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REQUEST FOR ORAL ARGUMENT

Massachusetts Independent Certification, Inc., joins the request for oral argument entered by Secretary Johanns.

INTRODUCTION

Defendant, Michael O. Johanns, Secretary of the United States Department of Agriculture (“Secretary” or “USDA”) moved to dismiss the complaint filed by Massachusetts Independent Certification, Inc. (“MICI”). The overarching question presented by USDA’s motion to dismiss is whether an accredited certifying agent within the National Organic Program (“NOP”) may be denied the right to an administrative appeal from USDA decisions.

MICI is an accredited certifying agent under the Organic Foods Production Act of 1990 (“OFPA” or “the Act”), 7 U.S.C. §§ 6501-6523. Am. Compl. ¶¶ 4-7. MICI’s mission is to provide affordable certification services to farm and food processing operations that seek to market organically labeled products. *Id.* ¶ 4. MICI determines whether applicants for organic certification achieve the national organic standard established under OFPA, and MICI makes decisions to approve or disapprove applications for organic certification on an ongoing basis. *Id.* ¶ 7. MICI competes with other certifiers for the fees it receives for performing these certification services, and OFPA’s implementing regulations require MICI’s name be placed on the label of any “100% organic,” “organic,” or “made with organic [ingredients]” product MICI certifies. *Id.* ¶¶ 85-86.

In this action, MICI asserts that USDA is unlawfully denying MICI administrative appeal rights as required under both OFPA and the United States Constitution. USDA’s appeal regulations deny MICI administrative review of agency actions that adversely affect it, and that are inconsistent with OFPA and its implementing regulations, despite the Act’s explicit mandate to provide such a remedy. *Compare* 7 C.F.R. § 205.681 *with* 7 U.S.C. § 6520. MICI seeks

declaratory and injunctive relief from the Secretary's adoption and continued enforcement of these unlawful appeal regulations.

STATUTORY AND REGULATORY BACKGROUND

Congress passed OFPA to (1) establish consistent national standards for the marketing of agricultural products as "organic," (2) ensure consumer confidence in the consistency of organically labeled foods, and (3) facilitate an interstate market in organically produced food. 7 U.S.C. § 6501. In order to achieve these goals, Congress specifically elected to preserve the existing network of private and state certification programs, allowing independent third parties to continue to act as certification agents. *E.g., id.* § 6514; *see also* National Organic Program Final Rule, Appendix A, 65 Fed. Reg. 80548, 80663-64 (Dec. 13, 2000). Pursuant to OFPA, these private certifiers form the cornerstone of the newly regulated organic marketplace and provide consumers with assurance that organic products adhere to the national organic standards. *See, e.g., Harvey v. Veneman*, 396 F.3d 28, 37, 38 & n. 1 (discussing certifying agents' "extensive" and "crucial" role under OFPA).

OFPA requires the Secretary to accredit private persons and governing state officials to provide third-party certification services. 7 U.S.C. § 6503(d) (requiring Secretary to implement program "through certifying agents"); § 6514 (requiring accreditation program); § 6502(3)-(5) (defining terms). These accredited certifying agents are then responsible for certifying farms and handling operations that meet the requirements of the Act and the NOP regulations. *Id.* § 6513(a) (requiring applicants to submit organic plans to certifying agents and explaining "certifying agent . . . shall determine if such plan meets the requirements of the programs"); § 6515 (outlining "requirements of certifying agents").

Certifying agents under NOP charge applicants fees for certification services. 7 C.F.R. § 205.642. There is no restriction under OFPA or NOP on the number of certifiers in a given

location, which permits competition among certifiers for “customers” of their certification services. Only operations that wish to sell, label, or represent their products as “100 percent organic,” “organic,” or “made with organic [ingredients]” must be certified. Packaged products labeled “100 percent organic” or “organic” must identify on the package the name of the certifying agent that certified the handler of the finished product. *Id.* § 205.303.

OFPA mandates that USDA provide an expedited administrative appeals process in which a person may challenge organic program decisions that are adverse to that person or are inconsistent with the national organic certification program. 7 U.S.C. § 6520 provides:

(a) Expedited appeals procedure. The Secretary shall establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that—

(1) adversely affects such person; or

(2) is inconsistent with the organic certification program established under this title.

(b) Appeal of final decision. A final decision of the Secretary under subsection (a) may be appealed to the United States district court for the district in which such person is located.

The appeal regulations, 7 C.F.R. § 205.681(a), however, provide in pertinent part:

(a) Certification appeals. An applicant for certification may appeal a certifying agent’s notice of denial of certification, and a certified operation may appeal a certifying agent’s notification of proposed suspension or revocation of certification to the Administrator, Except, That, when the applicant or certified operation is subject to an approved State organic program the appeal must be made to the State organic program which will carry out the appeal pursuant to the State organic program’s appeal procedures approved by the Secretary.

(1) If the Administrator or State organic program sustains a certification applicant’s or certified operation’s appeal of a certifying agent’s decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.

(2) If the Administrator or State organic program denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke

the certification. Such proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice or the State organic program's rules of procedure.

The regulations separately provide for appeals of USDA actions that would deny, suspend, or revoke a certifying agent's accreditation. 7 C.F.R. § 205.681(b).

In October of 2002, MICI began challenging the legality of the NOP appeal regulations. As explained in detail in MICI's First Amended Complaint, *see* Am. Compl. ¶¶ 40-90, after USDA reversed MICI's decision to deny organic certification to a farming operation that MICI had determined did not meet the organic standards, MICI filed an administrative complaint attempting to exercise its appeal rights under § 6520(a). *Id.* ¶¶ 76-80. MICI alleged that USDA's *ex parte* reversal of MICI's denial of certification (1) was adverse to MICI, because MICI's name was placed on the label of products MICI had determined were not organic, and (2) was inconsistent with the NOP standards. Despite MICI's specific request that USDA hear MICI's appeal pursuant to the mandates of OFPA and the Constitution, the Secretary refused to provide MICI the process due. *See id.* ¶ 79.

SUMMARY OF ARGUMENT

MICI has standing to bring this action based on its ongoing economic interest in (1) the integrity of its own organic certification decisions, due to the effect of these decisions upon its business reputation, good will, and consequent ability to attract clients, and (2) the integrity of organic certification decisions generally, due to the importance of consumers' confidence in the reliability of the organic label for the continued existence and growth of the organic marketplace, upon which MICI's revenue depends. These interests are squarely within the zone of interests of OFPA, and MICI's stake in this litigation is sufficiently private and personal to warrant prudential standing.

MICI has stated valid claims on which relief can and should be granted. USDA's promulgation and enforcement of the challenged appeal regulations are illegal under both the plain language of OFPA and the Due Process Clause of the United States Constitution. USDA's implementing regulations also purport to expand USDA's authority in excess of what was granted to it by Congress, and violate MICI's First Amendment Right to freedom from compelled speech and association. Thus, this court should hold that MICI has standing to pursue this action, and deny USDA's motion to dismiss in its entirety.

I. THE DISPUTE BETWEEN MICI AND USDA SATISFIES ARTICLE III REQUIREMENTS OF A "CASE" OR "CONTROVERSY"

The exercise of the judicial power under Article III of the United States Constitution is limited to "Cases" and "Controversies." The doctrine of standing, at its core, serves to identify those disputes that are "appropriately resolved through the judicial process." *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citation omitted). MICI's dispute with USDA satisfies the requirements of Article III and is appropriate for resolution in the courts.

The classic test for Article III standing is comprised of three elements. The plaintiff must demonstrate (1) that it has suffered "injury in fact" which is both "concrete and particularized" and "actual or imminent," (2) that the injury is fairly traceable to the challenged action of the defendant, and (3) that the injury is likely to be redressed by a favorable decision. *Id.* However, "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 572 n.7. Thus, "[v]iolations of procedural rights...receive 'special' treatment when it comes to standing." *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1281 n.10 (1st Cir. 1996). In order for violation of a procedural right to be sufficient for standing, a plaintiff must show that

“the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.” *Lujan v. Defenders*, 504 U.S. at 573 n.8.

“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss, [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.” *Id.* at 561 (internal citation omitted). The court may draw reasonable inferences from the plaintiff’s allegations. *Dubois*, 102 F.3d at 1282-83.

A. MICI Suffers Injury In Fact

The procedural injury alleged by MICI is the adoption and enforcement of regulations which not only fail to provide for, but actively prohibit, exercise of appeal rights guaranteed under OFPA and the Constitution. Am. Compl. ¶ 90. The procedural rights provided in 7 U.S.C. § 6520 are designed to protect MICI’s concrete interest in organic certification decisions that are consistent with the NOP standards.¹ Ensuring consistency with the national standards is a purpose of OFPA generally, 7 U.S.C. § 6501(2), and the required administrative appeals procedure specifically, *id.* § 6520(a)(2).

The injury suffered by MICI as a result of the denial of its procedural rights is “concrete and particularized.” *See Lujan v. Defenders*, 504 U.S. at 560. MICI’s injury is particular to its status as an accredited certifying agent. Am. Compl. ¶ 7. A commitment to maintain the integrity of its

¹ 7 U.S.C. § 6520 provides:

(a) Expedited appeals procedure. The Secretary shall establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that—

- (1) adversely affects such person; or
- (2) is inconsistent with the organic certification program established under this title.

(b) Appeal of final decision. A final decision of the Secretary under subsection (a) may be appealed to the United States district court for the district in which such person is located.

own organic certification decisions, and of the organic program generally, is of vital interest to MICI and is inherent in its mission as an organic certifier. *Id.* ¶ 81. The challenged regulation specifically denies appeal rights to accredited certifying agents whose denials of certification applications are overturned by USDA. 7 C.F.R. § 205.681(a)(1). Under the regulation, MICI has no recourse when it believes that USDA’s decision is inconsistent with the organic certification program established under OFPA, despite (1) MICI’s concrete interest in the integrity of organic certification decisions, and (2) the requirement that MICI’s name must appear on packaged products it is directed to certify as “organic” or “100% organic.” USDA’s denial of review deprives MICI of any opportunity to participate in efforts to ensure that its organic certification decisions are consistent with the law. Am. Compl. ¶ 90.

As a certifying agent, MICI has the requisite expertise in organic farming and handling to help ensure that certification decisions are consistent with the law. *Id.* ¶ 89. MICI also has firsthand knowledge of the compliance or noncompliance of the operations it investigates and reviews for organic certification. *Id.* Yet the denial of appeal rights deprives MICI of the opportunity to bring its expertise to bear, even though its private decisions regarding organic certification of products labeled “organic” or “100% organic” cannot be “uncoupled” from USDA appeals decisions regarding use of the USDA Organic seal.²

MICI also has a personal stake in the integrity of organic certification decisions generally, due to the importance of consumer confidence in third-party certification to the continued existence and growth of the organic marketplace upon which MICI depends for much of its

² In *Harvey*, 396 F.3d at 37-38, the First Circuit held that private certification regarding use of organic ingredients in the “third tier” of organic products can be “uncoupled” from USDA certification. MICI has no such ability to “uncouple” its private decisions regarding certification of products in the first two tiers (“100% organic” and “organic”) because it must be identified on packaged products bearing the USDA Organic seal.

income. *Id.* ¶ 88. The success of the National Organic Program and of the “USDA Organic” seal depends upon consumer confidence in third-party organic certification as a means of ensuring that products so labeled have been produced in a manner consistent with organic standards. *Id.* ¶ 82. Consumers pay a price premium when they purchase certified organic foods. *Id.* ¶ 83. This price premium is one factor that motivates producers and handlers to seek organic certification. *Id.* ¶ 84.

MICI’s interest in organic farming and handling is inextricably linked with its own economic interests. MICI’s organic certification decisions are publicly disseminated via the required identification of the certifier upon the labels of packaged organic products. If MICI is perceived as granting organic certification to producers and handlers that do not meet the standards, MICI reasonably fears that producers and handlers may choose to enlist the services of other certifiers. Accredited certifying agents compete with other accredited certifying agents for clients, based upon reputation, price, location, expertise with organic crops, livestock, or food handling, educational offerings, and quality of service. *Id.* ¶ 86. “Reasonable concerns” about economic harms may be taken into account in the standing inquiry. *Friends of the Earth v. Laidlaw Env’tl. Servs., Inc.*, 528 U.S. 167, 183-84 (2000); *see also Clinton v. City of New York*, 524 U.S. 417, 432-433 (1998); *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993). Harm to reputation may also confer standing. *Meese v. Keene*, 481 U.S. 465, 473-475 (1987).

If the NOP is perceived as arbitrarily granting organic certification to producers and handlers who do not meet the standards, MICI reasonably fears that consumers will be less willing to pay a premium for organic food, and the demand for organic certification services will diminish. MICI has interest in the process of placing its name on a certified product, and in ensuring that both USDA certification, as well as its own private certification continue to “tend

to increase consumer confidence and to facilitate interstate commerce in organic products, furthering two of OFPA's three goals." *Harvey v. Veneman*, 696 F.3d 28, 38 (1st Cir. 2005).

MICI alleges both that its procedural rights have been violated and that the violation of the right has resulted in the invasion of its concrete interests. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996). It is difficult to contest that a failure to provide appeal rights harms the integrity of decisions. As the United States Supreme Court has noted in the context of cases involving procedural due process rights of government employees, some opportunity for a party opposing the government to present its side "is recurringly of obvious value in reaching an accurate decision" and "will provide a meaningful hedge against erroneous action." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 & n.8 (1985) (internal citations omitted). Thus, the injury suffered by MICI goes to the heart of the integrity of the organic certification decisions it is charged with making and implementing, and which are the *raison d'être* of OFPA.

The injury suffered by MICI satisfies the relaxed standard of imminence required to show standing in cases alleging procedural injury. MICI must show that "the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *Fla. Audubon Soc'y*, 94 F.3d at 665. USDA review of certifier decisions, without an opportunity for certifiers to appeal, creates a "distinct risk" that erroneous organic certification decisions will be made, and attributed to certifying agents who do not support them. It has happened to MICI already.

The cases cited by USDA in its motion to dismiss to suggest that the harm in this case is speculative are inapposite. Those cases involved claims grounded in the belief that the government would continue to engage in activities that had already been found illegal. In the

instant case, USDA continues to defend the legality of 7 C.F.R. § 205.681(a)(1). *See* Mem. of Law in Supp. of Def.’ Mot. to Dismiss.

The harm is imminent. MICI continues to act as an accredited certifying agent, and its organic certification activities are ongoing. Am. Compl. ¶ 7. As a certifying agent, MICI continues to grant and deny applications for organic certification. *Id.* ¶¶ 99, 109, 115, 122-24. No speculation is required to conclude that if USDA disagrees with a denial of certification issued by MICI, it will overrule MICI and deny appeal rights to MICI in accordance with 7 C.F.R. § 205.681(a)(1). This is precisely what happened in the case of *The Country Hen*.³ Am. Compl. ¶¶ 78, 80; Def.’ Ex. B, C.

B. MICI’s Injury Is Caused by Defendant’s Action

USDA raises no objection to MICI’s standing on the grounds of causation. USDA promulgated the challenged regulations which deny certifiers any right to participate when USDA reviews their decisions. These regulations cause MICI procedural injury.

C. MICI’s Injury Would Be Redressed by a Favorable Decision

Declaratory relief and an injunction against the prohibition on MICI’s participation in USDA review of its decisions would provide redress for the threatened injuries alleged by MICI. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 108 (1998). The relief sought by MICI would ensure that, in the future, MICI would not be denied the opportunity to participate in USDA’s review of appeals filed by applicants for organic certification after receipt of a denial of certification from MICI.

This is sufficient to establish standing with respect to the procedural harm caused by USDA’s deficient organic certification appeals procedure. In order to demonstrate standing,

³ Of course, MICI’s Complaint was not, and its First Amended Complaint is not, limited to the single incident involving the *The Country Hen*.

MICI need not establish with any certainty that its participation would result in USDA's upholding its denial of organic certification in a given case. *See, e.g., Lujan v. Defenders*, 504 U.S. at 572 n.7.

II. THE DISPUTE BETWEEN MICI AND USDA SATISFIES PRUDENTIAL STANDING REQUIREMENTS

MICI has standing to seek judicial review of USDA's administrative appeal regulations and their impact on the role of private certifiers in the National Organic Program. MICI also has standing to challenge USDA's continued enforcement of these regulations. MICI's right of action derives from both the judicial review provision of OFPA, 7 U.S.C. § 6520(b), and the Administrative Procedure Act (APA), 5 U.S.C. § 702.

A. OFPA and APA Make Broad Judicial Review Available To MICI

In 7 U.S.C. § 6520(a), Congress requires the Secretary to provide an expedited administrative appeals process for persons from either adverse or inconsistent decisions under the program. In § 6520(b), Congress further provides that “[a] final decision of the Secretary under subsection (a) may be appealed to the United States district court for the district in which such person is located.”

MICI sought to exercise its appeal rights under 7 U.S.C. § 6520(a) to challenge administratively a USDA decision MICI alleged had an adverse effect on MICI and was inconsistent with the organic program. *Am. Compl.* ¶¶ 76-80. MICI also challenged outright USDA's appeal regulation that purports to preclude review. *See* 7 C.F.R. § 205.681(a). USDA denied review and continues to enforce its interpretation of § 6520(a) in its appeal regulation. Thus, this court's review is expressly authorized under 7 U.S.C. § 6520(b). *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998) (assuming independent cause of action under statutory provision very similar to 7 U.S.C. § 6520).

In addition, any aspect of this appeal that does not fall within 7 U.S.C. § 6520(b)'s sweeping judicial review authorization is still properly before this court pursuant to APA.⁴ The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. MICI is a person adversely affected within the meaning of the APA and therefore entitled to review.

B. MICI Has Prudential Standing Under Both OFPA and APA

Traditional prudential standing requirements are “judicially self-imposed limits on the exercise of federal jurisdiction...founded in concern about the proper—and properly limited—role of the courts in a democratic society.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (internal citations omitted). Among these prudential limits is the requirement that the plaintiff’s grievance arguably fall within the zone of interests protected or regulated by the statutory provision at issue, *id.*, and the doctrine that a plaintiff must have a sufficiently personal stake in the outcome of the litigation to ensure vigorous presentation of the issues. *See generally Warth v. Seldin*, 422 U.S. 490, 500-01 (1975).

In this case, denying MICI the procedural right guaranteed by 7 U.S.C. § 6520(a) is in direct violation of a congressional mandate and also violates MICI’s personal interest in having appeal rights in order to ensure consumer confidence in the organic label, and consequently an active market in organic products; these injuries are squarely within the zone of interests of OFPA. MICI is an independent, private non-profit, and MICI maintains this status despite USDA’s regulation of its business activities. MICI’s interests are truly adverse to USDA in this action,

⁴ The APA authorizes review only when “there is no other adequate remedy in a court.” 5 U.S.C. § 704.

and MICI has a significant personal investment in the outcome of this controversy. There is simply no principle of judicial self-restraint that should bar this action.

1. MICI's Grievances are Directly in "Zone of Interests" of OFPA

To satisfy the prudential "zone of interest" test, a plaintiff's interest in the litigation must be "arguably within the zone of interests to be protected or regulated by the statute...in question."⁵ *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). To apply this test, courts first discern the interests "arguably...to be protected or regulated by the statute, and then determine whether plaintiff's interests arguably fall within that same zone of interests."⁶ *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). Only a party claiming an interest that is "marginally related to or inconsistent with the purposes implicit in the statute" should be precluded from judicial review under this test.⁷ *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).

As outlined above, MICI's injury is a personal, economic one. However, despite USDA's argument to the contrary, the Supreme Court has specifically instructed that this court "should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." *Nat'l*

⁵ "The relevant statute, of course, is the statute whose violation is the gravamen of the complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990).

⁶ Again, the main purposes of OFPA include (1) establishing national standards governing the marketing of organic products; (2) assuring consumers that organically produced products meet a consistent standard; and (3) facilitating interstate commerce in organically produced food. 7 U.S.C. § 6501.

⁷ MICI asserts here that it easily falls within the "zone of interest" test as applied by the Supreme Court in its APA cases. However, MICI notes that the Court has held that a broad citizen suit provision can serve to "negate" the traditional zone of interest test and thereby require the court to give effect to congressional intent to provide expansive judicial review by requiring only Article III standing. *Bennett*, 520 U.S. at 164-65 (interpreting citizen suit provision of Endangered Species Act to provide broader judicial review than APA). In this case, the provision in OFPA at § 6520(b) is also notably broad and may compel still more flexible interpretation of the "zone of interest" test.

Credit Union Admin., 522 U.S. at 489. Thus, the test for standing is not whether private certifiers were the intended beneficiaries of OFPA. *See id.* Indeed the Court has decided several cases in which unregulated entities have had standing to challenge agency interpretations of statutes not even applicable to them. *E.g.*, *Ass’n of Data Processing*, 397 U.S. at 157 (data processing businesses challenge whether private banks can perform data processing under National Bank Act); *Nat’l Credit Union*, 522 U.S. at 492-93 (private banks challenge scope of credit unions’ membership restrictions under Federal Credit Union Act). Although none of the plaintiffs in those cases were parties to the administrative actions at issue, or even regulated by the statute in question, the Court found standing for both groups.⁸

Here, MICI’s interests are not nearly so remote. MICI and other private certifiers are both regulated and protected by OFPA. A challenge to the nature of these certifiers’ role in this program is squarely within the zone of interests “protected or regulated” by OFPA. *See Ass’n of Data Processing*, 397 U.S. at 153. Certifiers’ continued participation is essential to the maintenance of a viable organic program. Moreover, MICI’s personal economic interest in the opportunity to preserve both the integrity and good will associated with its own name—which USDA requires it to use on organic products MICI certifies—and the integrity of the USDA organic label itself— which MICI requires for the continued viability of its organic certification business—falls well within the overall purposes of OFPA. Thus, MICI’s interests are directly in line with OFPA’s purposes.

The First Circuit in *Harvey*, 696 F.3d at 38, recognized as much, explaining that the practice of placing a certifier’s name on a product that is made with organic ingredients “allows the

⁸ These cases also refute USDA’s attempt to analogize MICI to hypothetical “court reporters” mentioned in *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. at 883. That language in *Lujan* was entirely dicta, and it is also contrary to the Supreme Court’s subsequent opinion in *National Credit Union*.

Secretary to identify and track certifiers on a product-by-product basis, creates consumer confidence that the specified ingredients are indeed organic, and provides the name of the certifier, which may be useful to some consumers.” The *Harvey* court further concluded that use of private certifiers’ seals “will tend to increase consumer confidence and to facilitate interstate commerce in organic products, furthering two of OFPA’s three goals.” *Id.* Therefore, MICI satisfies the zone of interest test.

2. MICI is a Person Adversely Affected and Aggrieved Under Both OFPA and APA

MICI is a private organization suing to protect its private economic interest in the use of its name within the NOP and in the continued viability of the program in general, on which MICI depends for its revenue. Therefore, MICI has a sufficient personal stake in the outcome of this controversy to satisfy prudential standing limitations.

Generally, a federal agency suing in “its regulatory or policy-making capacity” cannot appeal another agency’s decision absent express statutory authorization to the contrary. *See Dir., Office of Workers’ Comp. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-30 (1995). This rule of statutory construction is based on judicial avoidance of “deciding intrabranched and intraagency policy disputes—a role that would be most inappropriate.” *Id.* at 129. In addition, this rule prevents violation of the “long-recognized principle that no person may sue himself.” *United States v. Interstate Commerce Comm’n*, 337 U.S. 426, 430 (1949).

However, none of these issues are relevant here. MICI is neither a “government agency” nor suing in a “governmental capacity.” MICI’s interest in this litigation is personal, not governmental. MICI pursues this litigation to maintain its own good name and the viability of its private certification business. As such, MICI is certainly not an agency suing in a “regulatory or

policy-making capacity.” *See Newport News*, 514 U.S. at 127. Therefore, MICI may sue under both OFPA and APA.

a. MICI is a Private Entity

USDA cites only to a generic Restatement definition of “agency” and asserts that (1) MICI is an agent of the government, and (2) that, as an “agent,” MICI is the equivalent of a government agency. These assertions are problematic for several reasons. First, the Defendant is incorrect in its characterization of MICI as an “agent” of USDA.⁹ Second, even if MICI is an “agent” of USDA for some purposes, USDA cites no case law that an “agent” is the equivalent of a governmental agency within the meaning of *Newport News*.

MICI is an independent non-profit organization in the state of Massachusetts. Both the legislative history and the statutory scheme of OFPA make clear that Congress intended to use private certifiers as an essential aspect of the National Organic Program and preserve their independence from the federal government. *E.g.*, 7 U.S.C. § 6502 (defining “certifying agents” to include “persons (including private entities)”); *see also Harvey*, 396 F.3d at 37-38 (detailing “extensive role” for certifying agents in OFPA and recognizing OFPA does not preclude private certification).

In its explanation of OFPA, the Senate Committee on Agriculture, Nutrition, and Forestry reported that OFPA “reflected the advice” of many members of the then-existing organic industry and “proposed a *partnership* between government and private organizations in standard

⁹ The mere naming of certifiers as “certifying agents” is insufficient to create a principal-agent relationship; instead, the question is a factual one based on the actual nature of the parties’ relationship. *See* Restatement (Second) Agency § 1 cmt. b (“Agency is a legal concept which depends upon the existence of required factual elements . . . [and] does not depend upon the intent of the parties to create it, nor their belief that they have done so”); 3 Am. Jur. 2d *Agency* § 19 (“The manner in which the parties designate their relationship is not controlling.”).

setting and certification.”¹⁰ S. Rep. No. 101-357 at 291 (1990) (emphasis added). This Committee also recognized that OFPA resulted in “a creative use of State and private organic farming programs,” and that the Act “breaks new ground for the Federal government and will require the development of a unique regulatory scheme.” *Id.* at 291, 293. Accordingly, in OFPA, Congress specifically intended “to take advantage of the network of existing entities already engaged in certification.” *Id.* at 294.

Moreover, as enacted, OFPA clearly contemplates that certifiers will continue to have private interests in certification. For example, as a condition of accreditation, certifiers must agree “to hold the Secretary harmless for any failure on the part of the certifying agent to carry out the provisions of this chapter.” 7 U.S.C. § 6515(e). At the very least, such a disavowal of federal responsibility is inconsistent with a principal-agent relationship, and it therefore reaffirms the original intent of Congress that certifiers remain private, independent entities legally responsible for their own actions. The NOP regulations provide partial recognition of certifiers’ private interests, by providing for appeals relating to accreditation. 7 C.F.R. § 205.681(b).

OFPA also provides that certifiers may collect fees for their services and does nothing to grant a monopoly to a particular certifier in a particular state or region. Indeed, the labeling requirements imposed by USDA foster a business competition among private certifiers.

Finally, although USDA claims that MICI is only performing a government function when certifying organic products, OFPA provides for no direct USDA involvement in certification

¹⁰ Part of the advice received from the existing organic industry, as reported by the Senate Committee, cautioned that “[r]ather than reinvent the wheel . . . [OFPA] should take advantage of the network of private organic certification organizations that [already] exist in nearly every State.” S. Rep. No. 101-357 at 291 (1990). In addition, the Senate Committee heard from these organic representatives of “the need to limit severely the Federal Government’s discretionary authority and involvement in this industry since the Government has little experience in this industry.” *Id.*

itself, as USDA concedes. Organic certification is not a traditional government function, and OFPA does not delegate statutory authority for certification to USDA. In fact, the rationale for the use of private certifying agents depends on the fact that USDA has no history or experience inspecting and evaluating farming and processing operations for organic compliance. *See generally* S. Rep. No. 101-357 at 291 (1990). Furthermore, possession of an organic certificate is not an economic necessity for food producers and food handlers to lawfully sell their products.

This case is about MICI's personal—albeit regulated—business interests. MICI has not unknowingly become an agency of the United States. Thus, MICI has standing to bring this case.

b. MICI is Suing in its Private Capacity

Assuming *arguendo* that MICI is an agency, MICI still has standing to bring this action to protect its private business interests. The rule that government entities cannot appeal agency decisions applies only when the government sues “in its regulatory or policy-making capacity.” *Newport News*, 514 U.S. at 128. Thus, in *Newport News* the Supreme Court barred the Director of the Office of Workers' Compensation in the federal Department of Labor from prosecuting a private employee's workers compensation claim, without participation by that private employee, where the Director's only interest in the case was her governmental duty to administer the workers' compensation program. *Id.* at 124-25. However, as the Court in *Newport News* emphasized, “the status of the Government as a statutory beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator.” *Id.* at 128. Only in the latter case is the Government prudentially barred from suit. *Id.*

In contrast, in *Interstate Commerce Comm'n*, 337 U.S. at 430, the Court permitted the United States, in its capacity as the owner of a shipping business, to sue the Interstate Commerce Commission (“ICC”) challenging an ICC order denying the Government's recovery of damages. Importantly, this was true even though the cause of action in *Interstate Commerce Comm'n* arose

under the APA, which expressly excludes “agency” from the definition of “persons adversely affected or aggrieved.” *See Newport News*, 514 U.S. at 128 n.3. This means that even if the action is brought under the APA, or another statute expressly or impliedly purporting to exclude actions brought by an agency of the government, that suit is barred only when the plaintiff is asserting standing based on its regulatory or policy-making interests.¹¹ *See id.*

MICI has alleged injuries to its personal business interests. MICI is itself a market participant in the organic industry, seeking to preserve its competitive advantage and credibility as against other certifiers and with organic consumers. MICI has also alleged it is an intended statutory beneficiary of the appeal rights guaranteed under OFPA § 6520(a). Thus, even assuming MICI is an “agency” within the meaning of the APA, it is not suing in a regulatory or policy-making capacity.

MICI is asserting a private, economic injury within the zone of interests of OFPA. MICI is directly adverse to the USDA here, and MICI has a sufficient personal stake in the outcome of the controversy to ensure vigorous presentation of the issues. Therefore, this action is properly before this court.

¹¹ In this case, USDA also attempts to make a literal argument that MICI is an “agency” within the meaning of the APA and therefore not entitled to sue because it is not a “person” under 5 U.S.C. § 702. *See* 5 U.S.C. § 551(1) (defining agency as “each authority of the Government of the United States”). However, as the Court held in *Interstate Commerce Comm’n*, even under APA’s express exclusion of “agencies” from the “persons” who may bring suit, an agency acting in a personal rather than governmental capacity has standing to sue under the APA. *See Newport News*, 514 U.S. at 128 n.3; *Interstate Commerce Comm’n*, 337 U.S. at 430.

MICI also continues to assert that it is not an “agency” under the APA, and that this action also arises under OFPA, which is notably broader than APA. *E.g.*, 7 U.S.C. § 6502(15) (defining “person” without expressly excluding agencies).

III. THE ORGANIC APPEAL REGULATIONS VIOLATE OFPA’S ADMINISTRATIVE APPEALS REQUIREMENTS

The APA requires reviewing courts to “hold unlawful and set aside” agency actions found to be not in accordance with the law, contrary to the Constitution, or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A)-(C). In this case, the Secretary has provided only limited administrative appeal rights.¹² *See* 7 C.F.R. § 205.681. Because its narrow appeals regulation violates the clear mandate in OFPA that the Secretary provide a broad appeal process for decisions involving the organic certification program, *see* 7 U.S.C. § 6520(a), the Secretary has acted contrary to the law and short of the statutory right guaranteed by OFPA. Therefore, MICI asks this court to hold the USDA’s action unlawful and set it aside.

A. OFPA’s Mandate to Provide Administrative Appeal Rights Is Clear

In reviewing the legality of this regulation, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue.” *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Courts and agencies “are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.” *MCI Telecomm. Corp. v. A T & T Co.*, 512 U.S. 218, 231 n.4 (1994). Thus, Congressional means, as well as purposes, must be honored. *See id.*

“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 843. Therefore, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must

¹² The Secretary has a duty to issue regulations “to carry out” OFPA. 7 U.S.C. § 6521(a); *see also* 7 U.S.C. § 6503(a) (requiring Secretary to implement organic certification program).

be given effect.” *Id.* at 843 n.9. Only when Congress has “left a gap for the agency to fill” do courts defer to an agency’s “reasonable interpretation” of the statute in question. *Id.* at 844-45.

Here, Congress’s intent is clear. Congress specifically mandated that USDA “shall” provide administrative appeal rights from both adverse decisions and decisions inconsistent with the program. 7 U.S.C. § 6520(a). It is an essential canon of statutory construction that statutes should be read so that no clause, sentence, or word is rendered superfluous, void, contradictory, or insignificant. *Richards v. United States*, 369 U.S. 1, 11 (1962); *Bailey v. United States*, 516 U.S. 137, 145-47 (1995). USDA’s appeal regulation—by limiting the adverse decisions that can be appealed to only a narrow class of decisions and by eliminating any of the statutorily required inconsistency appeals mandated by § 6520(a)(2)—does just that. Therefore, this narrow interpretation, making an entire clause of § 6520(a) superfluous, cannot stand.

In addition, OFPA specifically gives the term “person” an expansive definition that must be given effect. *See* 7 U.S.C. § 6502(15). Nothing in OFPA limits the “persons” for whom appeals of certification decisions must be available to only applicants for certification or certified operations. To the contrary, OFPA explicitly mandates broad appeals for any “person” from any adverse or inconsistent action, *see id.* § 6520(a), and then defines “person” expansively to include individuals, groups, corporations, associations, organizations, cooperatives, and “other” entities. *Id.* § 6502(15). The appeal regulation’s provision that only applicants for certification and certified operations qualify as “persons” who can challenge certification decisions therefore violates OFPA’s clear mandate.

Congress’s intent that certifying agents, in particular, be entitled to an administrative appeal is equally clear. OFPA’s expansive definition of “person” is certainly broad enough to include a private non-profit organization such as MICI. *See id.* Furthermore, OFPA’s own definition of

“certifying agent” defines certifiers, in part, as “a person.” *Id.* § 6502(3). Identical words used in the same act are presumed to have the same meaning. *Comm’r of Internal Revenue v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993). Thus, because certifying agents are defined to include “any person” accredited by the Secretary in 7 U.S.C. § 6502(3), the term “person” in 7 U.S.C. § 6520(a) must include those same certifiers. USDA itself implicitly recognizes certifiers as persons for purposes of § 6520, by providing for certifier appeals of accreditation decisions. 7 C.F.R. § 205.681(b).

The fact that Congress designed an organic program dependent on the active participation and expertise of private certifiers further confirms that OFPA was intended to extend appeal rights to certifiers. The First Circuit has recognized that OFPA “contemplates an extensive role for private certifying agents in implementing the Act’s requirements.” *Harvey*, 396 F.3d at 37. To be meaningful, this “extensive role” must include an opportunity to challenge USDA decisions regarding the very certification issues certifiers are expected to provide valuable expertise in.

B. USDA Should Not Be Permitted to Invent Ambiguity in § 6520 in Order to Expand Its Own Authority

OFPA clearly requires a broad administrative appeal mechanism for any person to appeal any action that is either (1) adverse or (2) inconsistent with the organic program. 7 U.S.C. § 6520(a). USDA’s appeal regulations fall far short of achieving this clear requirement, and this court should set aside this unlawfully narrow process under the first step of *Chevron*. *See Chevron*, 467 U.S. at 842-43; 5 U.S.C. § 706(2). However, even if this court were to reach the second step of the familiar *Chevron* analysis and determine whether the agency’s regulation is

“reasonable,”¹³ *see Chevron*, 467 U.S. at 844, it should be particularly wary of agency attempts to introduce ambiguity into otherwise clear statutory requirements in order to win deference for the agency’s own authority-expanding interpretation. *See, e.g., Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447, 452 (1990); *Hi-Craft Clothing Co. v. Nat’l Labor Relations Bd.*, 660 F.2d 910, 916 (3d Cir. 1981).

In this case, USDA interpreted 7 U.S.C. § 6520 to give interested persons less than OFPA itself specifically requires. By providing only a very narrow range of appeals from adverse decisions and no appeal whatsoever from decisions inconsistent with the national standards, USDA has effectively created for itself new, unfettered certification authority without the “checks” of the full administrative appeals system Congress required. USDA seeks to exercise authority which was not given to it under OFPA. Therefore, review of this issue should be especially searching.¹⁴

Before this court, USDA argues that Congress’s intent as to the scope of the administrative appeal mechanism is ambiguous. USDA claims that the term “person” in § 6520(a) is unclear and that Congress may or may not have intended it to include certifying agents. Specifically,

¹³ Of course, this is limited by the rule that, even in the face of a genuine delegation of interpretative authority to an agency, courts cannot uphold agency decisions that are unconstitutional or that exceed the agency’s jurisdiction. *United States v. Mead Corp.*, 533 U.S. 218, 228 n.6 (2001) (citing 5 U.S.C. §§ 706(2)(B), (C)). In keeping with the principle that statutes should be interpreted to be constitutional whenever possible, MICI’s constitutional arguments are reserved for the due process section that follows.

¹⁴ Indeed, the cases explain the need for this “[m]ore intense scrutiny” or “limited deference” based on solid logic that is particularly apt here. The Third Circuit noted that this rule “may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission.” *Hi-Craft Clothing*, 660 F.2d at 916. Likewise, the United States Claims Court explained that “[t]o do otherwise would risk diluting the judiciary’s power to stand guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority.” *Pender Peanut*, 20 Cl. Ct. at 452.

USDA relies on the “interpretative presumption that ‘person’ does not include the sovereign.”

See Vt. Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 780 (2000).

To prevail on this claim, USDA must convince this court to ignore the plainly broad definition of “person” in 7 U.S.C. § 6502(15) and, further, to hold that MICI is a “sovereign” that Congress did not clearly provide appeal rights for.

However, this attempt must fail. First, MICI is not a “sovereign,” as already established in the prudential standing section above.¹⁵ *See supra* Part II.B.2.a. Therefore, the cited cases are entirely unhelpful to USDA.

Second, even if this court accepts the leap that MICI has achieved sovereign status by its participation as a private certifier in NOP, the cases cited by USDA are not controlling. The rebuttable presumption relied on by USDA is premised on the doctrine that a court will not lightly infer a government has exposed itself, or another sovereign, *to additional liability* absent a more express statement of intent in that regard.¹⁶ Where, as here, the issue instead is whether a “sovereign” is entitled to a statutory *benefit or advantage*, the analysis “depends not upon a bare analysis of the word ‘person,’ but on the ‘legislative environment’ in which the word appears.”

¹⁵ *Cf. United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 741, 747 (2004) (concluding Postal Service is sufficiently governmental for presumption to apply only after emphasizing post office’s state-conferred nationwide monopoly, public national security responsibilities, eminent domain power, and power to conclude international postal agreements).

¹⁶ *E.g., Stevens*, 529 U.S. at 781 n.9 (explaining that “both comity and respect for our federal system demand that something more than mere use of the word ‘person’ demonstrate the federal intent to authorize unconsented private suit against [a state]”); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (explaining presumption “is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before”); *United States v. Cooper*, 312 U.S. 600 (1941) (holding that the United States is not a “person” entitled to bring suit under Sherman Act premised on the fact that if the definition of “person” included the United States, then the government would be exposed to liability as an antitrust defendant in a future case as well); *see also Flamingo Indus.*, 540 U.S. at 745 (explaining this rationale of *Cooper* and noting that after that decision Congress amended statutes to allow United States to bring antitrust suits).

Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 711 (2003) (internal citations omitted).¹⁷

Given the broad definition of person in provided in OFPA, combined with the clear purpose of the Act to ensure consistent and reliable organic decisions, the legislative environment here clearly indicates that Congress intended to provide an appeal to the central player in its organic program—the certifying agent. This is especially true to the extent that certifiers appeal to protect their own private business interests, and to protect the credibility of their own name and good will in the organic marketplace.¹⁸ Thus, the use of the word “person” in no way suggests MICI is excluded from this type of appeal, and USDA has not established credible ambiguity on that point.

C. Even If § 6520(a) Is Ambiguous, USDA’s Resolution of That Ambiguity Is Not Reasonable

Even if this court were to accept that the use of the word “person” in 7 U.S.C. § 6520 is ambiguous, USDA’s final appeal regulation would still fail under step two of the familiar

¹⁷ Even in *Stevens*, the case on which USDA relies primarily for the power of its presumption, the Supreme Court expressly decided that states are not “persons” subject to liability under False Claims Act, but specifically left open the separate question of whether states “can be ‘persons’ for purposes of commencing an FCA qui tam action.” 529 U.S. at 787 & n.18 (emphasis deleted).

Indeed, there is a similarly long line of cases in which the Supreme Court has determined the term “person” includes a “sovereign” in order to extend a benefit. *E.g.*, *Georgia v. Evans*, 316 U.S. 159, 161 (1942); *Pfizer Inc. v. Gov’t of India*, 434 U.S. 308, 317 (1978); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-261 (1972); *see also* Athena Mueller, Annotation: *Supreme Court’s Views as to Meaning of Term “Person,” as Used in Statutory or Constitutional Provision*, 56 L. Ed. 2d 895 § 2 (2005).

¹⁸ Moreover, where the sovereign is seeking to avail itself of a statutory benefit in order to vindicate a private interest, rather than a governmental one, the Court may be more likely to find the term “person” inclusive of those interests. *See Inyo County*, 538 U.S. at 712 (limiting holding that sovereign Indian tribe does not qualify as “person” entitled to bring suit under 42 U.S.C. § 1983 to cases in which tribe is seeking to vindicate only “a sovereign’s prerogative to withhold evidence” and not any private rights); *Jefferson County Pharm. Ass’n v. Abbott Labs.*, 460 U.S. 150, 154-57 (1983).

Chevron analysis. OFPA’s clear purpose is to ensure consistent and reliable organic decisions in order to facilitate a viable interstate organic market and to encourage consumer confidence.

7 U.S.C. § 6501. The appeal mechanism itself is designed not only to address adverse effects but also to provide an opportunity to correct unlawful organic decisions. *See id.* § 6520(a)(2).

By providing only a one-sided appeal right (i.e., appeals from denials of certification only), USDA has created a preference for granting certification. Only denials of certification receive review and therefore the potential to be overturned. No such preference in OFPA exists, and nothing in OFPA suggests the availability of appeal should depend on the outcome of the certifier’s decision. Instead, the priority in OFPA is to ensure accuracy and consistency in all decisions, and this purpose requires an equal appeal right on both sides. USDA’s interpretation to the contrary is unreasonable.

In addition, the entire legislative scheme relies on extensive participation from private certifiers. *See Harvey*, 396 F.3d at 37. USDA’s own implementation of OFPA has recognized that certifiers have a private interest in their accreditation status that warrants protection in the organic program. 7 C.F.R. § 205.681(b). The requirement that certifiers put their own name on the labels of products they certify recognizes that these private certifiers’ names have value.¹⁹ This, combined with the fact that OFPA permits competition among certifiers in the same geographic area, strongly supports MICI’s position that certifying agents have private stakes in the program. Thus, an appeal right is necessary not only to achieve OFPA’s overall purposes but

¹⁹ USDA’s analogy between certifiers and Administrative Law Judges is thus inapt. Certifiers are not, and certainly are not solely, subordinate decisionmakers. Unlike ALJ’s who have no private business interest in their decisions, certifiers cannot “uncouple” their private certification decisions from USDA appeals decisions for organic producers and handlers. *See, e.g. Harvey*, 396 F.3d at 37-38.

also to protect certifiers' individual interests. USDA's interpretation to the contrary is unreasonable.

IV. USDA APPEAL REGULATIONS INFRINGE UPON MICI'S PROTECTED PROPERTY INTERESTS AND VIOLATE DUE PROCESS

As a threshold requirement in order to state a claim that it has been denied due process of law, MICI must allege that it has been deprived of a constitutionally protected interest in life, liberty, or property. *Mimiya Hosp., Inc. v. United States Dep't of Health and Human Servs.*, 331 F.3d 178, 181 (1st Cir. 2003). "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

A. MICI Has a Constitutionally Protected Interest in Control Over Its Name

MICI has a protected property interest in control over the use of its name. MICI seeks to vindicate its interest in ensuring that producers and handlers may claim to be certified organic by MICI only with MICI's consent. In this way, MICI seeks to protect the good will associated with its organic certification program. There are many certifying agents which producers and handlers may choose for certification services, and it is in MICI's interest for producers, handlers, and consumers to have confidence in the integrity of its organic certification decisions so that they will choose to seek certification from MICI, or to buy products certified by MICI. Am. Compl. ¶¶ 86-87.

1. MICI has a property interest in its own name

The origins of property interests are well-established. Property interests are not created by the Constitution, but by independent sources such as state and federal law. *Roth*, 408 U.S. at 577. Control over the use of one's name is an important property right in Massachusetts, MICI's home state. Massachusetts state law recognizes claims for unfair and deceptive trade practices,

trademark infringement, libel, and misrepresentation.²⁰ Certifying agents have an important property right at stake in their certification decisions, and they are entitled to due process before USDA infringes on that right.

As the Supreme Court has noted, “The hallmark of a protected property interest is the right to exclude others.” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). Further, “[t]he assets of a business (including its good will) unquestionably are property.” *Id.* at 675. MICI seeks to maintain control over the use of its name by excluding applicants it believes to be ineligible for organic certification in order to maintain the good will associated with its organic certification program. Am. Compl. ¶¶ 81-90. The distinction between the access to certification, including private certification, properly available to qualified and unqualified applicants is fundamental, in light of OFPA’s purpose of ensuring organic certification decisions that consistently comply with the national standards.

USDA’s efforts to distinguish harm to the name of MICI’s previous organic certification program, the NOFA/Mass Organic Certification Program, from harm to the good will associated with Baystate Organic Certifiers are irrelevant. MICI has alleged that the threat to its property interest is ongoing. MICI alleges that if it issues a denial of certification that USDA disagrees with in the future, USDA will overrule MICI and direct MICI to certify the applicant. The applicant, then, would be required to include the claim to be “certified organic by Baystate Organic Certifiers” upon any of its packaged agricultural products that claim to be “100% organic” or “organic.” 7 C.F.R. § 205.303(b)(2).

²⁰ See generally Mass. Ann. Laws ch. 93A; Mass. Ann. Laws ch. 110B.

2. MICI did not surrender control over its name when it became an accredited certifying agent

The property interest which MICI now seeks to vindicate was not created by OFPA. Prior to passage of OFPA in 1990, and indeed, prior to full implementation of the NOP regulations in 2002, organic certifying agents across the country had property interests in the good will associated with their names under state statutory and common laws. *Coll. Sav. Bank*, 527 U.S. at 675. Far from compelling certifying agents to give up these existing interests, OFPA protects the authority of certifying agents. OFPA provides that an organic label may only be used when a certifying agent “agreed” that the organic system plan advanced by the applicant is in compliance with organic certification requirements. *See* 7 U.S.C. § 6504; *see also id.* § 6502(4)-(5). USDA lacks authority to deprive MICI without due process of law of its right to exclude producers and handlers whose certification applications it has denied from using its name on the labels of their products.

The provisions stating that a certifying agent must agree to an applicant’s organic plan prior to issuance of organic certification can be reconciled with provisions in OFPA calling for expedited administrative appeals of decisions within the NOP. Whether an applicant for organic certification is in compliance with the requirements for organic certification is not a subjective judgment. The NOP regulations provide an objective standard against which compliance can be measured. OFPA does not permit the Secretary to substitute his judgment for that of a certifying agent, and then insulate that judgment from review, nor does an administrative appeals process inherently demand such plenary power for the Secretary.

3. USDA’s Action Have a Direct Impact Upon MICI’s Property Interest in Control Over the Use of its Name

Because it involves an appeal of a certifying agent’s denial of certification, application of 7 C.F.R. § 205.681(a)(1) is necessarily directed at a certifying agent. Indeed, the regulation itself

states that no appeal rights accrue to the “affected” certifying agent. 7 C.F.R. § 205.681(a)(1). In *O’Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 778 (1980), the Supreme Court made a “simple distinction between government action that directly affects a citizen’s legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally.” Nothing in *O’Bannon* compels this court to find that MICI has failed to allege deprivation of a constitutionally protected interest.

The challenged government action, whether it is USDA’s action in adopting 7 C.F.R. § 205.681(a)(1) or USDA’s action in overturning a specific certification denial, directly affects the certifying agent’s legal right to exclude others from using its name without its consent. Contrary to the case before the court in *O’Bannon*, the challenged government action may not be said to be directed “against” an applicant for certification, since both the regulation and a specific decision by the USDA to overturn a certifier’s denial of certification redound to the benefit of the applicant. *See id.*

B. USDA Has a Duty to Provide MICI With Due Process Before Depriving It of Control Over the Use of Its Name

Having established USDA’s duty to provide due process of law before depriving certifying agents in general, and MICI in particular, of their right to exclude producers and handlers from making claims to be certified organic by them, there is the question of what type of process is due, and when. This court need not decide this issue at this stage of the case. This court need only decide that MICI has stated a claim that providing no process offends the Constitution.

V. THE SECRETARY’S AUTHORITY TO REVIEW CERTIFICATION DECISIONS DOES NOT EMPOWER HIM TO ISSUE FINAL, BINDING ORDERS TO CERTIFYING AGENTS TO GRANT CERTIFICATION

A. OFPA Assigns Authority to Make Certification Decisions To Certifying Agents

OFPA contemplates an “extensive role” for private certifying agents in implementing its requirements. *Harvey*, 396 F.3d at 37 & n.1. Producers or handlers must have been certified by a certifier before their products made be labeled or sold as organic. 7 U.S.C. § 6504(3).

B. The Secretary’s Duty to Provide Administrative Appeals Process Does Not Negate Statutory Provisions Setting Forth Authority of Certifying Agents

A mechanism to review organic certification decisions and use of the organic label is essential to achieve OFPA’s goal of consistent application of national standards for organic foods. 7 USC § 6501. The authority for a review mechanism to ensure that organic certification decisions are consistent with the requirements of the law is found in 7 USC § 6520. Because OFPA sets forth a creative partnership, the appeals provisions name several decisionmakers whose decisions may be reviewed by the Secretary, and, ultimately, the federal courts.

The appeals regulations promulgated by the Secretary are inconsistent with the mandate that products may be labeled organic only when a certifying agent has agreed with the producer’s or handler’s organic plan. As discussed above in the context of due process, it is possible to reconcile the powers of the Secretary and of certifying agents as set forth in OFPA.²¹

VI. USDA REGULATIONS WHICH COMPEL CERTIFYING AGENTS TO PROVIDE THEIR PERSONAL ENDORSEMENT OF PRODUCTS ARE AN UNLAWFUL ABRIDGEMENT OF FIRST AMENDMENT RIGHTS

USDA attempts to defeat MICI’s First Amendment claim by asserting that by issuing an organic certificate, MICI would merely be engaging in government speech. Mem. of Law in Supp. of Def.’ Mot. to Dismiss at 27-30. Taking MICI’s allegations in a light most favorable to

²¹ See e.g., *FEC v. Akins*, 524 U.S. at 25.

MICI, as it must at this stage of the litigation, this court should conclude that MICI has stated a claim that USDA's appeal and labeling regulations compel private speech and association.

A. Compelling Private Speech and Association Is Unlawful

“The First Amendment protects the right not to speak or associate, as well as the right to speak and associate freely.” *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 976 (1st Cir. 1993) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). The First Circuit has stated, “The most obvious infringement on First Amendment rights in the context of compelled speech occurs when individuals are forced to make a direct affirmation of belief.” *Wash. Legal Found.*, 993 F.2d at 977. USDA's regulations force certifying agents, like MICI, to make a direct affirmation of belief that they agree that a particular producer or handler is in compliance with the requirements of the NOP, even when they do not agree. 7 C.F.R. § 205.681(a)(1). USDA's regulations compel these certifying agent's statements in the absence of any provision in OFPA which favors granting certification over denying certification.

B. Product Label Information Identifying a Private Certifying Agent Is Not Government Speech

Taken together, USDA's labeling and appeal regulations compel MICI to communicate the false statement that MICI (not the government) has determined that the producer complies with the national standards. MICI's organic certification activities involve several types of speech and expressive conduct. First, MICI applies the NOP regulations to individual applications for organic certification. Second, MICI grants or denies organic certification. Third, the applicant for certification identifies MICI as the certifying agent which has granted it organic certification.

Only the first type of speech, the act of applying the NOP regulations, was squarely before the First Circuit in *Harvey* when it opined on whether organic certification is government speech. 396 F.3d at 42-43. Indeed, in another section of its decision in *Harvey*, the First Circuit noted that labels which identify the certifying agent responsible for certifying use of organic ingredients “creates consumer confidence that the specified ingredients are indeed organic, and provides the name of the certifier, which may be useful to some consumers.” *Id.* at 38. The *Harvey* court even determined that “private certification” can be “uncoupled” from “USDA certification” in some contexts. *See supra* footnote 4. MICI’s objection to USDA’s efforts to compel it to make an untrue statement—that it has tendered its own private certification to an applicant that it has, in fact, denied—raises valid First Amendment concerns.

As a matter of policy, USDA should not be permitted to simultaneously take advantage of the good will of private certifying agents and hide behind the shield of government speech. This policy concern was foreseen by the Supreme Court in *Johanns v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055, 2065 (2005). The Supreme Court noted that if a reasonable fact finder might conclude that ostensible “government speech” was attributed to private individuals, then an as-applied challenge could be maintained. *Id.* The statement “Certified Organic by NOFA/Mass Organic Certification Program” or “Certified Organic by Baystate Organic Certifiers” would indeed be attributed to MICI by a reasonable fact finder, as well as by a reasonable organic consumer, organic producer, or organic handler. Am. Compl. ¶¶ 121-24. MICI has stated a claim upon which relief may be granted for violation of its First Amendment rights.

CONCLUSION

For the foregoing reasons, the MICI urges the Court to deny USDA’s Motion to Dismiss in its entirety.

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Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on December 30, 2005, I caused to be served upon the attorneys of record a true and correct copy of the foregoing document by electronic means.

/s/ Jill E. Krueger

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