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 OPPOSITION TO PETITIONERS' EMERGENCY MOTION TO ENFORCE THIS COURT'S VACATUR AND TO HOLD EPA IN CONTEMPT

Philip J. Perry
Richard P. Bress
Stacey L. VanBelleghem
Andrew D. Prins
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Intervenor-Respondent Monsanto Company

June 16, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION AND BACKGROUND

Petitioners' motion is premised on a fundamental misconception. The effect of this Court's decision was *not* to make over-the-top use of dicamba immediately unlawful. The Court did not and under FIFRA could not have done that. Once that premise is corrected, it is apparent that EPA's subsequent action did not violate this Court's mandate and that no further relief is available to Petitioners in this forum.

This Court issued a complete vacatur of XtendiMax's, Engenia's, and FeXapan's registrations. Significant legal consequences flowed directly from that remedy. Most importantly, the vacatur rendered the herbicides *unregistered*. Therefore, none of the registrants could sell or distribute their products. But given the time of year, almost all the soybean and cotton crops had already been planted, many of the herbicides were *already* in the hands of applicators and farmers ("existing stocks"), and applications were already well underway. FIFRA *does not* automatically prohibit the use of unregistered herbicides. To the contrary, under FIFRA, absent EPA action, farmers and applicators were free to continue to apply their existing stocks *without adhering to EPA's crucial label restrictions*. At the same time, no one possessing the herbicides could transport them for return or disposal.

EPA understood that these would be the consequences of a vacatur, and sought leave to file a brief explaining those consequences and what regulatory steps

would follow. *See* ECF No. 121 at 6-7; *see also* ECF No. 124 at 2-3 (Monsanto response with similar explanation). The Court denied leave. But agricultural stakeholders less familiar with FIFRA's technical nuances had no idea what rules would apply. And they inundated EPA with pleas for guidance, explaining that the abrupt loss of these herbicides in the midst of the growing season could be devastating.[1] ESO at 6 (American Farm Bureau Federation letter).

In light of the regulatory gaps created by the vacatur, the confusion that had ensued among stakeholders, and the prospect, as EPA recognized, of "devastation to cotton and soybean crops that could result in a crisis for the industry," inaction was not a prudent option. *Id.* at 5. As the U.S. Secretary of Agriculture and agricultural officials in multiple states have stressed, "chaos" and "confusion" followed in the

[1] *See, e.g.*, EPA, Final Cancellation Order for Three Dicamba Products at 7, 9 (June 8, 2020) ("ESO") (quoting letters from groups representing most U.S. cotton and soybean growers). Like EPA, most state regulators also understood what regulatory consequences would follow a vacatur; at least seventeen states issued explanations post-vacatur that applications could continue pending further action by EPA, and urged EPA to issue a clarification. *The States of Dicamba*, Progressive Farmer (June 8, 2020), https://www.dtnpf.com/agriculture/web/ag/crops/article/2020/06/08/states-enter-uncertain-legal-dicamba.

wake of this Court's decision, and threatened to "strike a crushing blow to farmers across the country." It "is not something that should be done mid-growing season."[2]

On June 8, 2020, EPA entered a new order under its statutory authority to "permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled … under such conditions, and for such uses as [EPA] determines that such sale or use is not inconsistent with the purposes of [FIFRA]." 7 U.S.C. § 136d(a)(1); ESO at 3, 11. That Order did four things. First, it prohibited the registrants from distributing (including selling) the herbicides, *except* to dispose of them. ESO at 11. Second, it prohibited certain distributors in possession of the herbicides from moving them, *except* to dispose of (or return) them. *Id.* Third, it allowed commercial applicators with existing stocks to facilitate their use. *Id.* Fourth, it mandated that all continued use of the herbicides comply with EPA's previously approved labeling—and end by July 31, 2020. *Id.* Through that Order, EPA regained full regulatory control over the herbicides, because a violation of this type of order is an independent violation of FIFRA. *See* 7 U.S.C. § 136j(a)(2)(K). In other words, EPA assured that applicators in possession of the herbicide were not free to ignore the safeguards in label requirements.

---

[2] *See, e.g.*, Statement from U.S. Secretary of Agriculture (June 12, 2020), https://bit.ly/2Y43siq; Statement from Missouri Director of Agriculture (June 5, 2020), https://bit.ly/3ebDuiK; Statement from North Dakota Department of Agriculture (June 5, 2020), https://bit.ly/2Y54L0z.

Petitioners now ask this Court to take the extraordinary step of "recalling its mandate" so that it can "enforce" its vacatur to unwind EPA's subsequent action and hold EPA and a sitting cabinet-level Administrator in contempt. This Court should not accept that invitation.

I. EPA's Order did not violate this Court's mandate. The Court's vacatur did not have, and could not have had, the effect of making over-the-top use of the herbicides unlawful. Instead, the vacatur freed users to apply the herbicides without any of the labeling safeguards, and it prevented the disposal or return of unused stocks. It was then up to EPA to decide how best to address that situation in light of its statutory authorities.[3] Nothing in this Court's opinion can or should be read to prejudge or constrain EPA's ability to exercise those authorities. *See*, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160-61 (2010) (reversing this Circuit, and holding that a court cannot preemptively preclude agency from taking subsequent interim action "pursuant to the authority vested in the agency by law").

II. EPA's Order did not disregard this Court's findings on EPA's analysis of the costs and benefits of the 2018 registrations. EPA was faced with an entirely different and more pressing set of concerns than it faced when deciding whether to

[3] Monsanto's prior request for remedy briefing emphasized the significant harm to growers if XtendiMax "were suddenly pulled from the shelves." ECF No. 61 at 58. At the time, Monsanto of course had no knowledge of when the Court would rule or how EPA would exercise its discretion in response to a vacatur.

register the herbicides: a lack of any existing FIFRA regulation of use by applicators possessing the herbicides, the absence of alternatives immediately available to farmers to address weeds threatening already planted fields, and the prospect of crippling agricultural losses this year (during the COVID-19 pandemic). ESO at 5–9. EPA also had the benefit of substantial new information from the 2019 growing season that was not and is not before this Court. EPA weighed all the relevant considerations, took into account this Court's prior opinion, selected among its available statutory authorities, and then issued a new interim agency action to restore order and wind down these herbicides for the growing season.

III. Petitioners disagree about the scope of EPA's statutory authority and with the substance of EPA's decision, but they cannot litigate those disagreements in this forum. The Order is a new agency action, and any challenge must therefore be brought in a new proceeding. Because the Order did not follow a public hearing, that challenge must be brought in district court. 7 U.S.C. § 136n(a). And even if the Order were deemed to have followed a public hearing and thus subject to review in a court of appeals, it would not yet be ripe for that review: Under this Court's (in Monsanto's view, erroneous) prior jurisdictional holding in this case, the Order had not yet been "entered" for purposes of judicial review when Petitioners filed their motion because 14 days had not yet elapsed since it was signed. *NFFC v. EPA*, 2020 WL 2901136, at *8 (9th Cir. June 3, 2020).

IV. In light of the above, Petitioners' request for an order holding EPA and the Administrator in contempt should be denied summarily. The vacatur ordered by this Court did not bar EPA from exercising its statutory authority to take subsequent remedial agency action—much less with anything close to the clarity that would be needed to bring contempt into play. Petitioners cannot possibly reconcile their own request that the Court "clarify" that its decision prohibits all over-the-top use of the herbicides with their insistence that EPA violated the plain terms of the decision by allowing such use.[4]

ARGUMENT

Petitioners' entire theory depends on the premise that this Court's remedy made over-the-top use of dicamba unlawful, Mot. at 1, and EPA defied that remedy by taking subsequent action to make it lawful again. That premise is false. Petitioners may vehemently disagree with EPA's decision, but it was unquestionably

[4] Petitioners also request (at 23-26) that the Court amend its opinion to find that the 2018 registrations violated the Endangered Species Act ("ESA"). That request makes no sense. This Court declined to reach those arguments because it concluded that the registrations violated FIFRA and vacated the registrations on that ground. Petitioners' ESA request has no relationship to the justification they advance for "recalling the mandate." If Petitioners think the Court erred by not deciding the case on ESA grounds, their remedy is to seek rehearing. See *Boyde v. Brown*, 421 F.3d 1154, 1155 (9th Cir. 2005).

a *new* and distinct agency action, and their recourse is to challenge that new action in a new case in district court.[5]

I. PETITIONERS ARE WRONG ABOUT THE EFFECT OF THIS COURT'S REMEDY

A. This Court's Vacatur Did Not Make Over-The-Top Use Unlawful

The remedy ordered by this Court was vacatur: The Court "vacate[d] the EPA's October 31, 2018, registration decision and the three registrations premised on that decision." *NFFC*, 2020 WL 2901136, at *2; *see also id.* at *19-20 (ordering clause providing that the "Registrations" for those pesticides be "VACATED" immediately). And the effect of that vacatur was to nullify the registrations. *Massachi v. Astrue*, 486 F.3d 1149, 1154 n.21 (9th Cir. 2007) (defining "vacate" as "to nullify or cancel; to make void"); 7 U.S.C. § 136n(b) (authorizing the court to "set aside" certain EPA orders).

Petitioners argue (at 8) that portions of the Court's opinion suggest that the Court thought nullification of the registrations would preclude herbicide use by growers. But legal obligations are determined by the actions of courts, not speculation about their thoughts or intentions. Here, the only action the Court took was to "vacate the registrations." *NFFC*, 2020 WL 2901136, at *19. The effect of

[5] Petitioners' motion is also procedurally improper because they needed to first seek the relief they seek here from EPA, or at least explain why such option was unavailable. *See* Circuit Rule 27-3.

that action is determined by the substantive law passed by Congress. And as EPA and Monsanto informed the Court in advance (ECF No. 121 at 6-7; ECF No. 124 at 2-3), the nullification of these registrations caused the herbicides to become *un*registered under FIFRA.

In turn, because FIFRA by its plain terms does not prohibit *use* of an *un*registered pesticide—it merely prohibits using "any *registered* pesticide in a manner inconsistent with its labeling," 7 U.S.C. § 136j(a)(2)(G)—this Court's vacatur did not make any herbicide use unlawful. Instead, it had the opposite effect. Absent further regulatory action by EPA, the vacatur allowed unconstrained use of the herbicides that were already in the hands of applicators. *See generally id.* (describing prohibited conduct, none of which covers this scenario).[6]

Petitioners appear to admit that if this Court's vacatur caused the herbicides to become unregistered, that remedy would not have prohibited their use. Mot. at

[6] If this Court finds that its vacatur *did* have the effect of prohibiting unregistered use of the herbicides, that would mean that the Court had either read into FIFRA—a criminal statute—a prohibition that does not exist, or issued without authority a "remedy" to stop conduct that did not violate the law. *See INS v. Pangilinan*, 486 U.S. 875, 883 (1988) ("A court of equity cannot … create a remedy in violation of law."); *Thomas v. Whalen*, 962 F.2d 358, 363-64 (4th Cir. 1992) ("A federal court … has no authority to depart from the clear command of a statute in order to effect a result that it believes to be (or even one that would in fact be) dictated by general principles of fairness.").

19 ("The only way EPA's theory is correct is if the Court's vacatur to [sic] address *all these other uses*, despite this case not being about them.").[7] Petitioners therefore attempt to characterize this Court's remedy as a vacatur not of the entire registrations, but instead only of over-the-top uses. Under Petitioners' theory (at 18), the herbicides were registered in "earlier agency decisions" for non-over-the-top uses, and the Court's vacatur of the 2018 registrations did not disturb those prior registrations. Therefore, the theory goes, the herbicides remain registered for non-over-the-top-uses and this Court's vacatur made over-the-top use illegal because such use would run afoul of FIFRA's prohibition on use of a "registered pesticide in a manner *inconsistent* with its labeling." 7 U.S.C. § 136j(a)(2)(G).

Petitioners have their facts wrong. This Court's ordering clause was not limited to over-the-top uses. It said: "Registrations VACATED." 2020 WL 2901136, at *20. Those "Registrations"—issued by EPA in 2018—were the *only*

[7] Elsewhere (at 16), Petitioners argue half-heartedly that "FIFRA clearly prohibits the use of unregistered pesticides." But the only authority identified is 7 U.S.C. § 136a(a), which provides that "the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter." That is obviously a grant of authority to EPA to issue a regulation, not a prohibition itself. And Petitioners tellingly identify no regulation that limits use of unregistered pesticides (as none exists).

active registrations for these herbicides, and they were *not* limited to over-the-top uses.

Although XtendiMax and FeXapan were originally registered for solely non-over-the-top uses (in 2014[8] and 2015,[9] respectively), those registrations were subsequently amended to include over-the-top use[10] and to add additional label restrictions for that new use,[11] after which each herbicide had a single registration that covered all approved uses. The Engenia product at issue was *never* registered for only non-over-the-top uses. It was first registered in 2016, including for over-the-top use. [12] That registration was then amended in 2017 to add additional label

---

[8] https://www3.epa.gov/pesticides/chem_search/ppls/000524-00617-20140501.pdf (Notice of Pesticide Registration).

[9] https://www3.epa.gov/pesticides/chem_search/ppls/000352-00913-20150723.pdf (Notice of Pesticide Registration).

[10] https://www3.epa.gov/pesticides/chem_search/ppls/000524-00617-20161109.pdf (2016 "amendment" to add over-the-top uses for XtendiMax); https://www3.epa.gov/pesticides/chem_search/ppls/000352-00913-20170207.pdf (2017 "amendment" to add over-the-top uses for FeXapan).

[11] https://www3.epa.gov/pesticides/chem_search/ppls/000524-00617-20171012.pdf (2017 "amendment" to add additional restrictions on over-the-top uses for XtendiMax); https://www3.epa.gov/pesticides/chem_search/ppls/000352-00913-20171016.pdf (2017 "amendment" to add additional restrictions on over-the-top uses for FeXapan).

[12] https://iaspub.epa.gov/apex/pesticides/f?p=PPLS:8:16551289851009::NO::P8_PUID,P8_RINUM:508382,7969-345 (Notice of Pesticide Registration).

restrictions.[13] All three registrations expired by their own terms on November 9, 2018 and December 20, 2018. *NFFC*, 2020 WL 2901136, at *1; ER0005. EPA issued separate new registrations for these herbicides on November 1, 2018,[14] November 2, 2018,[15] and November 5, 2018[16]— encompassing both non-over-the-top uses and over-the-top uses. And it was those 2018 registrations that this Court vacated. 2020 WL 2901136, at *19-20. Thus, there are no registrations of these products authorizing only non-over-the-top uses that could remain in effect after the Court's vacatur.[17]

---

[13] https://www3.epa.gov/pesticides/chem_search/ppls/007969-00345-20171012.pdf (2017 "amendment" to add over-the-top uses for Engenia).

[14] https://www3.epa.gov/pesticides/chem_search/ppls/000524-00617-20181101.pdf (2018 Notice of Pesticide Registration).

[15] https://www3.epa.gov/pesticides/chem_search/ppls/007969-00345-20181102.pdf (Notice of Pesticide Registration).

[16] https://www3.epa.gov/pesticides/chem_search/ppls/000352-00913-20181105.pdf (2018 Notice of Pesticide Registration).

[17] Petitioners' confusion on this point may stem from the fact that their last action challenged the *2016 amendment* to XtendiMax's original registration, which for the first time allowed its over-the-top use. But that original registration expired, this Court held Petitioners' challenge to be moot, 747 F. App'x 646, 647 (9th Cir. 2019), and Petitioners filed a separate Petition for Review of the new 2018 XtendiMax registration. *See* Order, *NFFC v. EPA*, No. 17-70196 (9th Cir. Mar. 28, 2019), ECF No. 173. That 2018 registration authorized both non-over-the-top use and over-the-top use, and this Court vacated it in its entirety.

Petitioners also are wrong on the law. If, counterfactually, XtendiMax, Engenia, and FeXapan remain registered in part, that would still not make use of existing stocks in the possession of applicators illegal. Those existing stocks could lawfully be applied so long as it was done consistently with the existing product labeling. *See* 7 U.S.C. § 136j(a)(2)(G) (making it unlawful to apply a "registered pesticide in a manner *inconsistent* with its labeling"). FIFRA defines a "label" to mean the *physical*, *"printed"* piece of paper *"attached to*" a pesticide product. 7 U.S.C § 136(p)(1). And it defines "labeling" as the "labels and all other written, printed, or graphic matter … accompanying the pesticide or device *at any time*." *Id.* § 136(q)(2)(A). The labels that *at this time* accompany the herbicides in the hands of applicators permit their application over-the-top of dicamba-tolerant soybean and cotton crops.[18] Thus, use would remain legal under the extant labeling. (For this reason, Petitioners' invitation (at 19) for this Court to "clarif[y]" that "the only uses

[18] Petitioners argue (at 20) that § 136j(a)(2)(F) independently makes it "unlawful to use a restricted use pesticide for all purposes other than those approved." That is incorrect and highly misleading. What that provision actually says is that it is unlawful "to use, any registered pesticide classified for restricted use for some or all purposes *other than in accordance with section 136a(d) of this title* and any regulations thereunder." Section 136a(d) establishes procedures and factors for restricted use classification, and the implementing regulations require that restricted use application must be made by or under the supervision of certified applicators. 40 C.F.R. § 152.170. They do not prohibit those individuals from applying the herbicide consistently with the *printed* label.

vacated were the new uses approved conditionally in the 2018 decision"—in effect a request for the Court to *change* its remedy to a *partial* vacatur of the 2018 registration—would not have the legal effect Petitioners desire.[19])

In sum, no matter how this Court's vacatur is characterized, it did not have the effect of making over-the-top use of existing stocks unlawful. The entire thrust of Petitioners' argument—that EPA overrode the judgment of this Court—is therefore wrong.

B. This Court's Vacatur Did Not Prohibit EPA From Taking Subsequent Action

This Court's vacatur also did not prohibit EPA from acting subsequently to address the regulatory gap left by the Court's remedy based on the record then before the agency. Even Petitioners previously accepted this. *See* ECF No. 123-1 at 12 n.7 ("To be sure, vacatur does not limit an agency from proposing a narrower, interim new action, within the bounds of the law and the Court's order …."); *Indep. U.S. Tanker Owners v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) (explaining that the "present rule will be vacated and conditions returned to the *status quo*

[19] Petitioners also seem to invite the Court to judicially edit a label that is in the possession of thousands of applicators. Setting aside the practical impediments to such a request, the Supreme Court in *Geertson* made clear that this Court cannot issue a *mandatory injunction* compelling EPA to implement Petitioners' preferred label amendments. *See infra* at 14-15.

ante … subject of course to any *further action* that [agency may] take[] in the interim" before mandate issues (emphasis added)).

The Court rightly limited its remedy to vacatur of the existing registrations. Although this Court may *review* agency action that responds to a vacatur, the Court cannot pre-judge or foreclose such responsive action *ex ante*. The reason is fundamental: "judicial judgment cannot be made to do service for an administrative judgment." *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002). Had this Court's vacatur foreclosed subsequent action by EPA, its ruling would have been defective for the same reason as the injunction that the Supreme Court overturned in *Geertson*. In *Geertson* the district court concluded that the Animal and Plant Health Inspection Service (APHIS) violated the National Environmental Policy Act when it deregulated genetically engineered alfalfa. 561 U.S. at 144. In addition to vacating the agency's order, the district court forbade APHIS from deregulating the crop until completing an environmental review, and enjoined almost all future planting pending completion of that review. *Id.* The Supreme Court concluded that this order "premature[ly]" and impermissibly preempted APHIS's authority to act in the first instance. *Id.* at 160. And the Supreme Court explained that "[u]ntil such time as the agency decides whether and how to exercise its regulatory authority … *the courts have no cause to intervene*." *Id.* at 164 (emphasis added). The Court here likewise had no authority to enjoin subsequent action by EPA, so its opinion should not be

interpreted to do so. Now that EPA has taken subsequent action, that action can be reviewed by an appropriate court (which, as discussed below, is not this one).

II. EPA TOOK A NEW ACTION BASED ON A NEW RECORD TO SOLVE NEW PROBLEMS RESULTING FROM THIS COURT'S VACATUR

Despite Petitioners' attempt to anger the Court (at 11-12), EPA did not disregard the Court's judgment or double down on the cost-benefit analysis that this Court previously found insufficient. In 2018, EPA evaluated whether the benefits to growers of enhanced weed control in future growing seasons outweighed the potential risks of dicamba use. The question EPA faced here was different. In light of this Court's immediate vacatur in the *midst* of a growing season (according to national soybean and cotton grower associations, "the worst possible time" (*see* ESO at 8)), EPA evaluated the current circumstances, the most recent record, and the current risks and benefits, and reached a new judgment under FIFRA, halting further sale and distribution by registrants but permitting applicators to continue to apply these herbicides for the coming weeks.

Because of the timing of this Court's decision, much of the now-unregistered herbicides was in the hands of growers and applicators who were preparing to apply or in the midst of applying these herbicides to tens of millions of acres of dicamba-tolerant crops, but could now do so without enforceable label conditions. *Supra* at 2-3; ESO at 2-3, 5, 8-11. Additionally, under FIFRA, no person "may distribute or

sell to any person any pesticide that is not registered under [FIFRA]." 7 U.S.C. § 136a(a). Because the statute defines "distribute" to include any "shipment" of a pesticide, 7 U.S.C. § 136(gg), absent EPA action distributors and retailers could never dispose of stranded stocks.[20] ESO at 2, 10.

In addition to creating an immediate need for regulatory action to address those problems, the Court's vacatur resulted in mass confusion for applicators and farmers. Following this Court's decision, stakeholders, including groups that collectively represent a vast majority of farmers, flooded EPA with pleas for guidance and emergency relief. The Secretary of Agriculture encouraged EPA to use its authority to provide farmers this "critical tool for American farmers to combat weeds resistant to many other herbicides, in fields that are already planted." ESO at 5. The American Farm Bureau Federation, representing most U.S. farmers, explained that absent agency action farmers would be "abruptly expos[ed] to potentially billions of dollars in noxious weed damage" from Palmer amaranth and other weed species. *Id.* at 6. The American Soybean Association and National Cotton Council also explained the highly significant impacts, noting that farmers, lacking sufficient alternatives, would need to attempt to hire workers to manually remove weeds, if that were even possible. *Id.* at 7-9. But, as the Southern Farm

[20] FIFRA excludes activities by a pesticide applicator from the definition of "distribute or sell." 7 U.S.C. § 136(gg).

Bureau indicated, it would be very hard to actually find and employ such labor during COVID-19. *Id.* at 7. These stakeholders emphasized the immediate need for this important tool to combat herbicide resistant weeds.

EPA had to respond to this crisis with the tools provided to it by Congress. EPA could have re-registered the herbicides. 7 U.S.C. § 136a(c)(5), (7). EPA could have exercised its authority to issue a form of Stop Sale and Use Order, which allows it to set conditions for continuing use; that authority requires EPA to "issue a written or printed … order to any person who … has custody of such pesticide …, and *after receipt* of such order no person shall sell, use, or remove the pesticide … described in the order except in accordance with the provisions of the order." *Id.* § 136k(a). But EPA has historically interpreted this provision ("*receipt*") to require *personal service* on each regulated party for the order to be effective. EPA, Spirotetramat Final Cancellation Order at 6-7 (Apr. 5, 2010); ESO at 3 n.2. Finally, EPA "may permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled … to such extent, under such conditions, and for such uses as [EPA] determines that such sale or use is not inconsistent with the purposes of [FIFRA]." *Id.* § 136d(a)(1). And a violation of such an order, in turn, constitutes an independent violation of FIFRA. *Id.* § 136j(a)(2)(K).[21]

[21] EPA can also issue emergency exemptions to Federal or State agencies from any of FIFRA's requirements or prohibitions. 7 U.S.C. § 136p.

In deciding what to do, EPA took into account this Court's concerns about the now vacated registrations. ESO at 4 ("In light of the Court's reasoning for its vacatur, EPA is substantially restricting sale and distribution of existing stocks of these dicamba products."). It considered input from numerous agricultural stakeholders. *See supra* at 2-3; ESO at 5-9. And it considered the significant risks to the environment of inaction. ESO at 5 ("[T]here is no dispute that use inconsistent with the labeling formerly approved by EPA would have greater potential to cause unreasonable adverse effects …."); *id.* at 9 ("[D]isposal or return of product already in end users' hands may be neither feasible nor advisable."). EPA also possessed significant new information from the 2019 growing season that was not before this Court in evaluating the 2018 registration.[22] Ultimately, EPA selected the statutory tool provided by Congress that it thought most effective for the job at hand—an existing stocks order.

In short, EPA was faced with an entirely different and more pressing set of concerns than it faced when deciding whether to register the herbicides, and

[22] The 2018 registrations required registrants to submit voluminous additional studies to EPA and reports of inquiries regarding "potential damage to non-target vegetation" from use of dicamba during the 2019 and 2020 growing seasons. *See* ER0023. Registrants have provided detailed inquiry information since March 2019. In addition, EPA has information showing uses of *other* dicamba for other agricultural uses more than doubled since 2010, and EPA had a basis to assess whether those other uses are responsible for the type of "complaints" the Court's opinion identified. *See*, *e.g.*, ER0319.

possessed significant new information that is not before this Court. Exercising its expert judgment, EPA weighed the considerations and issued a different and far more limited interim agency action—prohibiting most distribution, and sharply curtailing the time period for use from what was permitted under the registration. This new action is of course reviewable on the merits, but contrary to Petitioners' inflammatory rhetoric, EPA did not disregard this Court's judgment or readopt the same cost-benefit analysis that this Court found insufficient to support the registrations.

III. THIS COURT LACKS JURISDICTION TO REVIEW THE EXISTING STOCKS ORDER

Petitioners believe EPA lacked statutory authority to issue the Existing Stocks Orders, and they disagree with EPA's weighing of the relevant considerations. Monsanto agrees with EPA that its use of its existing stocks authority was valid and appropriate.[23] But those issues are not before this Court. Because the Order is a new

[23] EPA has long recognized that the *nullification* of a registration under Section 136a (the registration provision) of FIFRA is a type of cancellation distinct from a cancellation under Section 136d(b)—the provision to which Petitioners refer and which allows EPA to cancel an otherwise valid pesticide registration pursuant to certain procedural protections. EPA, *Termilind Limited; Notice and Order of Revocation of Registrations*, 62 Fed. Reg. 61,890, 61,894 (Nov. 19, 1997) ("The Agency has concluded that there is no meaningful distinction between a revocation and a cancellation."). But by its terms, EPA's existing stocks authority applies to cancellations under Section 136a in addition to Section 136d(b). *See* 7 U.S.C. § 136d(a)(1) ("The Administrator may permit the continued sale and use of existing

agency action, it must be reviewed under the procedures established by Congress for judicial review of FIFRA orders. And under those procedures, the courts of appeals have jurisdiction only over those FIFRA orders that follow a "public hearing." 7 U.S.C. § 136n(b); *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1089 (9th Cir. 2017). All other FIFRA orders must first be reviewed by a district court. 7 U.S.C. § 136n(a). The Existing Stocks Order did not follow a public hearing, so Petitioners must raise any challenge to it in the district court.

This Court has interpreted "public hearing" such that, in addition to actual physical hearings, the term includes proceedings where "notice" is given "of a decision to be made" and there is "presentation to the decisionmaker of the positions of those to be affected by the decision." *NFFC*, 2020 WL 2901136, at *8. *But none of that happened here*. There was no physical hearing, no public argument, no notice of the decision to be made, and EPA did not solicit input from interested parties.

---

stocks of a pesticide whose registration is suspended or canceled under this section [136d], or section 136a or 136a-1 of this title, to such extent, under such conditions, and for such uses as the Administrator determines that such sale or use is not inconsistent with the purposes of this subchapter."); *see also NRDC v. EPA*, 2010 WL 431885, at *1 (S.D.N.Y. Feb. 8, 2010) (explaining EPA was "treat[ing] [a] vacatur as equivalent to a cancellation" and would issue an accompanying order to "allow use and sale of existing stocks"); *Almond Hill Sch. v. USDA*, 768 F.2d 1030, 1037-38 (9th Cir. 1985) ("[FIFRA] vests the EPA Administrator with discretion to permit the continued use of canceled pesticides if such use is not inconsistent with the purposes of the Act. This is true even if the pesticide has been canceled for noncompliance with the Act.").

Nor, it appears, did any of the Petitioners actually submit their views to EPA. *See* 7 U.S.C. § 136n(b) (challenger must have "been a party to the proceedings" under review). No surprise, then, that EPA expressly recognized in the Existing Stocks Order that it "did not follow a public hearing." *See* ESO at 11. Thus, the only forum for Petitioners to challenge that Order is in the district court. That court, in turn, will have the benefit of the full administrative record supporting the Existing Stocks Order, which is not presently before this Court.

But even *if* the Existing Stocks Order were deemed to have followed a public hearing, and Petitioners had filed a new petition for review, this Court would still lack jurisdiction to review that Order at this time because under this panel's own decision in this case, any current challenge would be premature. This Court concluded that, although Petitioners waited 72 days to file their petition for review of an immediately effective EPA order, the petition nonetheless had been filed within 60 days after its "ent[ry]" as the statute requires, 7 U.S.C. § 136n(b), because an EPA regulation provides that, absent explicit provision otherwise, an order's "date of entry" for purposes of judicial review is the "date that is two weeks after [the order] is signed." 40 C.F.R. § 23.6; *NFFC*, 2020 WL 2901136, at *8. Monsanto continues to believe that interpretation of EPA's regulation was erroneous because it allows the agency to create a two-week gap in which its actions are effective and thus binding on the public and yet not subject to judicial review—a power that no

agency has without express Congressional authorization and that EPA foreswore when it promulgated this regulation. *See* ECF No. 116 at 4-6. But this Court rejected Monsanto's objection, and its holding is now the law of the Circuit. That means the Existing Stocks Order—which was signed on June 8, 2020—is not yet reviewable by this Court. Instead, Petitioners cannot challenge until June 22, 2020—14 days after it was signed. *See Sierra Club v. U.S. Nuclear Reg. Comm'n*, 825 F.2d 1356, 1363 (9th Cir. 1987) ("premature" challenge "could not confer jurisdiction" and "must" be dismissed); *W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377-80 (D.C. Cir. 1985) (dismissing challenge because it was filed before agency order was "entered").

IV. PETITIONERS' REQUEST FOR CONTEMPT IS FRIVOLOUS

This Court should summarily deny Petitioners' request that EPA and the Administrator be held in contempt. For the reasons explained *supra* at 7-15, Petitioners cannot show that EPA violated any order of the Court, much less show by "clear and convincing evidence" that EPA "violated a *specific* and *definite*" one. *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (emphases added). Indeed, Petitioners' request (at 4, 7) that the Court recall the mandate to "clarify … its order" to explicitly prohibit all use of the pesticides concedes that this Court's existing order did not specifically and definitely prohibit EPA from taking the action it did here. *See Affordable Media*, 179 F.3d at 1239. Contempt should be rejected out of hand.

CONCLUSION

For the foregoing reasons, Petitioners' motion should be denied. If this Court nonetheless holds the Existing Stocks Order unlawful, it should stay its decision pending disposition of a petition for certiorari. For the reasons discussed above, a stay would be necessary to avoid irreparable harm to farmers and Monsanto.

Respectfully submitted,

s/ Philip J. Perry
Philip J. Perry
Richard P. Bress
Stacey L. VanBelleghem
Andrew D. Prins
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
philip.perry@lw.com

Attorneys for Intervenor-Respondent Monsanto Company

CERTIFICATE OF COMPLIANCE

This forgoing motion complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because the document contains 5,552 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f) and Circuit Rule 27-1(d). *See also* Fed. R. App. P. 32(e).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

s/ Philip J. Perry
Philip J. Perry