In the United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 22-1422

RED RIVER VALLEY SUGARBEET GROWERS ASSOCIATION; U.S. BEET SUGAR ASSOCIATION; AMERICAN SUGARBEET GROWERS ASSOCIATION; SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE; AMERICAN CRYSTAL SUGAR COMPANY; MINN-DAK FARMERS COOPERATIVE; AMERICAN FARM BUREAU FEDERATION; AMERICAN SOYBEAN ASSOCIATION; IOWA SOYBEAN ASSOCIATION; MINNESOTA SOYBEAN GROWERS ASSOCIATION; MISSOURI SOYBEAN ASSOCIATION; NEBRASKA SOYBEAN ASSOCIATION; SOUTH DAKOTA SOYBEAN ASSOCIATION; NORTH DAKOTA SOYBEAN GROWERS ASSOCIATION; NATIONAL ASSOCIATION OF WHEAT GROWERS; CHERRY MARKETING INSTITUTE; FLORIDA FRUIT AND VEGETABLE ASSOCIATION; GEORGIA FRUIT AND VEGETABLE GROWERS ASSOCIATION; NATIONAL COTTON COUNCIL OF AMERICA; AND GHARDA CHEMICALS INTERNATIONAL, INC.,

Petitioners,

v.

MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for Review from the
U.S. Environmental Protection Agency

PETITIONERS' RENEWED MOTION FOR A PARTIAL STAY PENDING REVIEW

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INTRODUCTION

Petitioners seek to preserve critical uses of the insecticide chlorpyrifos that the Environmental Protection Agency ("EPA" or "the Agency") agrees are safe and provide great benefit to American agriculture. These uses pertain to eleven crops (alfalfa, apple, asparagus, cherry, citrus, cotton, peach, soybean, sugarbeet, strawberry, and wheat) in states where EPA concluded such use is safe ("EPA's Designated Safe Uses"). Att. 1, Ex. B (Proposed Interim Registration Review Decision, hereinafter "PID") at 40–41. The value of these crops to the U.S. economy surpasses $59 billion annually. Moreover, these eleven crops are critical to the livelihoods of the family farmers represented here.

Despite finding that EPA's Designated Safe Uses are safe for everyone, EPA issued a rule that prohibited *all* uses of chlorpyrifos for agricultural commodities. *See Final Rule for Chlorpyrifos Tolerance Revocations*, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (the "Final Rule"), Declaration of Nash E. Long ("Long Decl.") Ex. A. EPA has denied Petitioners' objections to and requests to administratively stay the Final Rule ("EPA's Denial"). *Chlorpyrifos; Final Order Denying*

Objections, Requests for Hearings, and Requests for a Stay of the August 2021 Tolerance Final Rule, 87 Fed. Reg. 11,222 (Feb. 28, 2022), Long Decl. Ex. FF. EPA made clear in EPA's Denial that it "does not dispute its own scientific conclusions and findings" concerning EPA's Designated Safe Uses. 87 Fed. Reg. at 11,241. Rather, EPA attempted to justify prohibiting all uses, rather than limiting permissible uses to EPA's Designated Safe Uses, by claiming that it had an obligation under the Federal Food, Drug, and Cosmetic Act ("FFDCA") to make a decision considering all currently registered uses. *Id.*

That is not the law. EPA did not have to make one safety determination on the basis of all currently registered uses. The plain language of the FFDCA requires a tolerance-by-tolerance analysis for revocation—not a wholesale approach that ignores individual tolerances that EPA knows to be safe. 21 U.S.C. § 346a(b)(2)(A)(i) (EPA "shall modify or revoke *a* tolerance if the Administrator determines *it* is not safe") (emphasis added). EPA must base those safety determinations upon "anticipated" uses—not current uses. *Id.* § 346a(b)(2)(A)(ii). EPA regulates these pesticide uses under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and has a statutory obligation to

harmonize its registrations under FIFRA with its tolerance decisions under FFDCA. *Id.* § 346a(l)(1).

At its core, the Petition seeks review of a legal question, as EPA's Denial concedes: whether EPA's new interpretation of the FFDCA and FIFRA—requiring all registered uses of a pesticide to rise or fall together when considering the safety of tolerances—allows EPA to ignore its findings that certain uses and tolerances are safe. EPA had already done the work necessary to identify the tolerances that should be retained: EPA's Designated Safe Uses. The Agency should have followed its statutory duty and taken the steps necessary to preserve EPA's Designated Safe Uses and to oversee an orderly phase-out of all other food uses. Indeed, EPA held extensive talks with Petitioner Gharda to do just that. EPA then reversed course at the eleventh hour and made a wholesale revocation of all agricultural uses, contrary to its own science.

EPA's sweeping rule will cause significant and irreparable harm to the thousands of farmers represented here, who need chlorpyrifos to

fight insect infestation and preserve their crops.[1] In many cases, growers have no adequate substitute for controlling insects that attack their crops. Where alternatives exist, those insecticides are more expensive and less effective than chlorpyrifos. Without the ability to apply chlorpyrifos for EPA's Designated Safe Uses, crop yields will decrease and costs of production will increase. The resulting economic losses will be substantial. For example, over half of the domestic supply of sugar comes from sugarbeets grown by farmers represented by Petitioners Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association, American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, and Minn-Dak Farmers Cooperative. Att. 1, Ex. F at 9. Petitioners

[1] Petitioners Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association, American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, American Farm Bureau Federation, American Soybean Association, Iowa Soybean Association, South Dakota Soybean Growers Association, National Association of Wheat Growers, Cherry Marketing Institute, Florida Fruit and Vegetable Association, Georgia Fruit and Vegetable Association, and National Cotton Council of America (hereinafter, the "Grower Petitioners") represent individual farmers and growers who collectively cover each of the eleven agricultural commodities for which EPA found the use of chlorpyrifos safe and of high benefit.

Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, and Minn-Dak Farmers Cooperative estimate that their members will suffer losses approaching $82 million per year under the Final Rule. Att. 2, Ex. F (Geselius Decl.) at ¶22; Att. 2, Ex. G (Hastings Decl.) at ¶20; Att. 2, Ex. I (Metzger Decl.) at ¶18. The crop losses EPA estimates will occur threaten the viability of the sugarbeet cooperatives here. Att. 2, Ex. G (Hastings Decl.) at ¶27. Losses suffered by individual sugarbeet farmers will be equally significant. For example, a sugarbeet grower (one of the 10,000 family farmers represented by the sugarbeet petitioners) estimates his farm will lose up to $400,000 annually under EPA's Final Rule. Att. 2, Ex. B (Baldwin Decl.) at ¶14. These harms are imminent, as farmers will need to apply chlorpyrifos beginning in April 2022 to control destructive pests. Att. 2, Ex. H (Haugrud Decl.) at ¶8. And these harms are certain, as EPA's own calculations show. PID at 42.

The Final Rule will also irreparably harm Gharda, the primary supplier of chlorpyrifos for agricultural use in the United States. The Final Rule will effectively deprive Gharda of its legally protectable property interest in its chlorpyrifos registration. It will also cause

Gharda significant unrecoverable economic losses and reputational harm from lost sales, lost investment in inventory, and customer and public ill-will.

Petitioners made these facts known to EPA, in written objections to the Final Rule and in requests for an administrative stay of its effective date.[2] EPA ignored these entreaties for over four months, then issued EPA's Denial rejecting them. EPA's Denial acknowledged the "cases for a stay" made by certain Petitioners "are not frivolous and are being pursued in good faith." 87 Fed. Reg. at 11,268.

Pursuant to Federal Rule of Appellate Procedure 18, to avoid irreparable harm, this Court should stay implementation of the rule with respect to EPA's Designated Safe Uses. This Court should also stay the tolerance expiration date for all other crop uses of chlorpyrifos until the Agency coordinates its action with FIFRA and provides an appropriate existing stocks order for those uses.

[2] All Petitioners except the National Cotton Council of America filed objections.

BACKGROUND

Chlorpyrifos, a broad-spectrum, organophosphate insecticide, has been registered for use in the United States since 1965 and is currently registered for use on food crops and in non-food use settings. 86 Fed. Reg. 48,315, 48,320 (Aug. 30, 2021). Grower Petitioners represent individual farmers, particularly in the upper Midwest, who rely on chlorpyrifos to fight destructive insects, to meet demand for their products, and to avoid significant crop losses. Chlorpyrifos is a critical tool—sometimes the only tool—for addressing several pest problems for the crops at issue. *See, e.g.*, Att. 2, Ex. G (Hastings Decl.) at ¶11; Att. 2, Ex. F (Geselius Decl.) at ¶12; Att. 2, Ex. J (Crittenden Decl.) at ¶¶10–15; Att. 2, Ex. Q (Schmitz Decl.) at ¶¶11–15.

EPA regulates the use of insecticides under the FFDCA and FIFRA. The FFDCA requires EPA to set food safety "tolerances" that represent the maximum levels of pesticide residues allowed in or on agricultural commodities. 21 U.S.C. § 346a. EPA "may establish or leave in effect a tolerance for a pesticide chemical residue in or on a food only if the Administrator determines that the tolerance is safe" and "shall modify or revoke a tolerance if the Administrator determines it is

not safe." *Id.* § 346a(b)(2)(A)(i). When establishing, modifying, or revoking a tolerance, EPA must consider, among other things, "the validity, completeness, and reliability of the available data from studies of the pesticide chemical and pesticide chemical residue." *Id.* § 346a(b)(2)(D)(i).

The Food Quality Protection Act ("FQPA") amended the FFDCA to establish a safety standard for pesticide tolerances for residues in or on raw agricultural commodities. Such a tolerance is deemed "safe" if "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." *Id.* § 346a(b)(2)(A)(ii). This provision contemplates exposures from food, drinking water, and non-occupational exposure. When assessing "reasonable certainty [of] no harm," EPA applies an additional tenfold ("10X") margin of safety to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children. *Id.* § 346a(b)(2)(C)(ii)(II). The Agency may apply a different margin of safety (e.g., a 1X safety factor) if there is "reliable data" to support doing so. *Id.*

FIFRA establishes a licensing or "registration" regime for regulating pesticide uses. 7 U.S.C. § 136a(a). In approving a pesticide registration, EPA must review and approve pesticide labeling, which governs its use. *Id.* § 136j(a)(2)(G). When revoking a tolerance for a pesticide chemical residue in or on food, the FFDCA requires EPA to "coordinate such action with any related necessary action under [FIFRA]." 21 U.S.C. § 346a(l)(1). That "related action" may include canceling the pesticide's registration and entry of an "existing stocks" order for "the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled." 7 U.S.C. § 136d(a), (b).

As described in the Final Rule, EPA's action came after years of administrative process and litigation surrounding EPA's established chlorpyrifos tolerances. In 2007, several nongovernmental organizations ("NGOs") petitioned EPA to revoke all existing chlorpyrifos tolerances. EPA issued an order denying the petition in 2017 and subsequently denied the NGOs' objections. *League of United Latin Am. Citizens v. Regan*, 996 F.3d 673, 680–90 (9th Cir. 2021) ("*LULAC*"). On April 29, 2021, the U.S. Court of Appeals for the Ninth Circuit vacated those denials and ordered EPA to "issue a final

regulation within 60 days following issuance of the mandate that either (a) revokes all chlorpyrifos tolerances or (b) modifies chlorpyrifos tolerances and simultaneously certifies that, with the tolerances so modified, the EPA has determined that there is a reasonable certainty that no harm will result." *Id.* at 703–04. The court further instructed that EPA "modify or cancel related FIFRA registrations for food use in a timely fashion." *Id.*

The court's order made clear that EPA could "choose to modify chlorpyrifos tolerances, rather than to revoke them," based on a safety determination. *Id.* at 702. In making this statement, the court was aware of the Agency's PID. *Id.* at 703. The court explained that "[i]f, based upon the EPA's further research the EPA can now conclude to a reasonable certainty that modified tolerances or registrations would be safe, then it may modify chlorpyrifos registrations rather than cancelling them." *Id.* In discussions in May and June 2021, EPA expressed to Gharda its willingness to consider retaining EPA's Designated Safe Uses, and Gharda committed to accept a narrowing of its registration consistent with the Agency's safety finding. Seethapathi Decl. ¶¶ 21–33. EPA then abruptly ceased discussion. *Id.* at ¶ 34.

On August 30, 2021, EPA issued the Final Rule, revoking all tolerances for chlorpyrifos. 86 Fed. Reg. at 48,315. The Final Rule stated that "given the currently registered uses of chlorpyrifos, EPA cannot determine there is a reasonable certainty that no harm will result from aggregate exposure to residues, including all dietary (food and drinking water) exposures and all other exposures for which there is reliable information," notwithstanding the FQPA 10X safety factor. *Id.* at 48,317.

Applying the conservative 10X safety factor, EPA confirmed key findings from its PID—namely that there are no risk concerns based on exposures to chlorpyrifos from food alone. Factoring in drinking water exposures, EPA found that risks exceeded safe levels when taking into account all registered uses, but are within safe limits assuming only EPA's Designated Safe Uses. *Id.*

EPA conducted a drinking water assessment (DWA) in 2016 based on modeling all registered uses. *Id.* at 48,330. EPA conducted a refined 2020 DWA to better account for variability and estimate regional and watershed concentrations. 86 Fed. Reg. at 48,332. The 2020 DWA

underwent peer review,[3] and focused on a "subset of uses [(EPA's Designated Safe Uses)] . . . to determine, if these were the only uses permitted on the label, whether or not the resulting estimated drinking water concentrations" would be safe. 86 Fed. Reg. at 48,331. The results indicated that exposures for EPA's Designated Safe Uses were below the level of concern. *Id.*

EPA's Final Rule nevertheless put aside the 2020 DWA's results because, in EPA's view, "the Agency is required to assess aggregate exposure from all anticipated dietary, including food and drinking water, as well as residential exposure," and the 2020 drinking water assessment cannot be used to support "currently labeled uses." 86 Fed. Reg. at 48,333. EPA thus decided that, rather than maintain the tolerances for uses of chlorpyrifos it found safe, it should revoke all of them.

Petitioners filed objections to EPA's decision and requested a stay of the Final Rule, which EPA denied on February 22, 2022. Long Decl.,

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[3] *See generally* U.S. EPA, Memorandum, Updated Chlorpyrifos Refined Drinking Water Assessment for Registration Review, EPA-HQ-OPP-2008-0850-0941 (Sept. 15, 2020), https://www.regulations.gov/document/EPA-HQ-OPP-2008-0850-0941.

Att. 1, Ex. FF. Petitioners exhausted all administrative means of staying the Final Rule, which took effect on February 28, 2022. The 2022 growing season, and the need for farmers to use chlorpyrifos in planting and protecting their crops, beginning in mid-April, is quickly approaching. Att. 2, Ex. H (Haugrud Decl.) at ¶8. Without a stay of the Final Rule as requested herein, Petitioners will suffer immediate and ongoing irreparable harm from the inability to sell and use chlorpyrifos.

ARGUMENT

Courts consider four factors in determining whether to stay agency action pending judicial review: (1) the applicant's likelihood of success on the merits; (2) irreparable injury absent a stay; (3) the balance of equities among interested parties; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *accord Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). Although "no single factor is determinative," *Dataphase Sys.*, 640 F.2d at 113, "the 'likelihood of success on the merits is most significant,'" *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013) (quoting *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771, 776 (8th

Cir. 2012)). Petitioners satisfy these factors for a stay of the revocation of the tolerances for EPA's Designated Safe Uses and, for all other crop uses, a stay of the revocation until EPA issues an appropriate existing stocks order.

I. Petitioners Are Likely to Succeed in Challenging EPA's Unlawful Decision to Revoke the Tolerances For the Crop Uses EPA Found Safe.

This Court must set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Agency action is arbitrary and capricious if

> [1] the agency has relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *accord Nebraska v. EPA*, 812 F.3d 662, 666 (8th Cir. 2016).

EPA's decision to revoke tolerances for EPA's Designated Safe Uses is arbitrary and capricious and contrary to law for at least three reasons. First, EPA ignored the plain text of the FFDCA and FIFRA, rendering its decision contrary to law. Second, EPA's explanation for

its decision runs counter to its own finding that the tolerances for EPA's Designated Safe Uses are safe. Finally, EPA ignored important aspects of the problem in issuing the Final Rule, including Petitioners' reliance interests and the need for harmonization with FIFRA.

A. EPA ignored the plain text of the FFDCA and FIFRA in reaching its decision.

The FFDCA specifies how EPA must approach decisions concerning tolerances. For insecticides such as chlorpyrifos, EPA has established multiple tolerances: a separate one for each agricultural commodity on which it may be used. The plain language of the FFDCA specifies a tolerance-by-tolerance examination by EPA of these separate safety standards in determining whether to leave it in place, to modify it, or to revoke it. EPA "may establish or leave in effect *a tolerance* . . . if the Administrator determines that *the tolerance* is safe . . . [and] shall modify or revoke *a tolerance* if the Administrator determines *it* is not safe." 21 U.S.C. § 346a(b)(2)(A)(i) (emphasis added). This plain language requires that a determination on the safety of a tolerance occur on an individual basis.

Once EPA has made its safety decisions for the existing tolerances, then FFDCA and FIFRA require EPA to modify or cancel

the FIFRA registrations accordingly. *See* 21 U.S.C. § 346a(l)(1) ("[T]he Administrator shall coordinate such action with any related necessary action under [FIFRA]."). In short, FFDCA and FIFRA required EPA to address chlorpyrifos tolerances on a tolerance-by-tolerance basis—revoking any chlorpyrifos tolerances where it could not make a safety finding, leaving in place the tolerances for the eleven uses EPA found safe, or modifying individual tolerances as the science would require—and then cancel or modify chlorpyrifos registrations under FIFRA in accordance with that science. This is precisely how EPA has applied the law previously, Seethapathi Decl. Ex. 4, Reiss Decl. at ¶17, consistent with FFDCA's forward-looking mandate to consider "anticipated" uses in making a safety decision. 21 U.S.C. § 346a(b)(2)(A)(i).

EPA had already done the work in the PID to identify the tolerances to be maintained: EPA's Designated Safe Uses. Instead of following the science and adjusting the registrations to conform to its safety findings, EPA concluded—contrary to the plain language of FIFRA—that it could not do so. EPA asserted, for the first time, that all "currently registered" uses had to rise or fall together. EPA had no

basis for fashioning this new rule, and the Final Rule and EPA's Denial claim none.

At most, EPA suggests that the Ninth Circuit's order mandated this approach. 86 Fed. Reg. at 48,316. That argument fails. EPA had already drawn the necessary lines in the 2020 PID, identifying for retention EPA's Designated Safe Uses. Citing the PID, the Ninth Circuit gave EPA 60 days to make its decision to modify or revoke chlorpyrifos tolerances on the basis of the available evidence. With the science already in hand, EPA had more than enough time to "act based upon the evidence" as required by the Ninth Circuit's order. *Id.* at 703. EPA's Denial confirms that EPA does not dispute its conclusions that EPA's Designated Safe Uses are in fact safe.

Because EPA's decision-making departed from the plain language of FFDCA and FIFRA, as well as the agency's own settled practice, EPA's Final Rule is contrary to law and must be set aside.

B. EPA's explanation for its decision runs counter to its own safety findings.

The Final Rule and EPA's Denial are arbitrary and capricious because they runs counter to the evidence in the record, including EPA's own safety findings. EPA acknowledged as much in the Final

Rule, 86 Fed. Reg. at 48,333, and again in EPA's Denial, 87 Fed. Reg. at 11,241. EPA's Final Rule explained that the "PID recognized that there might be limited combinations of uses in certain geographic areas that could be considered safe." 86 Fed. Reg. at 48,333 (citing PID at 40 (discussing EPA's Designated Safe Uses)). Indeed, the PID explained that EPA's Designated Safe Uses "will not pose potential risks of concern" and at least these uses could be retained. PID at 40. EPA's Denial confirmed that EPA "does not dispute" these conclusions. 87 Fed. Reg. at 11,241.

EPA nevertheless refused to apply its own scientific findings and instead decided to revoke all of the tolerances, including those for EPA's Designated Safe Uses. EPA's Denial upheld the Final Rule's claim that EPA could not modify chlorpyrifos labels under FIFRA to narrow permissible uses. 86 Fed. Reg. at 48,333; 87 Fed. Reg. at 11,237–38. EPA also claimed that it could not make a safety finding for a narrowed subset of uses unless "EPA has a reasonable basis to believe" that other uses will cease. 87 Fed. Reg. at 11,246.

EPA fails to explain why it could not make label changes consistent with its safety finding. 86 Fed. Reg. at 48,320–33; 87 Fed.

Reg. at 11,238. EPA had the time and ability to do just that, as its negotiations with Gharda prior to the Final Rule demonstrate. No data review would have been required: EPA had already made the safety finding months earlier.[4] EPA and Gharda had already discussed, for several weeks, registration and label modifications. Gharda had already agreed to cancellation of the registrations for everything but EPA's Designated Safe Uses. Seethapathi Decl. ¶ 24. EPA has offered no genuine basis for ignoring its safety findings supporting retention of EPA's Designated Safe Uses. Its decision is therefore arbitrary and capricious. *See Siddiqui v. Holder*, 670 F.3d 736, 744 (7th Cir. 2012) (agency use of "only generalized language to reject the evidence" is improper).

Courts have rejected similarly overbroad agency actions where the agency ignored its own science. For example, the D.C. Circuit rejected EPA's revocation of import tolerances for carbofuran where EPA had acknowledged that the imported foods were safe. *Nat'l Corn Growers*

[4] Label changes with data review generally take four months, but that would not be necessary here. *See* EPA, PRIA Fee Category Table – Registration Division – Amendments, last visited January 19, 2022, https://www.epa.gov/pria-fees/pria-fee-category-table-registration-division-amendments.

Ass'n v. EPA, 613 F.3d 266 (D.C. Cir. 2010). Likewise, this Court rejected agency action where the weight of the evidence went against the agency's decision. *Sugule v. Frazier*, 639 F.3d 406, 412 (8th Cir. 2011). Here, EPA's action was similarly arbitrary and capricious because EPA ignored its own science and provided an unsupported justification for its decision.

C. EPA failed to consider important aspects of the problem.

EPA's decision is also arbitrary and capricious because EPA failed to consider important aspects of the problem. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. First, EPA failed to consider Petitioners' significant reliance interests. "When an agency changes course, . . . it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). The agency is "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915.

Grower Petitioners have a significant reliance interest in the EPA-approved use of chlorpyrifos as a safe and effective insecticide for protecting their crops. EPA failed to consider the interests of the farmers who have relied on chlorpyrifos for decades to grow a number of agricultural commodities safely. Similarly, Gharda has a reliance interest in EPA following the science in making decisions that impact Gharda's investment in its registration. EPA failed to consider this interest as well. EPA's overbroad decision upended decades of approved chlorpyrifos use, when EPA could lawfully, and based on its own science, leave in effect the tolerances for EPA's Designated Safe Uses.

EPA also failed to consider the need for an existing stocks order for crop uses other than EPA's Designated Safe Uses. EPA has a statutory mandate under FIFRA to ensure the safe, lawful, and orderly phase-out of these products. Yet EPA failed to do this in coordination with the Final Rule. *See* 86 Fed. Reg. 48,315. EPA's failure to deal with the issue of existing stocks of chlorpyrifos causes substantial harm, and further demonstrates that its Final Rule was arbitrary and capricious.

II. Petitioners Will Suffer Irreparable Harm Absent a Partial Stay As Requested Herein.

To demonstrate irreparable harm, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). The threat of unrecoverable economic loss qualifies as irreparable harm. *Id.* at 426. Economic losses are unrecoverable where the injured party would not be able to bring a lawsuit to recover their economic losses if agency rules are eventually overturned. *Id.* Further, the "potential loss of consumer goodwill qualifies as irreparable harm." *Id.*; *see also Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (loss of reputation and goodwill constitute irreparable injury).

Chlorpyrifos is a critical tool for which "there is no equal replacement," and in some cases, no replacement at all. *See, e.g.*, Att. 2, Ex. T (Harris Decl.) at ¶8. For example, chlorpyrifos is "the only tool that is consistently effective in controlling destructive pests" for sugarbeets. Att. 2, Ex. F (Geselius Decl.) at ¶12; *see also* Att. 2, Ex. A (Weber Decl.) at ¶8; Att. 2, Ex. B (Baldwin Decl.) at ¶10. As a result, loss of chlorpyrifos will have "a devastating impact," including up to

$400,000 in annual losses to just one family farm. Att. 2, Ex. B (Baldwin Decl.) at ¶¶11, 14. As another grower explained, due to the lack of alternatives, "our only plan is to hope that there is not a significant pest problem." Att. 2, Ex. H (Haugrud Decl.) at ¶9. These impacts are industry-wide, impacting over 10,000 family farmers. For example, without the ability to use chlorpyrifos, the three farming cooperative Petitioners estimate unrecoverable losses for their sugarbeet grower members approaching $82 million per year. *See* Att. 2, Ex. G (Hastings Decl.) at ¶¶20-21; Att. 2, Ex. F (Geselius Decl.) at ¶22; Att. 2, Ex. I (Metzger Decl.) at ¶18. The Final Rule threatens the viability of these businesses. Att. 2, Ex. G (Hastings Decl.) at ¶27.

Similar issues exist with other crops at issue here. For example, a peach grower represented by Petitioners has been unable, after six years, to find an effective alternative to fight the lessor peach tree borer. Att. 2, Ex. J (Crittenden Decl.) at ¶14. Chlorpyrifos is also the only effective insecticide to protect against trunk borers in cherry trees. Att. 2, Ex. T (Harris Decl.) at ¶10; *see also* Att. 2, Ex. J (Crittenden Decl.) at ¶15. When a tree is lost to trunk borers, it can take up to ten

years to get a replacement tree into production. Att. 2, Ex. T (Harris Decl.) at ¶12.

Even where alternatives exist, losing chlorpyrifos causes significant problems because of pesticide resistance. *See, e.g.*, Att. 2, Ex. K (Scott Decl.) at ¶¶9–11; Att. 2, Ex. Q (Schmitz Decl.) at ¶¶11–16; Att. 2, Ex. R (Johnson Decl.) at ¶¶9–16. "If growers have fewer tools to rotate and mix as a result of losing chlorpyrifos, the effectiveness of the remaining tools will erode more quickly as pest populations develop resistance." Att. 2, Ex. Q (Schmitz Decl.) at ¶14; Att. 2, Ex. J (Crittenden Decl.) at ¶12 (pesticide resistance is "a serious problem"). For example, alternatives for controlling soybean pests are limited. Loss of chlorpyrifos "would result in a rapid buildup of insecticide resistance to the other remaining options." Att. 2, Ex. Q (Schmitz Decl.) at ¶¶11–16. This will have "devastating economic impacts" for soybean farms, Att. 2, Ex. L (Goblish Decl.) at ¶13, including an estimated $1.26 million in annual cost increases, Att. 2, Ex. K (Scott Decl.) at ¶13, due to the loss of chlorpyrifos.

A partial stay is needed now because these losses will occur before litigation concludes. As one grower explained, "pest infestation will be

worse on my farm in 2023 if chlorpyrifos cannot be used during the spring of 2022." Att. 2, Ex. B (Baldwin Decl.) at ¶12. These losses are unrecoverable should the Final Rule be overturned. *See Iowa Utils. Bd.*, 109 F.3d at 426. Also, these growers are likely to suffer loss of customer trust because "EPA also attacked the safety of prior uses of chlorpyrifos in the eyes of the public." Att. 2, Ex. A (Weber Decl.) at ¶19; *see also* Att. 2, Ex. C (Bladow Decl.) at ¶22; Att. 2, Ex. I (Metzger Decl.) at ¶20. Such reputational harm is irreparable. *See Iowa Utils. Bd.*, 109 F.3d at 426.

Gharda will also suffer irreparable harm from revocation of tolerances, effectively causing the loss of its EPA registration for chlorpyrifos, in which it has a legally protectable property interest. *See Reckitt Benckiser Inc. v. EPA,* 613 F.3d 1131, 1133 (D.C. Cir. 2010) ("A FIFRA registration is a product-specific license describing the terms and conditions under which the product can be legally distributed, sold, and used."); *see also Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (due process violations constitute irreparable injury). Revocation of all tolerances will also cause Gharda devastating economic and reputational harm from lost sales, lost investment in

significant quantities of existing inventory it is unable to exhaust, and customer and public ill-will. Seethapathi Decl. ¶¶46–51.

III. The Public Interest and Balance of the Equities Support a Partial Stay.

The public interest and the balance of the equities support Petitioners' request for a stay. The partial stay requested will provide critical relief to the family farms that will be significantly harmed by the Final Rule. *Supra* at 21-25. Further, the agricultural commodities grown by the farmers represented here contribute significantly to the U.S. economy as a whole and to local communities in particular. *See, e.g.*, Att. 2, Ex. F (Geselius Decl.) at ¶7 (sugarbeet farming has a $4.9 billion impact in Minnesota and North Dakota). Thus, the losses suffered by Petitioners and the farmers represented will be magnified and spread to connected parts of the farming economy and beyond. *Id*.

Public health and public interest considerations do not outweigh the need for a partial stay. As EPA's Denial confirms, EPA's Designated Safe Uses present no concerns for food safety or public health. *Supra* at 18. The weighing of the public interest supports a stay based on the substantial, irreparable economic harm to growers, to Gharda, and to the public absent the stay requested herein.

CONCLUSION

This Court should stay EPA's decision revoking the tolerances for EPA's Designated Safe Uses, pending judicial review of that decision. This Court should also stay the tolerance expiration date for all other crop uses, until the Agency provides an appropriate existing stocks order for those uses.

March 3, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petitioners' Renewed Motion for Partial Stay Pending Review complies with the type-volume limitation of Federal Rule of Appellate Procedure because it contains 5,199 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Century Schoolbook typeface.

Dated: March 3, 2022

s/ Nash E. Long
Nash E. Long

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2022, I electronically filed the foregoing Petitioners' Renewed Motion for Partial Stay Pending Review with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will send a notice of electronic filing to all parties on the electronic filing receipt.

I also hereby certify that I have, on this day, served by overnight mail a copy of the foregoing document upon the parties below.

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