



Therefore, MICI satisfies its burden of proof at this stage of the litigation by making sufficient general factual allegations of standing and actionable claims. *See Dubois v. United States Dept. of Agric*, 102 F.3d 1273, 1281-83 (1st Cir. 1996). Because MICI has more than sufficiently alleged such facts in this action, USDA's motion to dismiss should be denied in its entirety, and this case permitted to proceed to resolution.

**I. The Text, Structure, and Legislative History of OFPA All Mandate That Certifying Agents Be Able to Appeal USDA Actions They Believe Violate OFPA.**

OFPA establishes a clear and unambiguous role for accredited certifying agents, which may be either private entities or state governmental entities.<sup>1</sup> OFPA also expressly mandates that all persons must be provided an expedited administrative appeal process from decisions that are *either* adverse to that person *or* inconsistent with the national organic standards established under OFPA. 7 U.S.C. § 6520. The text, structure, and legislative history of OFPA all make clear that certifying agents must be permitted to appeal USDA decisions that adversely affect them or that they believe are inconsistent with OFPA's organic standards.

**A. Certifying Agents Are the Primary Decision-Makers for Organic Certification Under OFPA.**

OFPA assigns to certifying agents the responsibility for reviewing a proposed organic plan and determining if the plan meets the requirements of the National Organic Program. 7 U.S.C. § 6513(a). This is affirmed repeatedly throughout the Act. For example, in order to be sold or labeled as organically produced, an agricultural product must "be produced and handled in compliance with an *organic plan agreed to by* the producer and handler of such product and *the certifying agent.*" 7 U.S.C. § 6504(3) (emphasis added). Indeed, an organic plan is defined as "a plan of management of an organic farming or handling operation that has been *agreed to by*

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<sup>1</sup> Foreign entities may act as certifying agents in certain circumstances. As of February 9, 2006, there were 56 domestic certifying agents and 41 foreign certifying agents accredited under OFPA. *The National Organic Program, Accredited Certifying Agents*, <http://www.ams.usda.gov/nop/CertifyingAgents/Accredited.html> (last visited Feb. 21, 2006).

the producer or handler and *the certifying agent* and that includes written plans concerning all aspects of agricultural production or handling.” 7 U.S.C. § 6502(13) (emphasis added).<sup>2</sup>

In contrast, OFPA assigns no responsibility to USDA for reviewing a proposed organic plan and determining if the plan meets the requirements of the National Organic Program. USDA acknowledged this fact in the preamble to the final NOP rule when it stated, “USDA does not perform organic certification activities under any circumstances.” NOP Final Rule, 65 Fed. Reg. 80,548, 80,595 (Dec. 21, 2000).

A certifying agent, must “have sufficient expertise in organic farming and handling techniques.” 7 U.S.C. § 6514(b)(2). Certifying agents must “be able to fully implement the applicable organic certification program” under OFPA. 7 U.S.C. § 6515(a). Certifying agents’ accreditations are to be subject to peer review. 7 U.S.C. § 6516.

The determinations made by certifying agents regarding an organic plan are two-part decisions. First, the certifying agent must determine whether the organic system plan and all procedures and activities of the applicant’s operation are in compliance with the requirements of the NOP organic standards. 7 C.F.R. § 205.404(a). Second, the certifying agent must determine whether the applicant is able to conduct operations in accordance with the plan. *Id.*

In addition to requiring general knowledge of and experience with organic farming and handling, making certification decisions under OFPA involves inspecting the farming or handling operation at issue and evaluating the specific organic system plan. An organic production or handling system plan must include six elements.<sup>3</sup> 7 C.F.R. § 205.201(a). The preamble to the

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<sup>2</sup> The organic plan was viewed by the Senate Committee on Agriculture, Nutrition, and Forestry as a “key element” in organic production. S. Rep. No. 101-357, at 291 (1990) *reprinted in* 1990 U.S.C.C.A.N. 4656, 4946.

<sup>3</sup> These six elements are: (1) a description of practices and procedures to be performed and maintained; (2) a list of each substance to be used as a production or handling input; (3) a description of monitoring practices and procedures; (4) a description of the recordkeeping system; (5) a description of management practices and physical barriers to prevent contact with prohibited

final rule noted: “The site-specific nature of organic production and handling necessitates that certifying agents have the authority to determine whether specific information is needed to carry out their function.” NOP Final Rule, 65 Fed. Reg. 80,548, 80,559 (Dec. 21, 2000).

Despite the fact that USDA has no authority to perform any of these certification functions, USDA interprets its authority under § 6520 of OFPA as allowing it not merely to review the lawfulness of decisions made by a certifying agent, but as providing plenary power to compel the certifying agent to grant certification--and consequently to compel the certifying agent to allow its name to be used on products labeled “organic”--without regard to whether the certifying agent agrees that the organic system plan is in compliance with the national organic standards. USDA’s proffered reading of the Act short-circuits the statutory certification process. That is to say, under the NOP regulation, USDA goes beyond reversing a certifier’s denial of certification to making its own decision that certification must be granted.<sup>4</sup> The regulation is unlawful because USDA has no authority to make certification decisions, and because it fails to provide the appeal rights explicitly mandated by OFPA.

**B. OFPA’s Appeals Provision Furthers the Statutory Purpose of Ensuring Organically Labeled Foods Satisfy a Consistent National Standard.**

OFPA’s appeal provision provides for two distinct types of administrative appeals. The provision of OFPA which requires USDA to 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 . . . that—(1) adversely affects such person” addresses the federal government’s responsibility to provide due process of law. 7 U.S.C. § 6520(a). However,

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substances; and (6) additional information deemed necessary by the certifying agent. 7 C.F.R. § 205.201(a).

<sup>4</sup> Even if USDA correctly found that the reasons given by a certifying agent for denying certification in a particular case were erroneous, it does not necessarily follow that the applicant meets the national organic standards and should be granted certification. The appeal regulation offers no opportunity to correct USDA decisions that erroneously order certification.

the administrative appeals provision contained in OFPA does not stop there. Under the second half of the provision, “persons may appeal an action of the Secretary, the applicable governing state official, or a certifying agent . . . that— . . .(2) is inconsistent with the organic certification program established under this title.” *Id.* This latter half of the appeals provision is plainly aimed at ensuring that the underlying purposes of OFPA—including organic certification decisions that are consistent with the organic standards—are achieved. By failing to provide for any appeals from decisions that are inconsistent with the law, the NOP regulations unlawfully render meaningless the “or” which serves two functions in OFPA: joining §§ 6520(a)(1) and 6520(a)(2) and making *either* circumstance a sufficient basis for recourse to the appeals process.

OFPA’s appeal provision advances a principal goal of the Act: to “assure consumers that organically produced products meet a consistent standard.” 7 U.S.C. § 6501(2). The consistency sought is to be achieved by having a single objective set of national organic standards. References to compliance with the national organic standards occur repeatedly in the Act. The USDA Organic seal may be used when an agricultural product “meets Department of Agriculture standards” and is produced and handled “in accordance with this title.” *Id.* §§ 6505(a)(2), 6506(a)(1)(A). The definitions of “certified organic farm,” “certified organic handling operation,” “organic plan,” and “organically produced” all refer back to compliance with the requirements of the Act. *See id.* § 6502.

**C. Certifying Agents Are Persons Entitled to Challenge USDA Orders to Grant Certification.**

Congress expressly provided for challenges of USDA actions by persons who believe that those actions are inconsistent with the National Organic Program. 7 U.S.C. § 6520(a)(2). Despite USDA’s protestations that it has “not eliminated appeals under 6520(a)(2),” it is unable to point to a single provision that it has made for appeals of inconsistent, and therefore unlawful, actions. (Def. Reply at 12.) Instead, it asserts that the existing appeal regulations at 7 C.F.R. §§ 205.680, 205.681 “reasonably cover the universe of persons likely to be affected by agency action.” (Def.

Reply at 13 n.9.) The provisions at §§ 205.680 and 205.681 set forth procedures to be used only by (1) producers and handlers appealing denial of certification and proposed suspension or revocation of certification decisions; and (2) certifying agents appealing denial of accreditation and proposed suspension or revocation of accreditation decisions.” 7 C.F.R. §§ 205.680, 205.681. All of these appeals would fall within the appeals provided for under 7 U.S.C. § 6520(a)(1). As MICI demonstrated in its opposition, USDA has failed to give effect to the express mandate of OFPA for persons to be able to appeal unlawful actions. (Pl. Opp’n Mem. at 20-25.)

USDA additionally asserts that in the case of The Country Hen—the producer whose application for organic certification was denied by MICI but then sustained on “appeal” by USDA—“neither competitors of MICI, nor competitors of The Country Hen, nor consumers could have appeared to contest MICI’s decision.” (Def. Reply at 15 n.12.) USDA maintains that the applicant for certification is the only party in interest. *Id.* While the phrase “party in interest” does not appear in OFPA, presumably USDA means to allege that an applicant is the only party that may be adversely affected by a certifier’s certification decision. Yet, Congress expressly provided in § 6520(a)(2) for appeals of inconsistent, and therefore unlawful, actions in addition to actions that adversely affect the person seeking to appeal.

USDA’s assertion that when certifying agents carry out certification decisions, they act on the federal government’s behalf, and not on their own, is incorrect. (Pl. Opp’n Mem. at 20-25.) The NOP requires products labeled as either “100% organic” or “organic” to bear the seal of the certifying agent. 7 C.F.R. § 205.303(b)(2). Consequently, when certifying agents make certification decisions, they continue to act in a private capacity. This does not mean that certifying agents apply different standards for use of the USDA seal and for use of their own seal. There is one set of national organic standards with which farmers and handlers must comply. But

it does mean that, even when acting as a certifier and making certification decisions, certifying agents never cease to also act in a private capacity, and to seek to protect their own reputations.<sup>5</sup>

Congress mandated that “persons” are entitled to appeal rights under OFPA. 7 U.S.C. § 6520. The “interpretive presumption that ‘person’ does not include the sovereign,” *Vt. Agency of Natural Resources v. United States ex. rel. Stevens*, 529 U.S. 765, 780 (2000), does not apply because certifying agents have an identity and role within OFPA that is distinct from that of the federal government. Certifying agents plainly are among those “persons” entitled to appeal rights. This is because there is an “affirmative showing of statutory intent” that certifying agents bear responsibility for making certification decisions that are consistent with the organic standards. *Id.* at 780-81. The analysis “depends not upon a bare analysis of the word ‘person,’ but on the ‘legislative environment’ in which the word appears.” *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 711 (2003) (internal citations omitted). In view of the “legislative environment,” under which certifying agents are private, state, or foreign entities distinct from the federal government, and in which the certifying agent’s own imprimatur, as well as the USDA Organic seal, is a consequence of certification, certifying agents are “persons” entitled to challenge USDA certification actions as inconsistent with the organic standards.

MICI seeks the opportunity to appeal USDA decisions which order it to grant certification.<sup>6</sup> Such USDA decisions are appealable under OFPA § 6520(a)(1), because they infringe upon

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<sup>5</sup> NOP regulations implicitly acknowledge this, as, for example, when they state, “A private or governmental entity accredited as a certifying agent under this subpart may establish a seal, logo, or other identifying mark to be used by production and handling operations certified by the certifying agent to indicate affiliation with the certifying agent.” 7 C.F.R. § 205.501(b). The NOP regulations define “private entity” as “[a]ny domestic or foreign nongovernmental for-profit or not-for-profit organization providing certification services.” *Id.* § 205.2.

<sup>6</sup> This is the salient fact about the challenged class of USDA actions, not the fact that they reverse certifying agent decisions, as USDA suggests.

MICI's control over the use of its own private mark, and under § 6520(a)(2), because they are inconsistent with OFPA. Under the NOP appeal regulation, if USDA sustains a producer's or handler's appeal, USDA's appeal decision must order the certifying agent involved to grant certification. 7 C.F.R. § 205.681(a)(1). Through this regulation, USDA seeks to do indirectly what it may not do directly: make organic certification decisions. As demonstrated above, the authority to make certification decisions is vested solely in certifying agents, whose agreement is incorporated in the very definition of an organic plan. 7 U.S.C. §§ 6513(a), 6502(13). There is no suggestion that Congress intended that an appeal authority created to redress grievances and ensure that OFPA's standards would be met would be used by USDA to circumvent the detailed certification review process and create organic certification by administrative fiat.<sup>7</sup> The challenged regulation, which compels a certifying agent to grant certification and allow the use of its private mark, even when it has determined that the organic standards are not met, is in conflict with the text, structure, and legislative history of OFPA.

## **II. MICI Has Standing to Assert Its Appeal Rights Under OFPA and Its Constitutional Rights Under the First and Fifth Amendments.**

### **A. MICI Has Standing Under Article III of the U.S. Constitution.**

MICI participates in the NOP as an accredited certifying agent, and is entitled to appeal rights before its name is used against its will to endorse products as meeting the national organic standards. MICI suffered a concrete injury the moment USDA denied certifiers this appeal right, and this denial of appeal rights jeopardizes both the integrity of the organic program generally and the value of MICI's name specifically. This harm is ongoing, as USDA continues to enforce

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<sup>7</sup> In fact, the legislative history manifests Congress' effort to heed the concerns of the organic community who "argued for the need to limit severely the Federal Government's discretionary authority and involvement in this industry." S. Rep. No. 101-357, at 291 (1990) *reprinted in* 1990 U.S.C.C.A.N. 4656, 4946.

its illegal appeal regulations and defend the propriety of these regulations in the instant action. This harm is certain to recur unless and until there is a remedy from this Court.

Article III standing requires the plaintiff to demonstrate an “injury in fact” that is (1) both “concrete and particularized” and “actual or imminent,” (2) fairly traceable to the challenged action of the defendant, and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff “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.

MICI has a concrete and particularized interest in the integrity of the organic certification program, from which its revenue derives. Because the farming and handling operations MICI certifies are required to identify MICI as their certifying agent on each of their organic packaged products, MICI also has a pressing interest in ensuring that those operations do in fact meet the national standards. Both MICI’s business interest generally in the continued viability of the organic market, and specifically in the credibility of its own name, are immediately and directly harmed by USDA’s ongoing denial of certifiers’ appeal rights. MICI is entitled to administrative appeal rights in order to protect these concrete business interests. The denial of these rights in and of itself directly and immediately harms the integrity of the organic program and the value of MICI’s accreditation.

In the specific context of the NOP, the First Circuit has already held that a consumer of organic food has standing to challenge regulations believed by that consumer to “weaken the integrity of the organic program and the standards it sets forth.” *Harvey*, 396 F.3d at 34. Like the plaintiff in *Harvey*, MICI is challenging NOP regulations that MICI reasonably believes weaken the integrity of the organic program. The organic marketplace is unique in that it depends on committed consumers who search out products certified to meet a series of objective standards, and often pay a premium price for those products. If those standards are perceived as lax or the integrity of the label is in doubt, MICI reasonably believes consumers will stop purchasing

organically labeled foods, and demand for its certification services will correspondingly decrease.<sup>8</sup> (Am. Compl. ¶¶ 81-90.)

These allegations are more than sufficient to satisfy the “injury in fact” requirement. The First Circuit recently reiterated that the plaintiff must only “indicate an objectively reasonable possibility that she would be subject to” a cognizable harm. *Osediacz v. City of Cranston*, 414 F.3d 136, 143 (1st Cir. 2005). The First Circuit has also explained that “a plaintiff need not show a certainty of future harm to establish standing, so long as there is a reasonable threat of such harm.” *Id.* (explaining *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183-84 (2000)).

This is particularly true in the context of economic injuries, as MICI alleges here. Probable or likely economic harm resulting from government actions that alter market conditions are routinely held to satisfy the injury-in-fact requirement of Article III standing. *Clinton v. City of New York*, 524 U.S. 417, 432-33 (1998) (citing 3 K. Davis & R. Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994)). “Certainly he who is ‘likely to be financially’ injured may be a reliable private attorney general to litigate the issues of the public interest.” *Ass’n of Data Processing Serv. v. Camp*, 397 U.S. 150, 154 (1970) (internal citation omitted).

Finally, USDA’s assertion that there is no substantive decision or likelihood of continued enforcement from which MICI appeals must be rejected in view of the fact that this case arises as a challenge to an existing, *and continually enforced*, appeal regulation. Indeed, USDA continues to argue the legality and propriety of its denial of MICI’s appeal rights in the instant action. There is nothing uncertain about the fact that USDA will continue to deny MICI appeal rights without intervention by this Court.

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<sup>8</sup> Indeed, organic consumers have already evidenced their active interest in the nature and details of the NOP. *E.g.*, Second NOP Proposed Rule, 65 Fed. Reg. 13,512, 13512 (Mar. 13, 2000) (“On December 16, 1997, the first proposed [NOP] rule was published in the Federal Register, and 275,603 people wrote to us to explain why and how the rule should be rewritten, *the largest public response to a proposed rule in USDA history.*”) (emphasis added).

**B. MICI's Private Interest in Preserving the Integrity of the Organic Label Amply Satisfies the Test for Prudential Standing.**

Under OFPA and the NOP, certifying agents “play an extensive role.” *Harvey*, 396 F.3d at 37. They are empowered by the Act to make the certification decisions upon which the entire program rests. Their personal identities are closely associated with every farming and handling operation they certify or are ordered by USDA to certify, since their name must appear on the label of every packaged agricultural product labeled “100% organic” or “organic” by those farmers and handlers. As such, it is well within this Court’s prudential power to decide MICI’s claims.

Prudential limits on federal jurisdiction require that a plaintiff’s grievance *arguably* fall within the zone of interests protected or regulated by the statutory provision at issue. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (emphasis added). MICI’s interest in the integrity of the organic program is squarely within the zone of interests of OFPA.<sup>9</sup>

The plain language of § 6520, which is the “statutory provision at issue,” *see Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882-83 (1990), guarantees broad administrative appeal rights to any person from any adverse decision *and* from any decision inconsistent with the NOP. MICI is both regulated and protected by this section of OFPA. Therefore, this action by MICI to give full effect to § 6520 is directly in line with the interests of Congress in enacting this section of OFPA and should be permitted to proceed.

More generally, MICI’s business interest in the integrity of the organic label is squarely within the zone of interests of OFPA as a whole. This Court “should not inquire whether there has

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<sup>9</sup> MICI’s challenge to USDA’s denial of MICI’s administrative appeal rights is directly reviewable by this Court pursuant to § 6520(b) of OFPA. (Pl. Opp’n Mem. at 11-13; Am. Compl. ¶ 1, 76-80). However, MICI emphasizes herein that it also easily falls within the traditional zone-of-interests test of the APA.

been a congressional intent to benefit the would-be plaintiff.”<sup>10</sup> *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). Instead, MICI need only show that its interest in the integrity of the certification program—regardless of MICI’s motivation for pursuing that interest—is within the zone of interests of OFPA. The First Circuit has already determined that the use of private certifiers’ seals on organic labels serves “to increase consumer confidence and to facilitate interstate commerce in organic products, furthering two of OFPA’s three goals.” *Harvey*, 696 F.3d at 38.

Though this Court need not reach the question, Congress did in fact express concern for the competitive interests of private certifiers. Congress specifically established a system in which multiple private and state certifiers compete for fees from producers and handlers who elect to seek the organic label, and clearly intended to protect the viability of private certifiers in the program.<sup>11</sup> *E.g.*, S. Rep. No. 101-357, at 294-95 (1990) *reprinted in* 1990 U.S.C.C.A.N. 4656, 4947. Indeed, the Senate committee directed USDA to allow for a diversity of private groups in the certification business by refraining from imposing restrictive educational requirements or onerous security requirements. *Id.*

Furthermore, much of the discussion in section I of this sur-reply is relevant to prudential standing. USDA seeks a dramatic extension of the holding in *Newport News* in order to apply that holding, which generally bars “agencies” acting in their regulatory or administrative capacity from challenging another agency decision, in order to apply the holding of that case to private

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<sup>10</sup> Despite USDA’s attempted analogies, MICI is not like the hypothetical “court reporters” mentioned in *Lujan v. National Wildlife Fed’n*, 497 U.S. at 883. MICI’s interest and role in the NOP cannot credibly be compared to that of a stenography firm that transcribes agency proceedings. Moreover, since *Lujan*, the Court has “adopted an even more permissive version of the zone text,” and the court reporter dicta is not consistent with the current standard. *See generally* Richard J. Pierce, Jr., *Administrative Law Treatise*, 1194 (4th ed. 2002) (*citing Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998)).

<sup>11</sup> *Cf.* Organic Foods Act of 1989, S.1896, 101st Cong. § 104 (1989) (bill which would have granted certification authority solely to states).

entities like MICI. *Dir., Office of Workers' Comp. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-30 (1995). MICI has consistently argued that this suit is brought in its private capacity and is not subject to the prudential limitation on agency suits in *Newport News*. (Pl. Opp'n Mem. at 15-19.)

Additionally, even for agencies acting in their regulatory or administrative capacity, the rule of *Newport News* is not absolute. The Court in *Newport News* noted that the plaintiff agency Director had not asserted that she was “hamper[ed in the] performance of [her] express statutory responsibilities” by the decision she sought to appeal. *Newport News*, 514 U.S. at 131. However, where there is a “clear and distinctive responsibility,” the result would be different. *Id.* at 132. Here, MICI has clearly established that, even if considered an agency subject to the *Newport News* rule, MICI still has standing because it has an express statutory responsibility to determine whether a proposed organic system plan is consistent with the requirements of the national organic standards. *Compare* 7 C.F.R. § 205.681(a)(1) *with* 7 U.S.C. § 6513(a) and 7 C.F.R. § 205.404(a).

Moreover, as asserted above, certifying agents continue to have private interests as market participants even when carrying out their certification function. *See Newport News*, 514 U.S. at 128. Indeed, USDA has elsewhere recognized certifiers' competitive interests in the NOP structure established by Congress. *E.g.*, NOP Final Rule, 65 Fed. Reg. 80,548, 80,552 (Dec. 21, 2000) (providing for first round of certifier accreditation to occur in a batch specifically to avoid giving the very first accredited certifying agents an undue “market advantage”). MICI was among the first group of certifying agents to be accredited, on April 29, 2002. (Am. Compl. ¶ 7.) As market participants, certifying agents have standing, even if this Court were to conclude they are “agencies.”

**III. MICI Did Not Surrender Its Private Constitutional Rights When It Became an Accredited Certifying Agent.**

MICI did not surrender its private rights when it was granted accreditation. (Pl. Opp'n Mem. at 27-29, 32-33.)

**A. MICI Continues to Possess Property Interests Which Entitle It to Due Process of Law Before It Is Deprived of Those Interests.**

When it agreed to become an accredited certifying agent, MICI agreed to accurately apply the national organic standards. 7 U.S.C. § 6515(f). MICI agreed to accept for consideration all applications for certification within the areas for which it was accredited and within its administrative capacity. 7 C.F.R. § 205.501(a)(19). MICI agreed that the farming and handling operations to which it granted organic certification could state on their labels that they had been granted certification by MICI. *Id.* § 205.303(b)(2). However, MICI did not agree that a farming and handling operation could claim to be certified by MICI when, in fact, MICI had not certified it. 7 U.S.C. §§ 6520(a), 6502(4)-(5), 6513(a). MICI has a private property interest in the use of its name, which it grants to farming and handling operations whose organic plans MICI has determined meet the national organic standards. In accepting accreditation, MICI extended no grant of authority to use its name to farming and handling operations whose organic plans MICI has not determined meet the national organic standards. Accordingly, the challenged regulation deprives MICI of a property interest without due process of law.

**B. MICI Retains a Private Interest in Its Own Speech and Associational Conduct, Which May Not Lawfully Be Compelled.**

When MICI places its name on the label of products it certifies as organic, MICI is expressing its private sentiment about that product's consistency with the national organic standards, and is thereby privately associating itself with that product and its producers. NOP regulations specifically require MICI to make this private endorsement of the products it certifies in the form of a statement that they are certified organic by MICI. 7 C.F.R. § 205.303(b)(2). This "certified organic" statement can only be attributed to MICI, a private entity, and indeed, this is

the very purpose of requiring private certifiers' names be placed on the labels.<sup>12</sup> This requirement of private attribution takes this expression out of the realm of government speech. *See Johannis v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2064-65 & nn.7-8 (2005).

By virtue of its appeal regulations, USDA purports to be able to order MICI to grant certification, and thereby place its personal endorsement on the label of products MICI has not, in fact, determined are in compliance with national organic standards. 7 C.F.R. § 205.681(a)(1). MICI never consented to this system whereby USDA unlawfully seeks to compel certifiers' private speech and private association.<sup>13</sup> To the contrary, MICI has always contended these unilateral actions by USDA illegally violate OFPA and the Constitution. (Am. Compl. ¶¶ 64-80.)

Finally, *Harvey* did not decide the First Amendment question presented in this appeal. *Harvey* holds only that reducing certifiers' conflicts of interest by prohibiting them from providing private consulting services about the organic program does not violate the First Amendment. 396 F.3d at 41-43. Regardless of any broad dicta in that case, *Harvey* does not address the ways in which the private labeling requirements in 7 C.F.R. § 205.303(b)(2) compel private speech to the world at large, and association with particular products, all without any opportunity for review of the decision's consistency, as required by law.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in MICI's Opposition Memo, USDA's Motion to Dismiss should be denied in its entirety.

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<sup>12</sup> During the comment period for the first proposed NOP rule, commenters successfully urged a change to a proposed USDA organic seal because it falsely suggested USDA was the certifier. NOP Final Rule, 65 Fed. Reg. 80,548, 80,584 (Dec. 21, 2000).

<sup>13</sup> USDA may not, through its appeals and labeling regulations, alter the statutory parameters of the NOP. These parameters state that (1) organic plans, by definition, must be "agreed" to by a certifying agent, and (2) certifying agents and other "persons" may appeal actions of the Secretary which are inconsistent with the national organic standards.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 27, 2006, I caused to be served upon the attorneys of record for the Defendant by electronic means a true and correct copy of the foregoing Sur-reply.

/s/ Jill E. Krueger

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