Koretoff declaration, Doc. 46-6, p. 2; *Koretoff v. Vilsack*, 614 F. 3d at 535.

Since the processing rule only applies to almonds grown in California, plaintiffs' market loss was a gain to non-California almond growers, particularly foreign producers in Europe who may continue to meet U.S. consumer demand for unprocessed raw almonds. *Id.*

The principal claims of the growers relate to USDA's statutory and regulatory authority, rather than to facts addressed to or resolved by the Board or AMS in the administrative record. Accordingly, the growers' motion for summary judgment was supported by a separate appendix containing statutes, regulations, and publications that documented and explained ninety years of regulatory history of farm product "quality" regulation by AMS (and predecessor agencies), sixty years of the agency's regulation of the marketing of Almonds Grown in California, and related administrative practices and interpretations.[51] The content of these publications relevant to statutory and regulatory

[51] Growers' five-part Appendix of Documents, Docs. 46-1 through 46-6. Included were: Statutes and Regulations in App. I (Doc. 46-2), agency publications on Marketing Orders in App. II (Doc. 46-3), Federal Register publications on the Almond Order, 1950 – 2008, in App. III (Doc. 46-4), and agency publications on food quality and food safety functions of USDA and FDA in App. IV (Doc. 46-5).

construction issues was summarized in growers' Statement of Material Facts appended to the Motion for Summary Judgment.[52]

USDA did not deny the regulatory history facts summarized by growers, nor contest the authenticity of publications in the appendix. USDA instead asked the district court to strike plaintiffs' appendix as extra-record, and to strike the Statement of Facts as improper, under local rules.[53] The district court agreed that the publications proffered in plaintiffs' Appendix were impermissively "extra-record,"[54] and plaintiffs' Statement of Material Facts was "improper," but denied USDA's motion as moot.[55]

On the merits of the agency's statutory authority, the district court first concluded that: (1) the word "quality," as used in §608c(6)of the AMAA, was not defined by Congress, (2) the word is ambiguous, and

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52 Growers' Motion for Summary Judgment, Doc. 46 at 37 – 56.

53 USDA's Motion to Strike, Doc. 48.

54 Mem. Op. at 2 n.1. The district court later took judicial notice, over USDA's objections, of one of the publications in plaintiffs' Appendix but not in the certified administrative record – USDA's Marketing Order Amendment decision authorizing "outgoing" quality standards published at 41 Fed. Reg. 22075 (June 1, 1976). Mem. Op. at 25 n.21. The Marketing Order provision adopted by the 1976 decision, 7 C.F.R. §981.42(b), contains the "authority" relied upon by USDA in the 2007 decision adopting the processing rule at issue in this case. Mem. Op. at 10-11.

55 Mem. Op. at 2 n.1 and 4 n.3

(3) USDA's interpretation of §608c(6)as authority for the 2007 processing rule – coined "*Salmonella* rule" by the district court[56] – was reasonable by *Chevron* step one and two analysis (Mem. Op. at 16-17). The court then went on to explain that Congress intended, in the enabling 1935 legislation, to provide "less specific purpose" and "broader leeway" for the content of F&V Marketing Orders under §608c(6)of the AMAA than for milk Marketing Orders under §608c(5), as construed in *Zuber v Allen*, 396 U.S. 168 (1969). Mem. Op. at 18-22.

By similar analysis, the court concluded that the agency's authority in a 1976 Almond Order provision to fashion "outgoing" limits on quality of almonds to be marketed was broad, in contrast to narrower authority for "incoming" quality limits, and the almond processing rule was therefore within agency discretion under the Almond Order (Mem. Op. at 24 – 28). Because the 2007 processing rule was authorized by the Almond Order's 1976 quality control provision, the court also reasoned that USDA was not required to follow the AMAA procedures for hearing and grower approval of Marketing

[56] Mem. Op. at 1. The agency's rulemaking decision never used the term "*Salmonella* rule," but frequently characterized the rule as one mandating pasteurization or treatment processing. *E.g.* 72 Fed. Reg. at 15023 and 15034. This brief uses one of the agency's descriptive terms, "processing rule.".

Order provisions; and the procedural claim in any event was foreclosed by this Court's prior approval of notice and comment procedure for the processing rule.[57]

The district court did not reach the merits of growers' fifth cause of action – failure of the Secretary to make the requisite 7 U.S.C. §608c(9) "only practical means" determination. The district court concluded that growers waived this claim by not presenting it in comments on the proposed rule (Mem. Op. at 6).[58]

SUMMARY OF ARGUMENT

Since 1935, the AMAA has authorized farm product trade regulation by "Marketing Orders." USDA Marketing Orders may include seasonal limits on agricultural commodities that can be marketed by "total quantity" of crop production, or "any grade, size or quality thereof." 7 U.S.C. §608c(6). The meaning of "quality" in this provision is clear in the context of history and the statutory text.

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[57] Mem. Op. at 29 (the "precedent" in *Koretoff v Vilsack*, 614 F.3d at 539 n.3, "establishes that the Secretary did not need to hold a hearing and a producer referendum….").

[58] Growers admittedly waived their fourth cause of action. Mem. Op. at 3 n.2.

In the text of §608c(6), "quality," like grade and size, refers to observed attributes of a raw agricultural commodity with the same meaning as "quality" in farm product inspection and standardization statutes since the 1910's. Enactment of §608c(6) in 1935 followed two years of experience in "marketing agreement" limitations under the AAA of 1933, and a decade of unsuccessful self-regulation by farm cooperatives. Section 608c(6)was modeled on this experience.

The authority provided in §608c(6)was also designed to be limited and precise in order to avoid overbroad delegation of power such as condemned by the *Schechter Poultry* case decided just prior to enactment of the AMAA's Marketing Order provisions. *Zuber v. Allen*, 396 U.S. at 183. In this context, "quality" limits authorized by §608c(6)cannot reasonably be construed to permit mandatory processing as in USDA's 2007 almond processing rule. This construction is reinforced by USDA's consistent application of "quality" for 70 years to mean inherent attributes of farm products, and USDA's equally consistent disavowal of food safety regulatory authority for AMS.

The 2007 almond processing rule, in any event, was not authorized by USDA's 1976 "quality control" amendment to the Almond Order and

Almond Marketing Agreement, codified at 7 C.F.R. §981.42. USDA's 1976 amendatory decision and the text of the amendment confirm that this provision was designed only to keep raw almonds that contained undesirable attributes off the market. It did not authorize any almond processing mandate. The 2007 almond processing rule was an unlawful attempt to change the Almond Order without following the statutory mandate of hearing and grower referendum for the change.

For Marketing Orders imposed without the consent of a majority of handlers of the commodity, such as the Almond Order, the Secretary must first determine that the regulatory remedy selected is "only practical means of advancing the interests of producers" of the commodity. 7 U.S.C. §608c(9). AMS failed to make an "only practical means" determination in its decision adopting the 2007 almond processing rule, and has not done so for the underlying Almond Order amendment of 1976 upon which the processing rule relies. The Almond Order's 2007 processing rule and 1976 quality control provision are therefore void.

STANDARD OF REVIEW

The issues raised on appeal involve statutory and regulatory construction – questions of law. The standard for review by this Court, therefore, is *de novo*. *National Ass'n of Clean Air Agencies v. Environmental Protection Agency*, 489 F. 3d 1221, 1228 (D.C. Cir. 2007). If statutory meaning or intent remain unclear after application of traditional tools of statutory construction, however, courts must defer to an articulated and reasonable agency interpretation. *Id.*

De novo review of 7 U.S.C. §608c(9) statutory mandates, raised by the third issue, is subject to an initial abuse of discretion review standard if the district court correctly concluded that statutory issue was waived at the administrative level. *Nat'l Ass'n of Clean Air Agencies, supra,* at 1231-32; *Foundation on Economic Trends v. Heckler,* 756 F. 2d 143, 156 (D.C. Cir. 1985) (a court may excuse waiver in limited circumstances).

ARGUMENT

This case is about a ban on the sale of high quality, unprocessed, pathogen-free, raw almonds that growers produce and many American consumers demand.

Two fundamental aspects of regulatory history and policy framed growers' argument to the district court: (1) farm product "quality" regulation by USDA for nearly a century has been limited to inherent, observable, and measurable attributes of the product, and (2) although AMS does not have food safety regulatory authority, inherent attributes relevant to quality also include attributes, such as pathogens, that may make food unsafe.

The district court incorrectly believed that this case is about a right to market almonds that contain unsafe contaminants like salmonella:

> Plaintiffs argue, however, that "'quality,' as used in 7 U.S.C. § 608c(6). . . refers to an inherent, measurable attribute of a farm product" such that whether an almond is contaminated by *Salmonella* is irrelevant to its "quality." [59]

The district court's mistake came from USDA's mischaracterization of growers' "central argument" – that growers "all along" have argued *against* the proposition "that the presence of a contaminant, such as *Salmonella* bacteria, in a commodity can be an 'inherent quality

[59] Mem. Op. at 14 (underscoring supplied); In a later footnote, the district court acknowledged growers' actual protest – that the almond processing rule requires processing "whether or not the almonds in question have been contaminated by the bacteria." *Id*. at 27 n. 23.

characteristic' of a commodity ...."[60] From this inaccurate perspective, some judicial ire concerning the growers' objectives might be expected and an expansive statutory construction favoring food safety regulatory authority might be explained. [61]

I. "Quality" Limits Authorized by §608c(6)of the AMAA Refers to Inherent Attributes of Farm Products that may be Marketed, not to the Manner in which Farm Products must be Processed.

The AMAA of 1937, and its predecessors -- the Agricultural Adjustment Act of 1933 and AAA amendments in 1935 -- were designed to address the farm price crisis during the New Deal. The AMAA provided self-help tools for producers (farmers) to improve prices by controlling quantity or quality of farm products to be marketed – tools that producers had unsuccessfully tried to implement before the

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[60] USDA's Sept. 15, 2011, Mem. in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, at 35 (Doc. 47, p. 38 of 47).

[61] The statutory construction advanced by growers was also, very likely, affected by the court's view of growers' separate statement of facts on, and documentation of, AMS's regulatory history and policy of farm product quality controls. Mem. Op. at 2 n.1, and 4 n.3. The district court's disparagement – as "improper" and "extra-record" – of the form by which plaintiffs summarized and documented USDA's history and practices for quality regulation and Marketing Orders has already stimulated form-over-substance motion practice before the district court. *See United Western Bank v. Office of the Comptroller of the Currency*, D.D.C docket no. 11-cv-00408-ABJ, Motion of United Western Bank "to Strike Defendant's Statement of Facts…" (Doc. No. 102, filed 5/22/12), citing the district court's opinion in *Koretoff v Vilsack*.

AMAA's authority for USDA's marketing intervention. The authority granted was, by Congressional design, limited, to "one or more" forms of product marketing control, but "no others" in 7 U.S.C. §608c(6). By this language, Congress intended to narrowly confine USDA's authority. The marketing of F&V commodities may be limited by "any grade, size, or quality thereof" produced during specified marketing periods. These forms of marketing control are "designed solely to reduce the quantities of [the commodity] entering the market." *Walter Holm & Co. v. Hardin,* 449 F.2d at 1011. The scope of commodity marketing limitation authorized by the word "quality" is the focus of the first question on review.

In the context of a raw agricultural commodity, as in this case, "quality" plainly refers to inherent attributes of the commodity. This was so before the AMAA was enacted. It has been so by consistent agency application for over 70 years.

Statutory construction on a question of regulatory power is guided by the familiar instruction of *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In the first step, without any judicial deference to agency interpretation, a court must apply all

available tools of statutory construction to determine if a clear meaning was intended or incorporated by Congress. If the meaning is still unclear, the court must defer to the statutory construction by the agency, if it reasonably fits within parameters left by Congress for agency construction. *Id.* at 842-43.

Clear meaning of words and phrases, in the first *Chevron* step, must be determined exclusively by reference to their use and meaning "at the time Congress enacted the statute." *BedRoc Limited, LLC v. United States*, 541 US 176, 184-85 (2004). Clear meaning is seldom found by a word in statutory isolation, and often requires examination of the provision in a broader context. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

Context that may provide a clear meaning includes other provisions of the same statute, use of the word or phrase in related statutes, legislative history, historical setting, an agency's contemporaneous interpretation, consistent agency application over the course of decades, and later enactments of Congress by which adoption of meaning from consistent agency practice may reasonably be inferred. *Brown v. Gardner*, 513 U.S. 115, 118 (1994)(statutory context, not definitional

possibilities, drives the Chevron step one inquiry); *Bragdon v. Abbott*, 524 U. S. 624, 642 (1998)(an agency's history of interpretive choices constitutes a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."). In all context settings by which clear meaning may be sought, the word "quality" as used in §608c(6) of the AMAA plainly means an inherent attribute of a raw agricultural commodity or the product of an agricultural commodity.

A. AMAA "quality" limitations in statutory context.

In statutory isolation, §608c(6) of the AMAA uses the word "quality" seven times – six times in subsections (A) – (E) as part of the phrase "any grade, size, or quality thereof" for which various forms of commodity marketing controls may apply."[62] As applied to a raw commodity, such as Almonds Grown in California, §608c(6)(A) quantity and quality limits are authorized as follows:

> (6) In the case of the agricultural commodities… orders issued … shall contain one or more of the following terms and conditions, and…no others:

[62] 7 U.S.C. §608c(6)(A) through (E). Elsewhere in the AMAA, the word "quality" is used at least twelve times: In §§602(3); 608b, 608c(5), 608c(7), and 608e-1.

> (A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity…, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets….

The provisions for Marketing Order "quality" limits in subsections (A) – (E) in each case refers back to "agricultural commodities…" in the introductory text of §608c(6).[63] The phrase "produced during a specified period" in §608c(6) of the AMAA also informs the raw commodity application of "quality" limits, since the quality of crop production, like quantity, may vary from season to season or year to year. In syntax context, quality limitations apply to a quality category of the raw agricultural commodity, just as there may be marketing limitations by grade and size categories of commodity production.

Normally "or" is disjunctive,[64] so that legislative use of "grade… or quality" would presumably refer to distinct or alternative methods of commodity marketing limitations. The district court seized upon these words to conclude that "quality" must mean something different from

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[63] Congressional intent to limit USDA's authority may also be inferred by the subtle differences in specific marketing limitations in subsections (A) – (E) of AMAA §608c(6). These do not hint at any authority for a processing rule.

[64] *United States v. Moore*, 613 F. 2d 1029, 1040 (D.C. Cir. 1979).

"grade," applying a canon disfavoring statutory redundancy. Quality therefore, according to the district court, can broadly and reasonably encompass food safety processing. Mem. Op. at 15-16.

But AMS itself defines "grade" as "a class or rank of quality" (7 C.F.R. §51.2), consistent with a general understanding of "grade" as a standardized set of "quality" factors."[65] Use of both terms makes sense since standardized grades of quality were in early development in the 1930's, they continue to be revised, and standardized grades alone are a rigid form of quality description. Without separate "quality" authority, the industry and agency could not devise Marketing Order quality limits in the absence of grade standards, or at variance from grade standards, which AMS has done. *See* fn. 17, *supra.*

B. AMAA "quality" limitations in historical context.

A clear meaning of "quality," as a category of raw agricultural commodity attributes, is also apparent from the history of related farm

[65] *E.g.*, *Hampton Feedlot, Inc. v. Nixon*, 249 F. 3d 814, 817 (8th Cir. 2001) (inspection of meat for "grade (quality)" factors); 7 USC §§ 7932 – 7934 (farm loans based on the "quality grades" of the commodity); 49 USC § 30123 (uniform quality grades for vehicle tires). "'Standards of quality' were generally understood to be for the purpose of grading goods." USDA, YEARBOOK OF AGRICULTURE, 1954, 83d Congress, 2nd Session, House Document No. 280 (GPO, 1954) at 166, http://archive.org/details/marketingyearboo00wash .

product quality legislation preceding the AMAA, farm cooperative marketing practices incorporated by the AMAA, and judicial decisions to which Congress responded in writing the AMAA.

(i) Related farm product quality laws through 1935.

During the early 1900's, federal laws dealing with the marketing, inspection, certification, standardization and grading of agricultural commodities by quality attributes were a significant focus of Congressional activity. In the first edition of the U.S. Code, Title 7 (Agriculture) included only 17 chapters, five of which dealt with quality, grading, or classification of agricultural commodities and products thereof, that were enacted during the prior 10 years.[66] Of particular significance to fresh produce marketing, section 414 of Chapter 17, Title 7 authorized the Secretary of Agriculture "to investigate and certify to shippers and other interested parties the class, quality, and condition of… fruits, vegetables,… and other perishable farm products when offered" or received in interstate commerce. The so-called "Farm Products Inspection Act" in §414, which originated with the Food Production Act of 1917, was reenacted in annual agriculture

[66] 7 U.S.C. (1925 Ed.) Chapters 2 (cotton standards), 3 (grain standards), 4 (naval stores), 10 (Warehouses), and 17 (miscellaneous matters, §414).

appropriations legislation every year through the early 1950s. Standardized quality descriptions for produce and other farm products, in the form of official U.S. Grades, were promulgated by USDA pursuant to §414 authority.[67]

Five years prior to 1935, Congress enacted the Perishable Agricultural Commodities Act of 1930, including permanent authority for inspection and certification of "the class, quality, and/or condition of any lot of any perishable agricultural commodity."[68] Three months prior to the AAA amendments of 1935, Congress passed the annual appropriations law, with its regular provision for inspection and certification of farm products for quality attributes.[69] And on August

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[67] The evolution of USDA's farm product quality inspection, certification, and grading functions is outlined in the Statement of Facts, pp. 14 - 17 herein.

[68] Section 14 of the Perishable Agricultural Commodities Act ("PACA") of 1930, 46 Stat. 531, 537 *codified at* 7 U.S.C. §499n. By mid-1935, farm product quality inspection and certification authority had also been provided in the Produce Agency Act of 1927, 44 Stat. 1355, *codified at* 7 U.S.C. §492 (1934 - 1953 Editions); section 19 of the Federal Warehouse Act of 1916, *codified at* 7 U.S.C. §257; and in several commodity-specific statutes: Cotton Futures Act of 1916, Sec. 9, 39 Stat. 476, 479; Grain Standards Act of 1916, 39 Stat. 482, *codified at* 7 U.S.C. §76; and Cotton Standards Act of 1923, 42 Stat. 1517, *codified at* 7 U.S.C. §56.

[69] Act of May 17, 1935, Pub. L. No. 62, 49 Stat. 247, 275.

23, 1935, Congress enacted the Tobacco Inspection Act,[70] providing for federal inspection, classification and grading of tobacco because of "unreasonable fluctuations in prices and quality determinations," to the detriment of tobacco farmers, without regulatory intervention.[71]

Thus, the term "quality," when used to describe agricultural commodities and farm products, had a clearly understood farm product trade meaning by August 24, 1935, when Congress amended the AAA to authorize, in §608c(6),[72] marketing limitations based on total quantity production of listed agricultural commodities, or "of any grade, size, or quality thereof."

(ii) Farmer cooperative efforts, prior to 1935, to limit the marketing of produce on the basis of quantity and quality.

Congressional understanding of a clear meaning of "quality," as used in the AAA amendments for F&V Marketing Orders, is reinforced by the fact that Congress intended to allow mandatory regulation to help raise farm prices by means of quantity and quality marketing

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[70] Act of August 23, 1935, Pub. L. No. 314, 49 Stat. 731-32, *codified at* 7 U.S.C. §§511a – 511b.

[71] *Id.*, 7 U.S.C. §511a.

[72] Commodities in the §608c(6) Marketing Order list included tobacco, quality standards for which Congress had addressed the day before in the Tobacco Inspection Act.

limitations that farmer cooperatives had previously attempted to establish by self-regulation since the 1920's.[73] The availability of a regulatory mandate was necessary to extend marketing limitations to non-participants or free-riders.[74]

Help in elimination of the free-rider problem first came with authority in §8(2) the AAA of 1933 for the Secretary to "enter into marketing agreements with processors, associations of producers," and handlers, combined with AAA §8(3) authority to impose marketing agreement limitations on non-signatories by license restrictions.[75]

By August 1935, the historical context of laws and cooperative marketing practices relating to farm product quality attributes for two decades, and the experience of marketing agreement and licensing with

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[73] For milk Marketing Orders, similarly, Congress authorized rules to enforce cooperative trade practices of the 1920's, which in turn had been incorporated in marketing agreements under the AAA of 1933. "Congress intended to carry forward the basic regulatory approach adopted under the 1933 Act, following the precedent of the 1920's." *Zuber v Allen*, 396 U.S. at 184.

[74] This history is described in several USDA publications cited in fn. 4, *supra*. Powers, FMOs, for example explains: "Several marketing cooperatives attempted to elevate farm prices during the early 20th century by shipping only high-quality, fresh produce and limiting sales to a market, but were unsuccessful because nonparticipating growers would benefit without bearing any of the costs of withholding produce from the market. * * * Congress responded to growers' requests for a means to find a solution to the free-rider problem by passing the…AMAA" Doc. 46-3, pp. 36-39 of 82;

[75] 73 Stat. at 34-35.

quantity and quality limitations under the AAA for two years, had been established. These consistently reinforce a conclusion that, when Congress amended the AAA in August 1935 to allow marketing limitations on agricultural commodities based on quantity produced or categories of "grade, size, or quality thereof," quality (like grade and size) refers to attributes of the raw farm commodity.

(iii) Schechter Poultry and judicial context of the AMAA.

President Roosevelt's New Deal programs of 1933 were challenged as unconstitutional in numerous lawsuits. In January 1935, the Court decided *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, which invalidated a provision of the Industrial Recovery Act as an unconstitutional delegation of legislative authority. On May 27, 1935, the Court decided *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, and invalidated, as an unconstitutional delegation of legislative authority, another provision of the Industrial Recovery Act due to lack of statutory standards to guide actions of the Executive Branch.[76]

[76] The statutory provision at issue in *Schechter*, much like then existing AAA marketing agreements that were made mandatory on dissenters through licensing, authorized codes of fair competition that were initiated by request and approval of industry representatives and made mandatory on dissenters by order of the President. 295 U.S. at 521-24. Justice Cardozo, who had dissented in *Panama*

Against this backdrop, the AAA was amended on August 24, 1935, by striking AAA §8(3) (the licensing provision), and adding authority for F&V Marketing Orders in a new §608c(6) with specific forms of farm product marketing limitations, and "no others."[77] The Supreme Court referred to this judicial and legislative history to caution that USDA's regulatory power in the AMAA is deliberately constrained: "The prefatory discussion in the House Report emphasizes the congressional purpose to confine the boundaries of the Secretary's delegated authority. In these circumstances an administrator does not have 'broad dispensing power.'" *Zuber v. Allen*, 396 U.S. 168, 183 (1969).

The district court devoted five pages of its opinion in an effort to distinguish *Zuber v. Allen, Blair v Freeman,* 370 F.2d 229 (D.C. Cir. 1966), and other decisions that confirm the narrow confines of USDA's Marketing Order authority in the AMAA.[78] In contrast to 'complex'

Refining, concurred in the *Schechter* opinion. He explained that there was no "statutory standard, definite or even approximate," so that "anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot." 295 U.S. at 552-53.

[77] 49 Stat. at 753 (striking AAA §8(3)), and 755-56 (adding §608c(6)).

[78] Mem. Op. at 18 – 22. The district court's discussion of *Zuber* begins with the observation that "*Zuber*, *Smyser*, and *Blair* all concerned challenges to regulations

pricing standards for §608c(5) milk Marketing Orders addressed in these cases, the district court reasoned that AMAA §608c(6) Marketing Order authority for other commodities is characterized by "less specific purpose" and "broader leeway" (Mem. Op. at 20).[79] The court ultimately concluded that the 2007 almond processing rule reasonably advances the AMAA's general purpose of "orderly marketing" and "public interest" in AMAA §602(3).

But regulation relying on a statement of general purpose was what the Court condemned in *Schechter Poultry,* and Congress sought to avoid by the 1935 AAA amendments. That is why, when a proposed marketing agreement is to become mandatory on dissenters by a Marketing Order, authorized provisions are restricted to a limited list, and "no others," regardless of consistency with the general purpose of the AMAA.

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promulgated pursuant to the Secretary's authority under the AMAA" to regulate milk prices under §608c(5) of the AMAA.

[79] Curiously, if the district court is correct that authority in §608c(6) for F&V orders is broad, but is narrow for §608c(5) milk orders, then perhaps the terms "grade or quality" used in §608c(5)(A) for milk has a different meaning than "grade or quality" of other commodities in §608c(6). In fact, milk orders regulate prices only for raw milk of Grade A quality from dairy farms (*e.g.*, 7 C.F.R. §1030.12), but the price received is adjusted for non-Grade quality attributes such as protein, fat, solids-not-fat, and a low count of somatic cells inherent in raw milk. *E.g.*, 7 C.F.R. §§1030.73.

The decisions in *Zuber, Smyser, and Blair* were not driven by judicial concern that the Marketing Order provisions undermined the general declaration of policy in §602 of the AMAA, as the district court incorrectly opined (Mem. Op. at 22), but rather that the agency reached beyond the limited methods allowed by Congress in §608c to achieve perceived policy objectives. *Smyser v. Block*, 760 F. 2d 514, 520 (3d Cir. 1985), for example, said:

> Our reading of the legislative history and case law leads us to conclude that the transportation credit, even if it promotes or is necessary for the orderly marketing of milk, is not authorized under the Act as an "incidental" term or condition.

In contrast, pure Marketing Agreements under AMAA §608b(a), without any corresponding "order" imposed on non-signatories, are not limited by any statutory term or condition other than the declaration of policy.

If Congress intended in 1935 to provide for mandatory processing of an agricultural commodity as part of §608c(6)authority to limit commodity marketing by "any grade, size or quality" of the commodity, it gave no hint of that intention during the 1935 legislative process, or thereafter. Significantly, USDA administrators of the Marketing Order program, likewise, gave no hint in 1935 and following decades.

The Court's approach in *Zuber* is instructive. *Zuber* involved a "nearby differential" adjustment to farmers' milk prices so that farms close to city markets received a higher price. USDA claimed that the nearby differential was a form of "location adjustment" expressly authorized by the AMAA. In view of the *Schechter* context in which the AMAA arose, the Court looked in the act and legislative history for express approval of the "nearby" farm price. To paraphrase the Court's observation in *Zuber,* "if those administrators who participated in drafting the 1935 Act understood [commodity quality limitations] to encompass [a mandatory processing rule], they obviously failed to communicate their understanding to the drafters of the committee report." 396 U.S. at 193. In this case, as in *Zuber,* "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Id.* at 185.

C. AMAA "quality" limits in statutory amendment context.

The Marketing Order section of the AMAA, 7 U.S.C. §608c, has been amended forty-one times since 1937. *Id.* (note). Many amendments have addressed §608c(6) fruit & vegetable order authority by adding commodities subject to Marketing Order regulation – such as

the addition of almonds and filberts (hazelnuts) to the list in 1949 [80] – and by adding additional types of authorized marketing controls, or limitations on controls for specific commodities, now contained in subsections 608c(F) – (J) that were not in the 1935 - 1937 versions of the AAA and AMAA. At no time in those seven decades did Congress change or expand the original authority in subsections 608c(A) – (E) for limitations on marketing of agricultural commodities by "grade, size, or quality thereof," nor suggest that "quality" could include a processing mandate.

A 1947 amendment to §608c(6), however, reenacted subsections (A) – (E) originally contained in the 1935 AAA amendments.[81] By that time (1947), Congress had before it USDA's experience in promulgation of (and amendments to) a dozen or more F&V Marketing Orders over the course of twelve years. [82] These contained quality limitations, some incorporating U.S Grade Standards, others with quality or grade

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80 *See* fn. 29, *supra*.

81 Act of Aug. 1, 1947, 61 Stat. 707 – 710.

82 Starting in 1938, these Marketing Orders were published in the Code of Federal Regulations (as supplemented) in Title 7 (Agriculture), parts 900 – 999.

specifications written in Marketing Order provisions. The 1935 western Walnut Order is instructive and defined "quality" as follows:

> (m) A "Quality" means the classification of any pack of walnuts according to appearance, edibility, color of kernels or such other characteristics as are employed in standard commercial practices, accordance with the specifications given in § 901.20, and/or other specifications as may be hereafter prescribed by the Control Board and approved by the Secretary.

7 C.F.R. 901.2(m)(1938).[83] This again confirms that in the two plus decades prior to the AMAA amendments of 1947, "quality" in the context of farm product inspection, standardization, and grading laws, as well as in Marketing Orders, referred to inherent attributes of an agriculture product.

With more than a decade of legislation, rulemaking, and administrative practice concerning agricultural product quality for Marketing Orders, it is clear that, in the 1947 AMAA §608c(6) amendments, Congress ratified the well-established 'inherent attribute' meaning of agricultural product "quality," if it were not

[83] The definition for quality was deleted from the walnut order, as simply unnecessary, prior to the 1947 statute that amended and ratified AMAA §608c(6). 12 Fed. Reg. 4819 (Jul. 19, 1947).

abundantly clear before that time.[84] *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184,193-94 (2002); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986). For a century, the meaning of "quality" in the marketing of farm products and in agriculture marketing statutes has been the same as AMS's current definition in 7 C.F.R. §51.2: "the combination of the inherent properties or attributes of a product which determines its relative degree of excellence."

D. AMAA "quality" meaning if Chevron Step 2 applies.

The district court quickly found ambiguity in the word "quality," as used by Congress in the isolated text of AMAA §608c(6), and

[84] By 1947, Congress also had before it several decades of the Yearbook of Agriculture, an annual report of USDA to Congress and the public concerning agricultural issues and agency practices, all of which are consistent with the inherent attribute meaning of agricultural commodity "quality." In several yearbooks from the 1920's through the 40's, these are addressed at length. For example: YEARBOOK OF AGRICULTURE, 1937, 75th Congress, 1st Session, House Document No. 28 (GPO, 1937) at 61-62 (marketing agreements) and 99-102 (quality standards and grading); and, FARMERS IN A CHANGING WORLD, YEARBOOK OF AGRICULTURE, 1940, 76th Congress, 3d Session, House Document No. 695 (GPO, 1940) – marketing agreements/orders at 31, 99, 320-31, 394, 668, and in special articles: "Marketing Agreement Programs as a Means of Agricultural Adjustment" (at pp. 638-649), and "Standardization and Inspection of Farm Products" (at at pp. 667-683), http://archive.org/details/farmersinchangin00unitrich The U.S. Government Manual, similarly, explained that standardized grades "serve as a yardstick with which producers, dealers, and consumers may measure the gradations in the quality of farm products." U. S. GOVERNMENT MANUAL, 1940, at 163.

proceeded to consider definitional possibilities for the word.[85] Spurred by USDA's assertions that food product "quality and safety concerns are one in the same,"[86] the district court rejected a "rigid distinction between food quality and food safety measures."[87] But a distinction has long been recognized by federal courts, *e.g., Supreme Beef Processors v. U.S. Dept. of Agriculture,* 275 F. 3d 432, 443 (5th Cir. 2001) (distinguishing pathogen controls from "quality of incoming raw materials").

Where regulated food safety measures are concerned, the distinction has also long been acknowledged by AMS: "AMS is not a food safety agency… food safety policy and the establishment of food safety standards are not within AMS' mandate."[88] The agency's long-term disavowal of food safety regulatory authority does not mean that

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[85] Mem. Op. at 12-13. The dictionary definition for "quality" cited by the district court (*id*. at 14) is not inconsistent with AMS's definition of quality in 7 C.F.R. §51.2. The court's departure from these definitions rests on a processing mandate application of "quality" as used in AMAA §608c(6).

[86] USDA's Mem. in support of summary judgment and in opposition to growers' motion for summary judgment at 28 (Doc. 47 at 31 of 47).

[87] Mem. Op. at 12-16, 23.

[88] Mem. Op. at 14-15, quoting testimony by the AMS administrator. AMS's disavowal of food safety regulatory authority also appears in U.S. Government Accountability Office, *Oversight of Food Safety Activities…*(GAO-05-213, Mar. 2005) at 10 (Doc. 46-5, p. 68 of 97).

AMS has functioned or must function with disregard for unsafe attributes present in a sample of agricultural commodities – a notion that the district court mistakenly attributed to plaintiffs (Mem. Op. at 14).

But the objective of *Chevron* step two is to determine whether an agency's statutory construction is within the parameters left open by Congress for exercise of *reasonable* agency discretion. Before venturing to second step of *Chevron*, therefore, a court must be satisfied that the contested interpretation is one on which the agency has provided a "rational justification" for the choice made. *Shays v. Federal Election Commission,* 528 F. 3d 914, 921 (D.C. Cir. 2008). USDA's litigation arguments, derived from but not disclosed in its 2007 almond processing rulemaking, simply represent an unacknowledged "effort to walk away from its long-settled view of the limits of its authority under..." §608c(6). *Financial Planning Ass'n v. Securities and Exchange Commission*, 482 F. 3d 481, 492 (D.C. Cir. 2007). If AMS's processing rule is affirmed, the line between food safety authority and product quality assessment will fade like invisible ink.

AMS's longstanding acknowledgement that it does not have food safety *regulatory* authority answers the question. AMS may inspect, certify, grade or limit samples of agricultural commodities for the presence of quality attributes, including harmful attributes. AMS may not disregard product attributes in a sampled lot in favor of a processing mandate for all sales. That is the function of the FDA.[89]

II. "Quality" Limitation Authorized by §981.42(b) of the Almond Marketing Order Likewise Refers to Attributes of Almonds that may be Marketed, not to the Manner in which Almonds must be Processed. The 2007 Almond Processing Rule was not authorized by the Order and Should Therefore have been Promulgated by Formal Hearing and Grower Referendum.

Judicial review of the meaning of a rule follows the same two-step procedure as statutory construction: (1) does the word have a clear meaning in text or context, and, if not, (2) is the agency's interpretation reasonable? *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (new rules cannot be created under the "guise" of interpretation).

AMS relied upon a provision for "quality control" in §981.42 of the Almond Order, adopted in 1976 pursuant to AMAA §608c(6) quality

[89] AMS inspects and grades table eggs for quality attributes, 7 C.F.R. Part 56, under authority of the AMA of 1946. But the FDA mandates that the surface of table eggs be pasteurized before reaching consumers. 74 Fed. Reg. 33030 (July 9, 2009).

limitation authority, as pre-existing regulatory authority for the mandatory almond processing rule. For "outgoing" almonds in §981.42(b), the agency is authorized to establish, "for any crop year,… minimum quality and inspection requirements applicable to almonds to be handled or to be processed…."

Examining the text of §981.42, the district court concluded that the authority in subsection 42(b) for "outgoing" quality control is broad, in contrast to the "inedible kernel" tolerance for "incoming" quality control in subsection (a). Therefore, according the court, AMS's construction of "quality" in subsection (b) to require almond processing is reasonable and must be given judicial deference. Mem. Op. at 26-27.

The court disregarded the interpretive effect of the phrases "to be processed," "to be handled," or "in any crop year" on the meaning of the word "quality." Each of these phrases limits the meaning of the word quality, support a commodity attribute meaning of "quality," and undermine an interpretation that would permit a perpetual mandatory processing rule.

The district court found support for the AMS construction, however, in the conjunctive phrase "'minimum quality *and* inspection

requirements." The court reasoned that use of both words – "quality" and "inspection" – would be unnecessary if quality merely meant "defects that can be ascertained by inspection." Mem. Op. at 27 n.22. Compliance with minimum quality standards, however, must necessarily be verified by inspection.

Over the government's protest, the district court did consult the 1976 Almond Order amendment decision by which §981.42 "quality control" was authorized.[90] Although there is likewise no hint in that decision that outgoing quality standards could include an almond processing requirement, the court reasoned that broad policy objectives of "orderly marketing" and "public interest" recited in the rulemaking supports AMS's mandatory processing rule. Mem. Op. at 27.

Notably, the 1976 quality control provision was promulgated, as a Marketing Order amendment, by formal adjudicatory-process rule-making governed by 5 U.S.C §§556-557. The regulatory result achieved by this unique and exacting rulemaking procedure must be understood by more than just deferential guess-work.

[90] 41 Fed. Reg. 22075 (June 1, 1976), reproduced in Doc. 46-4 pp. 39 – 48 [JA__].

The product of that process, moreover, was not simply a regulation. It was a contract (Marketing Agreement) proposed by the Almond Board, prepared by the Secretary, and offered to handlers. In 1976, handlers agreed to the contract.[91] 41 Fed. Reg. 26852 (June 30, 1976). The corresponding Marketing Order amendments were also offered for growers to approve by referendum, which they did. *Id.*

Interpretation of the 1976 Almond Order provision, therefore, must be constrained by ballot initiative and contract interpretation principles of reasonableness to those who signed the contract and voted on the ballot.[92] Since quality attributes subject to Marketing Order limitations had consistently involved inherent farm product attributes for 40 years prior to the 1976 amendment (and for 30 years thereafter), it would be unreasonable to ascribe a mandatory processing meaning to

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[91] The contract nature of a Marketing Agreement was firmly established even before enactment of the AMAA. "A marketing agreement… represents a legal contract between the Secretary of Agriculture and the parties thereto. It binds them to certain methods of procedure in the control of merchantable supplies of a commodity as to prices, trade practices, or other arrangements." United States Department of Agriculture, YEARBOOK OF AGRICULTURE, 1934, 73d Congress, 2d Session, House Document No. 260 (GPO 1934), p. 262. By the end of 1933, there were 15 marketing agreements for various tree fruits (including walnuts) and vegetable crops. *Id.* p. 264.

[92] *E.g.*, *Blount Brothers Construction Company v. United States*, 346 F. 2d 962 (Ct. Cl. 1965) (a latent government contract ambiguity is construed against the government).

"minimum quality" as used in §981.42(b) of the almond order. There is simply no principled way to read the 1976 Almond Order amendment as providing authority for the 2007 processing rule.

Because the 1976 amendment did not provide mandatory processing authority, a new Almond Order amendment would be required to adopt or authorize any processing rule. The Secretary's adoption of the 2007 processing rule, without following the mandatory procedure of formal hearing and producer referendum required by the AMAA,[93] renders the rule void even if its substance is otherwise authorized by the Act.

III. The Secretary's Failure to Make Mandatory 7 U.S.C. §608c(9) Determinations Renders the Mandatory Almond Processing Rule, and the Antecedent Quality Control Provision of the Almond Marketing Order, Invalid.

The last question presented for review is relatively simple, but requires appellate application of two standards for review. First, did the district court abuse its discretion by refusing to consider the merits

[93] 7 U.S.C. §§608c(3)-(4), (8)-(9) and (17); 7 C.F.R. §§900.1 - .18. On this AMAA procedure issue, the district court incorrectly concluded, alternatively, that this Court had already resolved the question in *Koretoff v. Vilsack*, 614 F.3d at 539 n.3. Mem. Op. at 29. However, this Court did not adjudicate the procedure issue in its ruling on justiciability of growers' claims.

of growers' 7 U.S.C. §608c(9) argument on grounds that the claim was waived by the purported lack of comment during the rulemaking on mandatory almond processing? If the merits are considered by this Court, the question presented by growers involves an issue of law which is reviewed *de novo* . The question of abuse of discretion is dependent upon the nature of the claim, so we address the 7 U.S.C. §608c(9) issue first.

Section 608c(9) of the AMAA requires the Secretary of Agriculture to make two determinations when handlers do not execute a marketing agreement by the requisite majority. These are: (1) that handlers' non-agreement "tends to prevent the effectuation of the declared policy of" the AMAA (§608c(9)(A)), and (2) that "issuance of such order is the only practical means of advancing the interests of the producers of such commodity…" (§608c(9)(B)). These are power-limiting features of the AMAA.[94]

The analytical mandates of §608c(9), and the contrast with less-demanding analysis for §608c(8) Marketing Orders, is again readily

[94] By §608c(9)(B), "the Secretary's power to [issue an order] is conditioned upon… making an administrative determination that the order is 'the only practical means of advancing the interests of the producers.'" *Block v. Community Nutrition Institute*, 467 U.S. 340, 342 (1984).

understood in the context of *Schechter Poultry* and the industrial codes vitiated by that case. The Secretary may impose a §608c(8) Marketing Order approved by majority of industry stakeholders if it reasonably advances the AMAA's objectives. A §608c(9) Marketing Order, in contrast, may be imposed on the dissenting minority only if the agency determines that there is no other practical alternative. It is not enough for §608c(9) purposes that industry proponents of a Marketing Order believe that regulation is a good idea. The Secretary must make his own independent determination that the specific regulation is the only practical good idea.[95]

It is undisputed that the §608c(9) determinations were not made for the 2007 mandatory processing rule, nor for the 1976 quality control amendment to the Almond Marketing Order. The two determinations were not required in 1976 because growers and handlers approved the

[95] As the Supreme Court observed in *Zuber*, responsibility lies with the Secretary: "Lower courts have, in some circumstances, permitted an agency to rely on the approval of those affected by an action as evidence that the action is in the 'public interest.'…. We need not consider what scope, if any, may be given to these principles." 396 U.S. at 196.

Marketing Agreement by §608c(8) procedures.[96] However, almond handlers have withdrawn their consent since 1996, when handlers first refused to sign a marketing agreement by the requisite majority. The Secretary made an "only practical means" determination for the1996 amendments, but did not do so (and has not done so) for the 2007 almond processing rule, for the 1976 quality control provision, or for the Almond Order as a whole. [97]

The district court was mistaken in the factual basis for its waiver conclusion because almond growers and others did, in fact, advocate alternative (and less burdensome) forms of regulatory control.[98] But in the end, the AMS administrator deferred to the wishes and determinations of the industry proponent – the Almond Board. The absence of

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[96] 41 Fed. Reg. 26852 (June 30, 1976) (USDA Determination of Grower Approval, Handler Agreement, and Final Amendments to Almond Marketing Order), reproduced in Doc. 46-4, pp. 50-52 [JA ___].

[97] 61 Fed. Reg. 32917, 32919 (June 26, 1996), reproduced in Doc. 46-4, pp. 86-91, determining that: "*this amendatory order* is the only practical means … of advancing the interests of producers of almonds" (italics supplied). At no time has the Secretary expressly made the 'tendency' determination required by §608c(9)(A).

[98] *See* pp. 22 - 26, *supra*.; *Nuclear Energy Institute. v. EPA*, 373 F. 3d 1251, 1290–92 (D.C. Cir. 2004) (Nevada's statutory argument was preserved by comments of the state and others at some point during the rulemaking process.).

an independent determination by the Secretary goes to the basic power of the agency to act, not simply the merits of its action.

The court's waiver conclusion, moreover, irrationally erects a "catch-22" for parties adversely affected by a final Marketing Order decision if non-waiver is dependent upon a grower's incantation of the statutory words "only practical means" or specific reference to §608c(9). The §608c(9) determinations are first made by the Secretary, if at all, only in the final rulemaking document – after a decision has been made. How can a party comment on the absence of the yet-to-be made determination in the course of rulemaking?

In the circumstances of this case, the district court abused its discretion by not considering the merits of the §608c(9) claim of the almond growers. This Court should address the merits of that claim. On the merits, the final action of AMS is clearly void because the Secretary made no determination that the regulatory remedy selected is the "only practical means" to advance almond growers' interests.

CONCLUSION

For the foregoing reasons, this Court should hold that USDA's 2007 almond processing rule exceeds the agency's authority for agricultural

commodity marketing limitations in 7 U.S.C. §608c(6), that USDA unlawfully attempted to change the Almond Marketing Order without holding a hearing and conducting a grower referendum as required by the AMAA, and that the regulatory provisions at issue are void because the Secretary failed to determine that they are the "only practical means of advancing the interests" of almond growers, as also required by the AMAA.

The decision of the district court should be reversed, and this case remanded for entry of judgment in favor of grower plaintiffs.

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1. This brief complies with the type-volume limitation of F.R.A.P 32(a)(7)(B) because this brief, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), by Microsoft Word (2010) word count, contains 13,824 words.

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____/S/_____
John H. Vetne
Attorney for Plaintiffs-Appellants

Dated: July 5, 2012

Koretoff v. Vilsack, D.C. Cir. No. 12-5075

ADDENDUM OF STATUTES AND REGULATIONS

FEDERAL STATUTES

AGRICULTURAL MARKETING AGREEMENT ACT of 1937, as amended (Excerpts).

7 U.S.C. § 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress--

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and

maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

7 U.S.C. § 608b - Marketing Agreements (excerpt)

(a) In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this chapter.
****

7 U.S.C. § 608c. - Orders regulating handling of commodity (excerpts)
(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such

agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such

commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the

net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

* * * *

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order…: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who…, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers *** to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers *** tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. §608c(17) – Amendments (excerpt)

(A) The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders. ****

7 U.S.C. §608c(19) – Producer referendum (excerpt)

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. ****

AGRICULTURAL MARKETING ACT OF 1946 (excerpts)

§ 1622. Duties of Secretary relating to agricultural products

The Secretary of Agriculture is directed and authorized:

* * * *

(c) Improvement of standards of quality, condition, etc.

To develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices. ****

* * * *

(h) Inspection and certification of products in interstate commerce *

To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural

products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection. ****

FARM PRODUCTS INSPECTION ACT (repealed in 1955)
7 U.S.C. §414 (1934 – 1953 Editions)

§ 414. Certification of condition, etc., of agricultural products shipped in interstate commerce; certificate as evidence.

The Secretary of Agriculture is authorized to investigate and certify to shippers and other interested parties the class, quality, and condition of cotton and fruits, vegetables, poultry, butter, bay, and other perishable farm products when offered for interstate shipment or when received at such important central markets as the Secretary of Agriculture may from time to time designate, or at points which may be conveniently reached therefrom, under such rules and regulations as he may prescribe, including payment of such fees as will be reasonable and as nearly as may be to cover the cost for the service rendered: Provided, That certificates issued by the authorized agents of the department shall be received in all courts of the United States as prima facie evidence of the truth of the statements therein contained.

FEDERAL REGULATIONS

7 C.F.R. Part 981 – Almonds Grown in California, excerpts.

Subpart—Order Regulating Handling

§ 981.12 Grower.

Grower is synonymous with *producer* and means any person engaging, in a proprietary capacity, in the commercial production of almonds.

§ 981.16 To handle.

To handle means to use almonds commercially of own production or to sell, consign, transport, ship (except as a common carrier of

almonds owned by another) or in any other way to put almonds grown in the area of production into any channel of trade for human consumption worldwide, either within the area of production or by transfer from the area of production to points outside or by receipt as first receiver at any point of entry in the United States or Puerto Rico of almonds grown in the area of production, exported therefrom and submitted for reentry or which are reentered free of duty. However, sales or deliveries by a grower to handlers, hullers or other processors within the area of production shall not, in itself, be considered as handling by a grower.

§ 981.42 Quality control.

(a) *Incoming.* Except as provided in this paragraph, each handler shall cause to be determined, through the inspection agency, and at handler expense, the percent of inedible kernels in each variety received by him and shall report the determination to the Board. The quantity of inedible kernels in each variety in excess of two percent of the kernel weight received, shall constitute a weight obligation to be accumulated in the course of processing and shall be delivered to the Board, or Board accepted crushers, feed manufacturers, or feeders. The Board, with the approval of the Secretary, may change this percentage for any crop year, may authorize additional outlets, may exempt bleaching stock from inedible kernel determination or obligation and may establish rules and regulations necessary and incidental to the administration of this provision, including the method of determining inedible kernel content and satisfaction of the disposition obligation. The Board for good cause may waive portions of obligations for those handlers not generating inedible material from such sources as blanching or manufacturing.

(b) *Outgoing.* For any crop year the Board may establish, with the approval of the Secretary, such minimum quality and inspection requirements applicable to almonds to be handled or to be processed into manufactured products, as will contribute to orderly marketing or be in the public interest. In such crop year, no handler shall handle or process almonds into manufactured items or products unless they meet the applicable requirements as evidenced by certification acceptable to the Board. The Board may, with the approval of the Secretary, establish different outgoing quality requirements for different markets. The Board, with the approval of

the Secretary, may establish rules and regulations necessary and incidental to the administration of this provision.

Subpart—Administrative Rules and Regulations

§ 981.442 Quality control (excerpts).

* * * *

(b) Outgoing. Pursuant to Sec. 981.42(b), beginning September 1, 2007, and except as provided in Sec. 981.13 and in paragraph (b)(6) of this section, handlers shall subject their almonds to a treatment process or processes prior to shipment to reduce potential Salmonella bacteria contamination in accordance with the provisions of this section.

* * * *

(6) Exemptions. Handlers may ship untreated almonds under the following conditions. For purposes of this section, container means a box, bin, bag, carton, or any other type of receptacle used in the packaging of bulk almonds.

* * * *

(ii) Handlers may ship untreated almonds directly or through a third party to locations outside the U.S., Canada, and Mexico, provided that each container of such almonds is identified with the term "unpasteurized." Such lettering shall be on one outside principal display panel, at least \1/2\ inch in height, clear and legible. If a third party is involved in the transaction, the handler must provide sufficient documentation to the Board to track the shipment from the handler's facility to the importer in the foreign country.

CERTIFICATE OF SERVICE

I certify that the foregoing Appellant's Brief was served today by first class mail, postage prepaid, or by hand to lead counsel for all other parties, as follows:

Appellate Counsel for USDA:
Michael P. Abate, Esq.
Michael S. Raab, Esq.
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I further certify that additional electronic copies of the foregoing were served this day upon the foregoing, by email to Michael.Abate@usdoj.gov, and Michael.Raab@usdoj.gov, and have been filed on the Court's ECF filing system.

July 6, 2012 ____/S/_____
John H. Vetne