No. 19-70115

IN THE

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

BASF CORPORATION'S OPPOSITION TO PETITIONERS' EMERGENCY MOTION TO ENFORCE VACATUR AND CROSS-MOTION TO RECALL AND STAY MANDATE

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INTRODUCTION

BASF Corporation respectfully submits this Opposition to Petitioners' Emergency Motion to Enforce This Court's Vacatur, and Cross-Motion to Recall and Stay the Mandate (ECF 127).[1] It is neither necessary nor permissible for the panel to take steps to "enforce" its June 3, 2020 decision that vacated the registrations of three dicamba pesticide products, including BASF's Engenia. This Court lacks jurisdiction over EPA's June 8 "Final Cancellation Order for Three Dicamba Products," because it is a new order issued after vacatur. Moreover, EPA's order is entirely consistent with the Court's ruling. The order acknowledges that the registrations are vacated and speaks only to the legal and practical consequences of vacatur for existing stocks of product.

Contrary to Petitioners' assertions, EPA's order does not seek to maintain the *status quo* in the wake of the panel's vacatur of the registrations. To the contrary, the order confirms that registrants and distributors nationwide were (and still are) prohibited under FIFRA from selling or distributing any of the now-unregistered products, including existing stocks, as of the date of the panel's mandate, June 3, 2020. The exception is shipment for purposes of return or

[1] BASF tenders this submission as a conditional filing pending resolution of its pending Motion to Intervene. ECF 130. BASF suggests that any responses to BASF's cross-motion be submitted by June 18 to correspond to Petitioners' reply deadline for their Motion.

disposal of existing stocks, which EPA's order authorizes because such return shipments might otherwise be prohibited as "distribution" of an unregistered pesticide under FIFRA. With respect to existing stocks of product already in the hands of farmers and licensed commercial applicators at the time of the June 3 mandate, the order allows use by farmers and sale/use by commercial applicators[2] only until July 31, and only in accordance with the strict label restrictions. EPA's order prohibits all use of existing stocks after July 31. This approach is consistent with the legal framework for unregistered pesticides under FIFRA, longstanding EPA policies, and EPA's response in every previous situation where a court action vacated a pesticide product registration. Absent EPA's order, FIFRA would allow end-users to apply existing stocks with no deadline and no binding requirement to follow the label restrictions. For these and other reasons, Petitioners' Motion should be denied.[3]

BASF further requests that the Court withdraw its mandate and deny Petitioners' request to reissue a revised mandate immediately. Instead, the Court should follow the normal schedule for issuance of mandates established in the

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[2] EPA's order allows state-licensed commercial applicators to sell/apply existing stocks to their customers' fields. Under the now-vacated 2018 registrations, these products can only be applied personally by state-licensed certified applicators, who are effectively end-users of the products.

[3] BASF joins EPA and Intervenor-Respondent Monsanto in opposing Petitioners' requests to hold EPA in contempt and to reopen the case to address the endangered species claims, as both are procedurally and substantively meritless.

Rules, which will allow an orderly process for pursuing rehearing. The record does not demonstrate emergency circumstances supporting immediate issuance or re-issuance of the mandate, as that record is limited to the information that was before EPA as of October 2018. Nothing in the record addresses use of the products under the additional restrictions and training requirements that EPA imposed in 2018. Immediate issuance of the mandate irreparably harms BASF, whose product was simultaneously swept into the action and summarily vacated by the June 3 decision, without adequate notice to BASF and without the Court having seen the Engenia administrative record.

The panel decision presents serious jurisdictional and legal questions that are appropriate subjects for rehearing, including whether BASF's Engenia product was properly at issue, and whether the Court had jurisdiction over the Engenia registration given the undisputed lack of a public hearing on EPA's Engenia decision (*see* 7 U.S.C. § 136n). The panel should recall the mandate, grant BASF's motion to intervene, and refrain from reissuing a revised mandate pending petitions for rehearing.

ARGUMENT

I. THE COURT SHOULD DENY PETITIONERS' REQUEST TO RESHAPE AND REISSUE THE MANDATE.

Petitioners urge that this Court must "immediately" revise its June 3 Opinion and at the same time act to "enforce its … decision through appropriate relief and

instruct EPA that it cannot avoid the vacatur of OTT uses…." ECF 127-1 at 26. Petitioners do not specify the "appropriate relief" they seek or who is to be bound by it. In the first instance, Petitioners appear to seek the extraordinary summary invalidation of a post-ruling agency order that is not properly before the Court. Petitioners also seem to be asking the Court to effectively grant an affirmative injunction barring non-party growers from applying their existing stocks of the vacated products "over the top" of their soybean and cotton crops, and/or directing EPA to issue an edict purporting to prohibit that conduct nationwide. In both cases, Petitioners seek their requested relief on an emergency basis. This Court should deny Petitioners' request as neither form of relief is appropriate or available to Petitioners.

A. Petitioners' motion should be denied because Petitioners have already been afforded the relief provided by the Court's decision, and because the Court lacks jurisdiction over EPA's June 8 order.

This Court should deny Petitioners' request to "enforce" because it seeks relief beyond what the Court ordered. *See State of California v. United States Dep't of Labor,* 155 F. Supp. 3d 1089, 1096 (E.D. Cal. 2016); *Heartland Hosp. v. Thompson,* 328 F. Supp. 2d 8, 13-14 (D.D.C. 2004) ("If the plaintiff has received all relief required by that prior judgment, the motion to enforce is denied."). The Court ordered vacatur of three dicamba product registrations. EPA's order accomplishes precisely that, consistent with established law. EPA's order

recognizes that the registrations were vacated by the Court as of its June 3 mandate, and are invalid. There is no relief provided by the Court's order that was not implemented, and therefore the motion should be denied.

After a court vacates an agency decision, it is up to the agency to determine in the first instance how to proceed consistent with the court's judgment. *See*, e.*g.*, *Bennett v. Donovan*, 703 F. 3d 582, 589 (D.C. Cir. 2013) (after a court "set[s] aside an unlawful agency action … it is the prerogative of the agency to decide in the first instance how best to provide relief."). This comports with the foundational administrative law principles that courts are not to direct agency policy or dictate in advance how an agency exercises its discretion. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160-61 (2010); *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989); *see also FTC v. Colgate-Palmolive*, 380 U.S. 374, 379 (1965) ("…the agency is not foreclosed upon the remand of the case from enforcing the legislative policy of the act it administers, provided the new order does not conflict with the reviewing court's mandate."); *Fed. Power Comm'n v. Idaho Power Co.,* 344 U.S. 17, 20 (1952).

Moreover, this Court lacks jurisdiction to review EPA's June 8 order. As Petitioners point out, this Court did not remand the decision to EPA, rather, the Court vacated the registrations. EPA's subsequent order is a wholly new agency action that is subject to judicial challenge only in a new proceeding, based on the

new administrative record that was before EPA when it issued the order. *See Bennet*, 703 F. 3d at 589. Under FIFRA, jurisdiction over such a challenge resides in district court, not this court. 7 U.S.C. §136n.

If Petitioners wish to challenge EPA's existing stocks order, they may file a new district court action, where BASF would have the right to intervene as a party and be heard regarding the legal status of the existing stocks of BASF's product.

B. Petitioners' motion should be denied because there is no basis for the Court to issue an injunction against use.

After concluding that EPA's decision to continue the registrations was not supported by "substantial evidence," the panel granted the only relief the Petitioners properly sought: vacatur of the registrations. ECF 125 at 56. Directing EPA how to respond to the vacatur of the registrations or issuing what would effectively be an immediate nationwide injunction against use of existing stocks would be inconsistent with foundational administrative law principles. *See* Section I.A, above.

If Petitioners nevertheless wanted to seek such a remedy, it was incumbent upon them to make a timely formal request for an injunction or other specific relief, properly defined and supported by the required factual showings. That would have provided the parties, and the countless affected non-parties nationwide, fair notice and a meaningful opportunity to be heard. It would have also given this Court time to receive full briefing on a normal schedule, and to adequately consider the legal

and factual issues raised. The lack of a timely and properly-supported request for injunctive relief further confirms that these issues were, and remain, outside the scope of this Court's jurisdiction in a record review case

Moreover, there is no record in this case that could support such an immediate use injunction. Despite contending that "[p]reventing a repeat of the past three seasons was central to this expedited litigation," ECF 127 at 4, Petitioners never sought a preliminary or permanent injunction against use of the products based on alleged ongoing harms. Thus, the record before this Court is limited to the facts before EPA in 2018, when it decided to extend the registrations and impose new restrictions and training requirements to eliminate crop damage concerns. There is no record evidence and there has been no briefing on the current impacts of the more restricted products in 2019 or 2020 and the panel (properly) made no findings on this question.

Petitioners repeatedly attribute fact findings to the panel that are not in the decision. This Court did not find that the costs to farmers of vacating the products were "outweighed" by the risks of use, ECF 127 at 11-12, but rather found a lack of "substantial evidence" in the administrative record to support EPA's 2018 decision-making. ECF 125 at 56. The panel did not "promptly issue[] the mandate specifically to end dicamba OTT use by June 3," it simply vacated the registrations and issued the mandate forthwith. ECF 125 at 56. The panel did not "vacate[] the

new uses to put an immediate stop to … grave harms" to endangered species, ECF 127 at 6, it declined to "reach the question of whether the registration also violates the Endangered Species Act." ECF 125 at 6.

Without the necessary factual record and showings by Petitioners, the panel cannot issue an immediate, nationwide injunction, even if such relief were otherwise available and even if Petitioners had timely requested it.

C. Petitioners' motion should be denied because Petitioners' alleged "emergency" was caused by their own litigation tactics.

It is no surprise to Petitioners that soybean and cotton growers are in the midst of their growing season, or that EPA would issue an existing stocks order if the Court granted the vacatur Petitioners sought. Any "emergency" is due to Petitioners' own delay in pursuing the case, and their failure to clearly state and properly pursue the remedies they now seek while this case was active. On that basis alone, it would be appropriate for this Court to decline Petitioners' invitation to proceed on an emergency basis to issue another (revised) edict with immediate effect. Doing so would serve only to cause more confusion, disruption, and harm to tens of thousands of non-parties nationwide who lack notice and a meaningful opportunity to be heard.

It was Petitioners' delay in pursuing their case that pushed its resolution into the midst of the 2020 growing season. The EPA decision document Petitioners challenged was issued on October 31, 2018. Petitioners waited over two months,

until January 11, 2019, to start this case. ECF 1. Petitioners initially had until June 28 to file their opening brief, but demanded a further extension to August 13, 2019, to give their lawyers four months to review the administrative record that EPA produced on April 12. ECF 26; ECF 29. Indeed, Petitioners had the bulk of the record even before that, as key regulatory documents were publicly available in EPA's Xtendimax docket. ECF 1-6 at 2. Petitioners' lack of urgency in pursuing their own challenge made it inevitable that a decision would not issue until the 2020 growing season was underway.

And while Petitioners now feign surprise, they were fully aware of EPA's long-standing interpretation of its authority and obligation to address existing stocks in the wake of the judicial vacatur of a registration. EPA has issued existing stocks orders in each other instance where a court has vacated a FIFRA registration, including a recent Ninth Circuit case in which Petitioners and their counsel were involved. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 521–22 (9th Cir. 2015); ECF 127, Exh. A at 3

Yet at no time during the 18-month lifespan of this case did Petitioners seek preliminary or emergency relief. Nor did they attempt to properly put before this Court any of the questions of statutory interpretation they now ask this Court to decide on an "emergency" basis – including the post-vacatur regulatory status of existing stocks under FIFRA and EPA's authority to issue the existing stocks order.

The first hint Petitioners gave that they wanted the Court to grant relief beyond vacating the registrations was their supplemental brief on May 13, 2020. ECF 115-1 at 10 (requesting an "order granting the petition and vacating the registration, halting any sale and use of these pesticide products, and notifying the parties that the Court's reasons will be more fully explained in a forthcoming opinion."). In response, EPA sought leave to file a supplemental brief describing the steps EPA planned to take if the registrations were vacated. ECF 119, 121. In that brief, EPA explained that "[FIFRA] does not prohibit the use of an unregistered pesticide," and therefore "if the Court were to grant the petition and vacate the Xtendimax registration, once the mandate is issued, manufacturers and others could no longer sell or distribute Xtendimax in commerce," but "Xtendimax end users would be free to use their remaining stocks." ECF 121 at 6-7. Petitioners successfully opposed EPA's request to file that supplemental brief. ECF 120, 123.

Having sat for months on their novel arguments regarding the legal implications of vacatur and EPA's existing stocks authority, Petitioners now demand that this Court act within days to impose broad and ill-defined "emergency" relief that will impact tens of thousands of non-party farmers and businesses. Even if this Court had jurisdiction to review EPA's existing stocks order, or to otherwise dictate EPA's post-decision activities, the Court should decline Petitioners' attempt

to enlist this Court to dictate agricultural practices across the country on an "emergency" schedule and without a complete factual record or an opportunity to be heard by those most directly impacted.

II. EPA'S EXISTING STOCKS ORDER IS A NECESSARY AND APPROPRIATE RESPONSE TO THIS COURT'S VACATUR.

In claiming that EPA "defied" the Court's vacatur decision by issuing the June 8 order, Petitioners misrepresent the nature of both. Petitioners ignore the legal and practical necessity to address existing stocks of the now-unregistered products, and the fact that EPA's action is consistent with the approach taken by the Agency in every prior instance where a registration was vacated by Court order.

A. Petitioners' motion misconstrues FIFRA and the nature of a product registration.

A premise of Petitioners' Motion is that EPA registration is required to authorize pesticide use, and thus if a registration is vacated farmers are barred by FIFRA from using their existing stock of a pesticide unless otherwise authorized by EPA. ECF 127-1 at 15-19. While the legal and practical consequences of vacating the registrations are not properly before this Court (*see* Section I above), Petitioners' views of the consequences of vacatur are inconsistent with FIFRA.

Fundamentally, a FIFRA registration is a license to sell, not a license to use. A registration is issued to the manufacturer and authorizes the "distribution and sale" of a particular product bearing specific EPA-approved label directions. In

considering whether to grant a registration, EPA is required to consider whether use of the product in accordance with its proposed label will have unreasonable adverse effects on the environment. But that requirement is distinct from the fact that registration is required to sell a product, while use of an unregistered product is not prohibited by FIFRA. 7 U.S.C. §§ 136a(a), 136j(a)(1)(A).

Petitioners misstate the law in suggesting otherwise. The very statutory provisions cited by Petitioners make explicit that FIFRA limits and regulates the use of registered pesticides. *See e.g.* 7 U.S.C. § 136j(a)(2)(G) ("it shall be unlawful for any person … to use any registered pesticide in a manner inconsistent with its labeling.") (emphasis added); ECF 127-1 at 20. By contrast, the statute generally makes it unlawful for any person to "distribute or sell … any pesticide that is not registered under section 3…" *Id.* § 136j(a)(1) (emphasis added).

The Ninth Circuit recognized this limitation of FIFRA in *Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir. 2015). The Court granted EPA's petition for rehearing and modified its published opinion to make clear that while FIFRA generally prohibits the "sale" of an unregistered pesticide, FIFRA does not preclude its "use." *Id.*; ECF 122, Exh. A (EPA Petition for Rehearing). Simply put, FIFRA generally makes it illegal to sell an unregistered pesticide. Nothing in FIFRA generally restricts or prohibits an end-user from using an unregistered pesticide in its possession. Without EPA's June 8 order limiting use

of existing stocks, growers would be free to use those stocks indefinitely and with no enforceable federal requirement to follow the label restrictions.[4]

Petitioners argue that the Court's Opinion only vacated EPA's approval of the products' over-the-top ("OTT") uses on soybean and cotton, and therefore any existing stocks remain registered pesticides that "can only be used in ways for which they are (lawfully) registered." ECF 127-1 at 20. However, the court's decision reads more broadly. ECF 125 at 54. The Opinion does not include language limiting the vacatur to particular uses, but concludes simply "Registrations **VACATED**." *Id*. at 56.

Even if Petitioners were correct that the Opinion only vacated the OTT uses, they misstate the statutory consequences for existing stocks. If the products remained registered for other uses, FIFRA requires only that their use be consistent with their existing labeling. *See* 7 U.S.C. § 136j(a)(2)(G) (prohibiting application in "manner inconsistent with its labeling"). Under FIFRA, "labeling" means the physical label that actually accompanies the product at a particular point in time. *See* 7 U.S.C. § 136(q). The physical labels that accompany all existing stocks of these products still provide for OTT use on soy and cotton, and end-users who apply the products consistent with those labels would not violate FIFRA.

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[4] Growers would remain subject to any state-law requirements governing the use of an unregistered pesticide, but such requirements do not exist in every state, and are not consistent among states that have them.

B. EPA's June 8 order properly addressed the legal and practical consequences of vacatur.

EPA's order does precisely what Petitioners contend it *should* do; it acknowledges that the products are "no longer … registered as of the time of the June 3, 2020 order" and "take[s] action consistent with" the Court's rulings. ECF 127-3 at 1; ECF 127-1 at 2. EPA's order addresses the regulatory status of existing stocks of the now-unregistered product, consistent with FIFRA and long-standing EPA policy and practice. Contrary to Petitioners' portrayal, EPA's order does not somehow reinstate the cancelled registrations, or bring back the *status quo* prior to this Court's vacatur. In fact, EPA's order prohibits far more than it allows.

EPA's order confirms that, because Xtendimax, Engenia, and FeXapan were no longer registered as of June 3, 2020, it "is a violation of FIFRA for any person to sell or distribute them." EPA's order at 1 (ECF 127-1 at 2). The order prohibits BASF and the other registrants from distributing or selling any existing stocks of the vacated products as of the June 3 decision, "except for distribution for the purposes of proper disposal." *Id.* at 11. Existing stocks in the hands of licensed commercial applicators and end users may be used only until July 31, 2020, and only in conformance with the label restrictions previously imposed by EPA in granting the registrations. *Id.* As discussed above, absent EPA's order, end-users would be free to continue to use their existing stocks with no deadline, and with no binding federal requirement to follow the label restrictions.

Petitioners falsely state that the June 8 order allows 16 million pounds of dicamba products to be applied over the top of cotton and soybean. ECF 127 at 6, 10, 13, 26. This figure is derived from EPA's estimate of the amount of product "in the channels of trade." *Id*. at 5. But much of those existing stocks cannot be used. Only the limited amount that was already in the hands of certified applicators and growers as of June 3 can be used, and only subject to the order's restrictions. *Id.* at 11. Petitioners entirely ignore the prohibition on *all* distribution and sale by registrants, distributors, and retailers (other than the limited commercial applicator sale/use of existing stocks, noted above). EPA's order thereby cut off any further supply to end-users and commercial applicators as of the date of the panel's June 3 mandate. BASF alone holds $44 million of Engenia product, sufficient to protect 6.6 million soybean acres, none of which can be distributed, sold, or used. Kay Decl. ¶ 16 (ECF 130-2 at 5).

C. The Panel's Opinion did not purport to immediately "ban" all use of the vacated products.

Petitioners assert that EPA is "brazenly attempting to tailor the Court's vacatur to its liking." ECF 127-1 at 1. This is patently untrue.

Petitioners misconstrue the June 3 decision to impose an immediate ban on all OTT use of the products. As amici in the *Pollinator Stewardship* case, Petitioners knew that vacating the registrations would not automatically halt "use" of the now-unregistered products. At the last minute, Petitioners improperly

suggested that the panel, for the first time, issue an order "granting the petition and vacating the registration, [and] halting any sale and use of these pesticide products…." ECF at 115 at 10. Despite that request, the panel issued a simple order vacating the registrations. ECF 125 at 56. Petitioners cannot now contend that in doing so the panel "show[ed] its clear intent that use immediately halt as of the day of its decision." ECF 127 at 9.

Likewise, to support their argument against allowing limited use of existing stocks, Petitioners contend that the June 3 decision did not vacate the registrations, but only OTT use of the products on soybeans and cotton. On this point, the panel's order was clear: "Registrations **VACATED**." ECF 125 at 56. The panel's order vacated registrations, it did not purport to vacate uses, and nothing in the Opinion appears to limit the vacatur by use. Petitioners' request that the panel rewrite the order to support their misguided rationale for an immediate ban on the use of the products should be rejected.

D. EPA's actions were consistent with every prior instance where a registration was vacated by court order and with what EPA advised this Court it would do.

EPA's order was not a ruse designed to "flout" the Court's vacatur order. As discussed above, the approach taken by EPA is consistent with every prior instance where a pesticide registration was vacated by court order. *See* ECF 127, Exh. A at 3. In a supplemental brief, EPA explained that it would address existing

stocks of these products following the same process and applying the same factors it did in those prior cases. ECF 121 & 122. The panel's decision did not "squarely reject[]" EPA's "reasoning," ECF 127 at 6 & n.3, it simply denied EPA's motion for leave to file the supplemental brief. ECF 125. Even if this Court had jurisdiction to review EPA's order, nothing in the order is inconsistent with this Court's ruling. The Court should deny Petitioners' request to revise and simultaneously "enforce" its ruling.

III. THE MANDATE SHOULD BE RECALLED AND SHOULD NOT REISSUE BEFORE THE NORMAL TIMEFRAME ESTABLISHED BY THE FEDERAL RULES.

The Court should reject Petitioners' invitation to recall the mandate, rewrite its decision, and reissue the mandate with yet another immediate edict that creates more chaos and disruption of national agriculture. BASF opposes the grounds for recalling the mandate urged by the Petitioners, as the Opinion clearly vacated the entirety of the registrations without attempting to limit that relief to particular uses. ECF 125 at 56. However, there are other serious legal and procedural problems with the Court's decision, which will soon be the subject of appropriate petitions for rehearing. Thus, the Court should recall the mandate and then follow the normal schedule of FRAP 41, not on the grounds argued by Petitioners, but to protect BASF's right to be heard before its Engenia registration is terminated. Together with granting BASF's Motion to Intervene (ECF 130), this would allow

the Court to hear from BASF and to consider rehearing petitions before the dramatic and irreversible impacts of the panel's decision are fully imposed on BASF and the nation.

This Court has discretion to recall the mandate for "good cause" or to "prevent injustice." *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). The Court's *sua sponte* decision to immediately issue the mandate terminated BASF's rights without meaningful notice or opportunity to be heard. Considerations of due process weigh strongly in favor of recalling the mandate for good cause and to prevent injustice, and then following the normal schedule under Rule 41.

The last thing this Court should do is immediately re-issue a revised mandate as the Petitioners request. That would serve only to further compound the confusion and harm imposed on tens of thousands of non-party growers nationwide. While Rule 41(b) makes clear that "the court may shorten or extend the time" for issuing the mandate, the Ninth Circuit has adopted a "Policy Against Issuance of Mandate Forthwith." General Order 4.6(a) (the "Policy"). A panel should issue the mandate forthwith "only in exceptional circumstances." *Id.* Exceptional circumstances include where a petition for rehearing "would be legally frivolous," where a losing litigant was "interposing delay tactics," or where an "emergency situation requires that" the mandate issue "at once." General Order

4.6(b); *see also* Circuit Advisory Committee Note to Rule 41-1.

The record does not establish exceptional circumstances to support immediate issuance or re-issuance of the mandate here. The panel's decision was based on its conclusion that EPA failed to adequately consider certain risks relating to potential non-target plant damage, and that EPA's 2018 decision-making was not supported by "substantial evidence" in the administrative record. There are no facts in the record addressing any alleged crop damage or other harm in 2019 or 2020, after the imposition of the additional use restrictions and training requirements that EPA adopted in 2018. Notwithstanding Petitioners' inflammatory allegations, no record facts indicate that significant crop damage or other harm is occurring today, let alone at levels that outweigh the undisputed harm to growers and others from immediate vacatur, or that are sufficient to create an "emergency situation" that requires immediate issuance of the mandate.

Immediate mandate issuance is especially inappropriate here, where BASF and others who are most directly impacted have not been heard. BASF will suffer irreparable harm if the mandate is not recalled or is immediately re-issued, including loss of its procedural rights, damage to customer relationships, and tens of millions of dollars in unrecoverable commercial losses. *See* Kay Decl. ¶ 16 (ECF 130-2 at 5). Under the circumstances, recalling the mandate and denying Petitioners' request for immediate reissuance will "prevent injustice" to BASF and

others, *Zipfel*, 861 F.2d at 567, and is necessary to preserve BASF's due process right "to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 US 319, 333 (1976). The panel should recall its mandate and allow BASF, EPA, and the other registrants the post-decision process established by the Rules, before the decision goes into effect with irreversible consequences.

CONCLUSION

This Court should deny Petitioners' Emergency Motion, recall the mandate, and follow the normal schedule for issuing the final mandate under Rule 41.

June 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Opposition and Cross-Motion complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in Times New Roman 14-point font using Microsoft Word 2010. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 4,737 words.

June 16, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, I filed the foregoing Opposition and Cross-Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

June 16, 2020

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