No. 19-70115

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION, *et al.*,
Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,
and

MONSANTO COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

INTERVENOR-RESPONDENT MONSANTO COMPANY'S BRIEF IN SUPPORT OF EPA'S MOTION FOR LEAVE TO FILE RESPONSE TO PETITIONERS' LETTER BRIEF

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On April 29, 2020, this Court requested simultaneous briefs from all parties addressing which registration order (or orders) are at issue in this suit. Petitioners' letter brief exceeds that mandate. In addition to addressing the scope of their challenge, Petitioners raise a brand new request for relief: They ask the Court to issue "a per curiam order granting the petition and vacating the registration, *halting any sale and use of these pesticide products*, and notifying the parties that the Court's reasons will be more fully explained in a forthcoming opinion." ECF No. 115-1 at 10 (emphasis added). Monsanto supports EPA's motion for leave to respond to this last-minute request, and agrees with EPA that the request is inappropriate.

To start, Monsanto agrees with EPA that Petitioners' request is procedurally improper. After four years of litigation about the 2016 and 2018 Registrations of XtendiMax, the merits of the most recent registration order are now pending before the Court. Having reviewed and made its own independent assessment of numerous registrant and academic studies, EPA imposed new conditions in the 2018 Registration that address *all* of the suggested causes of off-target movement. Monsanto believes this Court should conclude that EPA more than satisfied the requirements of FIFRA and the ESA, and that if the Court finds that EPA fell short in any respect it should order an appropriately tailored remedy, informed by supplemental briefing. Petitioners of course disagree on all counts. But, regardless of the outcome of those disputes, it is far too late for Petitioners suddenly to ask this

Court to take the extraordinary step of deciding this complex case (which also presents serious jurisdictional issues) in their favor in summary fashion with reasoning to follow.

The Court has taken that approach only in extreme circumstances requiring urgent action. Having never sought a stay of either registration order in the course of four years of litigation spanning three (now going on four) growing seasons, Petitioners cannot credibly insist that the circumstances here require such extraordinary relief. The record demonstrates that XtendiMax has assisted growers in addressing a significant nationwide weed resistance problem, and soybean and cotton yields have hit record highs nationwide during this litigation. Monsanto Br. at 9-10. To the extent Petitioners believed that, regardless, equity demands an immediate halt to all sale and use of this pesticide, they had every opportunity to seek that extraordinary remedy by motion or timely prayer for relief. But they had no legitimate grounds to smuggle such a request belatedly into their letter brief, as it was not even remotely responsive to the Court's question about which registration orders are properly before it in this case.

Monsanto also agrees with EPA that Petitioners' request for an order immediately halting all sales and uses of the pesticide invites legal error and potentially disastrous real-world impacts. Petitioners and EPA disagree about the legal effect of a vacatur of the 2018 Registration and about EPA's authority in the

wake of a vacatur to regulate future sales, distributions, and uses of the pesticide. Monsanto agrees with EPA that if the 2018 Registration were vacated "end users would be free to use their remaining stocks." ECF No. 115-1 at 7. Monsanto further agrees that, if the Court vacates, EPA would retain authority to craft an appropriate order addressing existing stocks. 7 U.S.C. § 136d(a)(1); *see also id.* § 136k (granting EPA authority to stop sales). But regardless, these questions—what uses, if any, are lawful following vacatur, and the extent of EPA's post-vacatur authority—are beyond the scope of the dispute in this case.

To the extent Petitioners are asking this Court to issue an order that preemptively decides those questions and constrains EPA's post-decision authority, they invite additional error. The parties disagree on the proper remedy (remand versus partial or full vacatur) if the Court finds a deficiency in the registration. But if the Court were to vacate the 2018 Registration, it should do just that and nothing more. Jurisdiction would then return to EPA to determine whether and how to respond to the Court's order in light of existing circumstances. Any court order addressing the lawfulness of future uses would be premature. And any court order prejudging EPA's remedial authority or otherwise limiting the agency's discretion *ex ante* would be invalid for the very same reason as the injunction that the Supreme Court overturned in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (vacating injunction against future agency action obtained by Center for Food

Safety); *see also Immigration & Naturalization Serv. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (explaining that "judicial judgment cannot be made to do service for an administrative judgment" and that an "appellate court [cannot] intrude upon the domain which Congress has exclusively entrusted to an administrative agency" (citations omitted)).

In addition to inviting legal error, Petitioners' requested relief invites imprudence because EPA (*but not this Court*) has the benefit of substantial new data (including studies required by the 2018 Registration, and others completed in 2019 by independent academic scientists) that would inform the appropriate scope of any EPA order setting conditions on existing stocks. *See* ER0023 (documenting voluminous new data submission requirements that Monsanto and other registrants have fulfilled since the 2018 Registration was issued). This new data also provides valuable information bearing on the reliability of the studies that informed the 2018 Registration. And in addition to that data, EPA has access to substantial extra-record information bearing on what, if any, realistic alternatives farmers would have if deprived of the ability to use XtendiMax for weed control in the midst of the 2020 growing season, and the potentially significant consequences those alternatives might have for agriculture and the environment. Monsanto accepts that all of this extra-record data is irrelevant to the merits of the agency action currently under review. But it would be highly relevant to EPA's determination how best to regulate

product use going forward should this Court remand or vacate the 2018 Registration.

Accordingly, in addition to lacking the authority to preemptively enjoin future EPA action, this Court lacks the information it would need to assess the merits of any future exercise of EPA's regulatory authority. Without knowing the grounds, breadth, or timing of this Court's decision, or even the registration orders to which it may apply, it is impossible to know what information would be relevant to any such remedial action, but it could include the following:

- To the extent the Court identifies specific deficiencies in EPA's registration decision, identification of the limited geographic areas within the 34 states where the 2018 Registration applies where those deficiencies are actually relevant;
- The immediate impact of a vacatur on farmers in the midst of the growing season, including whether serious weed control issues (and the consequences thereof) would proliferate in certain locations or nationwide and materially impact crop yield, whether growers would purchase and use pesticides with potentially greater environmental impact, and the potential collateral impacts of those pesticides;
- How the results of the 2019 growing season affect the assessment of risks and benefits;
- How the results of further registrant and academic studies may inform the assessment of risks;
- Whether there are additional effective measures to diminish further the alleged risk of off-target movement from pesticide volatility without compromising the effective control of problematic weeds; and
- Whether farmers would have any options to convert immediately to manual labor for weeding in the midst of the growing season (and midst of the COVID-19 health crisis).

At a minimum, this Court should not take the preemptory action Petitioners

demand without the benefit of full briefing on such issues.[1] A remedy that fails to account for these (and many other) factors will produce net harm, both to the economy and to the environment.

[1] EPA and Monsanto have argued that supplemental briefing is essential should this Court grant the petition for review, in part to provide the Court itself the information it would need to appropriately tailor its own remedial order. Although Petitioners argue that a blanket vacatur of the 2018 Registration is the only appropriate remedy, it is common for court-approved settlements in ESA litigation to allow pesticide registrations to remain in effect pending consultation. *See, e.g. Center for Biological Diversity v. EPA*, Dkt No. 364, Case No. 11-0293 (N.D. Cal. Oct. 18, 2019). Petitioner Center for Food Safety itself participated in such a Joint Stipulation on remedy where the court had already found that EPA failed to consult under the ESA on two pesticide active ingredients. Among other measures, the Joint Stipulation established a schedule for ESA effects determinations, and the 59 challenged product registrations containing those active ingredients remained in effect pending those determinations. *See Ellis v. Keigwin*, Dkt. No. 371, Case No. 13-01266 (N.D. Cal. May 31, 2019) (order approving Stipulated Notice of Dismissal); EPA-HQ-OGC-2018-0745-0002 (Proposed Joint Stipulation). Should this Court grant the petition for review, there are good reasons to follow a similar approach in the circumstances of this case.

Respectfully submitted,

s/ Philip J. Perry

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced font.

I further certify that this brief complies with Rule 27(d)(2) of the Federal Rules of Appellate Procedure, because it contains 1,492 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Philip J. Perry
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