[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)

REPLY BRIEF FOR APPELLANTS
(Joint Appendix Deferred)

Susan Silber, Esq.
Kenneth Sigman, Esq.
Silber, Perlman, Sigman & Tilev, PA
7000 Carroll Ave., Suite 200
Takoma Park, Maryland 20912
301-891-2200

John H. Vetne
Attorney at Law
311 George Cole Rd.
PO Box 15
New Portland, Me. 04961
207-628-2005

September 19, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASE AUTHORITIES

* Case Authorities upon which we chiefly rely are marked with asterisks.

STATUTORY AUTHORITIES

CODE OF FEDERAL REGULATIONS and FEDERAL REGISTER

Other Authorities

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

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.

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

DOJ – United States Department of Justice.

USDA – United States Department of Agriculture.

I. Introduction and Summary of Argument

USDA's Brief on the merits of almond growers' claims of *ultra vires* regulatory action by the agency's Agricultural Marketing Service ("AMS") studiously seeks to obfuscate those claims, and to avoid examination of the source, breadth and context of AMS's authority to regulate the "quality" of farm products under the Agricultural Marketing Agreement Act ("AMAA").

The agency does not dispute that farm product "quality" has, for a century, been the subject of federal legislation, USDA regulation and commercial trade practices. Nor is it disputed that agency regulation and standardization of products for quality has consistently been based on observed attributes and characteristics that enhance (or reduce) value, and enhance (or reduce) marketability, of raw agricultural commodities in the same way that farm products are and have been sold in commercial transactions based on "quality" characteristics. Never, during the last century of USDA "quality" regulation of farm products, has "quality" been construed to authorize mandatory processing of an agricultural commodity before any of the commodity can be marketed to U.S. consumers.

In response to the rich history of legislative, regulatory, commercial and judicial context in which 7 U.S.C. §608c(6)(A) was enacted in 1935 (Grower's Brief at 4-5, 15-18, and 39-46), USDA chose not to address historical facts and says no more than this history does nothing to illumine the intended scope of "quality" regulation in §608c(6)(A).[1]

In the end, the government's analytical response to Growers' claims of *ultra vires* action is summarized as follows:

> [T]his case… turns on a simple question: whether the Secretary reasonably determined that *Salmonella* bacteria contamination affects the "quality" of almonds intended for human consumption. If so, then a measure designed to prevent *Salmonella* contamination falls squarely within the Secretary's existing authority to establish "minimum quality and inspection requirements"

USDA's Brief at 16-17.

The predicate postulate to USDA's "if so…" conclusion is not at issue, as emphasized in Growers' Brief at 34-35. It is USDA's lack of

[1] USDA's Brief at 32 simply says: "Plaintiffs do not advance their attack on the Secretary's interpretation by surveying 'the history of related farm 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.'" USDA does not, however, dispute the history of the AMAA and farm product quality legislation as summarized by growers and detailed in the agency's own publications upon which growers relied.

authority in §608c(6)(A) to mandate processing "whether or not the almonds in question have been contaminated by the bacteria" that is, and has been, the focus of Growers' claims. Growers' Brief at 34 n. 59 (*quoting* Mem. Op. at 27 n.23); *Id.* at 3 (appeal issue No. 1); Amended Complaint, (Doc. 9) at 19 (¶s 76-77), 21 (¶ 85), and 23 (¶ A).

Notwithstanding Growers' unequivocal focus on the presence or absence of statutory authority to require processing of farm products as a 7 U.S.C. §608c(6)(A) quality measure, the government inexcusably attributes to almond growers' an argument that USDA may not consider the presence of salmonella to be detrimental to quality. From this false premise, the agency asserts that the reasonableness of USDA's conclusion that the presence of salmonella in a farm product is a quality detriment controls the outcome of the Court's inquiry.[2]

---

[2] The government, in these efforts to cloud and confuse issues, irrelevantly argues:

► "none of these plaintiffs suggested during the rulemaking that *Salmonella* contamination has no bearing on the "quality" of an almond intended for human consumption." USDA Brief at 21.

► "Common sense alone dictates that almonds infected with potentially lethal bacteria cannot be considered a "quality" product in any sense of the word." *Id.* at 24.

► "…'whether almonds are contaminated by *Salmonella* might reasonably be deemed a 'property' or a 'characteristic' of almonds…' " *Id.* at 25, *quoting Koretoff,* 841 F. Supp. 2d at 10.

Framing the Growers' argument in this way demonstrates that the government misapprehends the central issue before this Court, or desires readers of its brief to misunderstand the issue.

Resolution of the statutory authority issue identified by almond growers – mandatory farm product processing without regard to inherent quality or contamination of a farm product – will have broad national and international impact. If USDA can now look to §608c(6)(A) as authority to mandate processing or a processed attribute under the

---

(fn. 2, continued)

► "[Growers'] concession [that Aflatoxin may be deemed an undesirable quality attribute] is fatal to their case, for there is no basis to conclude almond quality is affected by 'undesirable attributes' like toxins, but not bacteria." *Id.* at 27.

Growers' argument clearly identified the target of their complaint as USDA's "ban on the sale of high quality, unprocessed, pathogen-free, raw almonds that Growers produce and many American consumers demand," while expressly acknowledging that "inherent attributes relevant to quality also include attributes, such as pathogens, that may make food unsafe." Growers' Brief at 34 – 35. USDA's brief is an untrustworthy source for the contents of Growers' claims. This is again revealed in USDA's assertion that Growers argued that "the word 'quality' can only be interpreted as a synonym for a commodity's agricultural 'grade'." USDA Brief at 31, citing Growers' Brief at 40-41. Growers' brief, in fact, argues that these two terms are necessarily distinct in meaning. Perhaps the agency hopes this Court, as the lower court apparently did, will give deference to the agency's representations about the content of Growers' arguments.

guise of regulating farm product quality, processing can be required for all agricultural commodities subject to marketing orders. 7 U.S.C. §608c(2) (listing commodities to which §608c is applicable). For twenty-four commodities, marketing order quality regulations also result in identical or comparable restrictions on imports of the commodities. 7 U.S.C. §608e-1.[3] Indeed, resolution of "quality" authority in the AMAA, if processing may be mandated, could readily be applied by USDA to related quality regulation in the Agricultural Marketing Act (AMA), 7 U.S.C. §§1622(c) and (h), and all quality standards thereunder (7 C.F.R. Parts 51 (fresh fruits and vegetables) and 52 (processed fruits and vegetables)), by limiting marketable quality classifications to those farm products that have been gassed, irradiated, pasteurized, or otherwise processed in some particular way for the perceived good of consumers or farmers. USDA would, of course, support this type of change by arguing that application of the expanded concept of "quality" to other regulations is entitled to extraordinary judicial deference.

[3] The government correctly observes that almonds are not included in the Section 608e-1 list. USDA Brief at 31 n. 11. Section 608e-1 is not, however, "beside the point," as USDA asserts. The agency advocates broad authority in the AMAA (not limited to almonds) to regulate "quality" by mandatory processing. That authority would necessarily apply to §608e-1 of the AMAA as well as §608c.

The government's litigation preference is that this Court avoid grappling with growers' *ultra vires* claims, and grant to USDA the statutory authority it seeks because plaintiff almond growers did not sufficiently preserve the *ultra vires* issue by their comments.

II. Growers' Claims of Ultra Vires Action by USDA are not Waived. The Scope of USDA's Authority to Issue a Mandatory Processing Rule was Presented to the Agency, Resolved by the Agency, and Required to be Addressed by the Agency.

The Government's alternative issue No. 1 asserts that this Court should not address the merits of Growers' claims that USDA clearly acted beyond its authority, because these claims have been waived. In effect, the Government argues that the lower court abused its discretion in considering the issues of agency authority on the merits. The district court reasoned:

> Whether plaintiffs are barred from seeking judicial review of their remaining claims presents a closer question. Courts "'excuse.. the exhaustion requirements for a particular issue when the agency has in fact considered the issue,'" *Ohio v. EPA*, 997 F.2d at 1529 (quoting *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987)), and plaintiffs have put forward at least some evidence to suggest that the agency considered whether the *Salmonella* Rule was within its statutory authority and whether it could be promulgated by notice and comment rulemaking.

The court then went on to resolve the statutory authority questions without expressly ruling on USDA's waiver argument on these issues. Mem Op. at 6-7.

USDA's renewed waiver argument misses the mark.

The waiver principle, an application of exhaustion of judicially-created issue-exhaustion, rests on two purposes: (1) to avoid judicial review of "'a substantive claim that has never even been presented to the agency for its consideration,' and to guarantee '[s]imple fairness' to administrative agencies." USDA's Brief (at 18-19), *quoting Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148-50 (D.C. Cir. 2005). But there are also some matters "an agency must consider *sua sponte,*" whether raised by a commenter or not. *Advocates for Highway & Auto Safety* at 1150.

The statutory authority issue raised by Growers meets the *Advocates for Highway & Auto Safety* factors on all three grounds.

The issues were presented to (and resolved by) the agency. As explained in Growers' Brief (at 22, with citations to the Administrative Record), the question of agency authority to issue a mandatory processing rule was expressly raised early in the rule development

process.[4] USDA's implication that the statutory authority issue was not raised and that it would be unfair to consider the issue on judicial review is untenable.

---

[4] The June 3, 2004, minutes of the Almond Board's Food Safety & Quality Committee, cited in Growers' Brief at 22 n 35, started the mandatory processing ball rolling, including questions of legal authority:

> Mr. Wells moved that all raw and natural almonds designated directly for human consumption be treated with PPO or another lethal process that achieves a 5-log reduction in bacterial pathogens. Mr. Hoskins seconded the motion. After some discussion, there was a roll call vote and the motion passed three to one. There was discussion on the wording of the motion and it was asked if the Board has authority to mandate a kill step process? Mr. Engeler [(a USDA-AMS representative)] replied that USDA-AMS is investigating the issue, to determine the extent to which the marketing order will allow for mandatory implementation of the Board's recommended actions.

Doc. 43-30 p. 52. A week later, the AMS representative reported that USDA had given the green light on authority:

> Mr. Engeler said that the USDA does recognize this is a serious issue for the industry and wants the Board to be able to do whatever is legally possible under the Marketing Order to address the issue. The main question from the June 3rd committee meeting was whether or not it was legal under the Marketing Order for the Board to implement a mandatory treatment or "pasteurization" program. Mr. Engeler was informed this morning, that there is legal authority under the Marketing Order.

Minutes of Food Safety & Quality Committee, June 10, 2004, Doc. 43-30 p. 33. On June 23, 2004, the Almond Board approved the Committee's action plan, with amendments, and on July 1, 2004, published the action plan with notice that "USDA has reviewed and approved a summary of the plan as outlined in this document" and that "USDA has reviewed the marketing order and determined that there is authority under the Quality Control provision of the marketing order to authorize a mandatory industry-wide pasteurization step." Doc. 43-30, pp. 19-21.

Additionally, the agency is obligated under the APA to address its statutory authority *sua sponte*. Notice of proposed rulemaking must include "reference to the legal authority under which the rule is proposed." 5 U.S.C §553(b)(2). "The reference must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 29 (1947). The APA further provides, that agencies may not issue a "substantive rule ... except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b).

Accordingly, there is no basis under waiver principles to avoid review of Growers' claims of *ultra vires* agency action.

The Fifth Cause of Action in Growers' Amended Complaint (Doc. 9 p. 22 ¶89) also implicates agency authority to issue the 2007 processing rule, but is not dependent upon the 2007 rulemaking (or comments thereto) for judicial review. Growers claim that USDA's marketing order authority to issue 7 C.F.R. §981.42 quality control regulations lapsed in June 1996 because that provision was not and has not been supported by an "only practical means" determination as

required by statute whenever a marketing order is not accompanied by a handler-approved marketing agreement. 7 U.S.C. §608c(9). Grower's Brief at 60-64. The agency's error in continuing to rely on the lapsed marketing order provision was compounded by the absence of an "only practical means" determination in the 2007 processing rule decision, even though commenting parties clearly advanced other practical means as part of their comments. *Id.* There is no basis, therefore, to conclude that the fifth cause of action has been waived.

III. USDA's Asserted Construction of its "Quality" Authority Under the AMAA and the Almond Order is Contrary to the Statute and Marketing Order, and is not Entitled to Deference Under Chevron or Auer.

This Court, in *Transohio Sav. Bank v. Director, Office of Thrift Supervision,* 967 F.2d 598, 621 (D.C. Cir.1992), observed:

> It is "central to the real meaning of 'the rule of law,' (and) not particularly controversial" that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so… Agency actions beyond delegated authority are "*ultra vires,*" and courts must invalidate them.

(citation omitted). Growers' Complaint invoked this rule of law. Growers' Brief provides detailed history and context, largely from USDA's own publications, to demonstrate that USDA's 2007 almond

processing rule exceeds the clear parameters of agency "quality" limitation authority in 7 U.S.C. §608c(6) and 7 C.F.R. §981.42, and is therefore *ultra vires.*

The history and context offered by Growers is not contested nor significantly analyzed in USDA's Brief other than to naysay the conclusions reached by Growers. USDA essentially skips the first step of *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), for statutory construction, and the first step of *Auer* for regulatory construction, by which courts will first look for a plain meaning by application of traditional tools of statutory construction.

A. Deference under Auer and Christensen.

We, as did USDA, first address judicial standards under *Auer v. Robbins,* 519 U.S. 452 (1997), *Christensen v. Harris County*, 529 U.S. 576 (2000), and their progeny for judicial deference agency construction of regulations. There are at least three preconditions to judicial deference to agency construction of its own regulations:

> First, the language of the regulation in question must be ambiguous, lest a substantively new rule be promulgated under the guise of interpretation. See Christensen v. Harris County, 529 U.S. 576, 588, 120 S.Ct. 1655, 1663, 146 L.Ed.2d 621 (2000). Second, there must be "no reason to suspect that the interpretation does not reflect the agency's fair and considered

> judgment on the matter in question." Auer, 519 U.S. at 462, 117 S.Ct. at 911; see also Bigelow, 217 F.3d at 878. Finally, the agency's reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that adequate notice of that interpretation is contained within the rule itself.

Drake v. F.A.A., 291 F.3d 59, 68 (D.C. Cir. 2002)

Growers' Brief (at 56-60) explains that USDA's broad interpretation is not supported by text, context, history, or the unique contract nature of marketing orders and agreements. USDA asserts in response that the 2007 processing rule was authorized by the ambiguous text of the 1976 marketing order amendment for quality controls, 7 C.F.R. §981.42, because the 1976 amendatory decision broadly allows discretionary quality controls. As restated by USDA (Brief at 23):

> The central question in this case is thus whether the *Salmonella* Rule was a proper exercise of the Secretary's authority to approve "such minimum quality and inspection requirements . . . as will contribute to orderly marketing or be in the public interest." 7 C.F.R. § 981.42(b).

USDA claims broad, greater-than-*Chevron*, deference in its construction of this language in the 1976 marketing agreement and marketing order. USDA Brief at 23-24. This regulatory language, also cited in 2007 processing rule decision, is nothing more than a paraphrase of AMAA Section 602(3), under which Congress declared its

policy for the Secretary to establish "minimum standards of quality and … inspection requirements for agricultural commodities enumerated in section 608c(2) of this title… as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." 7 U.S.C. §602(3). [5] As recently explained in *Gonzales v. Oregon*, 546 US 243, 257 (2006): "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." Further, §602(3) is not even the provision of the AMAA that gives USDA authority to promulgate marketing controls based on quality. That authority is found only in 7 U.S.C. §608c(6).

Auer also requires courts to hesitate in applying deference to agency interpretations of regulations where there is "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." Such "reason to suspect" exists in this case. It is the undisputed nature of the marketing order program that the agency ordinarily defers to wishes of a majority of the industry

[5] Section 602(3) of the AMAA was added by Act of Aug 1, 1947, 61 Stat. 707.

(Growers' Brief at 10), rather than the usual regulatory relationship of industry conforming to decisions of regulators. As one observer noted:

> In recent amendments to the AMAA, a House committee report stated that "[t]o the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the AMAA and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of an industry in how best to market a crop." And in fact the Secretary has almost invariably adopted recommendations that are the product of an industry consensus…. [6]

The 2007 almond processing rule was the product of such agency deference to the almond industry as represented by the Almond Board of California. *See* fn. 4, *supra*, and Growers' Brief at 23- 24, n. 41.

Finally, the agency's interpretation of 7 C.F.R. §981.42 to provide authority for a mandatory processing requirement is not "fairly

---

[6] Bensing, Daniel, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937* , 5 SAN JOAQUIN AGRIC. L. REV. 3, 22 (1995), quoting H.R. REP. No. 271, 99th Cong., 1st Sess., pt. I, at 193 (1985) (accompanying the Food Security Act of 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1297. http://nationalaglawcenter.org/assets/bibarticles/bensing_promulgation.pdf
The AMAA's unique relationship between the industry and the agency is balanced by express congressional intent to limit its delegation of authority to USDA, as explained in *Zuber v. Allen*, 396 U.S. 168 (1969), and Growers' Brief at 5-9, 46-50. The AMAA provides a particularly compelling context for a skeptical judicial view of USDA's interpretation of its regulatory authority where the interpretation advances the financial and jurisdictional self-interest of AMS's constituent marketing order boards and committees. *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest,* 13 CORNELL J.L. & PUB. POL'Y 203 (2004).

supported by the text of the regulation itself," which is necessary "to ensure that adequate notice of that interpretation is contained within the rule itself." *Drake v. F.A.A.*, 291 F.3d at 68. Since the 1976 marketing order amendment was adopted by a formal hearing process, the 1976 amendatory decision or administrative hearing record supporting that decision should presumably contain some hint that a mandatory processing requirement was authorized by the amendment. The absence of any such hint, and USDA's failure to cite or produce any portion of the hearing record containing a hint, preclude the interpretation now advanced. Even where a regulation is arguably ambiguous, courts should not defer to administrative construction if there are " 'other indications of the [agency's] intent at the time of the regulation's promulgation.' " *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). If the interpretive scope or intent of a rule is to be expanded beyond that expressed "at the time" of its promulgation, it can only be done by the same process as required to "modify the regulation." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir.1997). In this case, that process would be a formal hearing to amend the Almond Order, followed by a 5 U.S.C. §557

agency decision and referendum approval by almond growers. 7 U.S.C. §§608c(8)and (9).

USDA's Brief (at 17, 26-27) repeatedly invokes the Secretary's "contemporaneous understanding" of the 1976 marketing order amendment to support an agency construction authorizing mandatory processing, but we have searched USDA's brief and the 1976 amendatory decision in vain to determine what that "understanding" might be, and where it might be found. If there is anything in the administrative record to support such an understanding, it is unavailable to the Court and to Growers because USDA did not file with the district court any portion of the hearing record for the 1976 amendment, and even complained to the district court that judicial consideration of the 1976 amendatory decision of the Secretary would be impermissibly "extra-record."

In the end, USDA's interpretation of its authority from the 1976 marketing order amendment fails even the weakest "power to persuade" standard for judicial deference.

B. Deference under Chevron

USDA's claim for *Chevron*-deference (if *Chevron* step two is reached) is likewise misplaced. Even if the AMAA is ambiguous on the scope of agency authority under the "quality" clauses in 7 U.S.C. §608c(6), this Court " 'must next determine the deference, if any, [it] owe[s] the agency's interpretation of the statute.' " *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754 (D.C. Cir. 2007) (*citing United States v. Mead Corp.*, 533 U.S. 218 (2001)).

An important factor in assessing the degree, "if any," of judicial deference to administrative construction of statutory authority is the setting in which the agency interpretation was made and enunciated. *Chevron* deference applies most persuasively where "the agency enunciates its interpretation through notice-and-comment rule-making or formal adjudication." *Mount Royal, supra*. The "method by which the Secretary's interpretation has been articulated" is significant to this Court's application of Chevron deference, or deference under any other standard. *Akm LLC v. Secretary of Labor*, 675 F.3d 752, 754 (D.C.Cir. 2012).

In *Barnhart v. Walton*. 535 U.S. 212 (2002), the Supreme Court explained that less formal interpretations may still warrant *Chevron* deference if "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." *Id.* at 222.

The requisite settings required by *Mount Royal* and *Barnhart* do not exist in this case.

Nowhere in the 2007 processing rule decision, 72 Fed. Reg. 15021 (Mar. 30, 2007), does USDA "enunciate" an interpretation of 7 U.S.C. §608c(6)(A)'s quality authority. Section 608c(6)(A) is not even mentioned. The agency's conclusion that it had authority to issue a mandatory processing rule was made in June 2004, in informal response to requests by the Almond Board. See fn. 4. Even then, USDA did not "enunciate" an interpretation of the AMAA. USDA's enunciation of the scope of authority perceived to be granted to it by

Congress in 7 U.S.C. §608c(6)(A) was made for the first time in the government's litigation briefs in response to almond growers' complaint.[7]

In light of the severely constrained legislative authority delegated by Congress to USDA in the AMAA,[8] and the absence of any hint prior to this case that a mandatory farm product processing rule might be authorized under "quality" provisions in §608c(6) adopted in 1935, DOJ's litigation arguments in defense of USDA are not the kind of enunciated agency interpretations having the "power to persuade" to which this Court should defer. *Mount Royal*, 477 F.3d at 754.

---

[7] It is possible that an enunciation of some kind was made by AMS in 2004, perhaps containing the kind of thoughtful agency analysis ordinarily required for judicial deference to administrative statutory construction made in an informal setting. But if such documents exist, they were not included in the administrative record filed by USDA with the district court. The certified record filed expressly *excluded* unidentified materials deemed by the Almond Board or by AMS to be "privileged." Certification by Robert Keeney (AMS) and Julie Adams (ABC), Doc. 43, pp. 1, 3.

[8] See discussion of *Zuber v. Allen*, 396 U.S. 168 (1969), and historical context of §608c(6) in Growers' Brief at 41-50.

Conclusion

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

Respectfully submitted,

Susan Silber, Esq.
Kenneth Sigman, Esq.
Silber, Perlman, Sigman & Tilev, PA
7000 Carroll Ave., Suite 200
Takoma Park, Maryland 20912
301-891-2200

John H. Vetne
Attorney at Law
311 George Cole Rd.
PO Box 15
New Portland, Me. 04961
207-628-2005

Attorneys for Almond Grower Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This reply 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 4,249 words.

2. This reply brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, using Microsoft Word (2010), with text in 14 point type, Roman style, Century font, and with footnotes in 14 point type, Roman style, Times New Roman font.

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

Dated: September 19, 2012

CERTIFICATE OF SERVICE

I certify that electronic copies of the foregoing Reply Brief was served this day upon the foregoing, by email to Michael.Abate@usdoj.gov, and Michael.Raab@usdoj.gov, and by use of the Court's CM/ECF filing system.

September 19, 2012

S/ *John H . Vetne*
John H. Vetne