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14 **THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 NATIONAL ORGANIC COALITION,)
17 CENTER FOR ENVIRONMENTAL HEALTH,)
18 CENTER FOR FOOD SAFETY,)
19 CULTIVATE OREGON,)
20 INTERNATIONAL CENTER FOR)
21 TECHNOLOGY ASSESSMENT,)
22 ANIMAL LEGAL DEFENSE FUND, AND)
23 HUMANE SOCIETY OF THE UNITED STATES;)

24 *Plaintiffs,*)

25 v.)

26 SONNY PERDUE, in his official capacity)
27 as the Secretary of Agriculture,)
28 BRUCE SUMMERS, in his official capacity)
as Acting Administrator of Agriculture)
Marketing Service,)
JENNIFER TUCKER, PH.D., in her official)
Capacity as Deputy Administrator of the)
National Organic Program, and the)
UNITED STATES DEPARTMENT OF)
AGRICULTURE)

Defendants.)

CASE NO. 3:18-CV-01763-RS

**NOTICE AND UNOPPOSED MOTION FOR
LEAVE TO FILE AMICUS BRIEF OF
AMERICAN SOCIETY FOR THE PREVENTION
OF CRUELTY TO ANIMALS IN SUPPORT OF
PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

CASE NO. 3:18-CV-01763-RS

NOTICE AND MOTION FOR LEAVE TO FILE AMICUS BRIEF OF ASPCA IN SUPPORT OF PL. MSJ

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD,**

2 **PLEASE TAKE NOTICE** that this unopposed motion is submitted to the Honorable
3 Richard Seeborg in the above-captioned matter, wherein Proposed *Amicus Curiae* American
4 Society for the Prevention of Cruelty to Animals moves this Court to allow its participation as
5 *amicus curiae* in support of Plaintiffs' Motion for Summary Judgment in this matter.
6

7 All parties consent to the filing of Proposed *Amicus Curiae's* brief.

8
9 Proposed *Amicus* has special knowledge and experience in the area, as further described
10 below, that will assist the Court in its analysis of the parties' motions for summary judgment.
11 Proposed *Amicus* seeks to participate as *amicus* and to submit the Proposed *Amicus* Brief.

12
13 This Motion is based on this Notice of Motion and Motion, the supporting
14 Memorandum of Points and Authorities, all pleadings, records, and papers filed in this action,
15 such matters as the Court may judicially notice, and such further evidence or argument as the
16 Court may request.

17
18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 The American Society for the Prevention of Cruelty to Animals (ASPCA) hereby moves for
20 leave to file a brief as *amicus curiae* in the above-captioned matter, in support of the motion for
21 summary judgment of Plaintiffs National Organic Coalition, Center for Environmental Health,
22 Center for Food Safety, Cultivate Oregon, International Center for Technology Assessment,
23 Animal Legal Defense Fund, and Humane Society of the United States. The ASPCA's proposed
24 *amicus* brief is submitted conditionally, as an attachment to this motion, and Plaintiffs and
25
26 Defendants have all consented to its filing.
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28

I. REASONS WHY THIS MOTION FOR LEAVE TO FILE AN AMICUS BRIEF SHOULD BE GRANTED

a. Legal Standard

“The district court has broad discretion to appoint amici curiae.” *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). “There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable to the court.” *Duronslet v. Cty. of Los Angeles*, No. 2:16-cv-08933-ODW (PLAx), 2017 WL 5643144, at *1 (C.D. Cal. Jan. 23, 2017) (internal quotation marks omitted). At a minimum, “most courts have granted amicus participation . . . when the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Id.* (quoting *Cmty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999)). The ASPCA meets this discretionary standard.

b. The ASPCA Can Provide Added Value to the Court’s Consideration of this Matter

The ASPCA is a not-for-profit corporation whose mission is to provide an effective means for the prevention of cruelty to animals throughout the United States. Incorporated in 1866 by a special act of the New York State legislature, the ASPCA is North America’s oldest humane organization. Today, it is also one of the largest, with millions of supporters nationwide.

1 The ASPCA has a well-established farm animal welfare program that seeks to improve
2 the lives of the billions of animals on American farms through outreach to consumers,
3 advocates, farmers, industry, policymakers, and lawmakers. For example, the ASPCA's "Shop
4 With Your Heart" campaign assists the increasing number of consumers who prefer to purchase
5 meat, eggs, and dairy products derived from more humanely raised livestock. Through "Shop
6 With Your Heart," the ASPCA educates the public on how to recognize and find higher-welfare
7 food, providing resources to help consumers navigate the highly confusing marketplace.
8 Educating consumers about the different labels and certifications on animal products, like the
9 USDA Organic program, is critical to the overall mission of the ASPCA's "Shop With Your Heart"
10 campaign.
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14 In furtherance of its efforts to educate consumers, the ASPCA commissioned a poll in
15 2014 which found that 68% of consumers who purchase USDA Organic products assume
16 animals under the program have access to outdoor pasture and fresh air throughout the day,
17 and 67% assume such animals have significantly more space to move than on non-organic
18 farms. As such, the ASPCA has learned that many consumers reach for USDA Organic products
19 under the assumption that animals are raised in significantly higher welfare conditions, and are
20 often shocked to learn how little the program's animal welfare standards currently require.
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23 In addition, ASPCA experts with substantial knowledge of animal welfare science and
24 welfare certification programs assist farmers and other companies with implementation of
25 sustainable business models built on more humane practices, as well as participation in
26 meaningful certification programs consumers can trust.
27
28

1 The ASPCA also advocates for a range of laws, regulations, and policies that promote
2 greater protection for farm animals and support the transition to a more humane farming
3 system. The ASPCA has attended and submitted testimony at annual meetings of the National
4 Organic Standards Board since 2012, and submitted public comments throughout the trajectory
5 of the *Organic Livestock and Poultry Practices* rule. These efforts were mirrored by the ASPCA's
6 supporters, with more than 47,000 advocates submitting comments in 2017 urging the USDA to
7 implement the rule. Throughout this history of engaging with the USDA Organic program, the
8 ASPCA has consistently advocated for aligning the program's animal husbandry standards with
9 the expectations of organic consumers. This includes specifying minimum indoor and outdoor
10 space requirements for animals, prohibiting certain painful physical alterations, and requiring
11 critical indoor enrichments. In addition to this advocacy around the *Organic Livestock and*
12 *Poultry Practices* rule, the ASPCA continues to work to advance legislation and policy to help
13 farmers transition to higher-welfare, pasture-based farming systems that benefit animals,
14 farmers, consumers, and the environment.

15 Based on this knowledge and experience, the ASPCA is especially well-suited to advise
16 the Court on the public policy problems posed by the USDA's decision to withdraw the *Organic*
17 *Livestock and Poultry Practices* rule, which was intended to establish meaningful animal welfare
18 standards for products bearing the USDA Organic label, and ensure that those standards are
19 aligned with consumer expectations.

20 For these reasons, the ASPCA respectfully requests the Court grant it leave to appear in
21 this matter as *amicus curiae* in support of the Plaintiffs, and that the Court accordingly accept
22 the attached *amicus* brief as filed. A proposed Order is included with this Motion.

Respectfully submitted this 28th day of September 2021.

/s/ Paul J. Bauer

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Defendants.)

CASE NO. 3:18-CV-01763-RS

**BRIEF OF THE AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS
AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

Hon. Richard Seeborg

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1 **STATEMENT OF IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND SOURCE OF**
2 **AUTHORITY TO FILE**

3 Proposed *amicus curiae*, the American Society for the Prevention of Cruelty to Animals
4 (“ASPCA”), is a not-for-profit corporation whose mission is to provide an effective means for the
5 prevention of cruelty to animals throughout the United States.¹ Incorporated in 1866 by a
6 special act of the New York State legislature, the ASPCA is North America’s oldest humane
7 organization. Today, it is also one of the largest in existence, with millions of supporters
8 nationwide.
9

10 The ASPCA has a well-established farm animal welfare program that seeks to improve
11 the lives of the billions of animals on American farms through outreach with consumers,
12 advocates, farmers, industry, policymakers, and lawmakers. For example, the ASPCA’s “Shop
13 With Your Heart” campaign assists the increasing number of consumers who prefer to purchase
14 meat, eggs, and dairy products derived from more humanely raised livestock. In addition,
15 ASPCA experts with substantial knowledge of animal welfare science and welfare certification
16 programs assist farmers and other companies with implementation of sustainable business
17 models built on more humane practices, as well as participation in meaningful certification
18 programs consumers can trust.² The ASPCA also advocates for a range of laws, regulations, and
19 policies that promote greater protection for farm animals.
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25 ¹ No counsel for a party authored the attached proposed *amicus* brief in whole or in part, and
26 no entity or person, other than *amicus curiae* and its members, made a monetary contribution
27 intended to fund the preparation or submission of this brief.

28 ² The ASPCA’s farm animal welfare experts generally recommend that consumers who want
higher welfare meat, eggs, or dairy seek out producers who participate in certification
programs that have implemented higher welfare practices, such as pasture-based farming and

1 Based on this knowledge and experience, the ASPCA is uniquely well-suited to advise
2 the Court on the public policy problems posed by the USDA’s decision to withdraw the *Organic*
3 *Livestock and Poultry Practices* rule, which was intended to establish meaningful animal welfare
4 standards for products bearing the USDA Organic label, and ensure that those standards are
5 aligned with consumer expectations.
6

7 **SUMMARY OF ARGUMENT**
8

9 In failing to implement the *Organic Livestock and Poultry Practices* rule³ (“OLPP Rule”),
10 the USDA has abdicated its responsibility under the Organic Food Production Act of 1990⁴
11 (“OFPA”) to establish consistent and meaningful animal welfare standards for businesses using
12 the USDA Organic label on their products. The OLPP Rule is a major step forward from existing
13 regulations, which fail to set clear and consistent standards regarding such basic animal welfare
14 issues as adequate space and outdoor access for most farm animals within the USDA Organic
15 program. The OLPP Rule would establish critical protections for millions of animals raised for
16 products bearing the USDA Organic label, including minimum indoor space and air quality for
17 chickens, easy outdoor access for poultry that includes soil and vegetation, pain control and a
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23 enriched indoor environments, that are verified by third-party auditors including, for example,
24 Animal Welfare Approved, Certified Humane®, and Global Animal Products. See
25 [https://www.aspca.org/shopwithyourheart/consumer-resources/meat-eggs-and-dairy-label-](https://www.aspca.org/shopwithyourheart/consumer-resources/meat-eggs-and-dairy-label-guide)
26 [guide](https://www.aspca.org/shopwithyourheart/consumer-resources/meat-eggs-and-dairy-label-guide). These experts also work directly with select certification programs (including USDA
27 Organic) to further develop and improve their standards.

28 ³ National Organic Program (NOP); *Organic Livestock and Poultry Practices*, 82 Fed. Reg. 7042 (Jan. 19, 2017).

⁴ 7 U.S.C. §§ 6501-6522.

1 prohibition on certain painful physical modifications, and transport and slaughter standards for
2 all farm animal species.

3
4 With consumer demand for organic products dramatically increasing over the last
5 decade or more, spurred in part by the public's growing support for more humane treatment of
6 farm animals, implementation of the OLPP Rule is not only a legal imperative as Plaintiffs
7 contend, but is a public policy imperative as well. Indeed, many of the animal welfare
8 requirements the OLPP Rule would establish are standards that consumers – who generally pay
9 a premium for organic products – mistakenly believe are already in place. Given numerous
10 surveys conducted in recent years, it is clear that consumers expect animals raised within the
11 USDA Organic program to have better access to pasture, fresh air, and natural ground, more
12 space to move, and superior welfare standards than those raised on non-organic farms.
13
14 Instead, animals raised under the current organic program may live under inhumane conditions
15 that are indistinguishable from those on conventional farms. It is perhaps little surprise that
16 the vast majority of organic farmers, some of whom have already adopted more humane
17 practices than those required under the OLPP Rule, strongly support its implementation. Under
18 current regulations a small but powerful group of large-scale producers are able to profit from
19 using the USDA Organic label on their products without affording animals on their farms any of
20 the protections that consumers expect.
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24 In short, implementation of the OLPP Rule would help ensure that the USDA Organic
25 program engenders consumer trust rather than erodes it – something that the USDA itself
26 recognized during the rulemaking process but has suddenly and baselessly disavowed.
27
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ARGUMENT

I. BY FAILING TO IMPLEMENT THE OLPP RULE, THE USDA HAS ABDICATED RESPONSIBILITY FOR THE ESTABLISHMENT OF MEANINGFUL ORGANIC STANDARDS THAT ALIGN WITH CONSUMER EXPECTATIONS

Pursuant to the OFPA, one of the stated purposes of which is to “assure consumers that organically produced products meet a consistent standard,”⁵ the USDA is responsible for developing and implementing national standards for products bearing the USDA Organic label. In January 2017, the USDA issued the OLPP Rule after a decades-long collaboration with the National Organic Standards Board (“NOSB”), an advisory body created by Congress, along with organic producers, consumers, non-governmental organizations, and members of the veterinary and scientific community. In April 2017, the NOSB “as USDA’s Federal Advisory Board on organic issues and representing organic farmers, ranchers, processors, retailers and consumers – urge[d] the Secretary to allow the [OLPP] Rule to become effective . . . without further delay.”⁶ The OLPP Rule, as proposed, would have established stronger protections for the millions of farm animals raised in the USDA Organic program and created more consistent welfare standards for businesses seeking to display the USDA Organic label on their products. The USDA’s failure to implement this rule constitutes abdication of its statutory responsibility to consumers under the OFPA.

a. USDA Does Not Lack Authority to Regulate Animal Welfare

The USDA’s recent assertion that it lacks authority to regulate animal welfare concerns is at odds with the agency’s long history of enacting rules based upon animal welfare, and with

⁵ Organic Foods Production Act, 7 U.S.C. 94, §6501.

⁶ See NOSB Formal Recommendation, dated April 21, 2017. OLPP_00001733.

1 the legislative history of the OFPA itself. At best, this claim is pretext for a political decision
2 which abruptly ended many years of collaboration between the agency, NOSB, and industry
3 professionals which brought the OLPP Rule to the brink of enactment.
4

5 **i. OFPA’s Legislative History Demonstrates Authority to Regulate Animal Welfare**

6 Pursuant to the legislative history of the OFPA, it is clear that Congress authorized USDA
7 to consider animal welfare when enacting organic livestock regulations. In describing the vital
8 role that NOSB was intended to play in consulting with USDA, Congress declared the
9 “Committee expects that, after due consideration and the reception of public comment, the
10 Board will best determine the necessary balance between the goal of restrict[ing] livestock
11 medications and the need to provide humane conditions for livestock rearing.”⁷ Further, when
12 the House and Senate met in Conference to reconcile their respective versions of the
13 legislation, they stated the “Conference substitute adopts the House provision with an
14 amendment which requires the Secretary to hold hearings and develop regulations regarding
15 livestock standards in addition to those specified in this title.”⁸ This legislative history, as stated
16 directly by Congress in passing OFPA, highlights Congressional intent for USDA to enact new
17 livestock standards beyond those specified within OFPA, and demonstrates that such standards
18 are intended to include animal welfare.
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23 **ii. USDA’s Past Actions Demonstrate Authority to Regulate Animal Welfare**

24 The USDA’s own past actions serve as the best evidence of its authority to regulate
25 within the sphere of animal welfare. From the very founding of the National Organic Program
26

27 ⁷ S. Rept. 101-357 at 302-03 (1990) (*emphasis added*).

28 ⁸ H.R. Re. 101-916 at 1177-78 (1990) (*emphasis added*).

1 in 2000, the USDA has recognized that animal welfare is directly related to the production of
2 organic foods, stating:

3 Animals in an organic livestock operation must be maintained
4 under conditions which provide for exercise, freedom of
5 movement, and reduction of stress appropriate to the species.
6 Additionally, all physical alterations performed on animals in an
7 organic livestock operation must be conducted to promote the
 animals' welfare and in a manner that minimizes stress and pain.⁹

8 The Agency further stated that producers "must provide access to the outdoors, shade, shelter,
9 exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the
10 climate, and the environment," and indicated "pasture for ruminant animals" to be a
11 *requirement*.¹⁰ Such acknowledgements give direct indication of USDA's understanding that
12 animal welfare was to be regulated within the organic program.

14 Once again, in promulgating the Access to Pasture Rule in 2010, USDA demonstrated its
15 understanding that it had authority to regulate animal welfare. Its stated primary purpose
16 behind the rule was "to satisfy consumer expectations that ruminant livestock animals graze on
17 pastures during the grazing season," and the agency acknowledged that "[o]ne of the tenants
18 [sic] of organic production is that animals are able to express their natural behaviors, and
19 exercise and move freely."¹¹ Such statements make clear that USDA was directly invested in
20 improving animal welfare through organic regulations.
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26 ⁹ National Organic Program, 65 Fed. Reg. 80,547, 80,560 (Dec. 21, 2000).

27 ¹⁰ *Id.* at 80,561.

28 ¹¹ National Organic Program; Access to Pasture (Livestock), 75 Fed. Reg. 7,153, 7,171 (Feb. 17, 2010).

1 It is clear that, based upon OFPA and its legislative history, the USDA has long
2 understood that it does in fact have authority to regulate animal welfare matters. As such, its
3 withdrawal of the OLPP Rule based upon a claimed lack of authority is arbitrary and capricious,
4 as articulated by the Plaintiffs.
5

6 **b. The OLPP Rule Proposed Significant Protections That Exceed Current Regulations**

7 Current regulations under the USDA Organic program insufficiently address animal
8 welfare concerns, and fall short of consumer expectations regarding the same. As a recent
9 industry market analysis report concluded, “organic certification for animal-based products
10 does not require basic animal welfare standards . . . [t]his has devalued the USDA Organic seal
11 in some consumers’ eyes, and many want Organic Certification to go further in ensuring
12 humane living conditions.”¹² The USDA itself has acknowledged that current regulations
13 amount to nothing more than “broad and general requirements for ensuring the well-being of
14 organic livestock and poultry.”¹³ As the agency made clear, the OLPP Rule was designed to
15 “clarif[y] existing requirements, create[] new areas of standards, and protect[] the integrity of
16 the USDA organic seal.”¹⁴ This intention, and the ill effects of USDA’s decision to abandon the
17 OLPP Rule, are seen particularly clearly through the lens of the Five Freedoms – a long-standing
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25 ¹² See Packaged Facts, *The Organic and Clean Label Food Shopper* (September 2019), at 40.

26 ¹³ See USDA Agricultural Marketing Service, National Organic Program, *Organic Livestock and*
27 *Poultry Practices Final Rule, Questions and Answer* (January 2017) available at
<https://www.ams.usda.gov/sites/default/files/media/OLPPEXternalQA.pdf>.

28 ¹⁴ *Id.*

1 and well-regarded set of parameters for gauging basic animal welfare provisions,¹⁵ which the
2 ASPCA regularly refers to when assessing farm animal welfare.

3
4 The Five Freedoms include (1) Freedom from Hunger and Thirst, (2) Freedom to Express
5 Normal Behavior, (3) Freedom from Discomfort, (4) Freedom from Pain, Injury, or Disease, and
6 (5) Freedom from Fear and Distress. While animals are generally already free from hunger and
7 thirst under current organic regulations,¹⁶ the OLPP Rule included significant progress in the
8 other four areas.¹⁷ Unfortunately, due to USDA's arbitrary and capricious decision to abandon
9 the rule, this progress has been lost.

10
11 **i. Freedom to Express Normal Behavior**

12 Nearly twenty years ago, the USDA issued regulations requiring that "[t]he producer of
13 an organic livestock operation must establish and maintain year-round livestock living
14 conditions which accommodate the health and natural behavior of animals, including . . . [y]ear-

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18 ¹⁵ See Melissa Elischer & Michigan State University Extension, *The Five Freedoms: A history*
19 *lesson in animal care and welfare*, (Sept. 6, 2019), available at
20 https://www.canr.msu.edu/news/an_animal_welfare_history_lesson_on_the_five_freedoms;
21 see also ASPCA Guiding Principles, available at [https://www.aspca.org/about-us/aspca-policy-](https://www.aspca.org/about-us/aspca-policy-and-position-statements/guiding-principles)
22 [and-position-statements/guiding-principles.](https://www.aspca.org/about-us/aspca-policy-and-position-statements/guiding-principles)

23 ¹⁶ It is important to note that while animals raised within the organic program are presumed to
24 be *generally* free from hunger, there are instances in which proper nutrients may not be
25 provided under the program as it now stands. A poignant example is forced molting, through
26 which adequate sustenance is withheld from egg-laying hens to induce production of more
27 eggs. As USDA recently acknowledged, the cruel practice of forced molting is not prohibited by
28 existing regulations but would have been banned by the OLPP Rule. See Final Decision on
Organic Livestock and Poultry Practices Rule and Summary of Comments on the Economic
Analysis Report, 85 Fed. Reg. 57,937 (Sept. 17, 2020). OLPP_REMAND_00030238.

¹⁷ For the sake of brevity, the subsections below include a few examples of how the OLPP Rule
would have improved animal welfare within the context of the Five Freedoms, but it should be
noted that this represents a mere subset of the improvements offered by the Rule, and is far
from an exhaustive list.

1 round access for all animals to the outdoors”¹⁸ However, this requirement amounts to
2 little more than lip service, as existing regulations do not define or specify the standards that
3 must be met to constitute “outdoor access.” This has resulted in a variety of practices adopted
4 by producers, most of which are woefully insufficient and do not provide the outdoor access
5 that animals are naturally accustomed to, nor that consumers would expect. For example,
6 poultry producers utilize enclosed “porches” – typically enclosed structures with roofs and solid
7 floors – to fulfill this outdoor access “requirement.”
8

9
10 The OLPP Rule, had it been adopted, would have transformed the outdoor access
11 requirement into a meaningful standard which provided significant improvements for animals
12 raised within the organic program. Specifically, the Rule made certain that producers providing
13 only enclosed porches in an attempt to comply with the outdoor space requirement would not
14 be permitted to affix the USDA Organic label to their products.¹⁹ The Rule likewise established
15 specific requirements relating to the quality of the outdoor space provided, including ground
16 composition, provision of shade, space requirements, and the limited circumstances under
17 which non-enclosed porches may be considered outdoor space.²⁰ As such, the OLPP Rule
18 provided extensive standards to ensure that the requirement for access to the outdoors was
19 meaningful, and came closer to the animal welfare standards that consumers expect from the
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24 ¹⁸ 7 C.F.R. § 205.239(a)(1).

25 ¹⁹ OLPP Rule, 82 Fed. Reg. 7042, 7068 (Jan. 19, 2017) (“In the final rule, AMS has retained a
26 requirement for outdoor access, and AMS has defined the outdoors (§ 205.2) to clarify that
27 birds must be in the open air, outside an enclosed building or housing structure, to be
28 considered outdoors.”); see also *Questions and Answers* at 7 (“An enclosed ‘porch’ or ‘winter
garden’ cannot be considered part of the outdoors in the final rule”).

²⁰ OLPP Rule, 82 Fed. Reg. 7042, 7061-62 (Jan. 19, 2017).

1 USDA Organic label. However, USDA’s abandonment of the Rule leaves the promise of these
2 animal welfare improvements, and overall consumer confidence in the label, woefully
3 unfulfilled.
4

5 **ii. Freedom from Discomfort**

6 As they currently exist, organic regulations do not sufficiently address the cramped and
7 uncomfortable living conditions of avian species raised within the program. The OLPP Rule
8 sought to address this short-coming, to require that at least some of the discomforts
9 experienced by these animals be alleviated.
10

11 Specifically, any poultry products bearing the USDA Organic seal would have had to
12 originate from birds living in housing which was “sufficiently spacious to allow all birds to move
13 freely, stretch their wings, stand normally, and engage in natural behaviors.”²¹ For egg-laying
14 hens and fully feathered birds, the use of artificial light would have been restricted to ensure
15 natural light and darkness hours are maintained, and it would have been mandated that any
16 artificial lighting used be “lowered gradually to encourage hens to move to perches or settle for
17 the night.”²² In addition, a guaranteed minimum amount of perch space would have been
18 required for egg-laying hens, and access to scratching and dust bathing areas would have been
19 compulsory for all birds.²³ Due to the loss of these and other OLPP improvements, birds raised
20 within the organic program must continue to endure the discomforts currently allowed by the
21 program, and natural behaviors such as these can be denied with impunity.
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26 ²¹ *Id.* at 7091.

27 ²² *Id.*

28 ²³ *Id.*

1 **iii. Freedom from Pain, Injury, or Disease**

2 The OLPP Rule, had it been put into force by USDA, would also have included meaningful
3 improvements to alleviate pain, injury, and disease to which animals are sometimes subjected
4 under current regulations.
5

6 For example, physical alterations to the animals at issue which are currently permitted
7 within the organic program would have been severely restricted or, in many cases, banned
8 outright. Under the Rule, it would have been specified that physical alterations could “only be
9 performed for an animal’s welfare, identification, or safety.”²⁴ Harmful alterations such as de-
10 beaking, de-snooding, caponization, toe clipping of chickens, and tail docking of cattle would
11 have been strictly prohibited, assuring consumers that such procedures were not performed on
12 any animals raised within the organic program.²⁵ The Rule also made clear that organic
13 producers cannot withhold medical treatment from animals in an effort to preserve the
14 animals’ organic status. Rather, the Rule required producers to administer pain relief to
15 animals as needed—even if this necessitated using medications not generally allowed in organic
16 production.²⁶
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25 ²⁴ *Id.* at 7050.

26 ²⁵ *Id.*; see also Edge Research, *Research on Consumer Perceptions of Organic Food Standards for*
27 *Treatment of Animals* (April 2014), available at
https://www.aspca.org/sites/default/files/aspca-2014_organic_survey.pdf (affirming that 49%

28 ²⁶ OLPP Rule, 82 Fed. Reg. 7042, 7050 (Jan. 19, 2017).

1 Through these regulatory changes, the welfare of animals within the organic program
2 would have been meaningfully improved, and the USDA Organic label would have more-closely
3 represented the standards consumers expect.
4

5 **iv. Freedom from Fear and Distress**

6 Current regulations do not include any meaningful standards relating to transport of
7 animals within the organic program. This is a glaring omission, given that animal transport is an
8 extremely unnatural occurrence which can cause high levels of fear and distress.²⁷ The OLPP
9 Rule was set to introduce the first-ever federal requirements for establishing fitness to travel
10 for farm animals, and set key standards relating to length of travel, ventilation, and bedding.
11 Each of these regulations would have had a direct impact on animal well-being. Unfortunately,
12 due to USDA’s withdrawal of the Rule, these improvements will not come to fruition.
13
14

15 The OLPP Rule set “minimum fitness requirements for livestock to be transported”
16 which would have applied in instances of transport to buyers, auction facilities, or slaughter
17 facilities.²⁸ Specifically, calves would be required to have a dry navel cord prior to transport,
18 and would need to be able to stand and walk without assistance.²⁹ Under the new provisions,
19 transport of non-ambulatory animals would have been expressly prohibited.³⁰ Further, trailers,
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23 ²⁷ See, e.g., Food and Agriculture Organization of the United Nations, *Guidelines for Humane*
24 *Handling, Transport and Slaughter of Livestock*, 33-34 (2001), available at
25 <http://www.fao.org/3/a-x6909e.pdf> (“Transport of livestock is undoubtedly the most stressful
26 and injurious stage in the chain of operations between farm and slaughterhouse and . . . can
27 have serious deleterious effects on the welfare of livestock . . .”).

28 ²⁸ OLPP Rule, 82 Fed. Reg. 7042, 7075 (Jan. 19, 2017).

29 ²⁹ *Id.*

30 ³⁰ *Id.*

1 trucks, or shipping containers used for transportation of organic livestock would have been
2 required to include “seasonal-appropriate ventilation to protect animals against cold or heat
3 stress,” and bedding for livestock would have been required to keep the animals clean, dry, and
4 comfortable.³¹ For any travel exceeding twelve hours, the Rule would have mandated that
5 animals be provided with organic feed and clean water, as was recommended by the NOSB,
6 because the USDA’s Agricultural Marketing Service had determined such provisions to be
7 “reasonable and humane.”³² The Rule would have also required transporters to put emergency
8 plans in place to adequately address problems that may arise during transport.³³

11 Unfortunately, as “reasonable and humane” as these improvements were, none of them
12 will now come to pass due to the USDA’s arbitrary and capricious decision to discard the
13 carefully curated OLPP Rule.

15 **c. Consumers Expect USDA Organic Products to Meet Higher Animal Welfare Standards**

16 Americans care deeply about the welfare of animals raised for food, and
17 overwhelmingly believe that the welfare standards represented by the USDA Organic label are
18 stronger than they actually are. Organic consumers trust the presence of the USDA Organic
19 seal guarantees humane treatment of farm animals, but this expectation differs significantly
20 from the realities of the program. The OLPP Rule represented a meaningful stride towards
21 ensuring that consumer expectations match the standards required by the USDA, but the
22 agency’s withdrawal of the rule has eviscerated this progress.

26 ³¹ *Id.*

27 ³² *Id.* at 7075-7076.

28 ³³ *Id.* at 7075

1 **i. Consumers Expect Greater Welfare Protections Than Current Organic Regulations**
 2 **Provide**

3 In a 2014 survey commissioned by the ASPCA, 68% of organic consumers indicated belief
 4 that “[a]ll animals have access to outdoor pasture and fresh air throughout the day,” however
 5 current regulations do not provide any such guarantee.³⁴ Additionally, 67% of organic consumers
 6 expressed confidence that animals raised within the organic program “have significantly more
 7 space to move than on non-organic farms,” but in reality the current USDA Organic standards do
 8 not require a numerically expressed minimum amount of space per animals.³⁵ Further, a startling
 9 94% of organic consumers believe use of the USDA Organic seal *should* require that animals be
 10 given access to open pasture, and 93% believe they should be given access to natural ground, not
 11 concrete.³⁶ Once again, expectations fail to match reality here, as neither is currently required
 12 for all species under existing USDA Organic regulations. A 2017 Consumer Reports survey further
 13 exemplifies these unmet expectations, showing that 86% of organic consumers felt it was highly
 14 (“extremely” or “very”) important that animals used to produce organic food are raised on farms
 15 with animal welfare standards, and 83% of organic consumers felt it highly important for organic
 16 egg-laying hens to be able to go outdoors and move freely outside.³⁷ Affirming this public
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21 _____
 22 ³⁴ See Edge Research, *Research on Consumer Perceptions of Organic Food Standards for*
 23 *Treatment of Animals* (April 2014), available at
 24 https://www.asPCA.org/sites/default/files/asPCA-2014_organic_survey.pdf.

25 ³⁵ *Id.*

26 ³⁶ *Id.*

27 ³⁷ See Consumer Reports, *Consumer Reports Survey Finds Consumers think it’s Important to*
 28 *Have High Animal Welfare Standards for Food Labeled Organic* (April 20, 2017), available at
<https://www.consumerreports.org/media-room/press-releases/2017/04/consumer-reports-survey-finds-consumers-thin-its-important-to-have-high-animal-welfare-standards-for-food-labeled-organic/>.

1 perception, the Hartman Group’s Organic and Beyond 2020 report purports to have found “78
2 [percent] of consumers believe there should be more stringent animal welfare requirements for
3 the USDA organic certification.”³⁸
4

5 **ii. The OLPP Rule Would Have More Closely Aligned Organic Standards With**
6 **Consumer Expectations**

7 Existing organic regulations fall far short of meeting these clearly expressed consumer
8 expectations. The OLPP Rule was designed to bridge this chasm and instill consumer confidence
9 in the USDA Organic program. As was further described in Section b, *supra*, the rule was poised
10 to achieve this by, amongst other things, defining the outdoor access which animals raised within
11 the organic program must be provided, and clarifying that the use of enclosed “porches” with
12 roofs and solid floors do *not* satisfy this requirement. The OLPP Rule would also have established
13 requirements for ground composition in outdoor areas, space requirements, and provision of
14 shade – all of which would have represented meaningful guidance to producers on how to
15 structure their operations in compliance with organic standards, and would have come closer to
16 meeting the expectations held by organic consumers.
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19 **iii. By Withdrawing the OLPP Rule, USDA Has Failed To Achieve Its Stated Goal of**
20 **Maintaining Consumer Confidence in the USDA Organic Label**

21 The USDA’s Agricultural Marketing Service asserted that the OLPP Rule was intended to
22 maintain consumer confidence in the USDA organic seal, recognizing that strong and meaningful
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26 ³⁸ Elizabeth Crawford, *Hartman Group” Organic ‘is still meaningful, but . . . doesn’t symbolize*
27 *everything’ consumers want*, FOOD navigator-usa.com (June 11, 2020), available at
28 <https://www.foodnavigator-usa.com/Article/2020/06/11/Hartman-Group-Organic-is-still-meaningful-but-doesn-t-symbolize-everything-consumers-want#>.

1 standards must be developed to achieve this aim.³⁹ Such rulemaking was deemed necessary to
2 fulfill a chief aim of the Organic Foods Production Act (“OFPA”), namely to “assure consumers
3 that organically-produced products meet a consistent and uniform standard.”⁴⁰ As exemplified
4 by the organic consumer surveys discussed above, consumers expect products bearing the USDA
5 Organic label to be sourced from animals that were raised under higher welfare standards, such
6 as those which would have been realized through implementation of the OLPP Rule.
7

8
9 By withdrawing the OLPP Rule, USDA has ignored its mandate under OFPA, and put the
10 USDA Organic program in peril by refusing to meet the high expectations consumers have for
11 organic products. This decision was a marked departure from the emphasis USDA had previously
12 placed upon the need for implementation of robust organic standards, lacked legitimate
13 justification, and should therefore be adjudged arbitrary and capricious.
14

15 **d. Organic Farmers Support Higher Animal Welfare Standards, and Suffer Adverse**
16 **Impacts Due to Withdrawal of the OLPP Rule**

17 Organic farmers themselves have also supported implementation of the OLPP Rule,
18 noting that the changes included within would instill greater consumer confidence in the USDA
19 Organic label, thereby increasing market stability and allowing producers to expand their
20 operations.
21

22 On April 28, 2017, 334 certified organic producers, representing approximately \$1.95
23 billion in annual organic sales, wrote to Secretary Perdue expressing support for the OLPP Rule.
24 Within that letter, the producers noted that the rule “represents over a decade of discussion,
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27 ³⁹ OLPP Rule, 82 Fed. Reg. 7042, 7082 (Jan. 19, 2017).

28 ⁴⁰ *Id.*

1 feedback and support from our industry and ensures that we operate on a level playing field
2 and meet a consistent standard, regardless of our operation size.”⁴¹ As noted by the farmers,
3 “[c]onsumer demand for our [organic] products still outpaces domestic production, creating
4 opportunities for continued expansion of our farms . . . [and] our very survival is dependent
5 upon the trust that we have built with the American consumer.”⁴²

7 The USDA’s Agricultural Marketing Service shared the view expressed by these organic
8 producers, noting in its January 18, 2017 webinar that the clear regulations included in the
9 OLPP Rule would “provide[] opportunities for organic egg producers to expand operations and
10 new, pasture-based operations to enter the organic market [by providing for] fair competition
11 with consistent standards for organic poultry production.”⁴³ In the absence of the OLPP Rule,
12 organic farmers operating at higher welfare standards are left at a distinct disadvantage as
13 compared to other producers who take advantage of the USDA Organic label despite failure to
14 utilize welfare-based practices that organic consumers expect and deserve.⁴⁴

19
20 ⁴¹ Holcroft Farm, et al., *Letter from Certified Organic Producers to Secretary Perdue* (April 28,
21 2017), available at
22 [https://ota.com/sites/default/files/indexed_files/Organic%20Livestock%20and%20Poultry%20P
roducer%20Letter.pdf](https://ota.com/sites/default/files/indexed_files/Organic%20Livestock%20and%20Poultry%20Producer%20Letter.pdf).

23 ⁴² *Id.*

24 ⁴³ USDA Agricultural Marketing Service, *Organic Livestock and Poultry Practices Final Rule
webinar* - slide 43, p.62 (Jan. 18, 2017), available at
25 <https://www.ams.usda.gov/sites/default/files/media/OLPPWebinarSlidesScript.pdf>

26 ⁴⁴ See Dr. Devrim Ikizler, *Economic Analysis of OLPP RIAs: Comments on AMS’ Organic Livestock
and Poultry Practices Economic Analysis Report* (May 26, 2020) at p. 12, ¶31 (“In the absence of
27 OLPP rule [sic], small businesses would be unable to collect the rewards of their investments . . .
28 and large producers will continue to benefit from their ability to sell their products using the
same ‘organic label’ as the small producers, who actually invested in production facilities that
allow them to provide enhanced welfare to farm animals.”). OLPP_REMAND_00000057.

1 Both the organic producers themselves and the USDA recognized that the OLPP Rule
2 would create consistent standards which would improve animal welfare, match consumer
3 expectations, and create a level playing field for all organic producers regardless of the size of
4 their operation. The USDA withdrew this rule despite a chorus of support from the NOSB,
5 industry, consumer groups, and animal welfare groups; despite its own history of regulating
6 animal welfare; and despite the improvements that the rule was set to bring for consumers, as
7 well as animals and the producers who raise them. The USDA's withdrawal of the OLPP Rule is
8 arbitrary and capricious. As such, amicus respectfully requests that Plaintiffs' Motion for
9 Summary Judgment be granted, and that the OLPP Rule be reinstated.
10
11

12 Respectfully submitted this 28th day of September 2021, by
13
14

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Counsel for Amicus Curiae

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ORGANIC COALITION,)
CENTER FOR ENVIRONMENTAL HEALTH,)
CENTER FOR FOOD SAFETY,)
CULTIVATE OREGON,)
INTERNATIONAL CENTER FOR)
TECHNOLOGY ASSESSMENT,)
ANIMAL LEGAL DEFENSE FUND, AND)
HUMANE SOCIETY OF THE UNITED STATES;)

CASE NO. 3:18-CV-01763-RS

**[PROPOSED] ORDER GRANTING MOTION
FOR LEAVE TO FILE AMICUS BRIEF**

Hon. Richard Seeborg

Plaintiffs,

v.

SONNY PERDUE, in his official capacity)
as the Secretary of Agriculture,)
BRUCE SUMMERS, in his official capacity)
as Acting Administrator of Agriculture)
Marketing Service,)
JENNIFER TUCKER, PH.D., in her official)
Capacity as Deputy Administrator of the)
National Organic Program, and the)
UNITED STATES DEPARTMENT OF)
AGRICULTURE)

Defendants.

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[PROPOSED] ORDER

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2 Upon consideration of the Unopposed Motion for Leave to File *Amicus* Brief (“Motion”)
3 of the American Society for the Prevention of Cruelty to Animals (ASPCA, it is hereby ORDERED
4 that ASPCA’s Motion is GRANTED.
5

6 It is further ORDERED that the *Amicus Curiae* brief attached as Exhibit A to ASPCA’s
7 Motion is deemed filed upon entry of this Order.
8

9
10 Entered this _____ day of _____, 2021
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14 _____
15 Hon. Richard Seeborg
16 U.S. District Court Judge
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