

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Magistrate Judge

CENTER FOR ENVIRONMENTAL)
HEALTH, et al.,)
)
Plaintiffs,)

VS.)

NO. C 15-01690 JSC

TOM VILSACK, SECRETARY OF THE)
UNITED STATES DEPARTMENT OF)
AGRICULTURE, et al.,)
)
Defendants.)

San Francisco, California
Thursday, September 10, 2015

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Rhonda L. Aquilina, CSR #9956, RMR, CRR
Official Court Reporter

1 Thursday - September 10, 2015

9:07 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling civil action C-15-1690, Center for
5 Environmental Health, et al. versus Vilsack, et al.

6 Counsel, please come up to the podium to state your
7 appearances.

8 **MR. KIMBRELL:** Good morning, Your Honor. May it
9 please the Court, George Kimbrell on behalf of the plaintiffs
10 Center for Environmental Health.

11 **THE COURT:** Good morning.

12 **MR. GARG:** Good morning, Your Honor. Arjun Garg on
13 behalf of the defendants.

14 **THE COURT:** Good morning.

15 All right. So we're here on defendant's motion to
16 dismiss, and they've made two arguments, a 12(b)(6) and a
17 12(b)(1).

18 I think we should start with the 12(b)(6), because I think
19 it relates to the 12(b)(1), and your argument is that this
20 wasn't a legislative rule, therefore no notice and comment was
21 required, because it's an interpretive rule, or it's a
22 guidance; correct?

23 **MR. GARG:** Correct, Your Honor.

24 **THE COURT:** And on an interpretive rule, it's not
25 interpretive, according to the Ninth Circuit, it's if any of

1 three factors are met, the third one being that it effectively
2 amends a prior legislative rule.

3 **MR. GARG:** Correct.

4 **THE COURT:** And we would agree that 7 C.F.R.
5 205.203(e)(1) is a prior legislative rule. That was adopted
6 after notice and comment.

7 **MR. GARG:** Yes, Your Honor, that's correct.

8 **THE COURT:** And that rule says that compost -- that a
9 product cannot be labeled as organic if the compost used,
10 right, in the production of that product contains a synthetic
11 substance not included on the National List of permissible
12 synthetic substances.

13 **MR. GARG:** Yes, Your Honor.

14 **THE COURT:** And there's no other exception. It
15 doesn't say anything else. It just says it may not contain a
16 synthetic substance unless it's on that National List, period;
17 right?

18 **MR. GARG:** Correct.

19 **THE COURT:** Now, the guidance actually adds two
20 additional substances. In other words, it's kind of that you
21 would read it -- and this is a 12(b)(6), so I have to draw
22 inferences in the plaintiff's favor -- that the rule could be
23 read -- it now reads you cannot use compost that contains a
24 synthetic substance or in which the synthetic substance is not
25 directly -- no, no, not or -- no or, and the synthetic

1 substance is not directly applied during the composting
2 process.

3 **MR. GARG:** Correct, that's one prong.

4 **THE COURT:** Or, or is it *and*, does not affect or
5 contaminate the water or soil?

6 **MR. GARG:** I think the way Your Honor phrased it is an
7 *or*, if you're saying what they cannot do --

8 **THE COURT:** Yeah.

9 **MR. GARG:** They cannot -- it cannot be directly
10 applied during the composting process *or* --

11 **THE COURT:** Right.

12 **MR. GARG:** -- cause onward contamination to crops,
13 soil or water.

14 **THE COURT:** So even if it's not applied during the
15 compositing process, if it contaminates the soil or water,
16 although we don't know what that means, then it also can't be
17 used.

18 **MR. GARG:** Correct.

19 **THE COURT:** Right. But why isn't that amending the
20 rule? I mean, the rule was very clear. You can't use compost
21 that contains a synthetic substance unless it's on this list.
22 Now you've added another exception: Or if the synthetic
23 substance isn't applied directly during the composting process.
24 I mean, that's just adding -- now it's one, two, three.

25 **MR. GARG:** Your Honor, I would respectfully say that

1 under the concepts that exist in the statutory and regulatory
2 scheme as a whole, the word "contains," which we're looking at
3 here, is open to different interpretations than the one Your
4 Honor just stated and the one that the plaintiffs are pursuing
5 here where yes, under a dictionary definition of the word
6 "contains," it can be read to categorically forbid any
7 scintilla of any synthetic substance not on the National List
8 no matter where it came from, no matter how it got in there, no
9 matter what amount that is in there. That is a possible
10 reading.

11 What defendants argue is another possible reading,
12 consistent with the way the Supreme Court has said you should
13 do canons of construction, is that the dictionary definition is
14 not the only possible one you have to follow. A word can take
15 on other meanings based on what the statutory and regulatory
16 scheme around it provides in terms of context.

17 And here, the context of the statutory regulatory scheme
18 is not on all fours with this idea that we categorically forbid
19 any synthetic substance whatsoever in organic production.

20 **THE COURT:** No, no, no, that's correct, in compost, in
21 the compost. This rule is about compost.

22 **MR. GARG:** Correct.

23 **THE COURT:** There's nothing inconsistent with the
24 whole statutory scheme that you say if you're buying an organic
25 product, organic compost was used to make it. There's nothing.

1 Now maybe -- I'm not saying you couldn't adopt a rule that
2 said that compost used doesn't have to be organic if it has
3 some minimal amount; right? So here, it's not that you
4 can't -- it's correct, under the unavoidable whatever,
5 whatever; right?

6 **MR. GARG:** Correct.

7 **THE COURT:** In the -- what is it, the unavoidable --

8 **MR. GARG:** Unavoidable residual environmental
9 contamination, UREC.

10 **THE COURT:** Yes. I'll just call it the unavoidable
11 thing.

12 A product may have some residue in there, a product, but
13 that has to do with the soil that it's planted in or the
14 product itself. The soil, we know, sometimes if -- because the
15 farmer before you or you used to use pesticides, there might be
16 some residue in there, so it's unavoidable. There's nothing
17 you can do. The only way to avoid it would be to not plant
18 there; right?

19 **MR. GARG:** Right.

20 **THE COURT:** But that's not here. You can avoid it by
21 using organic compost.

22 **MR. GARG:** Right. Well, Your Honor, I don't think --
23 and the plaintiffs have argued this -- that NOP 5016 is a
24 misapplication of UREC or is trying to expand on this UREC
25 concept. I don't think that's correct at all.

1 UREC -- NOP 5016 does not purport to be an application of
2 UREC. As Your Honor just stated, UREC applies to soil and the
3 food products, not to compost. The regulation that governs
4 compost is 205.203(e)(1). I think where UREC comes into play
5 is showing that contextually in the overall regulatory scheme,
6 there is an idea that, as stated in NOP 5016, the regulations
7 and the standards for organic production practices are
8 processed-based, and there isn't an idea of zero tolerance
9 whatsoever for any synthetic residue without any attention to
10 well, how did that residue get into the production process, and
11 is it there in a way that's material that we really care about.

12 **THE COURT:** So let me ask you this, since we're
13 talking about the word "contained," and you say dictionary, I
14 say common sense definition.

15 How does whether something contains a substance, how does
16 that depend on how it gets there? I mean, like why is how it
17 gets there make a difference as to whether it contains it?

18 **MR. GARG:** Your Honor, I would again say that the
19 interpretation you're pushing towards with that question is a
20 valid possible interpretation.

21 **THE COURT:** Plausible.

22 **MR. GARG:** Plausible, sure.

23 **THE COURT:** Doesn't that mean I have to deny your
24 motion, because this is a 12(b)(6) motion, and the question is
25 whether their interpretation is plausible? I would say it's

1 plausible, and I in fact say it's more plausible than your
2 interpretation. Maybe you would argue if they're equally
3 plausible, you win. They're not equally plausible. You're
4 arguing for a definition of "contained," which is not the
5 dictionary, you would admit, though it's not common sense
6 either.

7 I mean, just answer this, because you're saying that it
8 doesn't contain a synthetic substance if the substance wasn't
9 added during the composting process, so how is that? How is
10 that consistent with any normal, understandable use of the word
11 "contained." Either something contains it or it doesn't. Now,
12 it may have gotten there through various means, but whatever
13 means it got there, it still contains it.

14 **MR. GARG:** Your Honor, I would submit that we're not
15 dealing here in the realm of -- this is a highly technical
16 regulatory provision. We're not dealing here necessarily in
17 the sense of common sense interpretation of the word
18 "contains."

19 And I'll just compare it to the *Dolan* case in the Supreme
20 Court. The language at issue there was negligent transmission,
21 and the question was when the Postal Service drops off a
22 package at the door and they put it somewhere where somebody
23 comes and slips on it and falls, does that qualify as negligent
24 transmission by the Postal Service. And the Supreme Court said
25 well, look, the definition of "transmission" probably includes

1 the act of you leaving it on the doorstep. But, in the context
2 of what we're talking about here, negligent transmission means
3 we delivered your mail to the wrong address or we delivered it
4 late. It doesn't mean the act of leaving it on your doorstep.
5 And the act of leaving it on the doorstep would be a common
6 sense understanding of yes, that's part of the transmission,
7 but that wasn't how the Supreme Court read the word.

8 So I don't -- you know, taking that as a precedent of what
9 the Supreme Court has done, I don't think it's unreasonable or
10 implausible to read the word "contains" the way that defendants
11 are reading it.

12 And I would back up to one point --

13 **THE COURT:** But as a matter of law, I have to read it
14 that way. That's what your motion is, is that as a matter of
15 law -- was the Supreme Court in *Dolan*, did that case -- did it
16 get there on a 12(b)(6)?

17 **MR. GARG:** Your Honor, I can't say that for sure.

18 But on this point of us arguing you have to read it our
19 way, that is not what the defendants are stating. That would
20 be the determination the Court needed to make if the plaintiffs
21 had made a substantive challenge to the validity of the reading
22 of 205.203(e)(1). That is not what they've done. Their claim
23 solely -- their sole claim in this case is that it is a
24 procedural rule that required notice and comment. And there,
25 the inquiry the Court is making is just a little different.

1 I don't have -- I don't think it's the defendant's burden
2 here to show that ours is the best interpretation, the only
3 interpretation, a better interpretation than the one they've
4 offered. All the defendants need to show is that it is a
5 possible interpretation.

6 **THE COURT:** Why do you win then if that's the case?
7 Why do you win? No, don't I have to find that it could not
8 possibly have amended the rule? Don't I have to find that that
9 is the interpretation, that "contains" is -- that that's what
10 they were doing, was actually interpreting "contains" as
11 opposed to amending the rule?

12 **MR. GARG:** Your Honor, again, I think that would be --
13 if that was a theory the plaintiffs wanted to pursue, the claim
14 would need to be a little different, that this is a substantive
15 challenge that your interpretation, no matter what deference it
16 may or may not be entitled to, is not a plausible reading of
17 the -- of the regulation.

18 **THE COURT:** But your argument is that it didn't amend
19 the rule, because we were interpreting "contains;" right?

20 **MR. GARG:** Correct.

21 **THE COURT:** Their argument is that no, you amended the
22 rule because "contains" can't be interpreted that way, so
23 they're completely intertwined, at least with respect to this.
24 Otherwise, are you saying that whenever the Government comes in
25 here and says we're interpreting the rule, the Court just has

1 to accept it, case over?

2 **MR. GARG:** I think as long as it is a possible
3 interpretation that the agency took of its own rule, yes.
4 Under the circumstances of the claim here --

5 **THE COURT:** On a 12(b)(6) what case do I look at for
6 that, because if I recall, almost all your cases were summary
7 judgment cases.

8 **MR. GARG:** Your Honor, on a 12(b)(6), let me look
9 through the papers and find you exactly a case that's on a
10 12(b)(6) dealing with this notice and comment issue. There
11 certainly are 12(b)(6) cases on the standing issue, but I'll go
12 through all the papers and get back to you if I have a case on
13 that, or submit a supplemental --

14 **THE COURT:** Well, if you have to get back, this is the
15 time.

16 **MR. GARG:** I understand.

17 **THE COURT:** So you don't. All right.

18 **MR. KIMBRELL:** Can I respond briefly, Your Honor?

19 **THE COURT:** Of course.

20 **MR. KIMBRELL:** I think the best case here is what we
21 cited in our briefs, the *Hemp Industries* case, and in this case
22 the Ninth Circuit decision there, you had a longstanding Drug
23 Enforcement Agency rule that defined THC to be just synthetic
24 THC, and then they changed it without notice and comment
25 expanding the definition to include natural sources of THC, and

1 the Hemp Industries oil and seed producers challenged that
2 successfully, that it was a legislative rule, because it had
3 changed the meaning of the regulation and had the force of law.

4 And the Ninth Circuit said:

5 (reading) An agency is not allowed to change a
6 legislative rule retroactively through the process of
7 disingenuous interpretation of a rule to mean something
8 other than its original meaning. To quote 'interpret' the
9 regulation, the DEA rule must be consistent with the
10 regulation.

11 So I think Your Honor has it exactly right, to interpret
12 "contains" to mean not contains is not consistent with the
13 existing regulation, and effectively amends it.

14 **THE COURT:** All right. So let's go to the argument
15 then that it's -- I can't -- you lose on that one. I can't
16 find on this, that it's interpretive rule as a matter of law.

17 So your other argument is that it's just guidance, and
18 that it has no binding effect, and for that you say all I have
19 to do is look at the document itself that says this guidance
20 provides clarification; right? Now, I can take judicial notice
21 of this document, that it exists and what it says, but I can't
22 take judicial notice for the truth of the matter asserted.

23 **MR. GARG:** I think if Your Honor is stating that you
24 don't have to accept it face value, the agency's claim that
25 this does not create binding legal obligations, then I think

1 that's an accurate statement of law. I also don't think that
2 it should be ignored, that the agency's own statements, before
3 this litigation ever occurred, or that this document that we've
4 issued does not create legal obligations.

5 **THE COURT:** So the certifier -- so if a certifier
6 tests a product and it finds some residue pesticide in it and
7 says to the farmer *What compost are you using? I'm using X*
8 *compost*, and it's the compost that was banned by California, at
9 least for OFPA, and the certifier then tests that compost or
10 explores it, investigates it, and finds that the pesticide
11 that's in that compost was not applied during the compositing
12 process, the leaves that were in there, whatever, weren't
13 organic, but it was not applied during the compost process, and
14 it's of such, in the certifier's mind, based on whatever
15 standards the certifier comes up with, it does not contaminate
16 the soil, and that kind of thing. The certifier can still
17 nonetheless order the producer to not be able to use the
18 organic label. They can say you *can't* use the organic label.

19 **MR. GARG:** There's -- I want to make sure I'm not
20 getting the double negatives wrong there, but I think you're
21 right. Yes, the organic -- the certifying agent in that
22 situation would not have authority to say even though you've
23 met what NOP 5016 says you're allowed to do, I'm still going to
24 say that you can't label your product as organic.

25 **THE COURT:** Could or could not do that?

1 **MR. GARG:** Could not do that.

2 **THE COURT:** Okay. Then it's binding. That's not
3 guidance.

4 **MR. GARG:** Your Honor, I don't think that's accurate,
5 because USDA -- so I would analogize it this way, and I think
6 the cases support this, USDA is allowed to be let's call it the
7 judge that says here is the principles of law that need to
8 guide your determination. The certifying agent is let's say
9 the jury, it's the fact-finder that says yes or no, this did
10 exist prior to the composting process, or yes or no this does
11 contaminate surrounding crops, soil or water.

12 I don't think that fact-finding process is a rogue thing
13 that has no discretion involved in it. That is a very
14 important and, as the plaintiffs have conceded, non-obvious
15 determination to make. So there is quite a large amount of
16 discretion still available to certifying agents. I don't think
17 agencies are prohibited from giving guidance to their agents in
18 the field of -- as a matter of policy of here's how we want you
19 to operate under our rules, and the cases support that. I
20 mean --

21 **THE COURT:** No, no, no, that's fine. But, actually,
22 what you're saying is we've now amended the rule, because the
23 rules say that you cannot have compost that contains a
24 synthetic substance, and you're now telling your certifiers,
25 no, it's okay if it contains a synthetic substance, as long as

1 it meets these two criteria, and by the way, not only is it
2 okay, you have no authority under (e) (1), it doesn't mean what
3 it says now, it means something else. It's not just guidance,
4 it's binding on them. You said they can't decertify.

5 **MR. GARG:** Well, I think the question as phrased by
6 the Court might be blending the interpretive rule and general
7 policy arguments with each other. I mean, if you've
8 accepted -- and you told me that you rejected this argument.
9 The USDA would say that no, the regulation always meant this,
10 it's not that we changed it, this is what it always meant. But
11 I understand Your Honor is not going to accept that.

12 **THE COURT:** They may say that on summary judgment, but
13 this is a 12(b) (6).

14 **MR. GARG:** I understand Your Honor is not accepting
15 that today.

16 On the general statement of policy argument then, what
17 we're talking about is a little different. Okay. Maybe 203.--
18 205.203(e) (1) says what the plaintiffs -- it means what the
19 plaintiffs think it means; however, in our discretion as an
20 agency, here's how we're going to enforce it. Even when
21 statutes are on the book, agencies or regulations are on the
22 book, agencies have discretion not to enforce it to maximum
23 level; right? That's a standard tool of discretion idea that
24 agencies have a good idea of what's practical and what makes
25 sense, in terms of allocation of resources, and where they want

1 to focus their attention.

2 So I think this would be saying, as a statement of policy,
3 we're not going to in all cases enforce this regulation to the
4 maximal level possible.

5 Here, we've carved out a narrow area where we think we're
6 better off not pursuing this, as far as we conceivably could.
7 And I don't think agencies are forbidden from issuing a policy
8 to their certifying agents in the field that says here's how we
9 want our discretion applied. You are still free to make fact
10 findings and determine where to go from there, but we want you
11 not to pursue these kinds of cases.

12 **THE COURT:** But isn't that just changing the rule? I
13 mean, I don't understand. That's just a way of getting around
14 why -- I mean, they could just -- they could add a million
15 exceptions then to (e)(1), right, and say -- actually, why
16 couldn't they just say we're not going to enforce it at all?
17 Could they do that? Could they say that? Could they issue a
18 guidance document that said to the certifiers that, you know
19 what, it can contain any synthetic -- compost can contain any
20 amount. We're not going to -- if the compost contains a
21 synthetic pesticide of any amount, we're not going to enforce,
22 we just don't care about that; could they do that? We're not
23 going to enforce it.

24 **MR. GARG:** Your Honor, short of an argument that that
25 would be a total abdication of their statutorily commanded

1 duty, yes, I think the agency could say that, you know, based
2 on the circumstances that are confronting us as an agency, this
3 is not where we want to focus our resources right now in
4 bringing enforcement actions.

5 **THE COURT:** Okay. So then what's the difference
6 between that and amending a rule? So then when do they ever
7 have to amend a rule? Under your argument they never have to
8 amend a rule. They can just say they're not going to enforce
9 it, though they have a rule out there, and then they could just
10 say they're not going to enforce it, and then they can just do
11 that.

12 **MR. GARG:** Your Honor, it gets to a tricky issue that,
13 you know, at some point you blend into well, when did they
14 change the rule?

15 **THE COURT:** Yes.

16 **MR. GARG:** I don't think this case is to that level of
17 a total abdication of any -- I mean, still, in the vast
18 majority of cases, USDA is saying you cannot use compost that
19 contains synthetic substances. This is a very narrow carve-out
20 that USDA is allowing here. I just don't think that it rises
21 to the level --

22 **THE COURT:** Well, when do we get to the line -- see,
23 now it's like law school, right, where you have that discussion
24 all the time.

25 All right. Let me hear from the plaintiff.

1 **MR. KIMBRELL:** Your Honor, just to respond briefly, I
2 would say on the binding norm issue, the best case is the
3 *Community Nutrition Institute* case from the D.C. Circuit where
4 the FDA did something similar, set allowances for contaminants
5 in food products there, corn, and said it wasn't going to
6 enforce below that and didn't do notice and comment, called it
7 a guidance, and consumer groups successfully challenged that.
8 And the D.C. Circuit said exactly as Your Honor did, you've
9 bound your own enforcement discretion, and that's a rule.

10 And I would also add that to be a general statement of
11 policy, there are two prongs that the cases talk about, one
12 being the binding norm, the other being that the action
13 challenged by the agency must be only prospective in nature.
14 And our allegation here is that this is definitively not
15 prospective in nature, but, rather, expressly retroactive, and
16 that's the history of this --

17 **THE COURT:** How is it retroactive?

18 **MR. KIMBRELL:** Well, if you look at the guidance
19 itself and the history of this litigation, as Your Honor noted
20 first, organic regulators in California applying the then
21 existing USDA standard, the one that you've quoted, banned
22 several compost products that were contaminated with the
23 insecticide bifenthrin, and then the USDA came back and issued
24 this decision.

25 And in the guidance itself, it goes through -- it recounts

1 as a background, on the first page, what happened in California
2 here, and then it said this is our new decision. At the end,
3 it says that it's -- now this type of compost, assuming that
4 these two new factors are met, it is acceptable.

5 So it overruled that decision, and in that way it's
6 retroactive. We have not heard from the Government that those
7 products, by the way, are still banned. They did not say that
8 in their reply briefs, so our allegation is that it's been
9 retroactive here, and if it's retroactive, setting aside the
10 binding question, independently it can't be a guidance.

11 **THE COURT:** I'm not -- so wait, so California banned
12 it in California.

13 **MR. KIMBRELL:** Yes, Your Honor.

14 **THE COURT:** But so I still don't understand. When
15 they issued this guidance then, they would say that applied
16 going forward. How does that change what happened before?

17 **MR. KIMBRELL:** Well, they had to withdraw the notices,
18 the notices from the organic regulators banning the previous
19 products.

20 **THE COURT:** All right. Well, what about that?

21 **MR. GARG:** Well, Your Honor, first of all, we are
22 under 12(b)(6), as the Court has made clear. I believe
23 plaintiffs' counsel might have just introduced a lot of facts
24 that are not in the complaint, for one thing; but secondly, I
25 think the idea that California -- first of all, California had

1 made a decision about this, not the USDA. NOP 5016 is the
2 first time USDA has addressed this issue of synthetic residues
3 in green waste compost. But even if --

4 **THE COURT:** No, no, no, it's not the first time, it
5 was addressed in 205.203(e)(1).

6 **MR. GARG:** All right, Your Honor, we'll agree to
7 disagree on that one.

8 But, on the -- on the point that, well, California had to
9 withdraw notices, that doesn't affect, you know, what
10 California notices were still valid and out there under
11 California's authority for however long they existed before
12 they got withdrawn, so it doesn't retroactively go back and
13 change determinations California had made during that time. It
14 says going forward, California, the policy you've been applying
15 is no longer consistent with what USDA is saying.

16 **THE COURT:** And what case would I look to that on a
17 12(b)(6), this argument that it's guidance as a matter of law
18 has been accepted, what case would I look to?

19 **MR. GARG:** So you're asking me to identify a 12(b)(6)
20 case.

21 **THE COURT:** Yes, this is a 12(b)(6) motion.

22 **MR. GARG:** Your Honor, I would again want to -- I'll
23 take a peek through the cases, but --

24 **THE COURT:** I don't know how you could get there on a
25 12(b)(6). I don't know how you could get there; right?

1 Because I have their allegations in the complaint. You want me
2 to reject their allegation and say no, you have to find that
3 this is just guidance, and that it doesn't -- you want me to
4 find that it's just minimal, that it doesn't cross that line -
5 all those things involve some development that I can't find on
6 a 12(b)(6). You're asking me, actually, to draw all the
7 inferences in your favor and not the plaintiffs' favor.

8 **MR. GARG:** Your Honor, I don't think so. I think
9 we're saying all their factual allegations can be true, that
10 they've said, you know, all the certifying agent has left to do
11 on the ground is make these fact determinations of, well, did
12 it preexist the composting process and does it contaminate
13 crops, soil or water. That can be entirely true. And I think,
14 under just the statements of law that are out there, numerous
15 circuit cases, that does not overly cabin administrative
16 discretion in a way that's inconsistent with a general
17 statement of policy.

18 And just a recent quote: Agency instructions that the
19 agency offers are not legislative rules. An agency action that
20 merely explains how the agency will enforce a statute or
21 regulation, how it will exercise its broad enforcement
22 discretion is a general statement of policy. That's a 2014
23 D.C. Circuit case.

24 **THE COURT:** But doesn't that depend on a finding that
25 it doesn't amend the existing rule? I mean, I've already told

1 you that just a common sense reading of it, and I draw the
2 inference favor, it amends it. There's one exception to
3 synthetics materials when you're filing compost, under that
4 legislative rule that was adopted by the USDA, and that is that
5 it's on the National List. You've now added two other
6 exceptions. That's a plausible interpretation of it. You
7 would agree with, that that that's a plausible interpretation?

8 **MR. GARG:** It is a possible interpretation, yes.

9 **THE COURT:** Okay. No, I want you to say or not say,
10 and if it's not plausible, tell me why it's not plausible,
11 because that I find hard to believe.

12 **MR. GARG:** I don't think the agency would say that it
13 is the most plausible interpretation.

14 **THE COURT:** No, no, I'm asking you as an advocate
15 standing here, as an attorney, as an officer of the Court, is
16 it a plausible interpretation. You went to law school. You
17 did those things. You're at the DOJ, so you obviously did
18 well. Is that a plausible interpretation of when it says any
19 compost that contains a synthetic substance -- cannot be
20 organic, any compost that contains a synthetic substance cannot
21 be on the National List; isn't it a plausible interpretation of
22 that, that it?

23 **MR. GARG:** Your Honor, taking into account the overall
24 regulatory scheme outside of that one narrow provision that
25 we're talking about, I don't think that's a plausible

1 interpretation.

2 **THE COURT:** Okay. All right. I don't -- okay.
3 That's your argument. I have to find -- I don't find that a
4 credible argument at all, and so when you take those kinds of
5 positions, then that carries over.

6 So I don't -- I can't grant the 12(b)(6) on either, so
7 let's talk about standing then.

8 So they've stated a claim. So the question -- so they've
9 argued, and there's lots of cases on standing, that they're
10 harmed by the fact that now -- or they say some of the
11 plaintiff members are harmed by the fact when they go to the
12 store, they have to do additional research to figure out if the
13 product before this guidance was adopted. And by the way,
14 there's nothing in the record in front of me that shows that
15 prior to the adoption of this guidance, compost that contained
16 synthetic materials other than -- not on those lists were
17 allowed to be certified as organic, in fact.

18 The only thing in front of me is the fact that when
19 California learned of compost that did not, they actually
20 banned it, so the inference goes the other way; that prior to
21 the adoption of this guidance, it was being enforced in such a
22 way that it would not be labeled organic if it was using
23 compost that was not organic as well.

24 So now they say so now if I go to the store and I'm buying
25 something, I have to do all this research if I want to be sure

1 that I'm buying products that were not produced with
2 non-organic compost. Why isn't that an injury?

3 **MR. GARG:** Your Honor, I don't think -- I think that's
4 not an injury, because there's no ability to connect this
5 policy preference of I don't like the fact that synthetic
6 pesticides are used generally. There's no ability to connect
7 that to an actual effect on the food that's purchased, because
8 NOP 5016 by its nature doesn't allow contamination of the food,
9 it doesn't permit that, it says it only allows introduction of
10 synthetic residues where it does not cause onward contamination
11 of crops, soil or water, and crops being what becomes the
12 foods. So as a consumer, if you have that personal preference
13 of I don't want -- I generally don't like the idea of synthetic
14 pesticides anywhere in my food production, that's fine,
15 obviously, you're perfectly entitled to have that view. I
16 don't think that view by itself gives you a right to come into
17 federal court based on a concrete --

18 **THE COURT:** Why not?

19 **MR. GARG:** Because there's no concrete personal harm
20 that the food I bought actually now is people -- farmers
21 complying with NOP 5016 are going to have introduced actual
22 synthetic residues into the food I'm purchasing. That's not
23 true. That can't be true under the guidance itself.

24 **THE COURT:** I'll accept that, but why doesn't my
25 preference to not eat food, because maybe I don't believe the

1 USDA, maybe I'm irrational whatever, but I actually think I am
2 harmed or I care about harm to the environment if pesticide is
3 being used, and I want to buy food that's produced in such a
4 way that reduces the amount of pesticides just being introduced
5 into the environment in general. Why isn't that a harm, and
6 what case would I look at? Because there's lots of cases that
7 show simply just aesthetic, right, the environmental cases,
8 simply aesthetic harm is enough.

9 **MR. GARG:** Well, so I would say that as taking the
10 aesthetic harm point, first of all, you know, even on that kind
11 of idea, you need to show a direct connection to aesthetically
12 here is an area where I know these synthetic residues are being
13 used, or I'm alleging that these synthetic residues are being
14 used, I visit that area and I go there and it's less pretty or
15 less nice a place to visit, and that upsets me. You at least
16 have to make that much an allegation, and that's not in the
17 papers the plaintiffs have submitted.

18 As to the broader point, I think that the argument that,
19 well, there's something about this that I don't like, and even
20 though it doesn't actually affect directly the product I'm
21 buying, I have a right to come into court and complain about
22 it, that just becomes a staggeringly broad thing that basically
23 nullifies the injury-in-fact requirement. I mean, you could
24 carry that on indefinitely that I don't like the Department of
25 Labor's regulations about union issues.

1 **THE COURT:** That's not even close. Who would have
2 standing then to challenge this action? Who?

3 **MR. GARG:** Your Honor, as I stand here now, I'm not
4 sure who would.

5 **THE COURT:** Of course that's the argument USDA is
6 going to make, that we can do this, and nobody can challenge
7 it. We're insulated from any review whatsoever, because you
8 have to accept the results. That's -- come on. Is that the
9 argument? No one -- no one would have standing to come in and
10 challenge it.

11 **MR. GARG:** Your Honor, the nature of the -- it's as I
12 stated, it's a very, very narrow policy exception here. This
13 is not a broad, huge impact where the quality of the organic
14 food itself physically gets degraded; right?

15 **THE COURT:** That's your argument. The problem is, is
16 the Department didn't want to open it up to notice and comment
17 so they could actually have a robust discussion about whether
18 that would be the case. I mean, why not -- that's what I don't
19 get, is why not just do that? What are they afraid of?

20 **MR. GARG:** Your Honor, I mean, these exceptions in the
21 APA are there for A reason. Congress thought the agency
22 shouldn't always have to do that. Notice and comment is not
23 always required.

24 So I don't think that -- you know, it's not the role of
25 the courts to go beyond what Congress stated the agency needs

1 to do under the APA.

2 **THE COURT:** No.

3 **MR. GARG:** And I understand Your Honor might disagree
4 with that.

5 **THE COURT:** Right. It is the role of the courts to
6 make sure that the agency doesn't hide and insulate what it
7 does from public reviewing by calling it things that it's not,
8 by amending the rule and then saying, oh, we're not amending
9 the rule, we're just interpreting the word "contained" to not
10 be what the dictionary definition is or even a common sense
11 definition, it's something else. Maybe you're right, and maybe
12 it has the ability to do so, but this is on a 12(b)(6) that
13 you're saying they don't even get past go. They don't even get
14 past go. And I'm a little -- I'm always a little skeptical
15 when the response is, well, no one would have standing,
16 especially when at least I found they have a plausible argument
17 here, their definition of the statute, and the fact that what
18 the agency has done amended it is completely plausible. It may
19 not in the end be right, I don't know, but it's plausible. But
20 to say that no one would have the right to do that -- let me
21 hear from the plaintiff.

22 **MR. KIMBRELL:** Thank you, Your Honor.

23 A few points in response to opposing counsel.

24 With regards to the exceptions, I would just respond that
25 those exceptions are to be narrowly construed, and that's from

1 the *Hemp Industries* case and others of when a notice and
2 comment is not required.

3 But to get to the standing issue, I think Your Honor has
4 it exactly right. The fundamental injury here is that a new
5 loophole has been created that previously didn't exist that
6 allows a new source of synthetic substances, including
7 pesticides, into the organic production stream. And for our
8 members and for organic consumers generally, they buy organic
9 not because only it's not going to be on their food, they buy
10 it because they don't want to harm bees, they don't want to
11 harm the environment. They know it to be an environmentally
12 beneficial way of producing food.

13 In fact, the very definition of "organic production" at 7
14 C.F.R. 205.2 is a type of production that, quote, promotes
15 ecological balance and conserves biodiversity. So they buy it
16 for many reasons, including environmental ones. And I think
17 Your Honor has it exactly right here, that the injury here is
18 this new introduction to the food stream.

19 **THE COURT:** Well, so point to me where in the
20 complaint that's alleged, because what counsel says is that's
21 not alleged in the complaint.

22 **MR. KIMBRELL:** Sure. I think we have sufficiently
23 pled standing at our paragraphs for standing -- I'll just find
24 them here. It's going to be -- I have them listed. Ah,
25 paragraphs 15, 18 through 20 and 60 through 63, those would be

1 the standing paragraphs, first describing our members, and then
2 later the injury to the plaintiffs. And we did file some
3 illustrative standing declarations as well with the Court in
4 support of our allegations.

5 But certainly there are several ways to talk about the
6 injury, and certainly I think when you talk about standing
7 injury, you have to take into account the statutory source.
8 And here it's not this free-floating concern. Really, there's
9 this fundamental tenant, in fact *the* fundamental tenet from the
10 statute itself, about the prohibition generally on the use of
11 synthetic substances. It's at 7 CFS 6504, and it says organic
12 foods, quote, must be produced and handled without the use of
13 synthetic substances, except as otherwise provided by the
14 Organic Food Production Act. So it doesn't say they're going
15 to be produced so it's not on the food. It says they're not
16 going to be produced using these substances unless you go
17 through the National List.

18 So standing injury, as Your Honor noted, it could be
19 aesthetic, it can be recreational, in environmental cases it's
20 oftentimes enjoyment of the forest.

21 And by the way, to respond to the cite-specific argument,
22 the case we cited in our brief, *Citizens for Better Forestry*
23 dispatches that argument and says that when you are dealing
24 with a programmatic nationwide approval, it's sufficient if you
25 have members that use the forest, in that case the forest

1 system generally, like we have members here that buy organic
2 foods.

3 But setting aside the environmental harm, the other way of
4 thinking about this is the economic harm of it. Essentially,
5 you have consumers that are paying a premium for a product for
6 a reason, and they're not getting what they're paying for, and
7 that's fundamental. And you can look at class action cases
8 like natural cases where somebody is buying natural cosmetics
9 or cooking oil, and it's not natural, it has some synthetic
10 substance in it. It doesn't matter if that's actually in the
11 product at the end of the day, what matters is that it's
12 produced in a way that's contrary to what's being purported to
13 be done. And that's the very same here, and that's the
14 economic side of this injury.

15 And I would just say that the *Harvey* case is right on
16 point. It's the exact injury that we allege, and it's the only
17 court of appeal case out there dealing with standing under the
18 Organic Food Production Act. That's a First Circuit case from
19 2004, and in that case Mr. Harvey was an organic consumer and
20 farmer just like our members, and he challenged eight different
21 regulations of OFPA, as contrary to the statute, and he said it
22 undermines their integrity, which is exactly what we say. And
23 one of his arguments, his third claim, I would like to point
24 the Court correctly to especially, I was rereading it last
25 night, and he alleged successfully in that case that the

1 regulations had unlawfully allowed synthetic substances in
2 production and handling of organic foods, and that the law --
3 the statute didn't allow that. And so that's very much akin to
4 what we're saying, instead of production and handling, we're
5 saying inputs, namely compost. But the same thing, you can't
6 impermissibly allow synthetic substances in this loophole. The
7 First Circuit had no problem finding standing for Mr. Harvey in
8 that case.

9 **THE COURT:** But here is a little different, because
10 you're arguing notice and comment, so really what you're
11 arguing is the injury is the inability for -- to be denied the
12 opportunity to make your argument to the USDA as to why they
13 should not adopt such a loophole; right?

14 **MR. KIMBRELL:** Yes, Your Honor, absolutely. But make
15 no mistake, we believe that what they've done here is contrary
16 to the statute.

17 **THE COURT:** No, no, I understand that, but why isn't
18 that in itself just an injury, I mean, when you're dealing with
19 notice and comment. See, they've stated a claim, so then why
20 isn't that an injury? I mean, that seems to me that the most
21 obvious injury is all, is they're being denied the opportunity
22 to persuade the USDA that the path they're taking is not -- I
23 mean, the whole point of the whole notice and comment process.

24 **MR. GARG:** Your Honor, I think the Supreme Court spoke
25 directly to that in the *Summers* case where -- which also is a

1 notice and comment case, I believe not under the APA, but
2 similar statute that provided notice and comments rights. The
3 procedural of injury alone of being deprived an opportunity of
4 notice and comment is not itself sufficient to confer standing
5 without attachment to some concrete interest underlying it.

6 And you know, they call it a procedural right in vacuo.
7 That's exactly what *Summers* says. That's not enough to get
8 standing.

9 **THE COURT:** All right. But here, they argue they have
10 more, and they do allege more, I think in paragraph -- the
11 earlier ones, their level of value, but in paragraph 62, they
12 allege that they pay a premium for organic. They needn't rely
13 on the rule that was out there, that no compost with any
14 synthetic material would be used in the process, and that's not
15 the rule anymore.

16 **MR. GARG:** Your Honor, I would say that, again, I
17 think it's -- that is divorcing a little bit. They relied on
18 the organic -- you know, so just to distinguish it and the
19 natural line of cases that plaintiffs' counsel is discussing,
20 that's a case where the food producer is saying I as the food
21 producer certify that the product is natural, and natural has
22 these meanings or it doesn't have this meaning.

23 Organic doesn't have a fixed, you know, meaning that way
24 outside of the regulations that USDA is putting in place. So I
25 think it's just a distinguishable situation where, under the

1 argument plaintiffs' counsel is making, USDA could never change
2 the argument -- change the meaning of what it is to be organic,
3 even if it went through formal rule making, without causing
4 injury to some consumer who says, well, I thought organic meant
5 something different, now you change what it means, and I get to
6 challenge that now, just because I used to rely on what it
7 meant before and now you changed it. I mean, what's wrong with
8 that? All we're talking about is standing, all we're talking
9 about is for the ability for the USDA's actions to be reviewed,
10 not whether they're lawful or not. I mean, it may be in fact
11 that the change in regulation may be entirely lawful and
12 consistent with the Organic Act, but why is it such a horrible
13 thing that someone would have standing to challenge it?

14 **MR. GARG:** I think it veers very much towards the
15 generalized grievance idea. I think smart plaintiffs lawyers
16 would drive a truck right through that exception. You can
17 characterize almost anything as I used to rely on what I
18 thought this meant, and now I can't rely on it anymore, and
19 that caused me an economic injury.

20 Take the *Schmier* case --

21 **THE COURT:** Doesn't have to be economic.

22 **MR. GARG:** Correct. Take the *Schmier* case, for
23 example. That's a case where a lawyer came into the Court and
24 said I believe the Ninth Circuit's rule is not allowing me to
25 cite their unpublished decision are illegal, and that's a case

1 where the district court found no standing, and the Ninth
2 Circuit affirmed no standing, and also it dismissed -- the
3 Ninth Circuit affirmed dismissal with prejudice, saying there's
4 no way you could ever show standing in this scenario.

5 That's a scenario where the lawyer could easily have come
6 in and said I practice law, my clients depend on a stable body
7 of law that makes sense and is rational and is dependable, and
8 the Ninth Circuit, by not allowing citations on unpublished
9 decisions, has some injury to my ability to tell my clients
10 that here is what the law is, and it always works out this way,
11 and that has damaged my brand as a lawyer, it damaged what I
12 used to be able to rely on, and I get to have standing because
13 of that.

14 I think it's very similar argument to one the plaintiffs
15 are trying to make here, and the Ninth Circuit in that case
16 said there is no circumstances where you could show standing in
17 that kind of scenario.

18 **MR. KIMBRELL:** Can I respond, Your Honor?

19 So the *Schmier* case, the unpublished decisions case, the
20 lawyer had no case. It wasn't if he had had, I think, an
21 unpublished decision, he might have had standing, but that's
22 totally inapposite to what we have here. We have numerous
23 consumers and members of ours, clients that have provided
24 declarations that they buy and continue to buy organic
25 products, and they're injured by this rule.

1 We also have farmers, which we haven't talked about yet,
2 and this new rule provides new risks for them. How do they
3 comply with this amorphous do-not-contaminate standard? What
4 if they don't want to use compost, are they put at an economic
5 disadvantage? Those are the allegations that we've provided
6 and provided an independent source of standing.

7 **THE COURT:** All right. Anything further?

8 **MR. GARG:** Unless Your Honor has further questions...

9 **THE COURT:** No. I mean, I'll write something, but
10 I'm -- I'll go back and look, but I'm inclined to find standing
11 as well. I mean, standing is there not to protect the
12 Government from being sued, but to ensure that those plaintiffs
13 who sue have a concrete interest so they actually represent and
14 have an injury, and that they're pursuing the interests of
15 everyone, but it's not there to protect the Government from
16 suits. So I think I'm inclined to find standing. But I'll
17 write something, so -- and then when I do so, I'll set a date
18 for a CMC.

19 How much time do you think you would need in between my
20 order and the CMC?

21 **MR. KIMBRELL:** It would depend on when the Government
22 could produce the record, I think, or --

23 **THE COURT:** So that what you're going to produce -- so
24 then you have to produce the administrative record. So I guess
25 maybe what I'll do is I'll suggest that you meet and confer and

1 come up with a schedule for production of the record and
2 briefing, and all that kind of thing.

3 And the last thing I would say is these cases the judges
4 often -- I did one the other day, not in a USDA case, entirely
5 different agency -- send to someone for settlement and then
6 it's totally pointless. So what I want to know would that be
7 pointless here or not, and if it is, that's completely fine. I
8 understand when you're dealing with the Government it's
9 different than in other cases. Or is that something -- you
10 don't have to answer me right now, I guess. Why don't you meet
11 and confer on that, and then when you submit your schedule, if
12 you would want, for example, a referral to a magistrate judge,
13 I would be happy to do so, but if you don't, I'm not going to
14 force you to do that at all.

15 **MR. GARG:** Thank you, Your Honor.

16 **MR. KIMBRELL:** Thank you, Your Honor.

17 **THE COURT:** Okay. Thank you.

18 (Proceedings adjourned at 9:51 a.m.)

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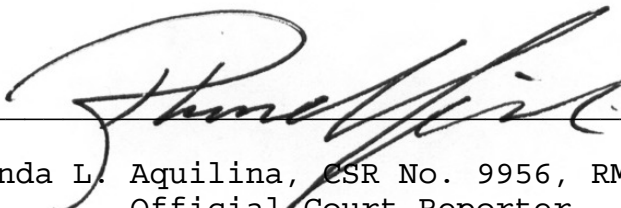
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, September 16, 2015


Rhonda L. Aquilina, CSR No. 9956, RMR, CRR
Official Court Reporter