Oral Argument Held on April 21, 2020

No. 19-70115

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

PETITIONERS' EMERGENCY MOTION TO ENFORCE THIS COURT'S VACATUR AND TO HOLD EPA IN CONTEMPT

RELIEF REQUESTED BY EARLIEST POSSIBLE DATE

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INTRODUCTION

Extraordinary events require extraordinary actions. EPA has defied this Court's decision, requiring Petitioners' emergency motion, pursuant to Circuit Rule 27-3. On June 3, this Court granted the petition for review and held that Respondent EPA violated FIFRA in registering the new over-the-top (OTT) uses for three dicamba products on soybean and cotton based on the strong record evidence of their drift harm. *Nat'l Family Farm Coal. v. EPA*, --- F.3d ---, 2020 WL 2901136 (9th Cir. June 3, 2020) (*NFFC*). As to remedy, the Court carefully weighed the impacts on growers of vacating the new uses against the drift harms of allowing the OTT use to continue and vacated, issuing its mandate concurrently to halt spraying immediately. *Id.* at *19-20. The Court's decision and remedy could not have been clearer.

Instead of simply admitting that vacatur means the OTT uses are unlawful and spraying is no longer allowed, EPA remained silent for five days, then opted to "mitigate"[1] the Court's decision, brazenly attempting to tailor the Court's vacatur to its liking, while in reality

[1] EPA, Press Release (June 5, 2020), https://www.epa.gov/newsreleases/epa-responds-ninth-circuit-vacatur-dicamba-registrations.

eviscerating it by making it prospective as to existing products until July 31, effectively the rest of the spraying season. EPA called this a "cancellation" order but it was actually a "continuing uses despite vacatur" order. EPA Admin Order (attached as Kimbrell Decl., Exhibit A).

Emergency relief is required to prevent off-field drift harms that will occur on millions of acres should spraying continue. First, while EPA can take new action after vacatur, such action must comply with FIFRA and this Court's Order. But here, EPA made *zero* attempt to address the Court's rulings or take an action consistent with them. Second and more fundamentally, EPA lacks authority to issue its "cancellation" order because there is nothing to cancel here; vacatur—which is wholly different from FIFRA pesticide cancellation—made null and void the 2018 new use decision allowing OTT dicamba spraying. And even if EPA could use its cancellation powers here, its premise for doing so—that the Court's Order vacated the entire three product registrations, leaving no lawful uses and that action is required to prevent indiscriminate use—is false. EPA absurdly interpreted this Court's remedy as creating unregulated OTT dicamba spraying, rather

than making it unlawful. This contortion allowed EPA to claim that conditions would be *worse* absent EPA's continuing use decision, because farmers after vacatur can spray without any restriction.

EPA has shown unconscionable disregard and contempt for this Court's order and the rule of law. In light of the immediate risk of harm from the continued use of dicamba and the short period of time between now and the end of the 2020 growing season, Petitioners request this Court to immediately enforce its June 3, 2020 Order through appropriate relief, instruct EPA that it cannot avoid the vacatur of OTT uses in the 2020 season using this unlawful method, and find EPA in contempt.

I. THE COURT HAS AUTHORITY TO ENFORCE ITS VACATUR.

This Court has inherent authority to manage its proceedings, vindicate its authority, and effectuate its decrees. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380 (1994) (recognizing courts' "inherent authority to appoint counsel to investigate and prosecute violation of a court's order.") (*citing Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). This inherent authority includes, if necessary, the power to recall its mandate "to prevent injustice" or "to

protect the integrity of [the court's] prior judgment" in extraordinary circumstances. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988) (citations omitted). The Court should enforce its vacatur and hold EPA in contempt for overriding it.

Here, there are very compelling circumstances requiring Court action: EPA defied this Court's remedy by brazenly authorizing the continuation of the very harms this Court held EPA underestimated or entirely failed to consider. *See Aerojet-General Corp. v. The American Arbitration Assoc.,* 478 F.2d 248, 254 (9th Cir.1973) ("[O]ne of the classic examples of [circumstances requiring clarification] is where the mandate does not fully express the intentions of the court" to ensure its proper enforcement.); *Dilley v. Alexander*, 627 F.2d 407, 408-411 (D.C. Cir. 1980) (where the Army unlawfully discharged two officers, finding "ample cause" to recall mandate to clarify the court's intent that the Army must reinstate the officers retroactive to their discharge).

Enforcement of the Court's remedy is necessary to prevent the onslaught of dicamba drift that will otherwise occur again. Preventing a repeat of the past three seasons was central to this expedited litigation, and the Court promptly issued the mandate specifically to end dicamba

OTT use by June 3. EPA's administrative order authorizes dicamba OTT spraying until July 31, 2020, guaranteeing drift damage throughout June and July, the peak period for such drift. ER0482 (incidents "continued to rise steadily throughout June and July, with most incidents reported in late-June, July, and August"); *NFFC*, 2020 WL 2901136, at *4-5 (discussing Professor Bradley's findings). EPA's action flies in the face of this Court's finding that cutting off later-season spraying was crucial to reducing drift damage in 2018. *Id.* at *6 (noting "substantial differences" in number of reported incidents between states that had cut-off dates and those that did not). And EPA made no attempt to address these harms before greenlighting them, in spite of this Court's finding that EPA had substantially underestimated the drift incidents and the extent of damage. *Id.* at *12-18.

Enforcing the vacatur is also critical to rectify EPA's continued disregard of the significant social, economic, and environmental harms of OTT dicamba use. In holding the OTT use approval unlawful, this Court explained that OTT dicamba use and resulting drift damage have "torn apart the social fabric of many farming communities," a "clear social cost" that "was likely to increase" absent vacatur. *Id.* at *18.

Continuing use imposed a heavy monopolistic cost, as more farmers plant defensively and lose their right to choose what seeds they plant. *Id.* at *17-18.

And as a result of EPA's order undermining and violating vacatur, the OTT uses will continue to cause a *16 million pound increase* in dicamba polluting the environment.[2] This includes the harm to literally hundreds of federally protected endangered species near dicamba-sprayed fields that now faces further threats to their survival as a result. ECF 37-2 at 5-6, 45-47. The Court vacated the new uses to put an immediate stop to these grave harms, and EPA has nonetheless authorized them to continue. Immediate enforcement of this Court's ruling and relief is imperative.

[2] USDA estimated 25 million pounds of dicamba would be used in 2020, ER1347; in its administrative order EPA estimates 4 million *gallons* (likely to downplay the perceived amount) which would roughly translate to 16 million pounds of active ingredient based on the conversion of gallons to pounds and dicamba being about half the formulation.

II. THE COURT SHOULD ENFORCE ITS REMEDY.

A. EPA's Administrative Order Flouts the Court's Decision.

EPA's administrative order violates this Court's vacatur, based on reasoning that this Court had squarely rejected, necessitating this Court to clarify and enforce its order to prevent harm and injustice.

First, EPA's position issued Monday evening is not new: it is a carbon copy of EPA's post-argument briefing that this Court rejected. EPA made the same erroneous argument then that vacatur *could not stop use* of existing stocks and that only it—EPA, not the Court—could address whether or how to stop existing stock use, in a further agency order implementing the Court's remedy on remand. *Compare* ECF 119 & 121 at 5-7 *with* June 8 administrative order. Petitioners explained why EPA's view of the scope of this case and of vacatur's effect on stopping use was wrong, and thus why its motion should be denied. ECF 123-1 at 1-3, 5-9, 10-13. The Court rejected EPA's arguments, but EPA has stubbornly gone ahead with its tactic anyway.[3]

[3] The Administrative Order acknowledges (at 2) EPA is putting forth the same argument the Court denied leave for it to bring, complaining it did not have the chance to "fully brief" it because the

EPA acts as if this Court merely remanded without vacating the unlawful registration decision, however, in *vacating*, the Court stated in no uncertain terms that it was "aware of the practical effects of our decision," which included the "adverse impact on growers who have already purchased DT soybean and cotton seeds and dicamba products for this year's growing season." *NFFC*, 2020 WL 2901136, at *19-20. The Court quoted EPA's prior representations to the Court regarding vacatur's effects: that those pesticides would be prohibited from further OTT use. *Id.* The Court went on to carefully distinguish legal *registration* from the now-vacated and illegal new *use*, again quoting EPA, explaining it was illegal to use registered dicamba products for the specific OTT uses. *Id.* ("using registered dicamba products" that are no longer registered "specifically for post-emergence use" is a violation of the label and FIFRA). The Court recognized "the difficulties" growers might have in finding alternatives, but based on EPA's substantial violations of law and the significant risks from continued use, vacated. There is no doubt the Court intended to halt harmful OTT uses, which

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Court denied its motion, apparently in willful denial that the Court has already rejected their position in its vacatur rationale.

is, after all, what this case was about. If that was not clear enough, the Court also denied EPA's motion to brief this issue further. *Id.* at *19.

Notably, while vacating, the Court did not also *remand*, indicating that there was nothing further in the way of rulemaking that EPA needed to do to implement its decision and address stopping use (contrary to what EPA has just done). *Id*. at 20. The Court also *sua sponte* issued the mandate immediately, showing its clear intent that use immediately halt as of the day of its decision. *Id; cf.* FRAP 41.

Despite all this, EPA did not simply confirm to regulated entities the plain intent of the Court's decision to halt OTT use. Rather, after doing nothing *for days* when asked if existing product use was unlawful, thereby stoking confusion from affected parties and states, EPA then flagrantly contravened this Court's opinion and vacatur by allowing continued use.

Second, from start to finish EPA's rationale for continuing OTT use shows utter disregard for this Court and its decision. EPA says that the Court immediately vacated "on the view" (Admin Order at 4) that EPA substantially underestimated risks, a view that EPA clearly disagrees with, but does not have the authority to override. EPA is

effectively editing the Court's decision to make the vacatur for existing product use prospective to July 31. EPA goes on to ignore all the Court's findings and holdings, and allows business-as-usual dicamba spraying on cotton and soy for the rest of the season.

For example, the administrative order addresses the risks and benefits of OTT use, the exact questions this Court addressed in its opinion. EPA purports to assess, *inter alia*, the "risks" and "benefits" "resulting from the use of the existing stocks," and the financial expenditures already made to purchase dicamba, all questions this Court directly resolved, but EPA nonetheless chose to reach a different conclusion. Admin Order at 4. These issues have been decided, and they cannot be re-litigated, let alone nullified in an administrative order.

As to the risks of continued OTT spraying of the existing 16 million pounds of dicamba this summer, EPA finds in two sentences that continuing use over the rest of 2020 would be worse if users are not required to follow the label. Admin Order at 5. This is based on what EPA surely knows is the entirely false premise that the entire label is null and void, as opposed to the OTT *use*. ECF 123-1 at 1-3, 5-9 & *infra* pp. 15-20.

And EPA's order *entirely ignores* the Court's finding that EPA "substantially understated the risks that it acknowledged," and "entirely failed to acknowledge other risks." These harms include: the acreage of DT seed usage; the complaints understating dicamba drift damage; quantification of the amount of damage to non-target plants caused by OTT dicamba applications; the substantial infeasibility of compliance with label restrictions; the anti-competitive effect of a DT seed monopoly or near-monopoly; and the social cost of tearing apart the social fabric of farming communities. *NFFC*, 2020 WL 2901136, at *10-19.

The same is true of benefits and costs. EPA relies on the same benefits as it did in approving the OTT new uses, Admin Order at 6, but the Court already held that EPA "failed to perform a proper analysis of the risks and resulting costs of the uses," including "enormous and unprecedented damage," and therefore lacked substantial evidence to support the OTT approval. *NFFC*, 2020 WL 2901136, at *18-19. EPA did the same in relying on costs to farmers who already purchased dicamba: the Court specifically addressed this and found such costs

outweighed by the substantial environmental, economic, and social risks of continuing use. *Id.* at *19-20.

B. EPA Lacks Authority to Issue a "Cancellation" Order Reviving the Use Just Vacated by the Court.

In the face of this Court's vacatur, EPA lacks the authority to allow continued existing OTT dicamba use through this disingenuous "cancellation" tactic. EPA's attempt flies in the face of the Court's Order, which rendered illegal any further OTT use of these pesticides as of June 3.

First, vacatur does not limit an agency from proposing a new action within the bounds of the law and the Court's order. EPA could try a wholly new use registration, applying FIFRA registration standards, with different restrictions, if supported by substantial evidence. Regardless, in any new proposed use decision, EPA will have to address the multiple legal violations the Court held and cannot just issue the *same* decision. *NFFC*, 2020 WL 2901136, at *19 (EPA's "fundamental flaws" in the 2018 OTT new uses decision were "so substantial that it is exceedingly unlikely that the same rule would be adopted on remand.") (internal quotations omitted).

Second, without a *new* basis for lawful use, EPA cannot unilaterally tailor the Court's vacatur to its own liking. EPA pretends the Court's vacatur is the agency's own pesticide cancellation, where it gets to decide things like when spraying stops and how. That is, EPA attempted to *revive the old*, now-nullified unlawful registration decision, zombie-like, and squeeze two more months and 16 million more pounds of dicamba spraying out of it. This it cannot do.

Judicial vacatur is *not* the same as pesticide cancellation. OTT dicamba use was not *cancelled*: the new uses were *vacated*. The differences between vacatur and pesticide cancellation under FIFRA are significant: FIFRA cancellation is subject to extensive rules and process that have nothing to do with a judicial order. *E.g.,* 40 C.F.R. Part 164. Vacatur is very different: setting aside or vacating voids the approval, returning the *status quo ante* before it was granted. 7 U.S.C. § 136n (reviewing court to "affirm[] or set aside[]" a challenged EPA order). Unless in the Court's equitable discretion it decides to remand without vacatur, or only apply vacatur prospectively,[4] it automatically would

[4] EPA could have argued in briefing for prospective vacatur, that is, that users who had already purchased their products by the date of the Court's decision should be allowed to use them. But it did not.

apply retroactively to cover products purchased earlier. *United States v. Goodner Bros. Aircraft*, 966 F.2d 380, 385 (8th Cir. 1992) ("[C]onsistent with the meaning of the word 'vacate,' we find that invalidation of the mixture rule applies retroactively."). Very simply, vacatur obliterates the unlawful OTT use approval; there is nothing left of the challenged use on which to undertake a further cancellation order.

FIFRA only allows EPA to issue "existing stocks" orders like it has tried here when EPA cancels or suspends a pesticide, not when a court vacates, and certainly not when a court vacates on the grounds set forth in this case. 7 U.S.C. § 136d(a)(1) (EPA "may permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or cancelled …."). FIFRA does not confer on EPA the authority to allow existing stock use for a pesticide use that was never lawfully approved in the first instance and thus has *never been cancelled or suspended*.[5]

[5] EPA's reference to its 1991 existing stocks policy statement only confirms the difference. Admin Order at 4 (citing 56 Fed. Reg. 29362). That policy applies only to three categories of changes to a registration: "Changes requested *by a registrant*; changes imposed *by EPA* for failure to comply with various obligations imposed upon registrants; and changes imposed *by EPA* because of a determination by the Agency that use of the pesticide product results in unreasonable adverse effects to man or the environment." 56 Fed. Reg. at 29362 (emphases added). None of those categories apply here.

These dicamba OTT new uses cannot be subject to the post-registration cancellation process because they were not lawfully registered to begin with; the 2018 decision was unlawful. EPA cannot permit their continued sale and use.

Absent a stay of the Court's decision, EPA has no authority to allow continued distribution, sale, or use. EPA's attempt to circumvent the Court's vacatur command through continued use is contrary to the Court's mandate and FIFRA.

C. The Entire Underlying Rationale for EPA's Action Is False, Based on a Misinterpretation of This Court's Decision.

EPA's groundless rationale (again, the same as that in ECF 119 & 121) is as follows: a "cancellation" order was needed post-vacatur because vacatur by itself made the three products dangerous—completely unregistered—"rogue" pesticides. Admin Order at 1 (EPA considers the products "no longer registered" post vacatur). EPA claims vacatur is "read" or "viewed" to be "equivalent" to when it undertakes a pesticide cancellation. *Id.* at 3. Based on that (mis)equation, EPA goes on to assume that after a cancellation, EPA can only prohibit their sale or distribution, not their *use*. *Id* at 2. So for users who have already

bought the products before the June 3 vacatur, those products could be sprayed with abandon over soy and cotton fields the rest of summer, without any regulation or restriction. *Id.* at 3 ("persons holding stocks of these dicamba products would not be legally precluded from using those stocks without following label directions").

Thus EPA claims it was actually doing Petitioners a *favor*: EPA's Administrative Order extending OTT uses of existing stocks until July 31 under the old label instructions—despite the Court's holdings about the inadequacy of the label—was actually *more protective* than the agency simply confirming that the Court's vacatur made existing use unlawful as of June 3. The reasoning and result are beyond absurd.

To begin with, vacatur is very different from cancellation and not limited by it, as explained *supra*. But even for *cancellation*, EPA has it precisely backwards: the default is no use, not unregulated use. 7 U.S.C. § 136d(a)(1) (EPA "*may* permit the continued sale and use…") (emphasis added). When read in context, FIFRA clearly prohibits the use of unregistered pesticides. *See* 7 U.S.C. § 136a(a) ("[T]he Administrator may by regulation limit the distribution, sale, *or use* in any State of any pesticide that is not registered under this

subchapter…") (emphasis added). And EPA's interpretation leads to nonsensical results, such as it being allegedly unlawful for a user to return a pesticide for disposal, or that it would be lawful to apply it at five times the label rate. *See, e.g.*, *EEOC v. Commercial Office Prods.*, 486 U.S. 107, 120-21 (1988) (rejecting reading of statute that would lead to "absurd or futile results ... plainly at variance with the policy of the legislation as a whole").[6]

But here is the most critical point: the scenario EPA presents as the entire rationale for its administrative action, even assuming it is correct, is *irrelevant*, because the condition precedent—that the pesticides become rogue, "unregistered" pesticides after vacatur—is false. After vacatur of the OTT new use approvals, the products themselves did not become unregistered. They are also registered for *other different uses* on different crops, uses with their own specific conditions.

[6] EPA's view that it lacks authority to stop use is also belied by the fact it also has independent authority to issue a "stop sale, use, or removal" order prohibiting further use, 7 U.S.C. § 136k(a), which EPA admits but rejects. Admin Order at 3, 10.

For example, XtendiMax is also registered for use on conventional crops like asparagus, barley, and sorghum. *See* ER81-84 (listing other crops), ER105-114 (XtendiMax other approved uses and crops); ER200-209 (Engenia uses, for "conventional (non-dicamba tolerant) crops"); ER149-158 (same for FeXapan). These other uses were approved in *earlier agency decisions* entirely separate from the challenged 2018 decision. *See, e.g.,* ECF 123-2 & 123-3 (XtendiMax other uses, on May 1, 2014).[7] Those other uses were not at issue in this case, nor its remedy. Thus only *those new OTT uses for soy and cotton approved in the challenged decision were vacated*, not the *entire* registration and not all uses. *See NFFC*, 2020 WL 2901136, at *8-9.

EPA admits these other uses exist and were "permitted under the previously-approved labels." Admin Order at 6 n.3 (listing other crop uses). EPA also acknowledges that the 2016 and 2018 conditional registration decisions were for "post-emergent use on crops genetically

[7] M1768 is the alternative name for XtendiMax. ER4, ER25 (EPA Reg. #524-617). These uses were approved unconditionally, unlike the 2018 conditional approval of the new OTT uses challenged.

engineered to be dicamba tolerant," Admin Order at 1, not all uses of the products.[8]

The only way EPA's theory is correct is if the Court's vacatur to address *all these other uses*, despite this case not being about them. These other uses are not the cause of the harms the Court found and were registered prior to the challenged conditional new use decision, i.e., *not* the new uses at issue in the 2018 new use approval. EPA's view makes no sense.

Accordingly the Court should instruct EPA that the *only uses vacated were the new uses approved conditionally in the 2018 decision*: the OTT use of the products on dicamba-tolerant soybean and cotton. That clarifies that while the products will otherwise remain registered, vacatur prohibits the OTT uses on cotton and soybean from continuing

[8] *Pollinator Stewardship* involved registration of a new pesticide, and *all* uses of it. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 523 (9th Cir. 2015) ("Sulfoxaflor is a new insecticide … Dow asked the EPA to approve sulfoxaflor for use on a variety of different crops ….").
Unlike here, after vacatur of that registration, no lawful use remained, so EPA's theory would apply. Although there the use of "cancellation" to circumvent court vacatur of unlawful registration for existing stocks was unchallenged, it is nonetheless unlawful. *See supra.* The Court should stop EPA from getting around the law in this way, which has dangerous consequences for meaningful vacatur remedy.

this summer. A user *cannot* spray the registered pesticides over-the-top of cotton or soybean after vacatur without violating FIFRA since they are no longer registered for those particular OTT uses. And pesticides can only be used in ways for which they are (lawfully) registered. 7 U.S.C. § 136j(a)(2)(F) (unlawful to use a restricted use pesticide for all purposes other than those approved); *id.* § 136j(a)(2)(G) ("It shall be unlawful for any person … to use any registered pesticide in a manner inconsistent with its labeling."); *id.* § 136(ee) (definition of "to use any registered pesticide in a manner inconsistent with its labeling" includes "to use any registered pesticides in a manner not permitted by the labeling."). And with that the entire rationale for the agency's "cancellation" order evaporates, because the unlawful use risk EPA is purporting to address was already addressed by this Court.

III. THE COURT SHOULD HOLD EPA AND ADMINISTRATOR WHEELER IN CONTEMPT.

"Civil contempt is characterized by the court's desire to compel obedience to a court order or to compensate the contemnor's adversary for the injuries which result from the noncompliance." *U.S. v. Bright*, 596 F.3d 683, 695-96 (9th Cir. 2010). A court may hold a party in contempt upon a showing "by clear and convincing evidence that [the

nonmoving party] violated the [court order] beyond substantial compliance, and that the violation was not based on a good faith and reasonable interpretation of the [order]." *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir.1997). Once the moving party demonstrates noncompliance, the burden shifts to the contemnors to demonstrate substantial compliance. *See Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983).

EPA and Administrator Wheeler should be found in contempt for not just failing to substantially comply with, but blatantly and intentionally violating the entirety of the Court's Order. *Supra* pp. 7-12. Rather than simply confirming that this Court vacated OTT uses of dicamba, EPA publicly stated that it was "assessing all avenues to mitigate the impact of the Court's decision on farmers."[9] Then it proceeded to allow business-as-usual OTT spraying, for existing product stocks. And EPA made no effort to address or correct the significant errors of law or the well-established harms continued spraying is sure to cause. EPA did not take any reasonable steps to comply with the Court's order, only actions to defy and ignore it. *See Stone v. City &*

[9] *See supra* n.1

Cnty. of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992) (substantial compliance means taking "all reasonable steps within [one's] power to insure compliance with [the] court's orders.").

Nor can EPA show that its action in defiance of this Court's Order was "a good faith and reasonable interpretation" of the Order. *Wolfard Glassblowing Co.*, 118 F.3d at 1322; *see supra* pp. 7-12, 15-20. The Court's decision and remedy was clear and unequivocal: it vacated the registration decision approving OTT uses without remanding to the agency for any further action on them. *NFFC*, 2020 WL 2901136, at *19-20. EPA acknowledged vacatur took immediate effect, Admin Order at 1, yet acted to delay its implementation. It cited potential "great economic hardship" on agricultural interests, *id.* at 6, even though the Court already recognized such impacts, but vacated the registration in spite of them, because they are outweighed by the overwhelming record evidence of drift damage and EPA's serious errors. *See supra* pp. 7-12.

Accordingly the Court should hold EPA and Administrator Wheeler in contempt. *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (civil contempt appropriate when party

disobeyed "a specific and definite court order by failure to take all reasonable steps within the party's power to comply").

IV. TO PROTECT ENDANGERED SPECIES, THE COURT SHOULD REACH PETITIONERS' ESA CLAIMS.

This Court did not reach the ESA claims because it already vacated based on its FIFRA holding and findings. Those included record findings of "substantial and undisputed" dicamba damage and a "high likelihood" that restrictions in the 2018 label "would not be followed" because they are "difficult if not impossible" to follow. *NFFC*, 2020 WL 2901136, at *2. Those same findings also underscore the grave threat to protected species. Given EPA's disregard of the Court's holding and remedy, and the imminent risk that more drift will harm endangered species, Petitioners ask the Court to reach the ESA claims and hold that EPA must consult on the adverse effects of dicamba OTT uses before continuing them.[10] Even if it does not go that far, at a minimum, the Court should weigh the ESA harms at stake in EPA's flouting of the

[10] Petitioners understand an ESA ruling could take more time and suggest that the Court could issue a summary decision with full opinion to follow. ECF 115-1 at 9-10.

Court's decision, allowing millions more pounds to be sprayed this summer.

With twisted and illogical reasoning, EPA claims continued OTT use is *more* protective, including for endangered species. Admin Order at 5. Petitioners addressed the errors in EPA's rationale above and they apply equally here: the boogieman of rogue use is not the baseline. *See supra* pp. 15-20. Vacating the OTT use decision and issuing the mandate forthwith should have resulted in *zero* OTT use on cotton and soybeans as of June 3 versus *allowing use* until July 31, thereby protecting wildlife as well as crops from dicamba damage.

EPA's blatant disregard for the Court's ruling likely will result in irreparable harm. Establishing "irreparable injury" to species protected by the ESA should not "be an onerous task" given "the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). Harm is irreparable "because '[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult.'" *Nat'l Wildlife Fed'n . Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir.

2018) (*quoting FCC v. Rosboro Lumber*, 50 F.3d 781, 785 (9th Cir. 1995)).

Here, this Court found EPA "substantially understated" dicamba sprayed, remained "agnostic" to substantially under-reported damage, and refused to estimate off-field damage the record showed was "substantial and undisputed." *NFFC*, 2020 WL 2901136, at *2, 12. While the evidence focused on crop damage, it also showed damage to trees and other plants. *Id.* at *7, 14, 18-19. This is likely to damage ESA-protected plants and ESA-protected insects and pollinators that rely on dicamba-damaged plants for food or habitat, such as the Karner blue butterfly and rusty-patched bumble bee. ECF 35 at 55-57, A80-96. "[D]estroying wildlife habitat" constitutes irreparable harm. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 323-25 (D.C. Cir. 1987); *Or. Natural Desert Ass'n v. Tidwell*, No. 07-1871-HA, 2010 WL 5464269, at *3 (D. Or. Dec. 30, 2010) ("habitat modification that is reasonably certain to injure an endangered species establishes irreparable injury" (*citing Defenders of Wildlife v. Bernal,* 204 F.3d 920, 925 (9th Cir. 2000)). Accordingly, the Court should reach Petitioners' ESA claims,

hold that the registrations are unlawful until EPA consults as required by the ESA, and vacate the registrations on ESA grounds as well.

CONCLUSION

It cannot be so easy to circumvent this Court's order. EPA cannot get away with allowing the spraying of 16 million more pounds of dicamba and resulting damage to millions of acres, as well as significant risks to hundreds of endangered species. Something else is at stake too: the rule of law. The Court must act to prevent injustice and uphold the integrity of the judicial process.

For these reasons Petitioners respectfully request this Court immediately enforce its June 3, 2020 decision through appropriate relief and instruct EPA that it cannot avoid the vacatur of OTT uses in the 2020 season using this unlawful method. And given the blatant disregard EPA showed for the Court's decision, Petitioners urge the Court to hold EPA in contempt.

Respectfully submitted this 11th 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 5,156 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

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