UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION, CENTER FOR FOOD SAFETY, CENTER FOR BIOLOGICAL DIVERSITY, and PESTICIDE ACTION NETWORK NORTH AMERICA, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW WHEELER, in his official capacity as Administrator, *Respondents*.	**Case No.** **PETITION FOR REVIEW**

PETITION FOR REVIEW

Pursuant to Section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136n(b), and Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioners National Family Farm Coalition, Center for Food Safety, Center for Biological Diversity, and Pesticide Action Network North America (collectively Petitioners) petition this Court to review the order (the Registration Decision) of the United States Environmental Protection Agency (EPA)

approving new five-year unconditional registrations for two dicamba pesticides (XtendiMax and Engenia) and unconditionally extending the registration of a third dicamba pesticide (Tavium) for spraying over the top of genetically engineered cotton and soybean that have been engineered to resist dicamba in thirty-four states. *See* Exhibits A-D (collectively, the Registration Actions).

Petitioners allege that EPA violated its procedural and substantive duties under FIFRA and the Administrative Procedure Act (APA) in issuing the Registration Actions re-approving the new uses of the three above-mentioned dicamba pesticide products, by, among other things: (1) failing to support its unconditional registration conclusion of no unreasonable adverse effects on the environment with substantial evidence, for the reasons set forth in *Nat'l Family Farm Coal. v. EPA* (*NFFC II*), 960 F.3d 1120, 1124-39 (9th Cir. 2020), as well as a some new reasons; and (2) refusing to hold notice and comment on the decision embedded in the Registration Decision to eliminate state pesticide restriction authority under section 24 of FIFRA, 7 U.S.C. § 136v(c). *See* Ex. A, at 20 n.19. Also, as in *NFFC II*, Petitioners allege that EPA violated the Agency's procedural and substantive duties under the Endangered Species Act (ESA), 16 U.S.C. §§ 1533-44, by failing to consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service to insure that the Registration Actions will not jeopardize

any listed species or destroy or adversely modify any of their critical habitats. *See* 16 U.S.C. § 1536(a)(2); *see also NFFC II*, 960 F.3d at 1124, 1125 (raising similar ESA claims the panel declined the need to reach); *see, e.g.*, *NFFC II*, No. 19-70115, ECF No. 39 at 36-74; ECF No. 72 at 2-22; ECF No. 73 at 18-32.

The present challenged registration decision order and notices of registrations were announced in documents signed on October 27, 2020, EPA Docket No. EPA-HQ-OPP-2020-0492-0007. *See* Exs. A-D. The Registration Actions approved the same use for three dicamba products, two of which EPA had conditionally registered in 2018, and which this Court vacated in June 2020, holding that EPA understated some of the risks of dicamba damage and entirely failed to acknowledge other risks; therefore, EPA did not have substantial evidence to support its determination that the pesticide uses would not result in unreasonable adverse effects on the environment, in violation of FIFRA. *See NFFC II*, 960 F.3d at 1124-39.

The current Registration Actions are closely related to the earlier registration decisions by EPA over the same pesticide products previously challenged by Petitioners and reviewed by this Court pursuant to section 16(b) of FIFRA, 7 U.S.C. § 136n(b). *See NFFC II*, 960 F.3d at 1130 (discussing procedural history); *id.* at 1132 (holding this Court had jurisdiction as set forth in 7 U.S.C. § 136n(b) because the

2018 registration decision arose from "the related 2016 registration decision."); *Nat'l Family Farm Coal. v. EPA* (*NFFC I*), No. 17-70196 (9th Cir. Jan. 11, 2019).

Petitioners respectfully petition this Court to: (1) declare that the Registration Actions violate FIFRA; (2) set aside, or vacate, the Registration Actions in whole or part; (3) craft equitable and/or declaratory relief to prohibit any continued use of existing, already sold pesticide products registered under the now-vacated registrations; and (4) declare that the failure to provide notice and comment on the decision embedded in the Registration Decision to eliminate state pesticide restriction authority under section 24 of FIFRA violates the APA, and (5) grant any other relief as may be appropriate.

Respectfully submitted this 21st day of December, 2020.

s/ George A. Kimbrell

George A. Kimbrell
Sylvia Shih-Yau Wu
Center for Food Safety
917 SW Oak Street, Suite 300
Portland, OR 97205
T: (971) 271-7372 / F: (971) 271-7374
Email: gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org

s/ Stephanie M. Parent

STEPHANIE M. PARENT
Center for Biological Diversity
PO Box 11374
Portland, OR 97211
T: (971) 717-6404
Email: SParent@biologicaldiversity.org