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No. A18-0517

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Oluf Johnson and Debra Johnson,

Plaintiffs-Appellants,

v.

Consumers Cooperative Association of  
Litchfield,

Defendant-Respondent.

District Court No.: 47-CV-16-464

Hon. Michael J. Thompson

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BRIEF OF *AMICI CURIAE* ORGANIC FARMERS ASSOCIATION, CENTER  
FOR FOOD SAFETY, AND ORGANIC FARMERS' AGENCY FOR  
RELATIONSHIP MARKETING

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## STATEMENT OF *AMICI CURIAE*<sup>1</sup>

The amicus parties have a long history of advocacy around protecting the integrity of the organic label on behalf of consumers and farmers. The Organic Farmers Association is the national voice for certified organic farmers. The Organic Farmers Association's top priority is maintaining consumer confidence in the organic label.<sup>2</sup> The Organic Farmers Association recognizes that organic certifiers must consistently and uniformly enforce organic standards to maintain consumer confidence in the \$47 billion organic industry.

The Center for Food Safety's (CFS) mission is to empower people, support farmers, and protect the earth from the harmful impacts of industrial agriculture. Through groundbreaking legal, scientific, and grassroots actions, CFS protects and promotes the public's right to safe food and the environment. CFS has more than 950,000 members nationwide that support organic food and farming, grow organic food, and regularly purchase organic products. One of CFS's flagship programs has always been its "Organic and Beyond" program, which seeks to protect the integrity of the organic standard. CFS worked to create the original organic rules nearly two decades ago, and ever since has

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<sup>1</sup> Pursuant to Minn. R. Civ. App. Pro. 129.03, this brief has been authored in full by counsel for the *amici curiae* the Environmental and Natural Resources Law Clinic at Vermont Law School and Farmers' Legal Action Group. No counsel for any party authored this brief in whole or in part. No monetary contribution toward the preparation or submission of this brief has been received from the parties to this dispute or anyone else.

<sup>2</sup> *2018 Policy Platform*, Organic Farmers Association, <https://organicfarmersassociation.org/news/2018-policy-platform/>.

acted as a lead public watchdog of the standard, protecting it from loopholes or attempts to undermine it.

The Organic Farmers' Agency for Relationship Marketing (OFARM) is a cooperative that works to support organic producers by serving as a marketing-agency-in-common for cooperatives and farmer associations. OFARM has repeatedly met with members of Congress to discuss members' concerns about organic fraud and the protection of the organic label, describing organic producers' challenges competing with fraudulently labeled "organic" products. OFARM recognizes the direct relationship between consistent enforcement by the National Organic Program and consumer confidence.

### **SUMMARY OF THE ARGUMENT**

Organic integrity is the bedrock of the organic industry. Organic farmers rely on consumers paying a premium so they can afford more costly, pesticide-free production methods. Consumers pay a premium for organic because they want pesticide-free food, but they will only buy organic when they trust the United States Department of Agriculture (USDA) organic label. Consumer trust in the USDA organic label hinges on consistent enforcement of organic standards across the country, in every state, by every producer and certifier, for every product.

In 2012, the Minnesota Supreme Court ruling that pesticide drift from an adjacent field could never cause decertification of land used for production of organic crops was a tragic outlier of a case. That conclusion relied on a tortured, convoluted reading of the federal organics regulations. It led to the absurd conclusion that two plots of land could

have identical amounts of pesticides on it and only the one—where the pesticide was applied by the owner—would be decertified. The other—where pesticide was applied by an adjacent landowner via drift—was still certified organic land. Organic consumers pay more because they want to avoid *all* pesticide exposure, not just intentional pesticide exposure from organic farmers themselves. The Minnesota Supreme Court’s 2012 *Paynesville* ruling ignores the purpose of the Organic Foods Production Act and threatens the integrity of the entire organic industry. *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693 (Minn. 2012).

Since the *Paynesville* case, the National Organic Program has interpreted its own regulations to conclude that “pesticide drift is a form of prohibited substance application” that can lead to decertification of organic land. Add. (*See* Miles McEvoy, Deputy Administrator, National Organic Program, Letter to Oluf Johnson dated August 26, 2015, Appellants’ Addendum 14.) Under controlling U.S. Supreme Court precedent, Minnesota courts must defer to any agency’s interpretation of its own regulation unless it is “plainly erroneous.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *see also Robertson v. Methow Valley Citizens*, 490 U.S. 332, 358 (1989), *citing Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (“This interpretation of the agency’s own regulation is not ‘plainly erroneous or inconsistent with the regulation,’ and is thus controlling.”); *see also Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 613 (2013), *citing Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011). Therefore, the District Court’s partial summary judgment decision which failed to defer to the agency’s interpretation that pesticide drift can cause organic decertification should

be reversed and this case remanded to the District Court to proceed with the Johnsons' claims.

## ARGUMENT

### **I. Organic farming better protects health and the environment than conventional farming, but costs more for farmers and consumers.**

Farmers and consumers alike have serious, well-founded concerns about the health and environmental impacts of conventional farming methods. Recent, well-publicized studies question the safety of conventional herbicides like glyphosate<sup>3</sup> and pesticides like chlorpyrifos.<sup>4</sup> Other studies demonstrate that organic products contain more antioxidants and fewer heavy metals and pesticide residues than conventional products.<sup>5</sup> Children are especially vulnerable to dangerous health complications from pesticide exposure.<sup>6</sup> The

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<sup>3</sup> See, e.g., Laura Vandenberg LN et al., *Is it time to Reassess Current Safety Standards for Glyphosate-Based Herbicides?*, Journal of Epidemiology & Community Health (Mar. 20, 2017), <https://jech.bmj.com/content/early/2017/02/22/jech-2016-208463> (discussing the use of glyphosate-based herbicides and human exposure).

<sup>4</sup> EPA's own risk assessment shows that the expected residues of chlorpyrifos on food crops exceed the safety standard under the Federal Food, Drug, and Cosmetic Act. See EPA, Revised Human Health Risk Assessment on Chlorpyrifos, <https://www.epa.gov/ingredients-used-pesticide-products/revised-human-health-risk-assessment-chlorpyrifos#human-health> (last visited July 20, 2018).

<sup>5</sup> E.g., Marcin Barański, *Higher Antioxidant and Lower Cadmium Concentrations and Lower Incidence of Pesticide Residues in Organically Grown Crops: A Systematic Literature Review and Meta-Analyses.*, 112(5) The British Journal of Nutrition, 794–811 (Sept. 14, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4141693/>

<sup>6</sup> *Pesticides and Children*, National Pesticide Information Center <http://npic.orst.edu/health/child.html> (last visited July 20, 2018).

American Academy of Pediatrics has reported that organic products protect children from the relatively higher levels of pesticide residue found on their conventional counterparts.<sup>7</sup>

Organic farming methods are more sustainable, too. Soil analyses from conventional and organic land show significantly higher levels of soil carbon in organic soil than in conventional soil, which correspond to higher soil water contents and higher crop yields.<sup>8</sup> Organic farming restores soil health by increasing nutrient use efficiency and reducing erosion and water loss.<sup>9</sup>

Organic farmers opt-out of using “silver bullet” chemicals and instead comply with a lengthy list of regulations to ensure their farming methods are better for people and the planet.<sup>10</sup> Organic farmers also know that organic production yields healthier, more flavorful food and preserves soil for sustainable, long-term productivity.<sup>11</sup> But organic farming methods, while better for people and the land, are more time-intensive and costly.

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<sup>7</sup> *American Academy of Pediatrics on Organic Foods for Children*, (Oct. 22, 2012), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/American-Academy-of-Pediatrics-Weighs-In-For-the-First-Time-on-Organic-Foods-for-Children.aspx>.

<sup>8</sup> David Pimentel, *Organic and Conventional Farming Systems: Environmental and Economic Issues*, Cornell University (July 2005) [https://ecommons.cornell.edu/bitstream/handle/1813/2101/pimentel\\_report\\_05-1.pdf;sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/2101/pimentel_report_05-1.pdf;sequence=1).

<sup>9</sup> Joanna Ory, *Organic Farming Improves Soil Health*, ORGANIC FARMING RES. FOUND., [www.ofrf.org/news/organic-farming-improves-soil-health-1](http://www.ofrf.org/news/organic-farming-improves-soil-health-1) (last visited July 20, 2018).

<sup>10</sup> Courtney Flatt, *Zapping Noxious Weeds on Organic Farms is Harder Than You Think.*, National Public Radio: The Salt (July 10, 2017), <https://www.npr.org/sections/thesalt/2017/07/10/535995515/zapping-noxious-weeds-on-organic-farms-is-harder-than-you-think>; See also "Organic Production & Handling Standards." *Agricultural Marketing Service*, USDA, 16 Nov. 2017, [www.ams.usda.gov/publications/content/organic-production-handling-standards](http://www.ams.usda.gov/publications/content/organic-production-handling-standards).

<sup>11</sup> Shea Gunther, *Growing Green: Interview with Organic Farmer Daniel Mays*, Mother Nature Network (May 5, 2013), <https://www.mnn.com/your-home/organic-farming-gardening/blogs/growing-green-interview-with-organic-farmer-daniel-mays>.

## II. The organic food system relies on a labelling program reflecting a nationally-consistent program.

Consumers were not always so willing to cough up extra money for organic products. Consumer demand for pesticide-free food led states to create their own standards for organic certification, but the different standards and labelling confused consumers and producers alike. Consumers had no means of vetting label claims, and producers likewise had no motivation to meet standards that were not publicly understood.<sup>12</sup> Enforcement gaps abounded, as did fraudulent organic claims.<sup>13</sup>

Congress saw the need for federal regulations to calm the chaos. The Organic Foods Production Act of 1990 was enacted to implement uniform, consistent standards for organic certification and ensure that consumers and producers across the country define “organic” the same way.<sup>14</sup>

As the National Organic Program recognized when it finalized its regulations at 7 C.F.R. part 205, “[o]rganically produced food cannot be distinguished visually from conventionally produced food and cannot necessarily be distinguished by taste; therefore, consumers must rely on labels and other advertising tools for product information.”

National Organic Program’s Final Rule, 65 Fed. Reg. 80,548, 80,663 (Dec. 21, 2000).

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<sup>12</sup> John Bovay & Julian M. Alston, *GMO food Labels in the United States: Economic Implications of the new law*, 78 Food Policy 14-25 (July 2018), <https://www.sciencedirect.com/science/article/pii/S0306919218301295>.

<sup>13</sup> Fred Kuchler et al., *Beyond Nutrition and Organic Labels—30 Years of Experience With Intervening in Food Labels*, USDA (Nov. 2017), <https://www.ers.usda.gov/webdocs/publications/85687/err-239.pdf?v=43053>

<sup>14</sup> See, e.g., Donald T. Hornstein, *The Road Also Taken: Lessons from Organic Agriculture for Market- and Risk-Based Regulation*, 56 Duke Law Journal 1541, 1550 (2007).

Congress has succeeded in promoting large-scale acceptance of organic certification through a simple, centralized seal of approval, which is demonstrably more effective than diverse and complex labels.<sup>15</sup>

### **III. The organic food industry is a success, but organic integrity is the bedrock of the organic label.**

The uniformity in enforcement and labelling spurred by the Organic Foods Production Act built consumer confidence in organic food and helped launch the industry's impressive growth. The \$47 billion U.S. organic industry is the largest in the world.<sup>16</sup> Consumers pay, on average, 47% more for organic products than what they would pay for more conventionally produced products.<sup>17</sup> Organic consumers believe that organic food is healthier than conventionally-farmed food crops.<sup>18</sup> Consumers are more

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<sup>15</sup> See, e.g., Jason Czarnecki et al., *Creating Order Amidst Food Eco-Label Chaos*, 25 Duke Environmental Law and Policy Forum 281, 305 (2015).

<sup>16</sup> Reports by the Organic Trade Association illustrate a double-decade record of double-digit growth for the organic industry. *Organic: Big Results from Small Seeds*, Organic Trade Association (2017), [https://ota.com/sites/default/files/indexed\\_files/Infographic%20and%20Citations.pdf](https://ota.com/sites/default/files/indexed_files/Infographic%20and%20Citations.pdf); *U.S. Organics: State of the Industry*, Organic Trade Association, [https://ota.com/sites/default/files/indexed\\_files/OTA\\_StateofIndustry\\_2016.pdf](https://ota.com/sites/default/files/indexed_files/OTA_StateofIndustry_2016.pdf) (last visited July 23, 2018); Maggie McNeil, *Robust Organic Sector Stays on Upward Climb, Posts New Records in U.S. Sales*, Organic Trade Association (May 24, 2017) [www.ota.com/news/press-releases/19681](http://www.ota.com/news/press-releases/19681)

<sup>17</sup> "Cost of Organic Food." *Product Reviews and Ratings*, Consumer Reports (Mar. 19, 2015), [www.consumerreports.org/cro/news/2015/03/cost-of-organic-food/index.htm](http://www.consumerreports.org/cro/news/2015/03/cost-of-organic-food/index.htm).

<sup>18</sup> See, e.g., Jyoti Rana & Justin Paul, *Consumer Behavior and Purchase Intention for Organic Food: A Review and Research Agenda*, 38 Journal of Retailing and Consumer Services 157–65 (Jun. 14, 2017); Farah Shafie & Denise Rennie, *Consumer Perceptions Towards Organic Food*, 49 Procedia – Social and Behavioral Sciences 360–64 (Nov. 4, 2009) (noting “[t]he most significant motive for choosing organic food is the health factor....”).

concerned about conventional agriculture's health and environmental impacts,<sup>19</sup> and see organic agriculture as a solution.<sup>20</sup> A large portion of consumers' willingness to pay more for organics is attributed to their desire to avoid pesticides.<sup>21</sup> Parents are increasingly eager to protect their children by choosing organic and are willing to pay the organic premium to protect their kids' health.<sup>22</sup> Indeed, millennial parents are the biggest group of organic buyers in America.<sup>23</sup>

Organic farmers understand that their ability to continue producing organic agriculture depends on consumers' continued demand for organic products, and they therefore seek to maintain consumer confidence in the integrity of the organic label. Indeed, the top priority of the Organic Farmers Association is to protect the integrity of

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<sup>19</sup> See, e.g., Bülent Ergönül, *Consumer Awareness and Perception to Food Safety: A Consumer Analysis*, 32 *Food Control*, (Jan. 15, 2013), [http://www.ssu.ac.ir/cms/fileadmin/user\\_upload/Daneshkadaha/dbehdasht/ behdasht\\_imani/article/Consumer-awareness-and-perception-to-food-safety-A-consumer-analysis\\_2013\\_Food-Control.pdf](http://www.ssu.ac.ir/cms/fileadmin/user_upload/Daneshkadaha/dbehdasht/ behdasht_imani/article/Consumer-awareness-and-perception-to-food-safety-A-consumer-analysis_2013_Food-Control.pdf)

<sup>20</sup> See Yeon Ho Shin et al. *The Effect of Environmental Values and Attitudes on Consumer Willingness to Pay More for Organic Menus: A Value-Attitude-Behavior Approach*. 33 *Journal of Hospitality and Tourism Management* 113-121 (Oct. 14, 2017), <https://www.sciencedirect.com/science/article/pii/S1447677017301201>

<sup>21</sup> See John Bernard & Daria Bernard, *Comparing parts with the Whole: Willingness to pay for Pesticide-free, Non-GM, and Organic Potatoes and Sweet Corn*, 35 *Journal of Agricultural and Resource Economics* 457-475 (Dec. 2010).

<sup>22</sup> *More Parents Choosing Organic for Their kids, Says new Study*, Organic Trade Assoc. (June 16, 2014), <https://www.ota.com/news/press-releases/17159>.

<sup>23</sup> See PR Newswire. "Parents Willing to Pay the Premium for Organic Food, Survey Shows - Press Release - Digital Journal." *Digital Journal: A Global Digital Media Network*, 19 June 2014, [www.digitaljournal.com/pr/1998911#ixzz356iOiU65](http://www.digitaljournal.com/pr/1998911#ixzz356iOiU65); Maggie McNeil, *Today's Millennial: Tomorrow's Organic Parent*, Organic Trade Association (Sept. 14, 2017), <https://ota.com/news/press-releases/19828>.

USDA's organic seal.<sup>24</sup> Organic farmers also understand that the certified organic seal is what assures consumers that the food they consume was produced without synthetic pesticides, herbicides, or fertilizers.<sup>25</sup> Without the organic premium, farmers will struggle to afford the increased costs of organic production and may be effectively stripped of their ability to produce organic food.<sup>26</sup> Many organic farmers also strongly believe that organic food production is better for people and the planet and organic farming for them is a calling. They are deeply committed to producing food without synthetic pesticides and herbicides and want a system that follows those principles with consistency and integrity.

Organizations like the Center for Food Safety have actively pursued litigation to safeguard organic integrity. In recent litigation, the Northern District of California recognized a cognizable injury to plaintiffs for injury to organic integrity where the National Organic Program allowed organic compost to be treated with synthetic pesticides. *See Center for Environmental Health v. Vilsack*, 2015 WL 5698757, \*7 (N.D. Cal. Sept. 29, 2015). Specifically, organic consumers alleged that they were injured when food labeled as organic was contaminated with pesticides and that they purchase organic food at a premium because the food is not grown with synthetic pesticides. *Id.* at \*7 An

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<sup>24</sup> *2018 Organic Farm Bill Priorities*, Organic Farmers Association, <http://organicfarmersassociation.org/news/2018-organic-farm-bill-priorities/> (last visited July 23, 2018)

<sup>25</sup> *Id.*

<sup>26</sup> Jeff Daniels, "Organic's Prices May Not Be High Enough: Report." *CNBC*, Aug. 29, 2016, [www.cnbc.com/2016/02/16/organics-premium-prices-may-not-be-high-enough-report.html](http://www.cnbc.com/2016/02/16/organics-premium-prices-may-not-be-high-enough-report.html).

organic farmer also stated an injury where she could no longer confirm that organic compost she was using was in fact free of all synthetic pesticides. *Id.* at \*7.

American consumers rely on organic certification to distinguish between the otherwise-identical conventional and organic products. According to the Organic Trade Association, over 75% of households highly trust the USDA organic label.<sup>27</sup> Likewise, the USDA's Agricultural Market Service recognizes that "the USDA Organic Seal is well-known by consumers, and organic certification gives producers an opportunity to receive a price premium for their products."<sup>28</sup> Indeed, studies have found that consumers' decisions to purchase organic products is influenced more by trust in organic claims than by price.<sup>29</sup>

Consumers already report having less trust in the food industry and greater sources of distrust include vague claims and false labeling, with transparency cited as the essential antidote.<sup>30</sup> Fraudulent organic claims erode consumer confidence.<sup>31</sup> Consumers

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<sup>27</sup> U.S. Families' Organic Attitudes and Beliefs 2016 Tracking Study, *cited in* "Organic Food is Good For the U.S. Economy," Organic Trade Association, [https://www.agripulse.com/ext/resources/Farm-Bill-Summit-Resources/Organic-In-Brief\\_Organic-Trade-Association.pdf](https://www.agripulse.com/ext/resources/Farm-Bill-Summit-Resources/Organic-In-Brief_Organic-Trade-Association.pdf).

<sup>28</sup> U.S. Department of Agriculture, 2019 President's Budget—Agricultural Marketing Service at 21-24, [www.obpa.usda.gov/21ams2019notes.pdf](http://www.obpa.usda.gov/21ams2019notes.pdf).

<sup>29</sup> See Hyun-Joo Lee & Jiyoung Hwang, *The Driving Role of Consumers' Perceived Credence Attributes in Organic food Purchase Decisions: a Comparison of two Groups of Consumers.*, 54 Food Quality and Preference 141-151 (Dec. 2016), [www.sciencedirect.com/science/article/pii/S0950329316301501](http://www.sciencedirect.com/science/article/pii/S0950329316301501).

<sup>30</sup> Chris Morrison, *Consumers Reveal What Makes Them Distrust a Food Brand and Who They Think is Responsible for Food Safety*, Food Manufacturing (Apr. 1, 2016), [www.foodmanufacturing.com/article/2016/04/consumers-reveal-what-makes-them-distrust-food-brand-and-who-they-think-responsible-food-safety](http://www.foodmanufacturing.com/article/2016/04/consumers-reveal-what-makes-them-distrust-food-brand-and-who-they-think-responsible-food-safety).

<sup>31</sup> *Fraudulent Organic Certificates*, Agricultural Marketing Service, USDA, Mar. 28, 2018, [www.ams.usda.gov/services/enforcement/organic/fraudulent-certificates](http://www.ams.usda.gov/services/enforcement/organic/fraudulent-certificates).

duped by dubious organics stop paying the organic premium.<sup>32</sup> When consumers can no longer trust that organic products are produced without pesticides, their willingness to pay the organic premium wanes.<sup>33</sup> When production methods do not meet consumers' expectations, consumer confidence in organic safety erodes,<sup>34</sup> and consumers will no longer pay more for products that they cannot be sure were produced without pesticides.

#### **IV. The integrity of the organic label depends on consistent enforcement of organic rules.**

Consumer confidence in USDA labelling will only last as long as consumers can trust that organic labelling means the same thing for foods produced in Minnesota as in California and New York. When consumers stop trusting organic certification, they will stop paying a premium for organic products and the industry will collapse.

Indeed, the Organic Foods Production Act was designed in order to “establish national standards governing the marketing” of organic products, and to “assure consumers that organically produced products meet a consistent standard.” 7 U.S.C. § 6501 (2012). To meet the purpose of the Act and organic consumers' expectations, the

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<sup>32</sup> Kristofor Husted, *In Organic Labels Consumers Trust, but Fraud Threatens the Industry*, Harvest Public Medicine (Dec. 14, 2017), [harvestpublicmedia.org/post/organic-labels-consumers-trust-fraud-threatens-industry](https://harvestpublicmedia.org/post/organic-labels-consumers-trust-fraud-threatens-industry).

<sup>33</sup> Fred Kuchler et al., *Beyond Nutrition and Organic Labels—30 Years of Experience with Intervening in Food Labels*, USDA (Nov. 2017), <https://www.ers.usda.gov/webdocs/publications/85687/err-239.pdf?v=43053>.

<sup>34</sup> A. Bryan Endres, *An Awkward Adolescence in the Organics Industry: Coming to Terms with big Organics and Other Legal Challenges for the Industry's next ten Years*, 12 Drake Journal of Agricultural Law 17-59 (June 24, 2007), <http://aglawjournal.wp.drake.edu/wp-content/uploads/sites/66/2016/09/agVol12No1-Endres.pdf>.

national organic standards must be equitably and consistently enforced across all commodities, states, farm sizes, and throughout international trade.<sup>35</sup>

The USDA’s Agricultural Marketing Service recognizes the “success of the [organics] program . . . depends on the integrity of the seal through standards enforcement.”<sup>36</sup> For this reason, the Agricultural Marketing Service seeks to promote “consistent compliance enforcement and increased transparency” and “to maintain consumer confidence in a fast-growing industry that is benefiting farmers and producers across the country.”<sup>37</sup> To help maintain organic integrity, the USDA issued interim instruction on regulating organic imports in October of 2017.<sup>38</sup> Likewise, reports of organic fraud prompted Congress to consider a bill in 2017 that would double USDA oversight of organic imports.<sup>39</sup> In the words of one Senator supporting consistent

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<sup>35</sup> *2018 Organic Farm Bill Priorities*, Organic Farmers Association, <http://organicfarmersassociation.org/news/2018-organic-farm-bill-priorities/> (last visited July 23, 2018).

<sup>36</sup> USDA 2019 President’s Budget—Agricultural Marketing Service at 21-24, [www.obpa.usda.gov/21ams2019notes.pdf](http://www.obpa.usda.gov/21ams2019notes.pdf). (“[T]he success of the program . . . depends on the integrity of the seal through standards enforcement[.]”).

<sup>37</sup> USDA, Agricultural Marketing Service, *fy 2014-2018 Strategic Plan*, [https://www.ams.usda.gov/sites/default/files/media/AMS\\_2014-2018\\_Strategic\\_Plan%5B1%5D.pdf](https://www.ams.usda.gov/sites/default/files/media/AMS_2014-2018_Strategic_Plan%5B1%5D.pdf).

<sup>38</sup> USDA Agricultural Marketing Service, *National Organic Program, Interim Instruction: Maintaining the Integrity of Organic Imports* (Oct. 25, 2017), <https://www.ams.usda.gov/sites/default/files/media/NOP4013IntegrityOrganicImports.pdf>.

<sup>39</sup> Peter Whorisky, *Organic Food Fraud Leads Congress to Weigh bill Doubling USDA Oversight*, *Washington Post* (Dec. 21, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/12/21/organic-food-fraud-leads-congress-to-weigh-bill-doubling-usda-oversight/?noredirect=on&utm\\_term=.e3f7fece60ef](https://www.washingtonpost.com/news/wonk/wp/2017/12/21/organic-food-fraud-leads-congress-to-weigh-bill-doubling-usda-oversight/?noredirect=on&utm_term=.e3f7fece60ef)

enforcement, “We've built a tremendous, \$47 billion industry. I'm not going to let it disappear.”<sup>40</sup>

**V. The District Court failed to properly analyze the National Organic Program’s interpretation of its own regulations.**

The District Court’s summary judgment ruling failed to properly analyze the National Organic Program’s interpretation of its own regulations governing organic certification. On August 26, 2015, the National Organic Program interpreted its own regulations at 7 C.F.R. part 205 to mean that “application includes drift.” (*See Miles McEvoy, Deputy Administrator, National Organic Program, Letter to Oluf Johnson dated August 26, 2015, Appellants’ Addendum 14.*) Specifically, the National Organic Program noted that “any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as ‘organic,’ must... [h]ave had no prohibited substances... applied to it for a period of 3 years immediately preceding harvest of the crop.” *Id., citing 7 C.F.R. § 205.202(b).* The National Organic Program then concluded that “pesticide drift is a form of application,”<sup>41</sup> based on the regulation’s definition of the term drift, *Id.* and regulations requiring organic producers to notify the certifying agent of “any application, including drift, or prohibited substances” to any field. *Id., citing 7 C.F.R. § 205.400.*

Applying this interpretation of the regulations to the facts of the pesticide drift impacting the organically certified fields owned by Mr. Oluf Johnson, the National Organic Program determined that, as a result of “pesticide application through drift,” it

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<sup>40</sup> *Id.*

would “suspend certification” of Mr. Johnson’s field for three years. *See id.*; *see also*, “Notice of Partial Suspension” (Oct. 13, 2015), Appellants’ Addendum 16, (final notice of partial suspension of organic certification of Mr. Oluf Johnson’s land for three years).

United States Supreme Court precedent beginning with the 1945 case *Seminole Rock* requires courts to defer to a federal agency’s interpretations of its own regulations unless the interpretation is “plainly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 358 (1989), *citing Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)(“This interpretation of the agency's own regulation is not ‘plainly erroneous or inconsistent with the regulation,’ and is thus controlling.”) Indeed, the U.S. Supreme Court has consistently held that “[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation.” *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 613 (2013), *citing Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011). Further, an “agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.” Indeed, the Minnesota Supreme Court has acknowledged *Seminole Rock*’s holding that an administrative agency's construction of its own regulation is entitled to “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Anderson v. Minnesota Department of Natural Resources*, 693 N.W.2d 181, 191 (2005) (declining to extend *Seminole Rock* deference to expert opinion offered by agency during litigation); *see also HealthEast Bethesda Lutheran Hospital and Rehabilitation Center v. Shalala*,

164 F.3d 415, 417 (8th Cir. 1998)(recognizing *Seminole Rock* as controlling law where agency is interpreting its own regulation).

In this case, the Deputy Administrator of the National Organic Program explicitly interpreted 7 C.F.R. §205.202(b), a regulation the National Organic Program created during notice and comment procedures, to require decertification of Mr. Johnson’s land for three years due to the pesticide drift at issue. (See Miles McEvoy, Deputy Administrator, National Organic Program, Letter to Oluf Johnson dated August 26, 2015, Appellants’ Addendum 14.) Therefore, under Supreme Court precedent, the District Court should have used the “plainly erroneous” standard to evaluate the National Organic Program’s interpretation of a regulation it wrote pursuant to its authority under the Organic Foods Production Act.

Instead, the District Court erroneously relied on the Minnesota Supreme Court decision in *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W. 693, 712 (Minn. 2012), which did not involve a decision by the agency to decertify land as a result of the National Organic Program’s interpretation of its own rules. In *Paynesville*, the Minnesota Supreme Court did not have the benefit of the agency’s interpretation of its own regulations. Further, the fact that the National Organic Program has interpreted its organic certification regulations to mean that “application” includes pesticide drift demonstrates that the regulation itself is ambiguous and the agency interpretation is therefore owed deference.

Judicial deference to the National Organic Program’s interpretation of its own regulations is particularly important here, as the purpose of the Organic Foods Production

Act is to “assure consumers that organically produced products meet a consistent standard.” 7 U.S.C. § 6501(2) (2012). Allowing state courts to advance their own interpretation of federal regulations that is contrary to the National Organic Program’s interpretation defeats the purpose of the Organic Foods Production Act. This interpretation is therefore entitled to substantial deference.

### CONCLUSION

The Minnesota Supreme Court interpreted regulations governing the Organic Foods Production Act in *Paynesville* without the benefit of the National Organic Program’s interpretation of its own regulations. Once the National Organic Program interpreted its own regulations, Minnesota state courts are bound to give proper deference to that interpretation, according to U.S. Supreme Court precedent. The Organic Foods Production Act directs the Secretary of the United States Department of Agriculture to “establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods...” consistent with the Act. 7 U.S.C. § 6503(a) (2012). The District Court’s failure to analyze the National Organic Program’s interpretation of its own regulations under the “plainly erroneous” standard is reversible error.<sup>42</sup>

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<sup>42</sup> The standard of review in this case is *de novo*; the court will “determine whether the district court properly applied the law...” *Riverview Muir Doran, LLC v. JADT Dev. Co., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13–point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 4,025 Word Count words, including headings, footnotes, and quotations.

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