No. 21-1043

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAMILY FARM COALITION, *et al.*,

Petitioners,

v.

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

Respondents,

PETITIONERS' MOTION TO TRANSFER CONSOLIDATED PETITIONS FOR REVIEW TO NINTH CIRCUIT PURSUANT TO 28 U.S.C. § 2112(a)(5)

CENTER FOR FOOD SAFETY
George A. Kimbrell
Sylvia Shih-Yau Wu
2009 NE Alberta St., Suite 207
Portland, OR 97211
T: (971) 271-7372
gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org

CENTER FOR BIOLOGICAL DIVERSITY
Stephanie M. Parent
PO Box 11374
Portland, OR 97211
T: (971) 717-6404
SParent@biologicaldiversity.org

Counsel for NFFC Petitioners

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Petitioners National Family Farm Coalition, Center for Biological Diversity, Pesticide Action Network, and Center for Food Safety (collectively *NFFC* Petitioners) move this Court for an order transferring these consolidated cases to the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2112(a)(5).

INTRODUCTION AND SUMMARY OF ARGUMENT

The dispute before the Court is the third in a series of litigation. The prior two, involving the same parties, were heard and decided by the Ninth Circuit. The present consolidated cases, including any jurisdictional issues regarding them, should also be decided by that Court.

In light of this history, the interests of justice mandate these cases be transferred to the Ninth Circuit. Random selection by the judicial panel is a means to avoid the "race to the courthouse" problem, not to determine which court should ultimately hear the case. Rather courts have held that where the same or an interrelated action was previously remanded by a court of appeals, a transfer to that appellate tribunal best serves the interests of justice and sound judicial administration.

This present situation is a classic example: the Ninth Circuit has for the past four years presided over prior closely related matters, deciding them last June. The challenged EPA decision here (the 2020 Registration Actions) came less than five

months after the Ninth Circuit told EPA its registration had major legal flaws. The legal and factual issues largely mirror that of the prior cases. The record will be substantially identical with the voluminous record of the prior two cases, plus the few studies EPA has added in the past few months. And in the newest decision EPA recognizes the centrality of the Ninth Circuit's prior decision and expressly purports to have remedied the half-dozen violations of law that the Ninth Circuit found. In this procedural comeback context, there is little question the Ninth Circuit is best equipped to analyze the agency's corrective claims, on which the case may well turn. Indeed the Ninth Circuit has held that should the case be transferred back to the Ninth Circuit, it should be assigned to the prior Ninth Circuit panel. *See Nat'l Fam. Farm Coal. v. EPA* (*NFFC III*), No. 20-73750 (9th Cir. Jan 26, 2021), ECF 22.

Transfer is further warranted by additional factors considered by this Court. A transfer would best serve the convenience of the parties to these proceedings. Nor should the Court allow this process to be misused as transparent forum-shopping by the other petitioners (Trade Association Petitioners) to divest the case from its prior panel. This "follow-on" phase in the review of EPA's dicamba registrations belongs in the Ninth Circuit.

Finally, while EPA has concurrently filed a motion to dismiss on jurisdictional grounds, given the Ninth Circuit's familiarity with the regulatory history of EPA's

approval process over the last four-plus years and prior analysis of this very question of whether appellate jurisdiction is appropriate, the Ninth Circuit is the proper court to answer whether direct appellate review of the challenged 2020 Registration Actions is again proper under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *See Nat'l Fam. Farm Coal. v. EPA (NFFC II)*, 960 F.3d 1120, 1132 (9th Cir. 2020) (holding jurisdiction proper for the 2018 decision under similar circumstances). Notably the other petitions for review consolidated here actually do not believe direct appellate review of the 2020 Registration Actions is proper. *See* Pet. Review 3, *Plains Cotton Growers v. Wheeler*, No. 20-1484 (D.C. Cir. filed Dec. 4, 2020), ECF 1874435, *transferred from* No. 20-1484 (5th Cir. filed Nov. 13, 2020) (stating that filing of petition for review was "protective" because "[p]etitioner believes that the challenged decisions are 'judicially reviewable by the district courts of the United States' rather than [the court of appeals]," citing 7 U.S.C. § 136n(a).); Pet. Review 3, *Am. Soybean Ass'n v. Wheeler*, No. 20-1445 (D.C. Cir. filed Nov. 10, 2020) (exact same language), ECF 1871621.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. FIFRA and Pesticide Registration Standards

FIFRA is the federal scheme regulating pesticides (including herbicides like dicamba). 7 U.S.C. §§ 136 *et seq.* Before any pesticide can be sold or used, EPA must

register it, *e.g.*, grant a license establishing the terms and conditions of its sale and use. *Id.* § 136a(c). FIFRA requires registration of not just pesticide active ingredients, but also any pesticide "new uses," such as here, over-the-top, in-season spraying of dicamba on soy and cotton engineered with resistance to the pesticide. *See* 40 C.F.R. § 152.3.

Generally speaking, EPA can register a pesticide only if it will not "cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C); 40 C.F.R. § 152.112(e). FIFRA defines "unreasonable adverse effects on the environment" to mean "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). This accounting for costs and weighing them against claimed benefits is the heart of the registration decision.

II. The Series of Three Dicamba Challenges

This is the third case in a series since 2016 over EPA's approvals of dicamba for over-the-top spraying, issued on October 27, 2020, after having twice approved substantially similar new uses. The Ninth Circuit heard each prior case directly under 7 U.S.C. § 136n(b). Accordingly, *NFFC* Petitioners filed their third case in that court.

1. *NFFC I*

In the first suit, *National Family Farm Coal. v. EPA* (*NFFC I*), No. 17-70196 (9th Cir. Jan. 20, 2017), the same *NFFC* Petitioners here challenged EPA's November 2016 registration of the initial dicamba products under FIFRA and the Endangered Species Act (ESA). After unprecedented damage to millions of acres from dicamba drift in summer 2017, in fall 2017 EPA amended the registration, making changes requested by the registrants. Petitioners amended their petition for review to encompass the amendments. EPA supplemented the record, and the case continued.

After briefing and an August 2018 oral argument, but before the Ninth Circuit issued its decision, in October 2018 EPA issued a second decision, extending the registrations another two years, this time until December 2020. The Ninth Circuit held the 2016 case moot and *NFFC* Petitioners filed a new case. *NFFC I*, 747 F. App'x 646 (9th Cir. 2019).

2. *NFFC II*

NFFC Petitioners filed a new petition for review in January 2019, again challenging EPA's 2018 decision under FIFRA and the ESA. Pet. Review, *NFFC II*, No. 19-70115 (9th Cir. Jan. 11, 2019). The Ninth Circuit expedited the case. *NFFC I*, 747 F. App'x at 648; Order, *NFFC II* (9th Cir. May 15, 2019), ECF 29. The same

panel that heard *NFFC I* retained jurisdiction over *NFFC II*. Order, *NFFC II* (9th Cir. October 31, 2019), ECF 69.

After briefing and another argument, in June 2020 the Ninth Circuit issued its decision, granting the petition and holding that EPA violated FIFRA. *NFFC II*, 960 F.3d at 1144. As summarized below, the detailed opinion demonstrates the extraordinary grasp of the facts and record the Ninth Circuit developed, warranting transfer to it now.

Namely, after a painstaking review and application of the voluminous administrative record, *id.* at 1125-36, and recounting in detail the unprecedented damage to millions of acres from dicamba drift, *id.* at 1127-30, the Ninth Circuit held that EPA had violated FIFRA in six different ways, broken into two subsets of three, *id.* at 1124 & 1144 (summarizing holdings in each place). First, EPA had "substantially understated" three risks it acknowledged. *Id.* Second, EPA had also "entirely failed to acknowledge three other risks." *Id.*

As to the first grouping of violations, EPA substantially underestimated several important risks and costs, including: the acreage and amount of dicamba sprayed; the number of drift injury reports; and the failure to quantify the amount and costs of dicamba-caused crop damage, including EPA's failure to quantify that damage despite having copious record evidence. *Id.* at 1136-1139.

For example, the record revealed EPA had "substantially understated" the amount of dicamba-resistant seed acreage that would be planted and correspondingly "the amount of dicamba herbicide that had been sprayed on post-emergent crops," by as much at 25%, based on improper reliance on a Monsanto prediction. *Id.* at 1136. Similarly, EPA's conclusion that state dicamba drift injury reports "could have either under-reported or over-reported" the actual amount of damage was "contradicted by over-whelming record evidence that dicamba damage was substantially under-reported." *Id.* at 1137 (detailing state reports).

Additionally, EPA's claims that it did not have information from which to assess drift damage were contrary to the record. *Id.* EPA actually had a "great deal of qualitative information about extensive dicamba damage." *Id.* at 1138-39. (recounting studies, articles, emails to EPA officials from university scientists and state agriculture departments reporting injury, and other documentation including acreage totals and complaint numbers).[1]

[1] For example, the Ninth Circuit recounted from the Kansas Department of Agriculture: "we have been overrun with dicamba complaints," *id.* at 1139; from the North Dakota State University pesticide program specialist: "what we now know, in 2018, is that minimizing off target movement of dicamba to a reasonable level is NOT possible . . . this level of movement is completely unacceptable," *id.*; Tennessee: "wave after wave of dicamba exposure," *id.*; Professor Larry Steckel of the University of Tennessee stated that the drift crisis "is like nothing I have ever seen before . . . ." *Id.* (estimating 40% of Tennessee non-DT soybean acres damaged).

The decision also violated FIFRA because EPA completely failed to consider and account for several other costs. *Id.* at 1139. First, EPA failed to acknowledge and consider problems of users' inability to follow the label instructions, despite EPA's heavy reliance on them as mitigation. *Id.* at 1139-40. The evidence was so "substantial" that "even conscientious applicators had not been able to consistently adhere" to the use directions in real world farming conditions. *Id.* Rather, the record showed that the instructions were "*difficult if not impossible*" to follow, *id.* at 1124 (emphasis added) and that compliance with the additional mitigation measures in the 2018 label "[would] be even more difficult." *Id.* Yet EPA "nowhere acknowledged the evidence in the record showing there had been substantial difficulty complying with the mitigation requirements of the earlier labels." *Id.* at 1142.

Second, FIFRA requires EPA to consider "any unreasonable adverse effects to man or the environment," including "the economic, social, and environmental costs" of the pesticide use. *Id.* (quoting 7 U.S.C. § 136(bb)). Yet EPA nonetheless "entirely failed to acknowledge risks of economic and social costs": namely, anti-competitive, monopolistic effects to the seed and related agricultural markets forced farmers into "defensive adoption" of the registrants' pesticides and engineered seeds. *Id.* at 1142. Record evidence showed that seed companies, professors, and expert

weed scientists warned EPA about this foreseeable cost of its decision, yet EPA failed to take it into account. *Id.*

Third, EPA had "entirely failed to acknowledge the social cost that farming communities had already been experience[ing] and was likely to increase." *Id.* at 1143. "Extensive evidence" showed dicamba had "torn apart the social fabric of many farming communities." *Id.* The "severe strain on social relations in farming communities" where the dicamba products were being sprayed was a "clear social cost," but again EPA failed to identify and take it into account. *Id.*

For all these reasons, the Ninth Circuit concluded that EPA had "failed to perform a proper analysis of the risks and resulting costs of the uses," and thus substantial evidence did not support the EPA registration. *Id.* at 1144.[2]

As to remedy, the Ninth Circuit rejected the arguments of registrants and EPA and vacated the registrations. *Id.* at 1144-45. It held that EPA made "multiple errors," and its "fundamental flaws" were "substantial." *Id.* The Ninth Circuit concluded that it was "exceedingly unlikely" that EPA could (lawfully) issue the same registration again for the new uses. *Id.* at 1145. It then carefully weighed the practical effects of the decision on farmers' current use and any difficulty finding alternative

[2] Because the Ninth Circuit vacated the registrations based on the FIFRA violations, it found it unnecessary to reach *NFFC* Petitioners' ESA arguments. *Id.* at 1125.

pesticide options, but concluded that the absence of substantial evidence to support the registrations compelled vacatur all the same. *Id.*

3. NFFC III

On October 27, 2020, EPA purported to have addressed the "deficiencies"[3] found by the Ninth Circuit in *NFFC II* and for a third time registered the dicamba products for over the top spraying.[4] These 2020 Registration Actions include Bayer and BASF applications on July 2, 2020 to register the same products (XtendiMax and Engenia) for the same uses on cotton and soybeans—less than one month after the Ninth Circuit held the registrations of these products unlawful and vacated them, as well as a third dicamba application (Tavium) from Syngenta submitted on August 12, 2020. *See* Pet. Review, Exs. A-D (Jan 26, 2021), ECF #1883191-3. Just as the prior 2016 and 2018 decisions allowed, the 2020 decision allows spraying of dicamba over-the-top of cotton and soy in 34 states, totaling 90 to over 100 million acres of farmland.

However, as *NFFC* Petitioners will argue, numerous deficiencies identified in the *NFFC II* decision remain unaddressed. These deficiencies will be assessed with

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[3] EPA, *Memorandum Supporting Decision to Approve Registration for the Uses of Dicamba on Dicamba Tolerant Cotton and Soybean* 3 (Oct. 27, 2020).

[4] *Id.*

the same record supporting the earlier decisions, along with a handful of further assessments EPA had put together in the four months before issuing the 2020 Registration Actions.

The few differences between the previous registrations and this one will also require review of the same assessments as before, in accordance with the Ninth Circuit's ruling. The Court's close review will need to ensure, for example, that the 2020 Registration Actions can meet the even more stringent standard for an "unconditional" registration for the products over the next five years. 7 U.S.C. § 136a(c)(5). Review of the 2020 Registration Actions will also again require assessment of label use instructions, several of which have been adjusted following the Ninth Circuit's assessment and discussion of these instructions. *See NFFC II*, 960 F.3d at 1139-42.

NFFC Petitioners timely filed their petition for review in the Ninth Circuit on December 21, 2020, 55 days after EPA issued the 2020 Registration Actions, and filed a comeback motion to assign review to the prior panel soon after. *See* Comeback Mot., *NFFC III*, No. 20-73750 (9th Cir. filed December 21, 2020), ECF 6; *see* 7 U.S.C. § 136n(b); 40 C.F.R § 23.6.[5]

[5] EPA did not undertake any notice and comment on the 2020 Registration Actions. In some such instances, review is proper in the district court. *See United Farm Workers of Am. v. EPA*, 592 F.3d 1080, 1087 (9th Cir. 2010) (Pregerson, J., dissenting) (court

However, unlike the past two cases, this time around, Trade Association Petitioners, agrochemical lobbying groups closely affiliated with the registrants—who participated as EPA-supporting Amici in *NFFC I* and *II*—also filed petitions for review, but in two other Circuits (the 5th Circuit and this Court).[6] On December 3, 2020 a multidistrict litigation (MDL) panel consolidated those two other challenges in this Court. *Id.* On January 26, 2021, the Ninth Circuit expressed its intention

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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 both filed its Petition for Review in the Ninth Circuit as well as a 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). The Trade Association Petitioners have also filed in district court as well as this Court. *See Am. Soybean Ass'n et al. v. EPA*, No. 1:20-cv-03190 (D.D.C. filed Nov. 4, 2020).

[6] In their nearly identical petitions for review, the Trade Association Petitioners, represented by the same law firms, allege that the 2020 decision 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. 20-1484, Pet. Review 2-3, *American Soybean Ass'n*, No. 20-1445. As for remedy, they do not seek to vacate the decision even for the alleged errors they claim. *See* Pet. Review 2, *Plains Cotton Growers*, No. 20-1484; Pet. Review 2, *American Soybean Ass'n*, No. 20-1445. These challenges are not in any way similar to *NFFC* Petitioners' challenge of the 2020 Registration Actions for failing to protect farmers and the environment from more seasons of drift damage and seeking vacatur. Rather they are a transparent attempt at procedural vehicles ginned up to remove this case from this Court's jurisdiction, by any means possible.

that the prior panel hear the case, but transferred the present petition to this Court in accordance with the MDL panel's random selection. *NFFC III*, No. 20-73750 (9th Cir. Jan. 26, 2021) (order granting motion to assign the prior panel,).

LEGAL STANDARD

In 28 U.S.C. § 2112(a), Congress provides a two-step venue determination process. First, if two or more petitions are filed within ten days of issuance of the agency order, like the Trade Association Petitioners' separate petitions here, then the MDL panel randomly selects one court of appeals from among those in which petitions for review have been filed and initially consolidates the cases. 28 U.S.C. § 2112(a)(3). Second and subsequently, pursuant to 28 U.S.C. § 2112(a)(5), the court selected, here this Court, has discretion to transfer petitions for review of an agency order to another court of appeals "[f]or the convenience of the parties in the interest of justice." *See* S. Rep. No. 100-263, 100th Cong., 1st Sess., at 3202 (1987) (28 U.S.C. § 2112(a)(5) "does not, in any way, prevent the selected court from transferring the challenges to the agency order to a more proper circuit '[f]or the convenience of the parties in the interest of justice'"). In particular, "one factor that has considerable weight" is "transfer to a circuit whose judges are familiar with the background of the controversy through review of the same or related proceedings." *E. Air Lines, Inc. v. Civil Aeronautics Bd.*, 354 F.2d 507, 510 (D.C. Cir. 1965). Other

factors that this Court considers include: "the location of counsel, location of the parties, whether the impact of the litigation is local to one region, ... the caseloads of the respective courts, and whether there is but one truly aggrieved party." *Liquor Salesmen's Union Loc. 2 of State of N. Y. v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981); *Oil, Chem. & Atomic Workers Loc. Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1300 (D.C. Cir. 1982) (emphases added).

Finally, courts of appeals also have inherent equitable authority to transfer to another court of appeals "in the interest of justice and sound judicial administration." *E. Air Lines*, 354 F.2d at 510. "The criteria used in evaluating the propriety of the transfer are largely the same" under the court's inherent power as under 28 U.S.C. § 2112(a)(5). *Liquor Salesmen's Union*, 664 F.2d at 1205 n.4. Here, the Ninth Circuit's familiarity with the underlying issues, *NFFC* Petitioners' identity as the truly aggrieved party, and the interests of justice and judicial efficiency all weigh heavily in favor of transfer.[7]

[7] Nor do the other factors support maintaining the case in this Court. As discussed *supra*, the Trade Association Petitioners and their counsel have participated in the prior challenges before the Ninth Circuit concerning EPA's past approvals covering the same 34 states.

ARGUMENT

I. This Court Should Transfer These Consolidated Cases to the Ninth Circuit.

A paramount consideration under 28 U.S.C. § 2112(a)(5) is whether another court has decided a related case, which is most assuredly this situation. "Transfer … is appropriate 'where the same or inter-related proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on-phase, where continuance of the same appellate tribunal is necessary 'to maintain continuity in the total proceeding.'" *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 682 (8th Cir. 2003); *see E. Air Lines*, 354 F.2d at 510 ("Certainly one factor that has considerable weight in the guidance of judicial discretion is the desirability of transfer to a circuit whose judges are *familiar with the background of the controversy* through review of the same or related proceedings.") (emphasis added); *Liquor Salesmen's Union*, 664 F.2d at 1205 (listing "whether one circuit is more familiar with the same parties and issues or related issues than other courts" as a factor); *ITT World Comm., Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980) ("[T]here is a significant interest in transferring a case to a court that has already ruled on an

identical or related case.") (citing D.C. Circuit decisions). [8] The issues in the two cases need not be "identical" to weigh in favor of transfer.[9]

This is unmistakably the case where transfer to another court familiar with the issues and background of the controversy through prior proceedings is appropriate. There is no question that the Ninth Circuit panel possesses significant familiarity with the dicamba controversy, the science of dicamba drift, and EPA's detailed spraying mitigation. *NFFC II*, 960 F.3d at 1137 (describing "overwhelming record

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[8] *See also Mun. Distrib. Grp. v. Fed. Power Comm'n*, 459 F.2d 1367, 1368 (D.C. Cir. 1972) (transfer was in the public interest because 5th Circuit was "familiar with the background of the controversy through review of the same or related proceedings"); *ATT v. FCC*, 519 F.2d 322, 327 (D.C. Cir. 1975) (transferring a petition because "the D.C. Circuit is intimately familiar with the background of this controversy through review of the Phase I decision."); *United Steelworkers of Am. v. Marshall*, 592 F.2d 693 (3d Cir. 1979) (transferring petitions challenging OSHA's occupational health standard governing exposure to lead to the D.C. Circuit where another petition had been filed challenging EPA's Clean Air Act standard for lead, finding that "the institutional interest in having one court consider air standards for lead issued by both federal agencies issuing such standards...is decisive."); *Indus. Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965, 972 (D.C. Cir. 1977); *Oil, Chem. & Atomic Workers Loc. Union No. 6-418, AFL-CIO v. N.L.R.B.*, 694 F.2d 1289, 1300 (D.C. Cir. 1982).

[9] *ITT World Communications*, 621 F.2d at 1208 ("The relationship between the present case and the previous case decided by this Court is sufficiently close for the interest in consistent results to come into play. While the two cases do not constitute the same proceeding, they do involve the same parties, the same statutory provision, and the same essential issue."); *Midwest Television, Inc. v. F. C. C.*, 364 F.2d 674, 676 (D.C. Cir. 1966) (transfer to the Eighth Circuit was proper where the Eighth Circuit had heard a precursor case involving "many of the same issues").

evidence"of under-reported dicamba damage); *id.* at 1139, 1143-44; *supra* pp. 6-11. The panel is familiar with the background of dicamba spraying for the first time over-the-top of cotton and soy. *See NFFC II*, 960 F.3d at 1125-1127. It 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 approvals, which will again occur. *Id.* at 1127-1129. It has in-depth knowledge of the 2018 registration, *id.* at 1120-1130, and the procedural history of the cases, *id.* at 1130-1131.

Relatedly, the Ninth Circuit is also familiar with and has already once decided the jurisdictional ambiguity caused by EPA's lack of notice and comment despite issuing a new use requiring it, and EPA previously holding notice and comment on that new use in the initial registration. *Id.* at 1131-32. It also has extensive knowledge of, and familiarity with, the complex process by which EPA assesses dicamba's risks, 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 court is also well-versed in the "mitigation" of dozens of pages of 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 whether farmers could follow in real world conditions, and for which the Ninth Circuit found them nearly

impossible to follow. *Id.* at 1124-26, 1142. Finally, although the prior court did not find it necessary to reach the ESA arguments in the prior cases, those arguments were fully briefed both in the 2016 briefing and again in the 2018 briefing, and will be 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. *See id.* at 1124-25.

Similarly, the overlap between the administrative records in *NFFC I* and *NFFC II* and the present case is substantial. Like the 2018 registration decision at issue in *NFFC II*, the challenged 2020 decision similarly arises from the original 2016 decision and its supporting documents. Like the 2018 registration, EPA again avoided further notice and comment. And like the 2018 decision EPA again incorporates and builds upon risk assessments and other 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 supplemental studies done by EPA.

The connection between *NFFC I* and *II* and the present case is even further pronounced because the question of whether EPA actually addressed the multiple deficiencies the court found in *NFFC II* is *central* to this proceeding. Allowing the same court to resolve related proceedings arising from the same controversy avoids

the duplication of judicial resources and the possibility of inconsistent results. *See Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 41 (D.D.C. 2010) (finding such considerations to be most important factor in granting transfer under 28 U.S.C. § 1404(a)); *cf. Va. Elec. & Power Co. v. EPA*, 655 F.2d 534, 536 n.2 (4th Cir. 1981) (explaining that permitting two separate courts to render potentially conflicting decisions "makes little sense either in terms of judicial consistency or economy."). The Ninth Circuit panel is best positioned to determine whether EPA has, in fact, acknowledged, assessed, and cured the many deficiencies in its registration actions recounted at length in *NFFC II*, and has already indicated its intent to hear this case when and if the case is returned. *See NFFC III*, No. 20-73750 (9th Cir. Jan. 26, 2021).

In sum, this a case where an "inter-related proceeding" was previously under review in another court of appeals, and is now brought for review "in a follow-on phase." *See Pub. Serv. Comm'n for N.Y. v. Fed. Power Comm'n*, 472 F.2d 1270, 1272 (D.C. Cir. 1972). While this Court is, of course, fully capable of becoming familiar with the statutory, regulatory, and judicial background of this case as well as the arguments raised by each party during the earlier phases of litigation, judicial economy and sound judicial administration—as well as the significant federal interest in consistency of results—weigh heavily in favor of a transfer to the Ninth Circuit.

II. The Trade Association Petitioners Are Not Truly Aggrieved.

In determining whether to transfer a case under 28 U.S.C. § 2112(a)(5), this Court has asked "whether there is but one truly aggrieved party." *Liquor Salesmen's Union*, 664 F.2d at 1205; *see also ITT*, 621 F.2d at 1208 ("It is a well recognized principle that the interests of justice favor placing the adjudication in the forum chosen by the party that is significantly aggrieved by the agency decision."); *J.L. Simmons Co. v. NLRB*, 425 F.2d 52, 55 (7th Cir. 1970). Specifically, the Court has not looked favorably on parties filing petitions for review as a means of forum-shopping, stating that parties "should not search out a remedy to request from the [agency] in an effort to choose a forum of review." *Liquor Salesmen's Union*, 664 F.2d at 1209.

Here, it is plain that *NFFC* Petitioners are the truly aggrieved party challenging the action. As explained above, the *NFFC* Petitioners prevailed after four years of prior litigation, only to see the agency re-approve the same uses less than six months later, without addressing the legal infirmities and harms the Ninth Circuit held. *See supra* pp. 11-14.

In sharp contrast, the Trade Association Petitioners—who from 2016-2020 sided strongly with EPA and the registrants in defending the registrations, *see supra*—now claim the new registrations are *too onerous* but at the same time 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. 20-1484; Pet. Review 2-3, *Am. Soybean Ass'n*, No. 20-1445. Further, as for "remedy" they *do not seek vacatur* of the 2020 Registration Actions even for the alleged errors they claim. *See* Pet. Review 2, *Plains Cotton Growers*, No. 20-1484; Pet. Review 2, *Am. Soybean Ass'n*, No. 20-1445. In fact, EPA has now moved to dismiss two of their four claims in the district court, including on the grounds that they cannot seek to have a court issue an advisory opinion affirming the lawfulness of EPA's registration. Mot. Partial Dismissal 10-11, *Am. Soybean Ass'n v. EPA*, No. 1:20-cv-3190-RCL (D.D.C. filed April 6, 2021), ECF 43.

Notably too, unlike *NFFC* petitioners, the Trade Association Petitioners, represented by the same law firm, filed nearly identical petitions within the 10 day MDL window intentionally and separately, presumably for one transparent, specific, and improper reason: to get the case *away* from the Ninth Circuit by triggering the random selection process. *See supra* pp. 13-14; 28 U.S.C. § 2112(a). Indeed at the same time they filed *jointly* in the district court, and their papers admit they do not actually believe this Court has jurisdiction at *all*. They should not be rewarded for their venue-shopping and gamesmanship of the system.

Their challenges are thus fundamentally dissimilar. *NFFC* Petitioners challenge the 2020 Registration Action as a whole for failing to protect farmers and the environment from more dicamba drift damage, and seek to vacate them. The Trade Association Petitioners' requests for 2020 Registration Actions to be held lawful make abundantly clear that there is "but one truly aggrieved party" here. *Liquor Salesmen's Union*, 664 F.2d at 1205.

CONCLUSION

For the foregoing reasons, this Court should transfer the consolidated petitions for review to the Ninth Circuit.

Respectfully submitted this 22nd day of April, 2021.

s/ George A. Kimbrell
GEORGE A. KIMBRELL
SYLVIA SHIH-YAU WU
2009 NE Alberta St., Suite 207
Portland, OR 97211
T: (971) 271-7372
gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org

s/ Stephanie M. Parent
STEPHANIE M. PARENT
PO Box 11374
Portland, OR 97211
T: (971) 717-6404

SParent@biologicaldiversity.org

Counsel for NFFC Petitioners