Mandate Issued on June 3, 2020

No. 19-70115

Before: Hawkins, McKeown, and W. Fletcher, Circuit Judges

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, BASF CORPORATION, and E.I. DU PONT DE NEMOURS AND COMPANY

Intervenor-Respondents.

ON PETITION FOR REVIEW FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITIONERS' RESPONSE TO INTERVENOR BASF'S MOTION TO RECALL AND STAY MANDATE

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After granting BASF Corporation (BASF) and E.I. du Pont de Nemours and Company (Corteva) intervention, the Court requested Petitioners' response to BASF's cross motion to recall the mandate so it could petition for rehearing under FRAP 41, specifically concerning whether BASF's Engenia product was properly at issue in the 2018 Registration decision and, similarly, whether the Court has exclusive jurisdiction over Engenia, based on BASF's assertion that there was no public hearing to trigger FIFRA Section 16(b), 7 U.S.C. § 136n(b). ECF 145 at 3. In light of these circumstances and the recent orders of the Court granting intervention and denying Petitioners' emergency motion, Petitioners offer the following response.

1. Intervenor BASF claims it will lose sales from immediate vacatur, but its claim rings hollow given the timing here. BASF alleges it still has $44 million of Engenia product on hand, but does not demonstrate that the product would actually be *sold* for use this season, given that BASF declared product decisions and orders began last December and that the majority of applications will be made within 30 days of June 16, 2020. Kay Decl., ECF 130-2 ¶¶ 12, 14. As BASF notes, it has already sold four times that amount of Engenia. *Id.* ¶ 15 ("BASF

estimates that there is enough Engenia currently located throughout the customer channel to treat 26.7 million acres of soybeans and cotton."); ¶ 16 (unsold Engenia is enough to cover 6.6 million acres).

2. BASF also cannot rely on harms to growers because it does not represent them. BASF and amici representing growers' groups were heard on Petitioners' emergency motion; therefore, BASF's reliance on impacts to users does not sustain its request to recall the mandate. *See* ECF 145 at 18-19 (alleging harm to growers, which BASF does not represent).

3. Should the Court grant Intervenors' motion and recall the mandate for the reasons presented, the interests of justice and judicial economy counsel that this Court limit Intervenors' petitions for rehearing, and/or otherwise instruct all parties to consolidate the issues on petitions for rehearing to avoid duplicity and repetition. If the Court recalls the mandate, it should be for the limited and express purpose sought, allowing BASF and Corteva to file a joint petition for rehearing on the issue of whether the panel erred in including their dicamba products in the scope of the decision. Both BASF and Corteva sought intervention belatedly, after this Court had issued its mandate, alleging

lack of notice that their dicamba registrations were at issue in the petition for review, and claiming that their interests in showing why their products should not have been covered by the Court's decision were inadequately represented by Respondent EPA and Intervenor Monsanto. *See* ECF 130-1 at 18-19 ("There is no party that has the same incentive as BASF to explain why the panel decision should not have reached the Engenia registration"); ECF 129-1 at 21 ("Monsanto does not have same incentive to explain the Panel should not have addressed [Corteva]'s registration."). Corteva filed a notice of joinder in BASF's opposition to Petitioners' emergency motion without raising any arguments on its own. ECF 148.

Since BASF and Corteva's identical interest is in challenging the Court's determination that their products were covered by the present petition for review, the Court should limit the recall of mandate to allow them to file a single consolidated petition for review on that question. That is what the Ninth Circuit did in *Day v. Apoliona,* the only case BASF cites to support granting its intervention for the limited purpose of pursuing rehearing. *See* ECF 130-1 at 13. There, the Ninth Circuit granted the State of Hawaii's post-decision intervention request, despite

its tardiness, and simultaneously accepted its proposed petition for rehearing on a single, dispositive issue which formed the basis of the panel's decision to overturn the lower court's ruling, where the State was the only one that had raise that argument as an amicus, and where no existing party was going to seek rehearing. *Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007); *see Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir.1962*) (*"A properly drawn petition for rehearing serves a very limited purpose."). The Court need not entertain any other arguments, nor admit evidence outside of the current administrative record. *See Amster v. U.S. District Court for Cent. Dist. of Cal.*, 806 F.2d 1347, 1356 (9th Cir. 1986) ("Consideration of subsequent factual occurrences is, thus, beyond the scope of a petition for rehearing."); *id.* (an abuse of privilege of petition for rehearing "when [a party] seeks review of a scope greater than the limited confines of Fed. R. App. P. 40") (citing *Anderson*, 300 F.2d at 297).

4. To the extent that the Court decides not to limit its recall to allow petition for rehearing on this limited issue and only to Intervenors BASF and Corteva, the Court can and should still require that Respondent EPA and all Respondent-Intervenors consolidate the

issues raised in their petitions for review, and to the extent practicable, join in filing a single petition for review, in the interests of judicial efficiency and economy. *See* Fed. R. App. P. 28(j); 9th Cir. R. 32(b) & advisory committee note (explaining that Rule 32-2(b) encourages separately represented parties to file a joint brief to avoid burdening the Court with repetitive presentations of common facts and issues"). *See, e.g., U.S. v. Albert Inv. Co., Inc.,* 585 F.3d 1386, 1396 (10th Cir. 2009) ("intervention as of right 'may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.'") (citation omitted); *Beauregard, Inc. v. Sword Servs., LLC,* 107 F.3d 351, 352–53 (5th Cir.1997) ("It is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right."); *Fair Empl. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741–42 (9th Cir. 2011) (citing *Beauregard* and recognizing district court authority to condition intervenor's participation in a permissive intervention case); *Earthworks v. U.S. Dep't of Interior,* No. 09–01972 (HHK), 2010 WL 3063143, at *2 (D.D.C. Aug. 3, 2010) (granting intervention as of right but requiring certification with any filing by intervenor that the filling

"does not contain arguments duplicative of those [raised by] the federal defendants or intervenor-defendants"). Such a restriction is consistent with the requirements of the rules governing petitions for rehearing. *See, e.g.,* Fed. R. App. P. 40(a)(2) (requiring a petition for rehearing to "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended); Fed. R. App. P. 35(b)(B) (requiring issues in a petition for rehearing en banc to be "concisely stated").

Respectfully submitted this 23rd day of June, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a proportionally spaced font.

I further certify that this brief complies with Rule 27(d)(2) of the Federal Rules of Appellate Procedure, because it contains 1,112 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ George A Kimbrell

GEORGE A. KIMBRELL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioners' Response to Intervenor BASF's Motion to Recall and Stay Mandate

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