No. 20-73750

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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NATIONAL FAMILY FARM COALITION, *et al.*,

*Petitioners*,

v.

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

*Respondents*,

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ON PETITION FOR REVIEW FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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# PETITIONERS' MOTION TO QUALIFY AS A COMEBACK CASE AND/OR ASSIGN CASE TO PRIOR PANEL

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## INTRODUCTION

Petitioners National Family Farm Coalition, Center for Biological Diversity, Pesticide Action Network North America, and Center for Food Safety (collectively, NFFC) respectfully move this Court to calendar the above-captioned case, *National Family Farm Coalition et al. v. USEPA, et al.* (*NFFC III*), No. 20-73750 (9th Cir. Dec. 21, 2020), as a comeback case under Ninth Circuit General Orders 1.12 and 3.6, or otherwise assign the case to the same panel that has decided the two prior cases concerning the same subject matter.

The present case is the third challenge to the Environmental Protection Agency's (EPA's) registration actions allowing for the first time the spraying of pesticide products containing dicamba in-season and "over-the-top" (OTT) of cotton and soybeans that have been genetically engineered to be resistant to dicamba (2020 Registration Actions). The two prior cases challenged EPA's registration actions for the same type of new uses and the same panel of this Court adjudicated both Petitions for Review. Pet. Review, *Nat'l Family Farm Coal. v. EPA* (*NFFC I*), No. 17-70196, (9th Cir. Jan. 20, 2017), ECF No. 1.5 (Petition to Review EPA's 2016 registration and 2017 amended registration actions) and Pet. Review, *Nat'l Family Farm Coal. v. EPA (NFFC II)*, No. 19-70115 (9th Cir. Jan. 11, 2019), ECF No. 1-6

(Petition to Review EPA's 2018 registration actions) (Hawkins, McKeown, W. Fletcher, Circuit Judges).

Having the same Court that decided *NFFC I* and *NFFC II* for all purposes also adjudicate *NFFC III* will serve the interests of judicial economy and the efficient administration of justice. In *NFFC I*, the parties fully briefed the merits and the panel heard oral argument, but Respondent EPA issued a new decision re-registering the dicamba registrations until 2020 before the panel issued its decision. The Court then decided to dismiss the first Petition as moot, but directed the Clerk of the Court to set an expedited schedule for any subsequent challenge. *NFFC I*, 747 F. App'x 646 (9th Cir. 2019), *mot. for amended petition or reconsideration denied*, Order (9th Cir. Mar. 28, 2019), No. 1 7-70196, ECF No. 173. After Petitioners filed the second case, the same panel subsequently issued an order retaining jurisdiction over it. Order, *NFFC II*, No. 19-70115 (9th Cir. October 31, 2019), ECF No. 60. In *NFFC II*, after another oral argument the Court issued a detailed opinion on the merits, holding that EPA's 2018 dicamba new-use registrations violated the Federal Insecticide Fungicide, and Rodenticide Act (FIFRA) and vacating EPA's registrations. *NFFC II*, 960 F.3d 1120 (9th Cir. 2020), *rehearing en banc denied*, 2020 U.S. App. LEXIS 26061 (9th Cir. 2020).

Accordingly, this Court's panel that decided *NFFC I* and *NFFC II* has extensive experience with the complex factual, procedural, and regulatory background relevant to the present case, including the risk assessment process by which EPA evaluates risks of OTT dicamba use and the documented extensive damage caused by EPA's prior registration actions. Many of the claims in the case will rise or fall simply based on whether or not EPA, in issuing a new approval less than 5 months after this Court's opinion, actually complied with that opinion. Judicial economy will be served by assigning the present Petition for Review to the panel that decided *NFFC I* and *NFFC II*.

Counsel for Petitioners advised Respondents' counsel of their intention to file this motion. Federal respondents filed a correspondence letter in response, discussed *infra*. *See* ECF No. 4-1

## BACKGROUND

This is the third case in a series since 2016 regarding EPA's registrations of OTT spraying of dicamba products on cotton and soybeans genetically engineered to resist dicamba to come before this Court. The same four nonprofits that are the Petitioners here challenged EPA's original November 2016 registration. That petition for review was then amended to also encompass the Fall 2017 amendment of the registration of the dicamba products for OTT use on cotton and soybeans in

*NFFC I*. That initial registration period was for 2 years, expiring in November 2018. After completing briefing and an August 2018 oral argument, but before the Court issued a decision in November 2018 EPA issued a second 2-year registration of the new OTT uses of dicamba on soy and cotton, this time to run until December 2020. The Court then held the 2016/2017 case moot and required petitioners to refile, but ordered any such case expedited. *NFFC I*, 747 F. App'x 646 (9th Cir. 2019).

The same Petitioners then filed a new petition challenging EPA's 2018 Registration. Pet. Review, *NFFC II*, No. 19-70115 (9th Cir. Jan. 11, 2019), ECF No. 1-6. The Court heard oral argument again in April 2020 and in June 2020 issued its decision, granting the petition for review and holding that EPA had violated FIFRA in issuing the registration decision. *NFFC II*, 960 F.3d 1120.

Among other holdings, the Court concluded that EPA violated FIFRA by substantially underestimating several important risks and costs, including the amount of dicamba sprayed, the number of injury reports, and the amount and costs of crop damage from spraying. *Id.* at 1124, 1136-39, 1144. The Court also found that EPA completely failed to acknowledge, consider, and account for several other additional costs, such as economic losses ensuing from anti-competitive effects of the registrations, as well as the social costs of strife and dissension in farming communities triggered by rampant off-target dicamba damage to neighbors' crops. *Id.*

at 1124, 1142-43. Finally, it also held that EPA violated FIFRA by predicating its conclusion that its approval would have no adverse economic and environmental effects on label mitigation—in the form of weather-related label use restrictions—that substantial record evidence demonstrated were so extreme that farmers could not both follow them and have any hope of controlling weeds. *Id.* at 1139-42, 1144. EPA failed to consider and analyze whether following those directions was possible in real world farming conditions. *Id.* In light of the "substantial" flaws in EPA's decision, the Ninth Circuit vacated the registrations *Id.* at 1145.

EPA's 2020 Registration Actions challenged here have many of the same fundamental flaws as the prior approval vacated in June 2020 as well as some new ones. Petitioners contend that EPA has not addressed the shortcomings identified by the Court in *NFFC II*. As a result, EPA's 2020 Registration Actions are not supported by substantial evidence and are again in violation of FIFRA, as interpreted and applied by the prior panel. *See* General Order 3.6(d). In short, *NFFC I*, *NFFC II*, and the present case all involve EPA's series of related decisions approving spraying of dicamba products for OTT use on cotton and soybeans with overlapping legal and factual issues.

## ARGUMENT

Petitioners submit that the interest of judicial economy and the efficient administration of justice will be best served by assigning the present case to the panel that decided *NFFC I* and *NFFC II*.

First, this petition for review is a comeback case, as those cases are defined by Ninth Circuit General Orders. Order 1.12 defines comeback cases as "subsequent appeals or petitions from a district court case or agency proceeding involving substantially the same parties and issues from which there previously had been a calendared appeal or petition." General Order 1.2. As explained above, that is the case here. This is the third in a series of petitions for review by the same petitioners of consecutive EPA registration approvals for the same new use of dicamba products sprayed over the top of soybeans and cotton, raising substantially the same issues.

Similarly, Order 3.6(d) explains that "[w]hen a new appeal is taken to this Court from a district court or agency decision following a remand or other decision by an argument panel, the Clerk's Office will notify the panel that previously heard the case that the new appeal or petition is pending, and will provide a brief description of the issues presented. The prior panel is encouraged to accept a case that predominately *involves the interpretation and application of the prior panel decision*, except when it is impossible to reconstitute the prior panel." General Order 3.6

(emphasis added). Again, that is the case here, this petition for review directly following vacatur and remand not 6 months ago in *NFFC II*, with the interpretation and application of the June 2020 panel decision being central to this case.[1]

Second, whether styled technically as a comeback or just reassignment, the *NFFC I* and *NFFC II* panel is already well versed in a number of complex factual and legal issues that will again be at issue in the present case. The Court is familiar with the background and development of dicamba spraying for the first time over-the-top of cotton and soy due to increasing weed resistance caused by overuse of glyphosate. *See NFFC II*, 960 F.3d at 1125-1127. The Court is also highly cognizant of the facts of the extensive vapor and spray drift damage in the subsequent growing seasons, caused by EPA's 2016 and 2018 dicamba registration actions. *Id.* at 1127-1129. Obviously, the Court has in-depth knowledge of the 2018 dicamba registration actions, *id.* at 1120-1130, and the procedural history of the cases, *id.* at 1130-1131.

[1] *See, e.g., League of United Latin Am. Citizens v. Wheeler*, 940 F.3d 1126 (9th Cir. 2019) (*en banc*) (accepting as comeback cases under General Order 3.6 petitions for review of a follow-up EPA pesticide decision and referring to original three-judge panel for the prior case) *cf. id.* at 1129 (Bea, J., dissenting) (disagreeing regarding that particular case qualified because the first case dealt with jurisdiction whereas the second case would deal with merits, but stating the rule as "[t]o characterize the new petitions as comeback cases then, we would need to find that properly presented issues in the new petitions are 'substantially the same" as properly presented issues in [petitioners'] petition for review of the initial [agency order]."); *see also, e.g.*, *Parsons v. Ryan*, 949 F.3d 443, 451 (9th Cir. 2020) (comeback case); *United Transp. Union v. Burlington N. Santa Fe Ry.*, 708 Fed. App'x. 330 (9th Cir. 2017) (same); *Lowe v. Johnson*, 701 Fed. App'x. 548 (9th Cir. 2017) (same).

The Court also has extensive knowledge of and familiarity with the complex process by which EPA assesses dicamba's risk to the environment and the damage that dicamba caused, and how EPA weighs the costs and benefits of these risks, concluding that EPA substantially understated some risks and entirely failed to acknowledge other risks. *Id.* at 1136-1143. The prior panel is also well-versed in the "mitigation" of use instructions that EPA asserted would prevent extensive damage to crops, trees, other crops, and the wildlife that depend upon them, but for which EPA failed to assess the ability of farmers to follow them in real world conditions and instead found them difficult to impossible to follow. *Id.* at 1124-26; *id.* at 1142. Finally, although the Court did not find it necessary to reach the Endangered Species Act arguments in the prior cases, *id.*at 1124 & 1125, those arguments were fully briefed to the panel both in the 2016 briefing and again in the 2018 briefing, *see NFFC II*, No. 19-70115, Dkt. Nos. 39 at 36-74, Dkt. No. 72 at 2-22; Dkt. No. 73 at 18-32, and will substantially similar this time around, as EPA still has failed to consult with the expert wildlife agencies under Section 7 before re-registering the products.

Moreover, the Court immersed itself in the administrative record as a whole to conclude that EPA did not have substantial evidence to support its 2018 registration actions. *Id.* at 1144. The extensive administrative records in *NFFC I* and

*NFFC II* overlapped substantially. And as explained *supra*, like the 2018 registration decision at issue in *NFFC II*, the challenged Registration Actions similarly arise from the original 2016 registration decision and the decision documents therein. The Registration Actions incorporate and builds upon risk assessments and other registration decision documents EPA compiled in the prior registrations. Having immersed itself in the prior record and its assessments and data (and lack thereof), the panel will be far best equipped to provide an assessment of any new studies done by EPA.

Finally, in the registration decision at issue in the present case, EPA purports to address the "deficiencies" found by the Court in *NFFC II*, and states that it properly "considered the issues raised by the Court." Pet. Review, Ex. A, at 3, ECF No. 1-7. The *NFFC II* panel is best positioned to determine whether EPA has, in fact, acknowledged, assessed, and cured the many deficiencies in its registration actions that the panel described at length in *NFFC II*.

**RESPONDENTS' CORRESPONDENCE AND JURISDICTION**

When informed by Petitioners of this motion, Respondents notified Petitioners of a forthcoming letter to this Court, which they filed a few hours later. *See* ECF No. 4-1. That notice states that on December 3, 2020, a multidistrict litigation panel consolidated two other challenges to the Registration in the D.C.

Circuit. *Id.* To be clear, those "challenges" were brought in two other Circuits (the 5th Circuit and the DC Circuit) by agrochemical lobbyist associations closely affiliated with the Registrants (former Intervenor-Respondents) and represented by the same exact law firm in both cases.[2] In those filings they allege that the new Registration is inexplicably *too onerous* in some ways but then also ask the respective courts to issue advisory opinions to "hold the remainder of [the registration] and the supporting analyses and decision documents *lawful*." Pet. Review 2-3, *Plains Cotton Growers*, No. 20-61055 (5th Cir. Nov. 13, 2020); Pet. Review 2-3, *American Soybean Ass'n*, No. 20-1445 (D.C. Cir. Nov. 10, 2020). As for "remedy" they do not seek vacatur of the Registration even for the alleged errors they claim. *See* Pet. Review 2, *Plains Cotton Growers*, No. 20-61055 (5th Cir. Nov. 13, 2020); Pet. Review 2, *American Soybean Ass'n*, No. 20-1445 (D.C. Cir. Nov. 10, 2020). In short, they are not challenges similar to this one, which challenges the Registration Actions for failing to protect farmers and the environment from more seasons of drift damage and seeking to vacate them. Rather they are a transparent attempt at procedural

[2] *See Plains Cotton Growers v. Wheeler*, No. 20-61055 (5th Cir. Nov. 13, 2020), Doc. No. 00515637402; *American Soybean Ass'n v. Wheeler*, No. 20-1445 (D.C. Cir. Nov. 10, 2020), Doc. No. 1871621. Among other things, the entities, represented by the same counsel, filed multiple amicus briefs in *NFFC II* in support of Intervenor-Respondents. *See NFFC II*, No. 19-70115, ECF Nos. 176-1, 153-1.

vehicles ginned up to remove this case from this Court's jurisdiction, by any means possible.

This Petition for Review, docketed on December 21, 2020, 55 days after EPA's October 27, 2020 Registration Actions, is timely. *See* 7 U.S.C. § 136n(b) and 40 C.F.R § 23.6 (petitions for review of EPA's registration actions are timely if filed within 60 days of date two weeks after the date the order was signed); *NFFC II*, 960 F.3d at 1131 (holding petition for review was timely when filed within the same time period). Yet Petitioners had no prior notice of any such MDL proceedings or such other cases, nor any attempt to participate in them or comment and oppose.

Finally, jurisdiction direct in the Court of Appeals in this case is far from clear. While it makes sense that the same panel that previously heard this case should hear it again, unlike the prior 2016 decision and its 2018 continuation, EPA did not undertake any notice and comment on its 2020 decision. In such instances, review is generally proper in the district court. *See United Farm Workers of Am. V. EPA*, 592 F.3d 1080, 1087 (9th Cir. 2010) (holding court of appeals lacked jurisdiction under FIFRA where there had not been a "quasi-judicial 'public hearing'"); 7 U.S.C. §§ 136n(a)-(b). Given the uncertainties of jurisdiction, and the appellate window being only 60 days, 7 U.S.C. 136n(b), Petitioners filed this Petition for Review out of precaution.

Accordingly, yesterday Petitioners also filed a 97-page complaint in the Federal District Court for the District of Arizona under 7 U.S.C. 136n(a). *See*. Ctr. for Biological Diversity *et al.* v. *USEPA*, No. 4:20-cv-00555-DCB (D. Ariz. filed Dec. 23, 2020). Review at the district court then could proceed with any appeal heard by this Court, the Court that decided *NFFC I* and *NFFC II*. Either of these routes of judicial review is far more logical and equitable than having the case transferred to a different Circuit entirely.

Since no record has been filed by EPA in any of the Petitions for Review, Petitioners ask that the Court stay any response until these issues, at a minimum, can be fully briefed and the appropriate jurisdiction determined. *See* 28 U.S.C. § 2112(a)(5) (explaining that "[a]ll courts in which proceedings are instituted with respect to the same order … shall transfer those proceedings to the court in which the record is so filed" and providing that even then, "the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.").

## CONCLUSION

For all these reasons, Petitioners ask this Court to assign the above-captioned case to the panel that decided *NFFC I* and *NFFC II*.

Respectfully submitted this 24th day of December, 2020.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 27(d) and 32(a)(5) because it has been prepared in 14-point Goudy Old Style font, a proportionally spaced font. I further certify that this brief complies with page-length limitations set forth in Ninth Circuit Rule 27-1(1)(d).

s/ George A. Kimbrell
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