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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
TUCSON DIVISION

Center for Biological Diversity, *et al.*,

Plaintiffs,

v.

United States Environmental Protection Agency, *et al.*,

Defendants,

and

Bayer CropScience LP, *et al.*,

Defendant-Intervenors.

No. CV-20-00555-DCB

JOINT MOTION TO TRANSFER VENUE AND SUPPORTING MEMORANDUM OF LAW BY BAYER CROPSCIENCE LP, BASF CORPORATION, AND SYNGENTA CROP PROTECTION, LLC

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INTRODUCTION

This case relates to three low-volatility dicamba herbicides registered by the U.S. Environmental Protection Agency (EPA) for use in 34 U.S. states. As the Amended Complaint, ECF No. 28 (D. Az. Compl.), demonstrates, Plaintiffs' allegations focus principally on herbicide applications over soybean crops in several Midwestern states, and to a lesser extent over cotton crops in the South. Only a tiny percentage of the herbicides at issue are likely to be applied in this District and likely only on cotton crops. And this District is the only location in the Ninth Circuit where the herbicides may be legally applied. This is also the *second* of two cases filed in federal district courts challenging these same herbicide registration decisions. Intervenors seek transfer of this case under 28 U.S.C. § 1404(a) to the U.S. District Court for the District of Columbia (D.D.C.), for consolidation with the first-filed case, *American Soybean Ass'n v. EPA*, No. 20-cv-03190 (D.D.C.) ("D.D.C. Action") – in which a nationwide association of soybean farmers, along with an association of Texas cotton farmers, are also challenging the same EPA registrations. As other courts have concluded, D.D.C. is an appropriate forum for a nationwide challenge of this type. *See infra* at 10-12. And, as set forth herein, the factors set out in § 1404(a) thoroughly support transfer.

In 2020, after conducting an extensive review of voluminous field studies and other submissions, EPA registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) three dicamba herbicides manufactured by Intervenors: Bayer CropScience LP's XtendiMax®, BASF Corporation's Engenia®, and Syngenta Crop Protection, LLC's Tavium®. Many thousands of farmers in 34 states depend on the dicamba herbicides at issue in this case, because dicamba addresses a widespread agricultural problem—weeds resistant to other herbicides (but not to dicamba) that can dramatically harm farm yields. In 2016, following formal notice-and-comment, EPA granted conditional, two-year registrations to specially formulated dicamba herbicides for use on dicamba-tolerant soybean and cotton crops. *See* EPA, Final Registration of Dicamba on Dicamba-Tolerant

Cotton and Soybean, EPA-HQ-OPP-2016-0187-0959 (Nov. 9, 2016). Plaintiffs here challenged certain prior and different dicamba registrations in the Ninth Circuit—challenges that were initially mooted by EPA's 2018 decision to extend those approvals for an additional two-year period, which Plaintiffs then also challenged. *See* EPA, Registration Decision for the Continuation of Uses of Dicamba on Dicamba Tolerant Cotton and Soybean, EPA-HQ-OPP-2016-0187-0968 (Oct. 31, 2018); *Nat'l Fam. Farm Coal. v. EPA*, 747 F.App'x 646 (9th Cir. 2019). Following the Ninth Circuit's vacatur of the 2018 XtendiMax and Engenia registrations, *see National Family Farm Coalition v. EPA*, 960 F.3d 1120 (9th Cir. 2020), Intervenor registrants—including one whose dicamba registration was not subject to the Ninth Circuit order—applied to EPA for new dicamba registrations which employed new chemical adjuvants to address volatility concerns and were in other respects materially different from those previously at issue. EPA developed a new administrative record, reviewed a host of additional studies (including from numerous independent academic scientists), and imposed significant new requirements for applicators. *See* EPA, Memorandum Supporting Decision to Approve Registration for the Uses of Dicamba on Dicamba Tolerant Cotton and Soybean, EPA-HQ-OPP-2020-0492-0007 (Oct. 27, 2020) ("2020 Registration"). EPA issued the challenged approvals on the basis of this new record with these new restrictions.

A week later, farmers across multiple U.S. states, including soybean farmers in the Upper Midwest and cotton farmers in the South, filed suit in D.D.C., alleging that EPA's new application restrictions are unnecessarily restrictive, too costly, and unjustified by the scientific record. *See generally* Original Compl., *D.D.C. Action*, (Nov. 4, 2020), ECF No. 1; Am. Compl., *D.D.C. Action* (Apr. 27, 2021), ECF No. 50 ("D.D.C. Compl."). Specifically, the farmers allege that EPA "impos[ed] unreasonable and expensive growing and herbicide conditions" that "will diminish crop yields, cut productivity, and drive up operational costs." *Id.* ¶¶ 7, 122, 130; *see also id.* ¶¶ 94, 97-116. These farmers are not alone in their view. Multiple state pesticide regulatory agencies have similarly raised

issues with EPA's additional restrictions and have petitioned EPA (so far unsuccessfully) to loosen certain requirements in their respective states.[1] Many other U.S. agricultural interests have raised similar concerns. *See infra* at 6 n.5.

On November 13, 2020, Bayer, BASF and Syngenta intervened to defend EPA's registration decisions (including the new dicamba restrictions farmers oppose) in the D.D.C. case, and have more recently intervened to defend EPA's decisions here. *See* Or., *D.D.C. Action*, ECF No. 20 (granting intervention to Bayer, BASF, and Syngenta); Or., ECF No. 29. Plaintiffs, however, did not seek to intervene in that initial D.D.C. suit. Instead, they waited a full seven weeks and then filed this suit almost 3,000 miles away in the only district in the Ninth Circuit with even a remote connection to the challenged actions.[2] Plaintiffs here—national advocacy organizations—believe that the restrictions that EPA imposed in the registrations are ineffective, and seek to invalidate all new applications of the registered herbicides on soybean and cotton throughout the United States. *See* D. Az. Compl. at 118 (asking the court to "[s]et aside" or "vacate" the registrations and "stop the use and sale of pesticides" authorized by the registrations). As the farmer plaintiffs in D.D.C. make clear, that would be a catastrophe—subjecting farmers nationwide (and the agricultural economy more generally) to significant risk of severe losses in future farming seasons. *See* D.D.C. Compl. ¶¶ 39-85.

The subject matter of this case overlaps heavily with the D.D.C. case. Both cases challenge the same new EPA registration decisions under the same statute (FIFRA). *Compare* D.D.C. Compl. ¶¶ 120, 127 (restrictions "exceed Defendants' authority under

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[1] *See, e.g.*, Emily Unglesbee, *Dicamba Cutoff Dates Will Vary By State Again*, FarmWeekNow (Mar. 1, 2021), https://www.farmweeknow.com/environmental/dicamba-cutoff-dates-will-vary-by-state-again/article_6cc32bcc-7a9d-11eb-827f-d7e58527e35c.html.

[2] Plaintiffs also filed a protective petition in the Ninth Circuit around the same time. *See* Pet. for Review, *Nat'l Fam. Farm Coal., v. EPA*, No. 20-73750 (9th Cir. Dec. 21, 2020), ECF No. 1-1.

FIFRA"), *with* D. Az. Compl. ¶¶ 368, 377 (registration decisions "not supported by substantial evidence in violation of FIFRA"). Thus, the two cases pose a genuine risk of inconsistent rulings with immense possible implications for the agricultural sector.

This case should be transferred to D.D.C., where the two cases can be consolidated before a single judge. Courts may grant motions to transfer when it is "in the interest of justice" and "[f]or the convenience of parties and witnesses." 28 U.S.C. § 1404(a). And courts in this circuit have routinely granted discretionary transfers when related litigation was pending in another venue. Not only is the D.D.C. litigation substantially similar, it is further along. Intervenors have filed Answers in D.D.C. (both to the original and Amended Complaints in that case), and the court has already set a July 6, 2021 deadline for the production of the administrative record in D.D.C. *See* Or., *D.D.C. Action*, ECF No. 53. The D.D.C. case was widely publicized from the first day it was brought, and Plaintiffs made a conscious choice not to bring their claims as Intervenors in that matter.[3] Instead, they chose to wait nearly two months before filing this case. The transfer statute is specifically designed to address such duplicative litigation.

Transfer is further supported by the District of Arizona's lack of any particular local interest in this case. Only an extremely limited percentage of the herbicides at issue are actually used in Arizona (less than 1% of those products used nationally). *See* Callen Decl. ¶¶ 4-5; Kay Decl. ¶¶ 5-6. Plaintiffs do not allege that any past dicamba use in this district has ever injured a member of their organizations here. *See* D. Az. Compl. ¶ 27. By contrast, D.D.C.'s interest is significant and well-established: EPA made the registration decisions in the District of Columbia, and all of the Defendants reside there.

Finally, Plaintiffs would not be inconvenienced by litigating their claims in D.D.C.;

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[3] *See* Press Release, Center for Biological Diversity, EPA Reapproves Dangerous, Drift-prone Dicamba Pesticides (Oct. 27, 2020) (announcing Plaintiffs' "plan to challenge today's decision"), https://biologicaldiversity.org/w/news/press-releases/epa-reapproves-dangerous-drift-prone-dicamba-pesticides-recently-banned-federal-court-causing-widespread-economic-harm-farmers-2020-10-27/.

Plaintiffs have offices in D.C. or routinely bring claims in that district. *See infra* at 15-16. Indeed, Plaintiffs' counsel regularly litigates in D.D.C., and three out of the four counsel who appear on Plaintiffs' Amended Complaint are admitted to the D.D.C. Bar; none of Plaintiffs' counsel actually resides in this District or is admitted to this Court's Bar. *See infra* at 16 (each is admitted *pro hac vice*). None of Defendants or Intervenors resides in Arizona, and only one Plaintiff even maintains an office in Arizona. Indeed, it appears that Plaintiffs chose to bring this case in Arizona – rather than in many other courts with a greater connection to the underlying facts – because they believe the Ninth Circuit is the most favorable forum for their claims. In light of these circumstances, this Court should grant the motion to transfer this case to D.D.C.

BACKGROUND

A. Statutory and Regulatory Background

FIFRA requires that a pesticide product be registered by EPA before it may be distributed in the United States. 7 U.S.C. § 136a(c). And EPA may register a pesticide only if it determines, among other things, that the product "will perform its intended function without unreasonable adverse effects on the environment." *Id.* § 136a(c)(5)(C). When EPA registers a pesticide, it approves a label that specifies the uses to which a product may be put and how it must be applied.

All three pesticide registrations challenged in this case involve formulations of the herbicide dicamba. These herbicides control a wide variety of weeds and are particularly effective for certain weeds that have become resistant to other herbicides, such as glyphosate. *See* 2020 Registration at 16. Over the past decade, soybean and cotton farmers have struggled to address the emergence of glyphosate-resistant weeds. *Id.* at 15. It is undisputed that those resistant weeds—which are effectively controlled by the herbicides at issue here—can otherwise cause significant crop losses. *Id*. For example, herbicide-resistant palmer amaranth can cause yield losses of 70% or more in soybeans and 60% in

cotton.[4] Many farmers and agricultural organizations from across the United States submitted comments to EPA to explain why these herbicides are a critical tool for fighting these weeds.[5]

Plaintiff groups challenged prior registrations for XtendiMax and Engenia (but not Tavium, Syngenta's product), alleging that these herbicides were volatilizing after application and drifting off field during application, and harming neighboring fields. *See Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120 (9th Cir. 2020) (vacating 2018 XtendiMax and Engenia registrations). In July and August 2020 each of the Intervenors applied to EPA for new registrations of their respective dicamba herbicide. EPA reviewed a voluminous new record in support of these registrations and imposed significant new requirements for applicators that were specifically designed to address the risk of volatility or drift. 2020 Registration at 3-5. Most importantly, applicators of these three herbicides must now (for the first time) add an approved "Volatility Reduction Adjuvant" (VRA) to every application, which has been proven in dozens of new on-field and other tests to further significantly reduce volatility potential. *Id.* at 4, 14. Likewise, EPA imposed significantly larger buffer distances—more than double the distance imposed by the 2018 registrations—to address drift, and for the first time required restrictive calendar cut-off

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[4] *See* U.S. Dep't of Agric., Palmer Amaranth 2 (Apr. 2017), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/archived-fact-sheets/palmer amaranth_nrcs_national_factsheet.pdf; EPA, Assessment of the Benefits of Dicamba Use in Genetically Modified, Dicamba-Tolerant Cotton Production (PC# 100094, 128931) ("Benefits for Cotton") 14 (Oct. 26, 2020), https://www.regulations.gov/document/EPA-HQ-OPP-2020-0492-0005.

[5] Benefits for Cotton, *supra* note 4, at 10 (summarizing comments urging EPA to register the products because "dicamba for use in [dicamba-tolerant] cotton and soybean is critically important to combat troublesome weeds"); *see also* EPA, 2020 Combined Comments and Letters A 70, (Nov. 24, 2020), https://beta.regulations.gov/comment/EPA-HQ-OPP-2020-0492-0013 ("Without access to dicamba . . . 20% of [dicamba-tolerant cotton] acres could be susceptible to significant yield losses due to increased weed pressures . . . . Overall, this would mean lost revenue for U.S. cotton producers of $392 million.").

dates to avoid applications to both soybean and cotton during weather conditions that can contribute to volatility. *Id.* at 4 (increasing the in-field downwind spray drift buffer from 110 feet to 240 feet and the downwind ESA spray drift buffer from 110 feet to 310 feet). EPA concluded that these and other measures would address the Ninth Circuit's concerns with the prior registrations of differently labeled XtendiMax and Engenia dicamba products, none of which mandated use of a VRA or of buffer distances anywhere near the current size. *Id.* at 17.

B. Five Suits Challenging EPA's 2020 Registration Decisions

This case is one of two cases filed in different district courts challenging the very same EPA registration decisions authorizing use in 34 states. In addition, Plaintiffs here and the same farmers groups that are plaintiffs in D.D.C. also filed protective petitions for review in three different federal courts of appeals—petitions that are all currently pending before the D.C. Circuit pursuant to a consolidation order issued by the United States Judicial Panel on Multidistrict Litigation (MDL Panel).[6]

The American Soybean Association ("ASA") and Plains Cotton Growers, Inc. filed the first challenge to these registration decisions on November 4, 2020, in D.D.C. *See* D.D.C. Original Compl., ECF No. 1. These farmers support EPA's registration of the dicamba herbicides at issue, emphasizing that "[w]ithout Dicamba Products in their arsenal, many farms would be largely defenseless in their fight against weeds." D.D.C. Compl. ¶ 82; *see also id.* ¶ 3 ("Dicamba and DT crops are critical weapons for farmers in their fight against these weeds."). But the farmers claim that certain restrictions that EPA

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[6] The petitions were "protective" because the plaintiffs wished to eliminate any risk as to jurisdiction. Under FIFRA, certain EPA decisions issued "following a public hearing" are required to proceed directly in the U.S. Courts of Appeals through petitions filed within 60 days. 7 U.S.C. § 136n(b). "Public notice and comment" can constitute a "hearing" for purposes of FIFRA. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 186 (D.C. Cir. 2017) (citation omitted). EPA did not issue any "public notice" seeking "comment" on the registrations at issue here. 2020 Registration at 7 n.6. Thus, the registration challenges must be litigated in federal district court in the first instance. *See* D. Az. Compl. ¶ 25.

imposed to address the risk of volatility or drift are *too* stringent. The farmers seek a ruling that these restrictions are unnecessary to meet the FIFRA standard. *See, e.g.*, *id.* ¶¶ 5-8, 117-31. ASA also filed a protective petition for review directly in the D.C. Circuit. *See* Pet. for Review, *Am. Soybean Ass'n v. Wheeler*, No. 20-1441 (D.C. Cir. Nov. 5, 2020), ECF No. 1870257. Plains Cotton Growers, Inc. separately filed a protective petition in the Fifth Circuit, as required by FIFRA because that is where the petitioner resides. Pet. for Review, *Plains Cotton Growers, Inc. v. Wheeler*, No. 20-61055 (5th Cir. Nov. 13, 2020), ECF No. 515637402 (citing 7 U.S.C. § 136n(b)).

Nearly two months after the farmers filed those challenges, Plaintiffs filed the present suit, selecting this venue within the Ninth Circuit as a platform for nationwide policy changes. Plaintiffs also filed a protective petition[7] in the Ninth Circuit—both suits challenging the same pesticide registrations that the farmer groups challenged in D.D.C. *See* D. Az. Compl.; Pet. for Review, No. 20-73750 (9th Cir. Dec. 21, 2020), ECF No. 1-1. In accordance with the statutory procedure for handling multiple challenges to an agency action, 28 U.S.C. § 2112(a), all three petitions were transferred to and consolidated in the D.C. Circuit. *See* Consolidation Or., *Am. Soybean Ass'n v. Wheeler*, No. 20-1445 (D.C. Cir. Dec. 4, 2020), ECF No. 1874441; Or., No. 20-1441 (D.C. Cir. Dec. 4, 2020), ECF No. 1874441; Or., No. 20-1441 (D.C. Cir. Feb. 2, 2021), ECF No. 1883240; Or., *Nat'l Family*

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[7] As noted, *supra* note 6, jurisdiction depends upon whether EPA's registration followed a hearing and Plaintiffs admit that there was no hearing held for these registrations. *See* D. Az. Compl. ¶¶ 25, 62 (asserting jurisdiction in this Court because there was no public hearing and that a "public hearing" under *United Farm Workers of Am. v. EPA*, 592 F.3d 1080, 1087 (9th Cir. 2010), requires a "quasi-judicial" process that is not satisfied by the written comment submissions in this case). That factual admission is determinative of jurisdiction. We note, however, that Plaintiffs recently asserted a contrary position in the D.C. Circuit action. There, Plaintiffs allege that a "public hearing" under *United Farm Workers* requires only "an adequate record made in the administrative proceeding," which they claim is satisfied by the written submissions in this case. Opp'n to Mot. to Dismiss & Mots. to Stay at 13, *Am. Soybean Ass'n v. Wheeler*, No. 20-1441 (D.C. Cir. May 17, 2021), ECF No. 1898988.

Farm Coal. v. EPA, No. 20-73750 (9th Cir. Jan. 26, 2021), ECF No. 22.

ARGUMENT

This Court has the power to transfer venue under 28 U.S.C. § 1404(a), which provides in relevant part: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." The Court considers public and private interest factors in determining whether transfer is warranted under the statute. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

The public and private interest factors weigh heavily in favor of a transfer to D.D.C. Given the nationwide benefits of the approvals, many other circuits, including the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh, have a substantial interest in the outcome of these case. The District of Columbia, where the decisions were made and the Defendants (and some Plaintiffs) reside, certainly has a substantial interest. In contrast, Arizona is the only state in the Ninth Circuit with even a minimal interest in this case. Use of the challenged products in Arizona accounts for less than 1% of nationwide use, and even the Plaintiffs' attorneys are not located in Arizona. Although Plaintiffs may believe the Ninth Circuit is the most favorable forum for them and appear to have selected this District for that reason, transfer to D.D.C. is warranted.[8]

A. The Interest of Justice Favors Transfer

"The interest of justice factor is the most important of all." *Conte v. Ginsey Indus., Inc.*, No. CV 12-0728, 2012 WL 3095019, at *2 (D. Ariz. July 30, 2012) (citation omitted). Whether transfer "serves the interest of justice" "may be decisive in a transfer motion even when all other factors point the other way." *Gerin v. Aegon USA, Inc.*, No. C 06-5407,

[8] D.D.C. is a proper venue because all Federal Defendants reside in the District of Columbia, and a "substantial part of the events . . . giving rise to the claim occurred" in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1).

2007 WL 1033472, at *6 (N.D. Cal. Apr. 4, 2007); *Ctr. for Food Safety v. Vilsack*, No. C 11-00831, 2011 WL 996343, at *6 (N.D. Cal. Mar. 17, 2011) (same). When considering whether transfer is in the interest of justice, courts may take into account a number of public interest factors, including (1) the local interest in the controversy, (2) feasibility of consolidation and the avoidance of multiple suits, (3) relative court congestion, and (4) the familiarity of the forum with governing law. *See, e.g.*, *Bos. Telecomm. Grp., Inc. v. Wood*, 588 F.3d 1201, 1211 (9th Cir. 2009). These factors uniformly favor transfer in this case.

1. Local Interest

"[T]his factor favors transfer to the venue where the 'crux' of the underlying events took place." *Pierucci v. Homes.com Inc.*, No. CV-20-08048, 2020 WL 5439534, at *6 (D. Ariz. Sept. 10, 2020). The heart of this action is a decision EPA commenced, considered, and concluded in the District of Columbia—a consideration that weighs strongly in favor of adjudicating this case in D.D.C. *See Ctr. for Food Safety v. Vilsack*, No. C 11-00831, 2011 WL 996343, at *7 (N.D. Cal. Mar. 17, 2011) (D.C. had stronger local interest because administrative process occurred there and federal defendants reside there). Because agency decisions are generally national in scope, "the general focus [in APA cases]" is "on where the decisionmaking process occurred." *Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 179 (D.D.C. 2009). Thus, "[a]n important factor to be weighed by this Court is the fact that *all* of the relevant events occurred in [the District of Columbia], not in the District of Arizona." *Leyvas v. Bezy*, No. CV07-1032, 2008 WL 2026276, at *4 (D. Ariz. May 9, 2008).

Indeed, the "crux" of this case has very little to do with Arizona. Over 99 percent of the use of these dicamba products is in states other than Arizona. According to the Arizona Farm Bureau, "dicamba is not widely used in Arizona."[9] The majority of

[9] *See* Chelsea McGuire, *EPA Offers Clarity on Dicamba Use in Light of Ninth Circuit Ruling*, Arizona Farm Bureau (June 10, 2020), https://www.azfb.org/Article/EPA-Offers-Clarity-on-Dicamba-Use-in-Light-of-Ninth-Circuit-Ruling.

Plaintiffs' allegations regarding drift and volatility harm address soybeans, but soybeans are not grown in Arizona. And there are very small amounts of cotton grown in Arizona, in comparison to the rest of the United States. *See* Callen Decl. ¶ 5; Kay Decl. ¶ 6. Indeed, Bayer estimates that 0.33% of the XtendiMax sold in the United States in market year 2020 was shipped to growers in Arizona, *see* Callen Decl. ¶ 4, and BASF estimates that in 2020, less than 0.1% of BASF's total U.S. Engenia sales were in Arizona, *see* Kay Decl. ¶ 5. By contrast, Illinois and Iowa received 15.06% and 17.52% percent of XtendiMax, respectively. *See* Callen Decl. ¶ 4. Plaintiffs' Amended Complaint speculates that there may ultimately be some impact of the registration decisions on Arizona residents, but fails to tie that speculation to any particular prior impact of dicamba use, or any specific factual allegation showing that such an impact is at all likely. Indeed, the Amended Complaint cites specific allegations of drift damage, mainly related to applications on soybeans, in numerous other states, but not Arizona. *Compare* D. Az. Compl. ¶¶ 109, 145, 148, 168-89 (alleging drift damage in states other than Arizona) *with id.* ¶¶ 27, 350 (Arizona allegations do not allege specific drift damage). This is not enough to give this district a sufficient "particular interest" in the registration decisions. *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968).

In contrast, D.D.C. has a significant interest in deciding whether to uphold EPA's national decision to register the three dicamba herbicides at issue here. *Wilderness Society v. Babbitt*, 104 F. Supp. 2d 10, 13 (D.D.C. 2000), which involved a challenge to the Secretary of Interior's decision to permit oil and gas leasing in Alaska, is squarely on point. The court there rejected a motion to transfer the case to Alaska, explaining that the case was "not an isolated, local environmental issue" but was instead a challenge to a "national policy decision." *Id.* While the case would "have an impact on the residents of Alaska," the decision's essentially national character weighed in favor of adjudication in D.D.C. *Id.* at 13-14; *cf. Vilsack*, 2011 WL 996343, at *7 (similar). So too here. As this Court has previously recognized, "the District of Columbia is the most convenient forum" for

litigation that "seek[s] a sweeping decision on a national policy." *WildEarth Guardians v. U.S. Dep't of Just.*, No. CV-13-392, 2014 WL 12539913, at *4 (D. Ariz. Aug. 12, 2014). Plaintiffs' suit is not limited to use of the registered herbicides in Arizona but covers 33 other states. "Such breadth limits the connection between plaintiffs' causes of action and the chosen forum. The lack of a localized controversy diminishes Arizona's interest in having the issue decided here." *Id.* at *4.

2. Consolidation and Avoidance of Multiple Suits

The avoidance of inconsistent verdicts likewise favors transfer. "As a general rule, cases should be transferred to districts where related actions are pending." *Mann v. Liberty League Int'l, LLC*, No. CV-09-1260, 2010 WL 94114, at *3 (D. Ariz. Jan. 6, 2010) (citation omitted). That rule strongly supports transfer here.

The Supreme Court has warned that allowing similar cases to proceed in multiple district courts "'leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.'" *Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990) (citation omitted). For that reason, this Court has repeatedly transferred cases where, as here, "a parallel action with at least partial, if not substantial, overlap was previously filed and remains ongoing." *Realty Execs. Int'l Servs. LLC v. Brokers Holdings LLC*, No. CV-17-00213, 2017 WL 1407676, at *2 (D. Ariz. Apr. 20, 2017).[10]

Here, a challenge to the exact same FIFRA registrations is already pending in D.D.C.—an action that was filed two months earlier, and in which Intervenors have (twice) filed Answers. That case will be decided on the same or substantially the same administrative record as this one, with many of the same legal principles, and as indicated, the record in that D.D.C. action will be produced in a matter of weeks. Although the

[10] *See, e.g.*, *Sw. Behav. & Health Servs. Inc. v. EnSoftek Inc.*, No. CV-19-03398, 2019 WL 8326683, at *7 (D. Ariz. Sept. 17, 2019); *Hoefert v. Am. Airlines Inc.*, No. CV-17-02996, 2018 WL 2740276, at *3 (D. Ariz. June 7, 2018); *HTA-SCW Webb Med. A LLC v. Roskamp Mgmt. Co.*, No. CV-17-01237, 2018 WL 1318875, at *5 (D. Ariz. Mar. 14, 2018).

plaintiffs in these actions have opposing views, they challenge the exact same registrations. "[B]ecause the legal and factual issues are similar, it would be more convenient and efficient for the [D.C.] court to consider all these issues together." *Mann*, 2010 WL 94114, at *4. Indeed, because of that, these cases would likely be subject to consolidation in D.D.C., an "important" factor favoring transfer. *A.J. Indus., Inc. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 503 F.2d 384, 389 (9th Cir. 1974); Fed. R. Civ. P. 42(a)(2). The fact that the D.D.C. action was filed first also weighs in favor of transfer. Indeed, courts have also applied the first-to-file doctrine in certain circumstances where a party sought transfer to the court where a case involving substantially similar issues and parties was first filed. *See, e.g.*, *Granillo v. FCA U.S. LLC*, No. ED-CV-15-02017, 2016 WL 8814351, at *3-4 (C.D. Cal. Jan. 11, 2016); *Cadenasso v. Metro. Life Ins. Co.*, No. 13-CV-05491, 2014 WL 1510853, at *9-11 (N.D. Cal. Apr. 15, 2014). The D.D.C. case was filed seven weeks earlier, and it involves similar issues and identical Defendants. The considerations underpinning the first-to-file doctrine also support transfer here.

Finally, transfer is "especially important where, as here, two courts might resolve the same substantive claims in contrary ways." *Mann*, 2010 WL 94114, at *4. Inconsistent verdicts would make it extremely difficult for farmers to plan for future growing seasons and generate significant uncertainty in the agricultural industry. Transfer would effectively eliminate that possibility, "ensur[ing] that this litigation . . . proceeds in the most expeditious and efficient manner possible." *Conte*, 2012 WL 3095019, at *5.

3. Relative Court Congestion

The relative congestion of the venues also favors transfer. D.D.C. is significantly less burdened than this District. Judges in the District of Arizona have an average of 569 pending cases, while judges in D.D.C. have an average of 383.[11] And the median time

[11] *See* Federal Court Management Statistics 2, 65 (Dec. 31, 2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2020.pdf.

from filing to disposition of a civil case in D.D.C. is less than *half* that of this District (5.3 months versus 13.9 months). *See id.*

4. Familiarity of the Forum with the Law

The familiarity of the respective districts with the governing law is neutral. Generally, federal courts are considered equally competent to handle issues of federal law. *See, e.g.*, *Nikola Corp. v. Tesla Inc.*, No. CV-18-01344, 2018 WL 6584981, at *3 (D. Ariz. Oct. 29, 2018), *report and recommendation adopted in relevant part*, 2018 WL 6584980 (D. Ariz. Dec. 7, 2018). And both D.D.C. and this District have substantial experience with APA cases.

Plaintiffs may argue that this factor argues against transfer because the Ninth Circuit adjudicated a challenge to the 2018 dicamba product registrations. But this Court had no involvement with those challenges, and the Ninth Circuit's decision (which did not include Syngenta's Tavium) was made on a vastly different record and presented distinct issues. For the 2020 registrations, EPA considered a host of new studies not previously before the Ninth Circuit, developed a voluminous new record, and imposed both entirely new and amplified application requirements designed to address the risk of volatility or drift. 2020 Registration at 3-5; *see supra* at 6-7. Judicial economy would be far better served transferring this case to join its sibling in D.D.C., rather than keeping it in this District on the chance that this distinct challenge is ultimately heard by the Ninth Circuit on appeal.

Indeed, the Northern District of California granted transfer in similar circumstances in *Vilsack*, 2011 WL 996343, at *8, despite that court's own direct involvement in the prior actions. There, the court considered and rejected the plaintiffs' argument that the court's experience counseled against transfer because "the agency decisions at issue here . . . are based on an entirely different administrative record that has developed since the Court granted a preliminary injunction in *Sugar Beets II*." *Id.* at *8-9. The same is true here. The fact that the Ninth Circuit previously decided a case involving a prior, distinct agency action supported by a different administrative record does not weigh against transfer.

B. The Convenience of the Parties Favors Transfer

The convenience of the parties also strongly favors transfer. In assessing the private interest of the parties, courts typically consider (1) the convenience of the parties and witnesses, (2) ease of access to evidence, and (3) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Kewlmetal Inc. v. Bike Builders Bible, Inc.*, No. 2:15-CV-01008, 2015 WL 8758065, at *6 (D. Ariz. Dec. 15, 2015) (citation omitted).

As explained above, transfer would make the resolution of this case easier, more expeditious, and less expensive by permitting the parties to consolidate litigation before a single judge in the District of Columbia. Such consolidation would make litigation of the cases far more convenient for those who are parties to both cases.[12] And Plaintiffs cannot credibly claim that D.D.C. would be an inconvenient venue for them. Three of the four Plaintiffs—the Center for Biological Diversity ("CBD"), the National Family Farm Coalition ("NFFC"), and the Center for Food Safety ("CFS")—have offices in D.C., and NFFC is headquartered there; in contrast, only *one* Plaintiff (CBD) has an office in Arizona, where it is headquartered.[13] Moreover, the lead Plaintiffs, CBD and CFS, routinely litigate in D.D.C., and the other plaintiffs have filed suit in D.D.C. as well.[14]

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[12] All Intervenors, Federal Defendants, and one of the farmer groups in the D.D.C. action, maintain offices in the District of Columbia.

[13] *See Contact Us*, CBD, https://www.biologicaldiversity.org/about/contact/ (last visited May 21, 2021); *Contact*, NFFC, https://nffc.net/contact/ (last visited May 21, 2021); *Contact Us*, CFS, https://www.centerforfoodsafety.org/contact-us (last visited May 21, 2021). The fourth Plaintiff—Pesticide Action Network North America (PAN)—is headquartered in California and has no offices in either D.C. or Arizona. *See Contact Us*, PAN, http://www.panna.org/contact-us (last visited May 21, 2021).

[14] *See, e.g.*, *Ctr. for Biological Diversity v. EPA*, No. 21-CV-01015 (D.D.C. filed Apr. 13, 2021) (CBD); *Ctr. for Biological Diversity v. Bernhardt*, 490 F.Supp.3d 40, 43 (D.D.C. 2020) (CBD and CFS); *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 177 (D.C. Cir. 2017) (same); *Ctr. for Biological Diversity v. EPA*, No. 1:10-CV-985, 2012 WL 967662,

Indeed, all Plaintiffs' counsel who have appeared thus far in this action are admitted *pro hac vice*. None of Plaintiffs' lawyers is located in Arizona (they appear to work from Oregon and California). All these facts favor transfer in this case.

The other private interest factors are largely neutral. Because this case will be decided primarily on the administrative record, there are unlikely to be any witnesses or discovery on the merits. *See, e.g.*, *Oceana, Inc. v. Pritzker*, 58 F.Supp.3d 2, 7 (D.D.C. 2013) (where case is decided on basis of administrative record, "convenience of witnesses and the ease of access to sources of proof" are "not likely to be relevant"). However, the relevant documents and decisionmakers are likely to be located in the District of Columbia, where the registration decisions were made. Therefore, to the extent this factor has any significance, it favors transfer. *See, e.g.*, *Adab v. U. S. Citizenship & Immigr. Servs.*, No. 2:14-CV-04597, 2015 WL 6249563, at *7 (C.D. Cal. Feb. 9, 2015) ("This factor favors transfer because agency adjudicators . . . are located in or near the District of Columbia."); *Wolfram Alpha LLC v. Cuccinelli*, 490 F.Supp.3d 324, 333-34 (D.D.C. 2020) (similar).

C. Plaintiffs' Choice of Forum Is Entitled to Minimal Weight

Finally, although a plaintiff's choice of forum is generally afforded some weight in the transfer analysis, "when the plaintiff's chosen forum is not his residence, or when the plaintiff's forum lacks a significant connection to the events that gave rise to the Complaint, the deference given to plaintiff's choice of forum is slight, *if any*." *Leyvas*, 2008 WL 2026276, at *5 (emphasis added); *accord Pac. Car & Foundry*, 403 F.2d at 954. As discussed above, almost none of the operative facts in this case occurred in Arizona—the relevant EPA decision was made in the District of Columbia. And Arizona has no "particular interest in the parties or the subject matter." *Pac. Car & Foundry*, 403 F.2d at 954; *see also Am. Sec. Ins. Co. v. Norcold, Inc.*, No. 10-CV-954, 2010 WL 2991585, at *2

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at *1 (D.D.C. Mar. 20, 2012) (same); *Ctr. for Biological Diversity v. EPA*, 794 F.Supp.2d 151, 152 (D.D.C. 2011) (same); *Greenpeace Int'l v. Browner*, No. 1:99-cv-00389-LFO (D.D.C. filed Feb. 18, 1999) (PAN and NFFC).

(D. Ariz. July 26, 2010). Only a vanishingly small amount of the challenged herbicides is sold or used in Arizona. *See supra* at 10-11.

That the registration decisions might allegedly have *some future* impact in Arizona is not dispositive; indeed, the crux of this case is not about "peculiar localized harm" unique to Arizona. *See Alec L. v. Jackson*, No. C-11-2203, 2011 WL 8583134, at *5 (N.D. Cal. Dec. 6, 2011) (challenge to various federal agencies' nationwide policies on greenhouse gas emissions). Rather, Plaintiffs' choice of forum is entitled to little weight because "the gravamen of the complaint is directed at nationwide policies that are created by federal agencies and departments headquartered in the District of Columbia." *Id.* at *3; *see also WildEarth*, 2014 WL 12539913, at *4 (stating "the District of Columbia is the most convenient forum" for litigation that "seek[s] a sweeping decision on a national policy").

The case for transferring this litigation is even more compelling. Not only are Plaintiffs challenging a nationwide policy developed exclusively in the District of Columbia, but only one of the four Plaintiffs even resides in Arizona—whereas three maintain offices in the District of Columbia. In short, Arizona lacks any significant connection to the decisionmaking process, to the alleged events flowing from that process, to Defendants, and even to Plaintiffs themselves. And the farmer plaintiffs in the D.D.C. action have no connection to Arizona. In contrast, there is substantially similar litigation pending in D.D.C. that is more advanced, closer to the events at issue, and more convenient for the parties.

CONCLUSION

For all these reasons, the Court should grant the motion to transfer this case to the District of Columbia.

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Respectfully submitted,

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