No. S216305

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHELLE QUESADA

Plaintiff and Appellant,

v.

HERB THYME FARMS, INC.

Defendant and Respondent.

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division Three, No. B239602

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, the Chamber of Commerce of the United States of America (Chamber) requests leave to file an amicus curiae brief in support of Respondent Herb Thyme Farms, Inc. The proposed amicus brief is submitted with this application.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases raising issues of concern to the nation's business community, including cases involving the scope of federal preemption.[*]

INTEREST OF AMICUS CURIAE

This case presents a question of vital importance to the Chamber and its members: whether a private party may pursue claims under state consumer laws to hold a producer of agricultural products liable for allegedly falsely labeling products as "organic" even though the producer was authorized to use that label under the Organic Foods Production Act of

[*] The Chamber's briefs in preemption cases are available at http://www.chamberlitigation.com/cases/issue/federal-preemption.

1990 (OFPA, 7 U.S.C. § 6501 et seq.) and its implementing regulations, the National Organic Program (NOP, 7 C.F.R. part 205).

Congress enacted the OFPA to implement uniform national standards for organic food products and to eliminate diverse state regulations that had created consumer confusion and barriers to a thriving national market for such products. The Chamber and its members have a strong interest in ensuring that Congress's federal framework be respected so that producers need follow only one set of uniform rules when labeling and selling their products nationwide as "organic." The uniform standards that Congress mandated would no longer be uniform if producers faced litigation and liability whenever consumers disagreed with a decision by an expert certifying agent or a final decision of the United States Secretary of Agriculture. Instead, producers would face a patchwork of standards, which could vary not only state by state but also jury to jury.

The Chamber is familiar with the issues before this Court and believes additional briefing would help the Court resolve this case. Among other issues, the Chamber's proposed amicus brief discusses the various ways that consumer lawsuits conflict with Congress's purposes in the OFPA. The proposed brief also discusses how the plain terms of the OFPA, which allow states to implement their own organic programs only to the extent approved by the Secretary, prohibit enforcement of state organic standards through state consumer laws that have not been presented to or approved by the Secretary.

CERTIFICATION

No party or counsel for a party in this appeal authored the Chamber's proposed amicus brief in whole or in part, or contributed money intended to fund the preparation or submission of the brief.

Dated: December 11, 2014

Respectfully submitted,

MORRISON & FOERSTER LLP

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INTRODUCTION

To remove barriers to a thriving national market for organic food products, Congress created a comprehensive federal regime for determining whether a producer is authorized—under uniform federal standards—to sell and market its products as organic, and for remedying alleged violations. In furtherance of its goals, Congress prohibited state action in this area except to the extent the United States Secretary of Agriculture (Secretary) has approved a state's organic program. Here, although Herb Thyme Farms, Inc. (Herb Thyme) was a certified producer authorized by federal law to use the "organic" label for its products, Michelle Quesada sued Herb Thyme under California's unfair competition law for doing exactly that. As the Court of Appeal correctly held, private lawsuits that seek to enforce organic standards under state consumer laws are an obstacle to Congress's objectives for the Organic Foods Production Act of 1990 (OFPA, 7 U.S.C. § 6501 et seq.). Moreover, because the Secretary has not approved the use of state consumer laws to enforce organic standards as part of California's state organic program, Ms. Quesada's claims are contrary to the plain terms of the OFPA.

A "USDA organic" seal matters. This lawsuit threatens that principle. A decision allowing state consumer lawsuits to impose liability on certified producers for using a federally-authorized label could resurrect the very patchwork of standards that Congress found had burdened interstate commerce. Rather than the uniformity that Congress mandated, certified producers would be subject to piecemeal liability on a state-by-state basis for a particular consumer's and a particular jury's view of whether the authorized use of the label was proper under state law. And consumers in states with state organic programs would be endowed with even greater powers to enforce organic standards than the state official

charged by federal law with responsibility for enforcing that program (as well as more authority than consumers in states without a state program). These and other irrational results are starkly inconsistent with Congress's declared goal of uniformity and its explicit directives that a state organic program be consistent with the OFPA and approved by the Secretary.

The Court of Appeal's judgment should be affirmed.

LEGAL ARGUMENT

I. THIS LAWSUIT CONFLICTS WITH CONGRESS'S MANDATE THAT UNIFORM FEDERAL STANDARDS GOVERN CERTIFYING AND LABELING ORGANIC FOOD PRODUCTS.

A. Congress enacted the OFPA to establish the uniformity necessary for a thriving market in organic products.

As demand for organically-produced foods grew in the late 1980s, American farmers were "ready and willing" to meet that demand. (S.Rep. No. 101-357, 2d Sess., p. 289 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 4943.) But "[g]rowth in the organic food trade . . . ha[d] been hampered by a lack of consistent standards for production." (*Ibid*.) In particular, the disparity among state regulations had led to "consumer confusion and troubled interstate commerce." (*Ibid*.) Those diverse standards left farmers and processors with "no choice but to produce and label their products according to conflicting standards" (*ibid*.), and had even caused some "large food chains and distributors" to "refuse to purchase organic products" (*id*. at p. 290, reprinted in 1990 U.S. Code Cong. & Admin. News, p. 4944). As a result, the organic industry, as well as state departments of agriculture, sought federal regulation and the implementation of uniform federal standards. (*Ibid*.)

Congress responded by concluding that nationally uniform standards were necessary to remedy these problems and foster the growing organics food market, finding "it is time for national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper." (S.Rep. No. 101-357, 2d Sess., p. 290 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 4943.) To achieve this result, Congress enacted the OFPA, which has as its declared purpose:

> (1) to establish national standards governing the marketing of certain agricultural products as organically produced products;
>
> (2) to assure consumers that organically produced products meet a consistent standard; and
>
> (3) to facilitate interstate commerce in fresh and processed food that is organically produced. (§ 6501.)[1]

B. To accomplish these goals, Congress created a rigorous, extensive regulatory framework with limited state participation only as approved by the Secretary.

1. The overarching federal regime.

The OFPA and its implementing regulations, the National Organic Program (NOP, 7 C.F.R. part 205), create a comprehensive federal regime overseeing and regulating all aspects of the production of agricultural products that may be sold and marketed as "organic." Section 6503 (titled "National Organic Production Program") directs the Secretary to "establish

[1] Undesignated statutory references are to title 7 of the United States Code.

an organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for" in the OFPA, and to implement that program through "certifying agents." (§ 6503(a), (d); see also §§ 6514-6515.) Section 6504 (titled "National Standards for Organic Production") sets the requirements for agricultural products to be "sold or labeled as an organically produced agricultural product," including that the 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." (§ 6504(3); see also § 6506.) The OFPA also identifies approved and prohibited production and handling practices (§§ 6508-6512) and requires that a certifying agent review the "organic plan" submitted by any "producer or handler seeking certification" under the Act to determine whether the plan "meets the requirement of the programs" (§ 6513(a)). (See also § 6513(b)-(g).)

The National Organic Program provides the detailed regulations that carry out the OFPA's requirements, defining which agricultural products qualify as organic and may be labeled and sold using that term, and setting forth rigorous and ongoing certification and compliance standards for certification. (E.g., 7 C.F.R. §§ 205.400, 205.406, 205.403.)[2]

Under the OFPA and the National Organic Program, a producer or handler that has its organic plan certified by a certifying agent becomes "an organically certified farm or handling operation." (§ 6503(d); see 7 C.F.R. § 205.404(a).) Certification is a determination that "a production or

[2] All citations to title 7 of the Code of Federal Regulations are to the 2014 version (and are identical to the 2012 version cited by the Court of Appeal).

handling operation is in compliance with the Act" and regulations. (7 C.F.R. § 205.2.) Under the OFPA's "Compliance Requirements," a person "may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with" the Act. (§ 6505(a)(1)(A); see also § 6505(a)(1)(B) ["no person may affix a label to" or market a product as organic "except in accordance with" the OFPA].) The National Organic Program identifies the approved United States Department of Agriculture (USDA) seal and the approved terms that certified producers and handlers may use for their products. (7 C.F.R. §§ 205.303, 205.304.) Thus, a certified producer is authorized to use the term "organic" in labeling and marketing its products.

The OFPA grants the Secretary extensive powers to determine whether any person has violated any provision of the Act or its implementing regulations. (§ 6519(b).) It prescribes a civil penalty of $10,000 for unauthorized use of the "organic" label (§ 6519(c)(1)) and criminal penalties for any false statement made to the Secretary, a governing State official, or a certifying agent (§ 6519(c)(2)). In addition, if the Secretary determines that a person attempted to use an "organic" label on a product that was not produced or handled in accordance with the OFPA, any farm or handling operation in which that person has an interest "shall not be eligible" to receive a certification for five years. (§ 6519(c)(3).)

Congress directed the Secretary to establish an "expedited administrative appeals procedure" allowing a person to appeal any action taken with respect to the OFPA that either "adversely affects" that person or "is inconsistent with the organic certification program established" under the Act. (§ 6520(a).) As the OFPA requires, the regulations include

administrative procedures for correcting noncompliance or revoking or suspending certification, as well as an administrative procedure for appeals of certification decisions. (§ 6520(a); 7 C.F.R §§ 205.662, 205.681.) A final decision in any noncompliance proceeding may be appealed to a United States District Court. (§ 6520(b).)

Congress did not establish a private right of action to enforce the OFPA or the implementing regulations. The Final Rule explained that "the National Organic Program—not private actors—"is ultimately responsible for the oversight and enforcement of the program, including . . . cases of fraudulent or misleading labeling." (Final Rule, 65 Fed.Reg. 80,557 (Dec. 21, 2000).)

2. The states' limited role.

The OFPA does not contain a "savings clause" preserving state statutes or remedies related to the Act's subject matter. On the contrary, the OFPA defines a specific, limited role for state participation—subject to federal approval and oversight—thereby securing federal supremacy in this area.

As part of the OFPA, Congress permitted states to establish organic certification programs, but with strict limitations. (§ 6503(b).) In particular, a state organic program must meet the Act's requirements and must be approved by the Secretary. (§§ 6502(20), 6507(a).) After initial approval, the Secretary retains oversight of a state program, and must review the program at least once every five years. (§ 6507(c); 7 C.F.R. § 205.622.) As a result of that later review, the Secretary may approve or disapprove the program. (7 C.F.R. § 205.622.)

A state organic program may contain more restrictive requirements for organic certification than those in the National Organic Program only if they are consistent with the OFPA and are approved by the Secretary. (§ 6507(b)(1)-(2).) Once approved by the Secretary, the more restrictive requirements "become the [National Organic Program] regulations for organic producers and handlers in the State." (Final Rule, 65 Fed.Reg. 80,617 (Dec. 21, 2000).) Thus, state organic standards cannot exist separate and independent from the National Organic Program. California law acknowledges as much by providing that "no product shall be sold as organic pursuant to this article unless it is produced according to regulations promulgated by the NOP." (Health & Saf. Code, § 110820.)

As part of an approved state organic program, a "governing state official"—either the state's "chief executive official" or an official elected "to be responsible solely for the administration of the agricultural operations of the State"—oversees certification compliance proceedings in the state and is responsible for administrative enforcement of noncompliance, revocation, or suspension of certification. (§ 6502(7); 7 C.F.R. § 205.620(d).) Under an approved state plan, the governing state official may do no more than what the federal plan permits. The state program must use appeals procedures and rules that are "equivalent to those of the [National Organic Program] and USDA" and that have been "approved by the Secretary." (Final Rule, 65 Fed.Reg. 80634-80635 (Dec. 21, 2000).) The governing state official must notify the Secretary of any noncompliance proceeding against a certified operation. (7 C.F.R. § 205.668(a).) A final decision in any noncompliance proceeding conducted under the state organic program may be appealed to a United States District Court. (Final Rule, 65 Fed.Reg. 80634-80635 (Dec. 21, 2000); 7 C.F.R. § 205.668(b).)

C. State consumer laws stand as an obstacle to Congress's goals for the OFPA.

1. The Court of Appeal, like the Eighth Circuit, correctly concluded that consumer lawsuits are inconsistent with Congress's goals.

The Court of Appeal concluded that a state consumer lawsuit based on violations of either the OFPA or California's state organic program (codified as the California Organic Products Act of 2003 (COPA)) was preempted because it "would frustrate the congressional purpose of exclusive federal and state government prosecution and erode the enforcement methods by which the Act was designed to create a national organic standard." (Slip Opn. 2.) The Court of Appeal applied obstacle preemption, which it explained, "arises when the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at p. 8 [citing *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936].) Determining whether a state's law presents such an obstacle requires a court "to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526.) The Court of Appeal applied the "presumption against preemption of state laws that operate in traditional state domains." (Slip Opn. 9 [citing *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088].)

The Court of Appeal followed *In re Aurora Dairy Corp. Organic Milk Marketing & Sales Practices Litigation* (8th Cir. 2010) 621 F.3d 781 (*Aurora Dairy*), which also addressed whether consumer lawsuits under state law alleging noncompliance with federal organic labeling standards were preempted. There, the Eighth Circuit held that claims that a producer

and retailers "sold milk as organic when in fact it was not organic are preempted because they conflict with the OFPA." (*Id*. at p. 796.) Specifically, the court held that, because the producer (Aurora) "maintained its certification" under the OFPA, claims "relying on state consumer protection or tort law" that "seek damages from any party for Aurora's milk being labeled as organic in accordance with the certification . . . conflict[] with federal law." (*Id*. at p. 797.) The court reasoned that any such action "directly conflicts with the role of the certifying agent" to "'certify a farm or handling operation that meets the requirements of' the OFPA." (*Ibid*. [quoting § 6503(d)].)[3]

The Eighth Circuit also rejected the plaintiffs' argument that compliance with the OFPA's implementing regulations is a "separate requirement independently enforceable via state law." (*Id*. at p. 796.) The court concluded that such enforcement would conflict with the OFPA's declared purposes because (1) national standards for marking organically produced products would be "deeply undermined by the inevitable divergence in applicable state laws as numerous court systems adopt possibly conflicting interpretations of the same provisions of the OFPA and NOP" and (2) "not only different legal interpretations, but also different enforcement strategies and priorities could further fragment the uniform requirements." (*Id*. at pp. 796-797 [citing § 6501(1)-(2)].)

Applying *Aurora Dairy*, the Court of Appeal concluded that Ms. Quesada's lawsuit conflicts with federal law. Here, as in *Aurora*

[3] As a federal court decision on a federal question (the preemptive scope of the OFPA), the Eighth Circuit's decision is "persuasive and entitled to great weight." (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320.)

Dairy, the state consumer law claims seek to hold "a certified grower[] accountable for mislabeling its product as organically grown," and "require proof of facts that, if found by the certification agent, would have precluded federal certification or would have caused a revocation or suspension of certification." (Slip Opn. 12.) Allowing such claims to proceed "might result in a finding that the certified grower mislabeled its product as 'organic,' but the certified grower's federal certification had not been revoked or suspended." (*Ibid*.) That "incongruous result" would "'come[] at the cost of the diminution of consistent standards.'" (*Ibid*. [quoting *Aurora Dairy*, *supra*, 621 F.3d at pp. 796-797].) As the Court of Appeal concluded, state consumer lawsuits, whether alleging violations of the OFPA or of a state organic program, "would frustrate the congressional purpose of exclusive federal and state government prosecution and erode the enforcement methods by which the Act was designed to create a national organic standard." (*Id*. at p. 2.)[4]

[4] Accordingly, the Court of Appeal rejected Ms. Quesada's attempt "to distinguish *Aurora Dairy* by narrowly reading the case to apply only to certification challenges," and not to compliance challenges. (Slip Opn. 12.) Ms. Quesada again attempts to distinguish *Aurora Dairy* on the ground that the state law claims in that case contended that the producer was not allowed to use the organic label *at all*, notwithstanding its certification, whereas Ms. Quesada claims Herb Thyme is not allowed to use label on particular packages because the contents were mixed organic and non-organic. (Petr.'s Opening Br. (POB) pp. 27-28.) If a producer is certified, it is authorized to use the federal label; thus, consumer lawsuits arising from use of the label necessarily conflict with the federal standards allowing that use. Preemption does not turn on the reasons that someone is challenging use of the label. (Cf. *Gade v. National Solid Wastes Mgmt. Ass'n* (1992) 505 U.S. 88, 105-106 [state law that frustrates effectiveness is preempted even if state legislature "'had some purpose in mind other than one of frustration'"].)

This Court's opinion in the *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 does not compel a different result, as the Court of Appeal concluded. The statutory scheme at issue there allowed states to establish their own requirements for labeling so long as those requirements were identical to those in the federal statute. There was no mandate, as here, that a federal agency approve the states' requirements—and indeed, any state program addressing the same issues. (Cf. *Solus Industrial Innovations, LLC* (2014) 229 Cal.App.4th 1291, 1305-1306 [distinguishing *Farm Raised Salmon* in interpreting preemptive scope of federal statute that required Secretary of Labor to approve state plan].) The OFPA's federal pre-approval requirement thus reflects what Congress called a "unique regulatory scheme" (S.Rep. No. 101-357, 2d Sess., p. 293 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 4947), distinguishing the preemption analysis here from that in the *Farm Raised Salmon Cases*.[5]

[5] The unique regulatory scheme embodied in the OFPA also distinguishes *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390. There, this Court held that a claim under California's unfair competition law could be based on a violation of the federal Truth in Savings Act, 12 U.S.C. § 4301 et seq. even though Congress had repealed a provision allowing a private right of action under the federal statute, because Congress had "also made it plain that state laws consistent with the federal statute are not superseded." (*Rose*, 57 Cal.4th at pp. 393-394.) As this Court explained, by "leaving [the Truth in Saving Act's] savings clause in place, Congress explicitly approved the enforcement of state laws 'relating to [bank disclosures] except to the extent that those laws are inconsistent'" with that statute—and the UCL fell within that savings clause. (*Id*. at p. 395 [quoting 12 U.S.C. § 4312].) In contrast, the OFPA has no savings clause for "explicitly approved" state laws enforcing state standards that are not inconsistent with the Act. Instead, Congress explicitly limited states' role in this area to state laws approved by the Secretary. (Cf. *Solus Industrial Innovations, LLC, supra*, 229 Cal.App.4th at p. 1306 [distinguishing *Rose* in interpreting preemptive scope of federal statute that required Secretary of Labor's approval of state plan].)

Jones v. ConAgra Foods, Inc. (N.D.Cal. 2012) 912 F.Supp.2d 889, which reached conclusions regarding preemption that are contrary to those of the Court of Appeal and the Eighth Circuit, is not persuasive. The court in that case reasoned that because California's organic program incorporated the National Organic Program regulations (as they must, pursuant to federal law), the California statutes "do not impose any relevant additional requirements than those under the OFPA." (*Id*. at pp. 895-896.) The court never addressed the limited enforcement mechanisms in federal law for violations of the OFPA or the National Organic Program, or the limitations on state authority that require federal approval and oversight of a state organic program.[6]

2. Consumer lawsuits challenging a certified producer's use of an authorized label would undermine uniformity and threaten to resurrect a burdensome patchwork of standards that would burden interstate commerce.

The Court of Appeal's and Eighth Circuit's conclusions that state consumer laws are obstacles to the accomplishment of Congress's objectives in the OFPA are amply supported. Ms. Quesada's claims seek to hold Herb Thyme liable for "falsely labeling" its products as organic by using a label that it is certified to use under federal law and regulations. (POB p. 1.) Allowing this lawsuit to proceed would open the door to

[6] In *Wyeth v. Levine* (2009) 555 U.S. 555 (discussed in Petitioner's Reply Brief at pages 15-16), the Supreme Court concluded that "an agency's mere assertion that state law is an obstacle to achieving its statutory objectives" was "entitled to no weight." (*Wyeth*, 555 U.S. at pp. 576, 581.) Here, in contrast, obstacle preemption is based on Congress's declared purposes and mandates in the OFPA and the implementing regulations of the National Organic Program.

private lawsuits throughout California whenever consumers object to a grower's federally-authorized use of the organic label. That result is flatly inconsistent with Congress's mandate for uniform federal labeling requirements for organic produce, and with the federal scheme that relies on certifying agents to determine whether a producer is authorized to sell and market its products as organic (and on governmental enforcement to remedy alleged violations).

First, there is a clear and obvious conflict between federal law that authorizes a producer to label products as "organic" and state consumer lawsuits that subject the producer to damages for doing exactly that. This fundamental inconsistency undermines the federal scheme that Congress put in place through the OFPA. Indeed, state consumer lawsuits will undo the very uniformity Congress mandated, by subjecting producers to liability on a state-by-state basis for a particular consumer's and a particular jury's view of whether use of the authorized label was, in fact, proper under state law.

Courts have recognized in analogous contexts that state law challenges to the use of federally-approved labels would countermand Congress's intent. For example, under the Federal Meat Inspection Act and Poultry Products Inspection Act, the USDA inspects meat and poultry products and approves all product labels before use. (See 21 U.S.C. §§ 456-457, 606-607.) Courts have concluded that the presence of the USDA mark of inspection is presumptive evidence of compliance with the statutes, and state law challenges to the products' labeling are inconsistent

with the federal regime.[7] (See, e.g., *Trazo v. Nestle USA, Inc.* (N.D.Cal. Aug. 9, 2013, No. 5:12-CV-2272 PSG) 2013 WL 4083218, at *8 ["[A]llowing a jury to weigh in on preapproved USDA labels would surely conflict with the federal regulatory scheme."]; *Barnes v. Campbell Soup Co.*, (N.D.Cal. July 25, 2013, No. C 12-05185 JSW) 2013 WL 5530017, at *5 [preapproved label "cannot be construed, as a matter of law, as false or misleading"]; *Kuenzig v. Kraft Foods, Inc.* (M.D.Fla. Sept. 12, 2011, No. 8:11-cv-838-T-24 TGW) 2011 WL 4031141, at *6-7 [preapproved labels "are presumptively lawful and not false or misleading"].)[8]

Similarly, federal law authorizes the Food and Drug Administration to give "premarket approval" for certain medical devices, including their labeling, and prohibits manufacturers from making changes to the approved labeling without agency approval. (See *Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312, 317-319 [discussing Medical Device Amendments of 1976, 21 U.S.C. § 360c et seq.].) As the United States Supreme Court has held, claims asserting that an approved device was "labeled . . . in a manner that violated" state law are preempted because they impermissibly impose requirements that "'are different from, or in addition to,'" the federal

[7] The OFPA places far stricter limitations on state authority than either the Federal Meat Inspection Act or the Poultry Products Inspection Act. While those statutes permit states to enforce labeling and packaging requirements so long as they are not "in addition to, or different than" federal requirements (21 U.S.C. §§ 467e, 678), the OFPA bars all state requirements unless they have been submitted to and approved by the Secretary (7 U.S.C. §§ 6502(20), 6507(a)). Thus, the conflict is even more acute in the context of the OFPA.

[8] Because the federal decisions on this issue are "both numerous and consistent," this Court "should hesitate to reject their authority." (*Etcheverry v. Tri-Ag Service, Inc.*, *supra*, 22 Cal.4th 316 at p. 321 [internal quotation marks omitted].)

requirements. (*Id*. at pp. 320, 330 [quoting 21 U.S.C. § 360k(a)(1)]); see also, e.g., *Wyoming Premium Farms, LLC v. Pfizer, Inc*. (D.Wyo. Apr. 29, 2013, No. 11-CV-282-J) 2013 WL 1796965, at *4, *9 [rejecting state law challenge to vaccine's efficacy because USDA had pre-approved vaccine and its labeling pursuant to Virus-Serum-Toxin Act].)

Here, as in these other cases, subjecting certified producers to liability under state laws for use of federally-approved labels presents a fundamental conflict with federal law and risks widespread inconsistency and uncertainty as to labeling requirements.

Second, lawsuits under state consumer laws would expose producers to liability for conduct that would not be subject to penalty under the federal enforcement procedures, another clear conflict with the federal scheme. As discussed, the OFPA and its implementing regulations impose severe consequences on producers who fail to comply with organic standards—including the suspension or revocation of their certification, and the attendant inability to continue to label their products as "organic." (§ 6519(c)(3).) But the regulations also explicitly permit certifying agents to require correction of minor noncompliance issues within specified time periods. (7 C.F.R. § 205.404(a).) Thus, the National Organic Program vests certifying agents—who are the most knowledgeable about the federal organic requirements and the most familiar with the operations and efforts of certified growers (§§ 6503(d), 6514(a), (b)(2))—with the necessary discretion to ensure the OFPA is properly implemented and violations are appropriately remedied. Consumer lawsuits could subject producers to liability and damages for conduct that the OFPA empowers certifying agents to conclude is better addressed by requiring correction through specified measures and timeframes.

The United States Supreme Court addressed similar circumstances in which state law did not permit variations from prescribed standards that were tolerated by federal regulations, and held the state law unenforceable. (*Jones v. Rath Packing Co*., *supra*, 430 U.S. 519.) The federal statute at issue in *Jones*, the Federal Meat Inspection Act, provided that meat is misbranded unless it has a label showing "an accurate statement of the quantity of the contents in terms of weight." (21 U.S.C. § 601(n)(5)(B) [quoted in *Jones*, 430 U.S. at p. 529].) The statute contemplated, however, that "reasonable variations may be permitted" by regulation (*ibid*.), and its implementing regulations permitted "[r]easonable variations caused by loss or gain of moisture during the course of good distribution practices" (9 C.F.R. § 317.2(h)(2) (1976) [quoted in *Jones*, 430 U.S. at p. 529]). In contrast, the California standards at issue made "no allowance for loss of weight resulting from moisture loss during the course of good distribution practice." (*Jones*, 430 U.S. at p. 531; *id*. at pp. 526-527 [discussing Bus. & Prof. Code, § 12211 and 4 Admin. Code, ch. 8, art. 5].) Accordingly, the Court concluded that the state law was "'different than' the federal requirement," and therefore unenforceable. (*Id*. at pp. 530-532; see 21 U.S.C. § 678 [prohibiting labeling requirements "in addition to, or different than" federal requirements].)

Third, allowing consumers to bring claims under state law also would be inconsistent with Congress's determination that final decisions of the Secretary regarding violations of the OFPA be reviewed by a United States District Court. (§ 6520(b).) A state consumer lawsuit would substitute lay jurors for the Secretary and federal court to evaluate a grower's or producer's compliance with the OFPA.

Notwithstanding these conflicts, Ms. Quesada contends that "[c]onsumer protection claims are consistent with the OFPA's requirement that California enforce organic regulations within the state." (POB p. 23.) She argues that, "[o]nce an SOP is approved, the state assumes the obligation of enforcing all organic regulations within its borders," and "the OFPA contains no indication whatsoever that Congress intended to restrict how a state may choose to enforce its approved SOP." (*Ibid*.)

This argument ignores that, where a state obtains approval to implement a state organic program, the *governing state official*—not the state itself or the state and all its citizens—is charged with administering the program. (§ 6502(7).) That role includes taking responsibility for enforcement of the program through the enforcement mechanisms set forth in the National Organic Program. (7 C.F.R. § 205.620(d) [state organic program "must assume enforcement obligations in the State for the requirements of this part and any more restrictive requirements approved by the Secretary"].) As explained in the Final Rule, the governing state official of a state organic program is "the equivalent of a representative of the Secretary for the purpose of the appeals procedures under the NOP." (Final Rule, 65 Fed. Reg. 80,684 (Dec. 21, 2000).) The OFPA and the National Organic Program not only identify the specific mechanisms available for enforcing the statute and regulations, but also require that any state regulations in addition to those in the national program be approved by the Secretary. (§§ 6502(20), 6507(a), 6519-6520; 7 C.F.R §§ 205.662, 205.681.)

Given that role, a governing state official could not bring an action under a state consumer protection law to seek redress for alleged violations of the OFPA or of the state organic program, as such an action would be an

improper attempt to enlarge the official's enforcement duties and circumvent the state organic program. Ms. Quesada's argument, therefore, hinges on consumers' having more authority to enforce the OFPA and National Organic Program than that of the governing state official charged with enforcement duties. There is no basis in the OFPA or the National Organic Program to grant consumers in a state with a state organic program more rights to enforce organic standards than the explicit grant of authority to the governing state official.[9]

In light of the conflicts between the federal scheme and state consumer lawsuits, the potential repercussions of allowing such lawsuits challenging the use of authorized labels would be enormous. The federal statutory and regulatory framework serves Congress's purpose of removing barriers to a thriving market for organic products. As Congress noted, it takes years for growers to transition to organic requirements. (S.Rep. No. 101-357, 2d Sess., p. 291 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 4945.) Producers must go through an arduous process (and incur tremendous expense) to implement organic practices and then obtain and maintain certifications to use the term "organic" consistent with the uniform national standards that Congress mandated. Producers are also subject to ongoing oversight and obligations for continued compliance, inspections, correction of noncompliance issues, and annual fees and updated plans. Although they face stiff penalties—including revocation of

[9] Nor do the OFPA and National Organic Program grant consumers in states with state organic programs more rights to enforce organic standards than consumers in states without a state program. Consumers could only gain additional rights if their state requested and obtained the Secretary's approval to include state consumer lawsuits as part of a state organic program. California neither sought nor received approval to grant its consumers such approval.

their certification—for violating the OFPA or the National Organic Program, the uniform standards and federal framework Congress created offer a measure of certainty by permitting producers to use the organic label while their certification is in place and by allowing them to work with certifying agents to resolve any minor noncompliance issues. The OFPA ensures that producers that take on these obligations need follow only one set of uniform rules in order to be able to label and sell their products as "organic."

Allowing state consumer lawsuits to impose liability on certified producers for using a federally-authorized label would undermine the uniform national standards that Congress created and threaten to resurrect the diverse state regulations that had hampered the organics industry and burdened interstate commerce. Rather than being able to rely on hard-earned certifications, producers would face expensive litigation—including class actions—if any consumer decided that products were not suitable to bear the "organic" label. There would be no uniform standards if producers faced litigation and liability whenever consumers disagreed with a decision by an expert certifying agent or a final decision of the Secretary. Instead, producers would face a patchwork of standards, which could vary not only state by state but also jury to jury. (Cf. *Turek v. General Mills, Inc*. (7th Cir. 2011) 662 F.3d 423, 426 ["It is easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide. Manufacturers might have to print 50 different labels, driving consumers who buy food products in more than one state crazy."].)

Businesses may not be willing invest the time and resources necessary to become certified and maintain their certification under

rigorous federal standards if they face litigation from consumers across the country who contend the producers violated such standards, or they may pass the costs on to consumers. Either way, consumers lose. These are precisely the types of ill effects that Congress sought to eliminate by enacting the OFPA.

D. Claims under state consumer protection laws are not immune from preemption.

To the extent Ms. Quesada suggests that state consumer protection laws such as California's unfair competition law (UCL) are not subject to preemption because they are laws of general applicability (see Petr.'s Reply Br. pp. 4-6), that suggestion is incorrect as a matter of law. As her cited cases demonstrate, although a law of general application may not be preempted *on its face*, a claim under such state law may nevertheless be preempted if the claim is in conflict with Congress's goals for the preempting statute.

In *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, the federal statute at issue barred any state "'requirement or prohibition based on smoking and health.'" (*Id.* at p. 1266 [quoting 15 U.S.C. § 1334(b)].) This Court held that, because the UCL "is a law of general application, and it is not based on concerns about smoking and health," the federal statute "does not preempt that law *on its face*." (*Id.* at p. 1272.) But the Court further explained that it was "not sufficient to consider . . . whether plaintiffs have based their claim on a law of general application that is not motivated by concerns about smoking and health," because the Court "must also determine whether plaintiffs seek, *by a particularized application of a general law*, to restrict the content or location of cigarette advertising based on" such concerns. (*Ibid.* [italics added].) The Court determined that the

particularized application of the UCL in that case *did* implicate those concerns and that the plaintiffs' unfair competition claim therefore *was* preempted. (*Id*. at p. 1273.) The Court's opinion demonstrates that the generally-applicable nature of the UCL does not determine preemption. Instead, a court must analyze whether the particular claim asserted falls within a federal statute's preemptive reach.

In *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, petn. for cert. filed (U.S. Oct. 27, 2014, No. 14-491) 83 U.S.L.W. 3293, the People brought a claim under the UCL based on a trucking company's "alleged general violation of labor and employment laws" through misclassifying drivers as independent contractors. (*Id*. at pp. 775, 783.) This Court addressed whether that claim was expressly preempted by a federal statute that bars the enforcement of state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." (49 U.S.C. § 14501(c)(1); see *Pac Anchor*, 59 Cal.4th at p. 778.) In the portion of the case cited in Ms. Quesada's brief, this Court held that the action was not "facially preempted" because the UCL is a law of general application that "does not mention motor carriers" and a UCL action that is "based on an alleged general violation of labor and employment laws does not implicate" Congress's concerns about regulation of motor carriers' transportation of property. (*Pac Anchor*, 59 Cal.4th at pp. 782-783.)

But the Court's analysis did not end there; it also held that the UCL claim was not preempted "as applied," because the claim had only "'remote'" effects on carriers' prices, routes, and services and did not implicate Congress's concerns in the federal statute at issue. (*Id.* at pp. 784-785.) As the Court recognized, UCL claims have been held

preempted by that statute where the claims do relate to carriers' prices, routes, or services, and therefore do implicate Congress's concerns regarding transportation. (See, e.g., *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 [cited in *Pac Anchor*, 59 Cal.4th at p. 780].) Here, because Ms. Quesada's UCL action is based on violations of organic standards that implicate Congress's concerns about regulation of organic producers, the action is preempted by the OFPA.

In *Gade v. National Solid Wastes Management Association* (1992) 505 U.S. 88, the United States Supreme Court addressed whether state licensing statutes that required hazardous waste workers to receive training and obtain licenses were preempted by the federal Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 651 et seq. Absent approval of the Secretary of Labor, the OSH Act "pre-empts all state law that 'constitutes, in a direct, clear and substantial way, regulation of worker health and safety.'" (*Gade*, 505 U.S. at p. 107 [citation omitted].) The Court held that "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act." (*Id*. at pp. 98-99.) The Court further held state laws preempted even if they had a dual purpose of addressing public safety, in addition to occupational safety concerns. (*Id*. at pp. 104-108.)

In so holding, the Court noted that "state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSH Act standards and that regulate the conduct of workers and nonworkers alike would *generally* not be pre-empted" because they "cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public." (*Id*. at pp. 107-

108 [italics added].) The Court's reference to laws of general applicability does not establish a rule that laws such as the consumer protection statues at issue here are immune from preemption. The traffic and fire safety laws referenced in *Gade* are nothing like the consumer protection law *claims* asserted here, which are based on alleged violations of duties imposed by the OFPA.

II. THE PLAIN MEANING OF THE OFPA COMPELS PREEMPTION OF THIS LAWSUIT BECAUSE THE SECRETARY DID NOT APPROVE THE USE OF CONSUMER LAWS TO ENFORCE CALIFORNIA'S ORGANIC PROGRAM.

By explicitly requiring a state organic program to be approved by the Secretary, the OFPA's plain terms preempt enforcement of organic standards through state consumer laws unless the Secretary has approved such enforcement mechanisms as part of a state organic program.

The broad directives of Section 6507 expressly require the Secretary's approval for all aspects of a state organic plan. Section 6507 requires a governing state official to "submit a plan for the establishment of a State organic certification program to the Secretary for approval," sets forth the requirements for a state program to be "approved by the Secretary," and allows a state program to "contain more restrictive requirements" than those in the National Organic Program if "approved by the Secretary." (§ 6507(a)-(b); see also § 6502(20).) Under those explicit terms, absent the Secretary's approval, there can be no state organic plan or any aspect of a state organic plan that differs from the National Organic Program. And because the OFPA and National Organic Program contain specific requirements regarding enforcement of organic standards (see §§ 6519(b)-(c), 6520(a)-(b); 7 C.F.R §§ 205.662, 205.681), absent the

Secretary's approval, there can be no enforcement mechanisms for a state organic plan.

Ms. Quesada acknowledges that the Secretary's approval is necessary for a state organic program—including mechanisms for enforcing the program's requirements—to be effective. She asserts that California statutes that were in effect before the OFPA "remained in force" only "until the final national organic standard went into effect." (POB p. 10.) She further describes COPA as thereafter "enacted to 'conform California law to the national regulations and codify existing state provisions *regarding enforcement* of the state and federal requirements regarding organic products.'" (*Ibid*. [italics added, citation omitted].) Ms. Quesada's characterization of Section 6507 as a "savings clause" further confirms that the OFPA preempts state regulation that is not "saved" by falling within the scope of state action authorized by that provision.

It is undisputed that no provisions of California's consumer laws—such as Business & Professions Code section 17200—were submitted to the Secretary as part of COPA or approved by the Secretary as part of the state organic program. (See POB p. 10 [referring to Health & Safety Code sections 110810-110959 as comprising COPA].) In the absence of the Secretary's approval, the plain terms of the OFPA preempt use of state consumer laws to hold a certified producer liable for its use of a federally-approved label.

The Court of Appeal recently concluded that a similar federal statutory scheme, the OSH Act, preempted UCL claims brought by a district attorney because such claims had not been approved as part of a state plan. (*Solus Industrial Innovations, LLC, supra,*

229 Cal.App.4th 1291.) The OSH Act allows a state to develop and enforce state standards regarding occupational health and safety on the condition that the state submits—and the Secretary of Labor approves—a state plan to do so. (See *id*. at pp. 1300-1301 [discussing 29 U.S.C. § 667(b)-(c)].) California had submitted a state plan, which the Secretary of Labor had approved, but that plan did not encompass enforcement by UCL actions. (See *id.* at pp. 1301-1303.) The Court of Appeal held that the state could act only within the parameters of the approved state plan: "Under this statutory scheme, we conclude the approved state plan operates, in effect, as a 'safe harbor' within which the state may exercise its jurisdiction. It is only when the state stays within the terms of its approved plan, that its actions will not be preempted by federal law." (*Id*. at p. 1307.) Accordingly, because the Secretary of Labor had not approved UCL actions as a means to enforce the California standards, the OSH Act preempted the district attorney's UCL claims.[10] (*Id*. at pp. 1307-1308.)

The reasoning and holding of *Solus* apply with equal force here. Just as the OSH Act requires the Secretary of Labor to approve a state plan regarding occupational health and safety standards, the OFPA requires the Secretary of Agriculture to approve a state program regarding organic

[10] The *Solus* court did not identify the type of preemption it applied, noting at one point that the OSH Act brought the federal government "into a field that traditionally had been occupied by the States" (*Solus*, *supra*, 229 Cal.App.4th at pp. 1299-1300 [internal quotation marks omitted]), and at another that "state regulation of workplace safety standards is explicitly preempted by federal law under the OSH Act" (*id*. at p. 1308). As the United States Supreme Court has noted, the categories of preemption "are not rigidly distinct." (*Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, *supra*, 505 U.S. at p. 104, fn. 2 [internal quotation marks omitted].)

standards for agricultural products.[11] As in *Solus*, as a result of these requirements, "the federal government's intent to preempt is clear." (*Solus*, *supra*, 229 Cal.App.4th at p. 1299.) Like the state plan in *Solus*, the State did not seek approval for using the UCL as an enforcement mechanism as part of its state organic program. And just as the Secretary of Labor did not approve use of the UCL to enforce state standards in *Solus*, the Secretary of Agriculture did not approve the use of the UCL to enforce COPA. Thus Ms. Quesada's claims here, like the UCL claims in *Solus*, are preempted.

CONCLUSION

For the reasons explained in Herb Thyme's brief and above, the Chamber respectfully submits that the judgment should be affirmed.

[11] Ms. Quesada may attempt to distinguish *Solus* on the ground that the OSH Act explicitly requires a state plan to include both the standards to be employed "and their enforcement" (29 U.S.C. § 667(b)), but any such argument would not be persuasive. As noted, Ms. Quesada herself argues that COPA sought approval of enforcement mechanisms for state and federal organic standards (POB p. 10) but it is undisputed that the UCL was not included in COPA. Independent of her concession, the National Organic Program explicitly requires that a state organic program "must assume enforcement obligations in the State for the requirements of [the National Organic Program] and any more restrictive requirements approved by the Secretary." (7 C.F.R. § 205.620(d).) In light of that requirement, approval of additional or different enforcement provisions cannot be divorced from the overall requirement that the Secretary approve a state program. It also would be illogical to suggest that Congress would preempt substantive organic standards that were not approved by the Secretary yet permit an unapproved state law procedure to enforce state standards. Doing so could lead to the absurd result that Congress permitted a state remedy where the state had no state standard to enforce.

Dated: December 11, 2014

Respectfully submitted,

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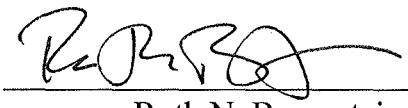
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this brief was produced using 13 point type and contains 7,482 words.

December 11, 2014



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