No. 17-70196

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

and

MONSANTO COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

INTERVENOR-RESPONDENT MONSANTO COMPANY'S SUGGESTION OF MOOTNESS AND MOTION TO DISMISS FOR LACK OF JURISDICTION

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Intervenor Monsanto Company hereby notifies the Court that the challenge raised in Petitioners' amended petition for review is now moot and, accordingly, respectfully moves to dismiss this case.[1] In support of this motion, Monsanto states as follows:

1. In this case, Petitioners ask the Court to vacate XtendiMax's 2016 registration along with its 2017 amendment (collectively, the "2016 Registration"). The 2018 Registration was set to expire by its own terms on November 9, 2018. ER0355–36. On November 1, 2018, EPA issued a new superseding registration for XtendiMax—the "2018 Registration"—which will be in effect for at least the next two years. *See* EPA, *Registration Decision for the Continuation of Uses of Dicamba on Dicamba Tolerant Cotton and Soybean*, (Oct. 31, 2018), https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0187-0968 (2018 Registration Decision); *see also* EPA, *EPA Announces Changes to Dicamba Registration*, EPA News Releases (Oct. 31, 2018), https://www.epa.gov/newsreleases/epa-announces-changes-dicamba-registration. Before issuing this 2018 Registration, EPA evaluated an extensive body of new scientific evidence, conducted new environmental analyses, and compiled a new

[1] Pursuant to Circuit Advisory Committee Note 5 to Local Rule 27-1, EPA does not object to the relief requested in the Intervenor's motion and intends to file a response brief per Federal Rule of Appellate Procedure 27(a)(3)(A). Petitioners will oppose this motion.

administrative record. *Id.* As EPA emphasized in its public announcement of the 2018 Registration, "[t]his action was informed by input from extensive collaboration between EPA, state regulators, farmers, academic researchers, pesticide manufacturers, and other stakeholders." *Id.*; *see also* 2018 Registration Decision at 3, 6 (registration decision made after consideration of field visits with growers, researchers, state regulators and review of other stakeholder feedback received by EPA).

2. Based on this new administrative record, EPA established new enhanced conditions for XtendiMax's use, including further limitations on when the pesticide can be applied (days after planting, time of day), who can apply the pesticide (only certified applicators), limits on the number of applications per season for certain crops, additional measures to address concerns about volatility, enhanced buffer requirements relevant to threatened and endangered species, and a range of other refined label requirements. *Id.* at 19–22. As a result of EPA's issuance of the new, superseding 2018 Registration, the 2016 Registration that Petitioners challenge is no longer in force, and a court order vacating that registration would have no legal or practical effect. The petition for review of the 2016 Registration is therefore moot, and this Court accordingly should dismiss the petition for lack of jurisdiction.

3. Federal courts have jurisdiction only to decide live cases and controversies. U.S. Const. art. III, § 2. "The doctrine of mootness, which is

embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012) (citation and internal quotation marks omitted). "If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed." *Id.* at 1016–17 (citation and internal quotation marks omitted).

4. This Court has repeatedly recognized that superseding agency actions moot challenges to prior agency actions. *Id.*; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir. 2003); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1124 (9th Cir. 1997); *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071, 1074–75 (9th Cir. 1995); *see also Pac. Coast Fed'n of Fisherman's Ass'ns v. U.S. Bureau of Reclamation*, No. C 02-2006 SBA, 2006 WL 1469390, at *8 (N.D. Cal. May 25, 2006) ("[T]he Ninth Circuit has consistently held that a claim is moot where the challenged agency action or decision has been superceded by a new agency action or decision."). Those decisions are correct because superseded agency actions have "no current operative effect," and therefore "cannot govern future agency actions." *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105–06 (D.C. Cir. 1993); *see Fund for Animals v. Norton*, 512 F. Supp. 2d 49, 53 (D.D.C. 2007) (explaining that a superseded agency action "has run its course and no longer governs"); *see also W. Radio Servs. Co. v. Glickman*, 113 F.3d 966, 974

(9th Cir. 1997); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996). Because a superseded agency action "no longer has any force," "[a]ny . . . judicial pronouncement on [a superseded agency action] would be purely advisory." *Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1164 (D.C. Cir. 1984); *see also Nat. Res. Def. Council, Inc. v. U. S. Nuclear Regulatory Comm'n*, 680 F.2d 810, 815 (D.C. Cir. 1982) (holding that challenging "the initial promulgation of [a superseded] rule" would prompt "an advisory opinion which federal courts cannot provide"); *Bhd. of Maint. of Way Emps. v. Atchison, Topeka & Santa Fe Ry. Co.*, No. CIV. 95-2031 (TFH), 1996 WL 435018, at *2 (D.D.C. Apr. 11, 1996) (explaining that "nothing would turn on" a court order involving a superseded agency action).

5. *Idaho Department of Fish & Game*, decided by this Court, is illustrative. There, the plaintiffs claimed that a National Marine Fisheries Service ("NMFS") 1993 biological opinion ("1993 BO") violated the Endangered Species Act. 56 F.3d at 1073. The district court held that the 1993 BO was arbitrary and capricious. *Id.* at 1074. But "[a]t the time the [district] court rendered its decision, NMFS' 1993 BO was due to expire in twelve days." *Id.* By the time this Court heard the case, NMFS had issued a new biological opinion that would apply for the next four years ("1994–1998 BO"). *Id.* The 1994–1998 BO was based on new findings and new agency decisions, and would be the operative action on which the

agency and others would rely going forward. *Id.* at 1074 & n.8. Because the superseded 1993 BO was no longer relevant—"water over the spillway, as it were"—this Court held that the plaintiffs' claims regarding the 1993 BO were moot. *Id.* at 1074–75.

6. Applying those same principles here, this case is moot as well. Petitioners challenge XtendiMax's 2016 Registration, which was set to expire by its own terms on November 9, 2018. Am. Pet. for Review, 1–2, ECF # 62. EPA has now issued a new and superseding registration. *See* 2018 Registration Decision. In doing so, EPA evaluated an extensive body of new scientific evidence, compiled a new administrative record, conducted new environmental analyses, imposed new conditions, and issued new decision documents justifying its determinations. *Id.* EPA's new administrative record contains data from more than a dozen new field tests and other evaluations supporting EPA's conclusions that XtendiMax will not move off the field in an unanticipated manner, including field tests by multiple independent academic scientists; *see* EPA, *Summary of New Information and Analysis of Dicamba Use on Dicamba-Tolerant (DT) Cotton and Soybean Including Updated Effects Determinations for Federally Listed Threatened and Endangered Species* at 23–45, (Nov. 1, 2018), https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0187-0967; a refined No Observed Adverse Effect Concentration determination, *id.* at 22, and a range of new enhanced conditions, 2018 Registration

Decision at 19–22. Moreover, EPA's new scientific determinations, the new studies and other new record materials, and the new conditions on use, address many of the concerns raised by Petitioners in this case regarding the 2016 Registration.

7. As a result of the new 2018 Registration, the 2016 Registration is no longer operative and no longer governs any conduct of any party. Any decision by this Court respecting the 2016 Registration would be purely advisory.

8. At oral argument, several questions were specifically raised about the potential that this case would become moot,[2] and Petitioners did not dispute that a new registration would moot their petition for review of the 2016 Registration. They suggested, however, that their challenge to the 2016 Registration might be justiciable nonetheless because it might be (1) capable of repetition (2) yet likely to evade review. If Petitioners actually make that argument, they would be wrong.

9. To begin with, the 2016 Registration that Petitioners challenge in this case is not capable of repetition. An agency action is capable of repetition only if

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[2] *See*, *e.g.*, Oral Argument at 47:06–10, *National Family Farm Coalition v. USEPA* (No. 17-70196), https://www.youtube.com/watch?time_continue=2830&v=5AqjvWRU_Iw ("Petitioners' Counsel: "Right now, this is a live decision. And that's all we know." Judge Hawkins: "[A] [l]ive decision facing a certain death."); *id.* at 46:54–57 (Judge McKeown: "We don't give advisory opinions."); *id.* at 48:08–14 (Judge McKeown: "But if there's a completely different record, then this would basically be moot.").

"there is a reasonable expectation that the plaintiffs will be subjected to it again." *Idaho Dep't of Fish & Game*, 56 F.3d at 1075. As this Court has explained, there is no reasonable expectation parties will again be subjected to a superseded agency action because, by definition, that agency action is no longer valid and therefore will not impact parties in the future. *Id.* That is absolutely the case here. The 2018 Registration materially altered the terms of the 2016 Registration and is based on a significantly greater volume of scientific record material and refined scientific conclusions. To be sure, if Petitioners challenge the 2018 Registration, they might ultimately advance some arguments similar to certain arguments they advanced in their challenge to the 2016 Registration (that EPA failed to adequately weigh certain data, for example), and they might ultimately assert similar errors of law. But that remains to be seen, and in any event any such challenge will necessarily need to account for the new record, new scientific determinations, and differing label requirements. It will be a new case addressing a new agency action. *Newton-Nations v. Betlach*, 569 F. App'x 525, 526 (9th Cir. 2014) ("It is unlikely, if not entirely impossible, that this dispute over the sufficiency and development of the administrative record . . . will arise again because [the previous agency action] has expired and was replaced by a new [agency action] with a new administrative record."); *see also S. Cal. All. of Publicly Owned Treatment Works v. U.S. Envtl. Prot. Agency*, No. 2:14-CV-01513-MCE-DA, 2015 WL

2358620, at *3 (E.D. Cal. May 15, 2015) ("[T]he exact circumstances of this case are unlikely to occur again as any new [agency] decision would be based on a new record and an amended regulation."); *Am. Wild Horse Pres. Campaign v. Salazar*, 800 F. Supp. 2d 270, 275 (D.D.C. 2011) (holding that the issuance of a superseding agency action—"even one involving some of the same elements" as the superseded agency action—moots challenges to the former agency action when "based on a different record, . . . different environmental considerations," and scientific evidence). For these reasons, the 2016 Registration is not capable of repetition.

10. To the extent that EPA applied in the 2018 Registration certain overarching methodologies that Petitioners sought to challenge in this case, any challenge to the application of such methodologies in the 2018 Registration would not likely evade review. An agency action evades review only if "the duration of the challenged action is too short to allow full litigation before it ceases." *Idaho Dep't of Fish & Game*, 56 F.3d at 1075. Petitioners will have at least two years to prosecute any challenge the 2018 Registration, which is more than enough time to obtain a judgment. *See Ramsey*, 96 F.3d at 445 (finding 1993 harvest decision did not evade review even though it was "in effect for less than one year"); *see also Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005) ("As a general rule, two years is enough time for a dispute to be litigated."); *Burlington N.*

R. Co. v. Surface Transp. Bd., 75 F.3d 685, 690 (D.C. Cir. 1996) (explaining that two years is enough time to litigate a case under Supreme Court precedent). Although Petitioners were unable to obtain judicial review of the superseded 2016 Registration within two years, that is because of their own litigation conduct: They significantly delayed filing their challenge; needlessly fought with the government about a protective order, necessitating resolution by a motions panel; sought multiple extensions on their briefs; and otherwise failed to act with any expediency—all causing multi-month delays.

11. Moreover, dismissing this case as moot would not prevent Petitioners or other parties with similar objections from litigating their core claims respecting EPA's methodologies for evaluating pesticides in other cases. Indeed, several of the methodological claims Petitioners make in this case are repeated almost verbatim in another case already pending before this Court. For example, Petitioners claim here that "EPA failed to find that either of the two conditional new use prerequisites were met" because "it lacked sufficient data to assess harm from XtendiMax's new use" and "EPA applied the *unconditional* registration standard: that XtendiMax 'will not generally *cause* unreasonable adverse effects.'" Pet'rs' Br. at 17. In the other pending case, the petitioners make nearly identical claims against EPA with respect to a different pesticide. Pet'rs' Br. at 58, No. 17-70810, ECF No. 64-1 ("EPA failed to find that either of the two conditional new use prerequisites were met.

First, . . . EPA . . . lacked sufficient data to assess harm from Enlist Duo's new uses. . . . Second, EPA applied the *unconditional* registration standard: that Enlist Duo will not 'generally cause unreasonable adverse effects.'"). Thus, Petitioners' concerns with EPA's underlying methodologies will not evade review.

For the foregoing reasons, this case is moot. Monsanto therefore respectfully asks the Court to dismiss the amended petition for lack of jurisdiction.

November 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Philip J. Perry, hereby certify that on November 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system which will send notice of such filing to all registered CM/ECF users.

s/ Philip J. Perry
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