Oral Argument Held April 21, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-70115

NATIONAL FAMILY FARM COALITION, *ET AL.*
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*
Respondents,

and

MONSANTO COMPANY,
Intervenor-Respondent.

On Petition For Review of Agency Action
of the United States Environmental Protection Agency

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

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TABLE OF CONTENTS

Table of Authorities

Cases

United States Code

Federal Rules of Civil Procedure

Federal Register

INTRODUCTION

Petitioners' motion to "Enforce This Court's Vacatur and to Hold EPA in Contempt" ("Pet'rs Mot.") (Dkt. 127-1), is a thinly-veiled attempt to revive arguments the Court already rejected or declined to reach. It should be denied.

EPA fully complied with the Court's June 3, 2020 decision vacating three pesticide registrations for dicamba-based pesticide products. Those products remain unregistered. EPA has not taken any action to revive the registrations. EPA's June 8, 2020 Cancellation Order (Dkt. 127-3) reinforces the Court's order, banning further distribution and sale of existing stocks and facilitating return to the manufacturer. It takes responsible steps to avoid unregulated and inappropriate use of existing stocks that may otherwise result. *See* Cancellation Order at 11. Petitioners' argument that this action violates the Court's vacatur order misconstrues the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the vacatur, and the Cancellation Order.

The petition for review (as construed by the Court) sought vacatur of the *registrations* for three dicamba products. The Court granted this relief, taking the extraordinary step of issuing the mandate immediately. However, as EPA explained in prior briefing in this case, *see* Proposed EPA Response to Petitioners' Supplemental Brief ("EPA Suppl. Resp.") (Dkt. 121), and as this Court has recognized in prior cases, *Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir. 2015) (opinion amended on rehearing), pesticide registrations authorize the sale and distribution of pesticides, and govern the conditions for using that *registered* pesticide. *See* 7 U.S.C.

§ 136a(a) ("Except as provided by this subchapter, no person in any State may *distribute or sell* . . . any pesticide that is not registered under this subchapter." (emphasis added)); *see also* Cancellation Order at 2-3 (discussing relevant statutory provisions and administrative precedents in more detail). Accordingly, rescission of a pesticide *registration* (either by judicial or administrative action) only makes it illegal to distribute or sell that pesticide. It does not outlaw *use* of products already legally purchased.

Petitioners' unsuccessful attempt to seek an injunction on *use* of the dicamba products in their post-argument supplemental brief implicitly recognized this distinction. Dkt. 115-1 at 9-10. The Court declined to grant that additional relief (Dkt. 125 at 56), after EPA submitted a proposed response illustrating why such an injunction was inappropriate (Dkt. 121). Instead, the Court limited its decision to the relief actually requested in the petition for review: vacatur of the registrations.

Against this background, there is no legal or factual basis for Petitioners' allegation that EPA violated the Court's order by providing for a responsible wind-down of existing stocks instead of banning their use immediately and completely. Simply put, EPA can hardly be faulted for not complying with an order the Court never issued, especially when immediately banning use of existing stocks of these pesticides, as Petitioners advocate, would have draconian effects on the U.S. agricultural system. *See* Cancellation Order at 5-11. Indeed, Petitioners' request to clarify the Court's order is a concession that grounds for contempt are lacking.

Moreover, the action EPA took was entirely lawful and appropriate. While the Court's decision did not *directly* affect use of existing stocks, vacatur of the registrations does have one significant, and potentially problematic, *indirect* effect on pesticide use. When a registration is vacated, misuse of that product is no longer a violation of FIFRA. The Cancellation Order addresses this indirect and potentially disruptive environmental harm. The Order plugs a regulatory gap by ensuring that existing stocks of these newly-unregistered pesticides are used safely and appropriately, and only for a limited period of time. *See* Cancellation Order at 5. As EPA explained, this necessary and responsible regulatory action is expressly authorized by FIFRA. *See id.* at 3-4.

There are numerous other problems with Petitioners' Motion. For example, Petitioners' request that the Court recall the mandate so that Petitioners can have another opportunity to litigate their Endangered Species Act claims and raise entirely new merits arguments distinguishing over-the-top uses from other uses is wholly unwarranted. But the most important point is that EPA's Cancellation Order is, contrary to Petitioners' distorted characterization, an entirely appropriate and responsible response to this Court's decision.

BACKGROUND

A. EPA's Registration Decision and the Court's Order

Petitioners sought review of EPA's action to amend the FIFRA registration for a dicamba-based pesticide product, XtendiMax. Exercising its authority under 7

U.S.C. § 136a(c)(7)(B), EPA issued the conditional registration for Xtendimax on November 1, 2018, including the "new use" of the product over-the-top of cotton and soybean genetically modified to tolerate dicamba. The conditional registration superseded the prior registration for that product, which was set to expire on November 9, 2018. ER0065; *cf. Nat'l Family Farm Coal. v. EPA*, Case No. 17-70196, Order (Jan. 10, 2019) ("Mootness Order") (finding 2016 registration "no longer has any legal effect"). EPA later issued conditional registrations to BASF and DuPont for their similar products (Engenia and FeXapan). ER0121; ER0167. All three registrations included previously approved uses in addition to the new over-the-top uses.[1]

After briefing and argument, the Court issued a decision on June 3, 2020. Dkt. 125. The Court's decision construed the petition to encompass XtendiMax, Engenia, and FeXapan, over EPA and Monsanto's objection. *Id.*[2] The Court further concluded that all three registrations were invalid under FIFRA and ordered the registrations vacated. *Id.* at 56 ("Registrations VACATED."). The Court further ordered the mandate to issue the same day. Dkt. 126.

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[1] Other uses permitted under the previously approved labels include, for example, weed control in asparagus,corn, and sorghum. *See* ER0026.

[2] A fourth over-the-top dicamba product, Syngenta's Tavium, was registered on April 5, 2020, and is not part of the litigation.

B. EPA's Cancellation Order and Existing Stocks Provision

The Court's vacatur eliminated the registrations for Xtendimax, Engenia, and FeXapan. Existing stocks of these products thus became unregistered, effective immediately upon issuance of the mandate. *See* Cancellation Order at 1. This action removed the license to "distribute or sell" those products, *see* 7 U.S.C. § 136a, and made further distribution or sale of the now-unregistered products subject to potential civil or criminal penalties, *id.* §§ 136*l*, 136j(a)(1)(A).

There is, however, no corresponding provision of FIFRA that makes *use* of unregistered pesticides illegal. *See id.* § 136j(a)(1) (providing it is unlawful to sell or distribute "any pesticide that is *not registered* under section 136a of this title or whose registration has been canceled or suspended," unless otherwise authorized (emphasis added)). There is also no provision that requires that unregistered pesticides—even formerly registered pesticides—must be used according to their labels. *See id.* § 136j(a)(2)(G) (providing it is a violation of FIFRA to use a *registered pesticide* in a manner inconsistent with its labeling). Thus, where there are "existing stocks"[3] of an unregistered pesticide—regardless of how the pesticide became unregistered—already

[3] Existing stocks are "those stocks of a registered pesticide product which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the [cancellation] action." Existing Stocks of Pesticide Products, Statement of Policy, 56 Fed. Reg. 29,362, 29,362 (June 26, 1991).

in the possession of users (for example, certified applicators, including growers), FIFRA neither directly prohibits nor regulates their use.

FIFRA does, however, provide EPA with authority to address this regulatory gap. Specifically, 7 U.S.C. § 136d(a)(1) authorizes EPA, in appropriate circumstances, to "permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled . . . under such conditions, and for such uses as the Administrator determines that such sale or use is not inconsistent with the purposes of [FIFRA]." Because 7 U.S.C. § 136j(a)(2)(K) makes the failure to comply with a cancellation order enforceable under FIFRA, EPA can establish enforceable terms and conditions for the disposition of existing stocks in such an order. Those conditions can and often do include a provision for limited use of existing stocks consistent with the previously approved labeling. *See* Cancellation Order at 3; *see also, e.g.*, 85 Fed. Reg. 34,622 (June 5, 2020); 72 Fed. Reg. 68,580 (Dec. 5, 2007).

EPA has consistently interpreted its existing stocks authority to apply whether a registration is cancelled by administrative action or vacated by court order. *See* Cancellation Order at 3 (citing cancellation orders following vacatur in *Natural Resources Defense Council v. EPA*, 676 F. Supp. 2d 307 (S.D.N.Y. 2009), and *Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir. 2015)).

EPA's Cancellation Order states that the Court's vacatur caused Xtendimax, Engenia, and FeXapan to become unregistered. Cancellation Order at 1. And with respect to existing stocks only, the Cancellation Order:

(a) prohibits further sale or distribution of existing stocks by the registrants, except for purposes of proper disposal;

(b) bars further sale or distribution of existing stocks for persons other than the registrant except for disposal or to facilitate return to the registrant, unless otherwise allowed below;

(c) allows limited distribution and sale of existing stocks that are in the possession of commercial applicators for the purpose of facilitating use no later than July 31, 2020; and

(d) prohibits any use of existing stocks inconsistent with the previously-approved labeling and prohibits all use after July 31, 2020.

Id. at 11. In short, the Cancellation Order ensures that existing stocks of these now-unregistered products can lawfully be returned to the registrant, transported for disposal, and be used for a limited time and only in accordance with previously approved label restrictions that reduce the risk of adverse effects.

ARGUMENT

EPA fully complied with this Court's vacatur, issuing a Cancellation Order pursuant to FIFRA and consistent with prior EPA actions stretching back over 20 years. Petitioners' motion is not only procedurally and substantively unsound; it is internally inconsistent.

Petitioners first ask the Court to recall its mandate in order to "clarify" the Court's order and provide additional relief. *See* Pet'rs Mot. at 3-4, 7, 19-20, 23-26; *id.*, Form 16 at 1 (Dkt. 127-4) (requesting recall of the mandate). However, recalling the mandate is an extraordinary measure to be exercised only for "good cause" and to "prevent injustice." It is not a vehicle for Petitioners to seek an additional ruling or

remedy, particularly when the court granted the precise relief Section 136n(b) authorizes and Petitioners requested: vacatur.

Petitioners' request that the Court hold EPA and Administrator Wheeler in contempt strays even further afield of the applicable legal standard. Petitioners have not come close to the clear and convincing showing that the EPA violated a specific and definite order of the court necessary to warrant the severe remedy of contempt. EPA's Cancellation Order is consistent with the vacatur order and a lawful exercise of EPA's FIFRA authority. The Court issued no injunction, despite Petitioners eleventh-hour request for one. As evidenced by Petitioners' call for clarification, the Court's vacatur order did not enjoin use of existing stocks already lawfully sold and distributed or EPA's authority to issue a cancellation order addressing existing stocks, as the Agency has done in similar circumstances.

Finally, Petitioners cannot seek judicial review of the Cancellation Order in the guise of a motion to "enforce" the Court's vacatur. The Cancellation Order is a separate agency action that must, per FIFRA's jurisdictional provisions, be reviewed in district court. Petitioners' motion should be denied.

I. Petitioners demonstrate no "exceptional circumstances" supporting recall of the mandate.

Petitioners do not justify their request that the Court recall its mandate. This power should be exercised sparingly and only in extraordinary circumstances. *See Calderon v. Thompson*, 523 U.S. 538, 550 (1998); *M2 Software Inc. v. Madacy Entm't*, 463

F.3d 870 (9th Cir. 2006) (Beezer, specially concurring) (the power of recall "is one of last resort, to be held in reserve against grave, unforeseen contingencies"). Petitioners contend that recall is warranted because the Court *actually* intended to prohibit only certain uses of the products. Petitioners therefore ask the Court to "instruct EPA that the *only uses vacated were the new uses approved conditionally in the 2018 decision*" and "clarif[y]" that the Court's vacatur order "prohibits the OTT uses on cotton and soybean from continuing this summer." Pet'rs Mot. at 19-20 (emphasis in original). As explained below, however, the vacatur order was clear. Recalling the mandate is not appropriate merely because Petitioners wish the Court had ordered different relief, reached additional issues, or want to challenge a subsequent agency action.

A. The Court's vacatur order was clear and definitive and should not be expanded or revised.

Petitioners contend that the Court must clarify its order to effectuate its intentions. Pet'rs Mot. at 7, 19-20. But this is not a case where the Court's order requires clarification. *See Aerojet-General Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 254 (9th Cir. 1973). The Court held that the registrations were not supported by substantial evidence and thus "vacate[d] the registrations." Dkt. 125 at 55, 56. The Court's ordering paragraph stated clearly: "Registrations VACATED." *Id.* at 56. This granted precisely the relief that FIFRA contemplates and that Petitioners requested: that "the Court vacate the registration." Pet'rs Br. at 74 (Dkt. 35).

Petitioners ask that the Court clarify that its order prohibits any further use of these products. Pet'rs Mot. at 19-20. But Petitioners already requested such relief in their supplemental letter brief. Dkt. 115-1 at 10. In response, EPA explained in its proposed response to Petitioners' supplemental brief (Dkt. 121 at 5-8) that FIFRA does not bar the *use* of existing stocks of unregistered pesticides and thus vacating the registrations does not have the effect of prohibiting use of the pesticides.[4] The Court did not grant Petitioners' request: the vacatur order does not prohibit "use." Dkt. 125 at 55-56. Therefore, recall is not warranted. *See Calderon*, 523 U.S. at 551 (recall not warranted to revive a denied *en banc* petition for review of a determination that "had been given full consideration on the merits by a panel").

B. Petitioners' desired "clarification" goes beyond the relief authorized by FIFRA and is contrary to basic principles of administrative law.

The Court should (again) decline Petitioners' request to prohibit use of existing stocks of the dicamba products because such relief goes beyond what FIFRA authorizes and would be inconsistent with basic administrative law principles. 7 U.S.C. § 136n(b) (authorizing reviewing court to "set aside the order complained of in whole or in part"). It is well settled that "the function of the reviewing court ends when an error of law is laid bare." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952);

[4] The Court did not grant EPA's motion for leave to file that response because it was unnecessary in light of the Court's vacatur order. Dkt. 125 at 56.

see Cal. Wilderness Coal. v. Dep't of Energy, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action.").

Relatedly, the Supreme Court has found courts cannot restrict the options available to an agency following judicial review. *See Idaho Power Co.*, 344 U.S. at 20 (finding the D.C. Circuit erred in modifying an agency order in response to a motion to "clarif[y]" its judgment); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940) (holding the court of appeals lacked authority to issue a writ of mandamus to control proceedings on remand after the court identified a legal error in the agency's original decision). Indeed, even where a court has found a statutory violation, it cannot prevent an agency from taking subsequent action within its statutory authority. *See Monsanto Co. v. Geertson Seed Farm*s, 130 S. Ct. 2743, 2753-54, 2758 (2010).

The action under review here was EPA's registration of pesticide products, granting a license to sell and distribute the products for particular uses. FIFRA prohibits the *distribution or sale* of *unregistered* pesticide products. 7 U.S.C. § 136a(a). But it does not directly prohibit the *use* of that product. *Id.* Similarly, while FIFRA makes distribution and sale of an *unregistered* pesticide an unlawful act, *id.* § 136j(a)(1)(A), it only makes *use* of an unregistered pesticide unlawful in certain circumstances, such as

in a manner inconsistent with its labeling or if it is in violation of a cancellation order, *see id.* § 136j(a)(2)(G), (K).[5]

Thus, setting aside a pesticide registration sets aside the legal license to sell or distribute that product. *Id.* § 136a(a). And because FIFRA does not directly regulate use of *unregistered* pesticides, setting aside that registration does not, of its own force, prohibit use.

The Court recognized this in *Pollinator Stewardship Council*, 806 F.3d 520 (opinion amended on rehearing). There, this Court granted EPA's Petition for Panel Rehearing, which requested that the Court amend its opinion to remove references implying that 7 U.S.C. § 136a regulated the *use* of unregistered pesticide products. *Id.* at 522; *see* EPA Petition for Panel Rehearing, *Pollinator Stewardship Council v. EPA*, Case No. 13-72346, October 26, 2015 (Dkt. 60-1).

That vacatur does not render use of existing stocks unlawful is true even if the Court embraces Petitioners' argument that this vacatur order did or should only set aside the registration for over-the-top use. *See* Pet'rs Mot. at 17-19. For one, there is no separate or severable "registration" for over-the-top uses of the three products at issue here; the previous registration expired and has no legal effect. The vacated registrations were the sole legal licenses to sell and distribute Xtendimax, Engenia, and

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[5] The other circumstances where use of unregistered pesticides would be unlawful are subject to certain rules (7 U.S.C. § 136j(a)(2)(S)), orders (7 U.S.C. § 136j(a)(2)(I)), and experimental use permits (7 U.S.C. § 136j(a)(2)(H)).

FeXapan for all uses. *See, e.g.*, ER0026; *see also* Cancellation Order at 6 (noting the cancelled registrations included "many uses other than post-emergent use on dicamba-resistant soybeans and cotton"). What's more, even if a partial vacatur of only the over-the-top uses would make them *unregistered* uses, it would not make them unlawful uses, for the reasons explained above.

To the extent Petitioners' are requesting an order preventing EPA from issuing a cancellation order addressing existing stocks would reach beyond the action challenged in this petition and the relief authorized by FIFRA, 7 U.S.C. § 136n(b). The Court should not—and cannot—limit EPA's discretion to take future actions consistent with the Court's vacatur. Accordingly, it should be denied. *Greater Bos. Television Corp. v. FCC*, 463 F.2d 268, 281 (D.C. Cir. 1971) (a court's mandate "must preserve and respect the distinctive administrative role of the agency and not encroach on its permissible zone of discretion").

C. The Court need not and should not recall the mandate to rule on the unaddressed ESA issues.

There is also no basis to recall the mandate to reach the ESA claims that the Court did not address in its opinion. *See* Pet'rs Mot. at 23-26. The Court's finding that the registrations were not supported by substantial evidence was sufficient to afford Petitioners all the relief they requested: vacatur. There is no need for the Court to address issues not necessary to dispose of the petition. Petitioners' desire for a broader or different holding, moreover, is not one of the "exceptional circumstances"

warranting recalling the mandate. To the extent Petitioners believe an opinion addressing their ESA arguments would afford them different relief, they can request panel rehearing. Petitioners' emergency request to recall the mandate for this purpose should be denied.

II. EPA acted consistent with and did not violate the Court's Order.

EPA's Cancellation Order does not violate the Court's vacatur order. The Cancellation Order is a reasonable exercise of EPA's statutory authority to responsibly wind down use of existing stocks of products whose registrations have been cancelled or, in this case, terminated by the Court. EPA has not restored the registrations for these products, and the Cancellation Order does not have that effect. Further, the Court's vacatur order did not enjoin or limit EPA's authority to take future administrative actions related to existing stocks whose registrations were vacated. The Court should reject Petitioners request to "enforce" its vacatur by declaring the Cancellation Order unlawful or finding EPA in contempt.

A. The Cancellation Order did not violate "a specific and definite court order" and thus cannot give rise to contempt sanctions.

EPA did not violate a specific and definite order; no contempt sanction is warranted. The power to hold a party in civil contempt to enforce compliance with a court's order is a potent weapon, that, "[b]ecause of [its] very potency, . . . must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *see Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831-32

(1994). Accordingly, a civil contempt sanction may be founded *only* on clear and convincing evidence that the contemnors violated a definite and specific court order. *Ahearn v. Int'l Longshore & Warehouse Union*, 721 F.3d 1122, 1129 (9th Cir. 2013). This Court has consistently held that civil contempt is a "severe remedy" requiring that "'those enjoined receive explicit notice' of 'what conduct is outlawed before being held in civil contempt.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019); *see also Gates v. Shinn*, 98 F.3d 463, 472 (9th Cir. 1996) ("Civil contempt is appropriate only when a party fails to comply with a court order that is both specific and definite.").

Petitioners' motion to hold EPA and Administrator Wheeler in contempt does not approach this stringent standard. The Court's vacatur order did not "specific[ally] or definit[ely]" enjoin EPA from issuing a cancellation order addressing existing stocks, *see Gates*, 98 F.3d at 472; it simply vacated the registrations, terminating the licenses to sell and distribute the dicamba products.

Issuing the Cancellation Order was therefore not inconsistent with *any* injunction or other order, let alone a "specific and definite" one. *Id.* Indeed, it is a far cry even from other orders that this Court has found were not enough to give rise to contempt sanctions. *See id.* at 465-66, 72 (holding consent decree requiring prison officials to provide an "appropriate level" of psychiatric care for prisoners "does not command any conduct with specificity" and hence cannot be the basis of a contempt order); *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1133-34 (9th Cir. 2006) (holding temporary restraining order's description of the trademark and "confusingly

similar variations thereof" lacked "sufficient specificity" to give rise to contempt sanctions); *cf.* Fed. R. Civ. P. 65(d) (an injunction must be "specific in terms" and describe "in reasonable detail" the acts restrained).

Relying on an alternative, strained interpretation of the Court's order, Petitioners assert—incorrectly—that the Court did not vacate the *registrations*, but rather the authorization to *use* the dicamba products over-the-top. *See, e.g.*, Pet'rs Mot. at 17-18. They contend that, "[a]fter 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." *Id.* at 17 (emphasis omitted). The existing stocks of Xtendimax, Engenia, and FeXapan are therefore not *unregistered* pesticides, the argument goes, they are just *differently* registered pesticides. Petitioners are wrong.

As already discussed, there is no separate or severable "registration" for over-the-top uses alone. *See supra* Part I.B. Moreover, the Court did not—and cannot—engage in rewriting the agency actions under review. *Id.* The Court's order plainly vacates *the registrations*, Dkt. 125 at 56 ("Registrations VACATED."); it does not distinguish among specific uses of dicamba or otherwise address conditions of use. While Petitioners may have objected to the registrations because of the over-the-top uses, they never limited their request for relief in that way, nor did the Court so limit its order. And even had the Court granted a partial vacatur, it would not enjoin EPA's

authority to issue an order governing the disposition of existing stocks that would then bear labeling for an unauthorized use. *See supra* Part I.B.

In any event, Petitioners' argument that the vacatur order bars the over-the-top uses but not dissolve the registrations is anything but obvious. Petitioners have to turn an unambiguous vacatur into an ambiguous partial-vacatur-and-injunction-against-use to even approach an argument that the order prohibited EPA's reasonable Cancellation Order. A simple vacatur does not create any "specific and definite" injunction against EPA's future administrative action; rather, it results in setting aside and invalidating the action. *See* "Vacatur," Black's Law Dictionary ("The act of annulling or setting aside."). Indeed, Petitioners' request that the Court recall the mandate to "clarify" that the vacatur would not allow action like the Cancellation Order merely underscores that there was no clear prohibition against EPA's action.

Additionally, it is insufficient for Petitioners to argue that the Cancellation Order is inconsistent with the Court's *reasoning* in support of its vacatur order. The Supreme Court rejected that premise in *International Longshoremen's Association v. Philadelphia Marine Trade Association*, 389 U.S. 64 (1967), which reversed a civil contempt judgment arising out of labor strikes. The Supreme Court explained that because the lower court's order referred to an arbitrator's award that contained conclusions of law but not "an operative command capable of 'enforcement,'" the order was impermissibly vague, and "with it must fall the [lower court's] decision holding the union in contempt." *Id.* at 73-74, 76.

Moreover, Petitioners improperly urge the court to use contempt not to enforce compliance with a specific and definite court order, but to constrain EPA's lawful discretion to take a separate final agency action in light of that order. The Court's order did not clearly or specifically restrict EPA's ability to address existing stocks that became unregistered upon vacatur, just as the Agency had done in past cases where pesticide registrations were vacated. Without a specific order enjoining EPA's conduct, the Court must reject Petitioners' contempt motion. Neither EPA nor Administrator Wheeler have violated "a specific and definite court order," and should not be found in contempt.

B. The Cancellation Order was consistent with the vacatur order.

EPA's Cancellation Order does not violate the Court's vacatur order. The vacatur rescinded the dicamba registrations; the Cancellation Order does not change that. Rather, the Cancellation Order addresses sale, distribution, and use of existing stocks of the now-unregistered products that had been lawfully sold and distributed before vacatur. As discussed above, that action was not inconsistent with the vacatur order. *See supra* Part II.A. The Court did not and could not restrain EPA from taking this separate, subsequent agency action to address the disposition of existing stocks in light of the registrations' vacatur. *See supra* Part I.B. At the very least EPA's action represents substantial compliance with the Court's order.

EPA's response in issuing the Cancellation Order is a reasonable exercise of its FIFRA authority to address the disposition of existing stocks that had been lawfully

sold and distributed before the vacatur. When the Court's vacatur became immediately effective, approximately 4 million gallons of existing stocks were in the channels of trade. Cancellation Order at 5. People in possession of those stocks had no legal way to distribute them back to the registrants or for disposal. *Id.* at 2. And EPA had no way to ensure that applicators would not use the pesticides in a manner that would increase the chance of unreasonable, adverse effects, including to endangered species, relative to the previously approved label restrictions. *Id.* at 2-3. Recognizing this and the turmoil in the agricultural industry as growers heavily invested in systems dependent on over-the-top dicamba weed control, and applying the six factors of its Existing Stocks Policy Statement, 56 Fed. Reg. at 29,364, EPA exercised its lawful authority to issue an order governing the safe disposition of existing stocks. *See* Cancellation Order at 4-11.

This action did not violate the vacatur: it did not restore the registration; it addresses only existing stocks left in a regulatory limbo. Petitioners argument to the effect that there is not actually a regulatory limbo to address because FIFRA prohibits use of unregistered pesticides is wrong. *See, e.g.*, Pet'rs Mot. at 17, 20. For example, Petitioners contend that FIFRA clearly prohibits the use of unregistered pesticides, citing 7 U.S.C. § 136a(a). *Id.* at 16-17. But that provision states that "the Administrator may *by regulation* limit the distribution, sale, or use . . . of a pesticide that is not registered under this subchapter." 7 U.S.C. § 136a(a) (emphasis added). Petitioners identify no regulations prohibiting use of existing stocks. Petitioners also point to

Section 136j(a)(2)(F). But that provision, too, only applies as to *registered pesticides* classified for restricted use. In any event, Petitioners' claims about the scope and effect of the vacatur are unfounded. *See supra* Part I.B, II.A.

Petitioners are also incorrect in that the Court's recitation of a statement from EPA's 2018 Decision Document indicates the Cancellation Order is contrary to the Court's intent. At the end of its opinion, the Court quoted EPA's statement that "using registered dicamba products on dicamba-tolerant [cotton or soybean crops] that are not registered specifically for post-emergence use . . . is inconsistent with the pesticide's labeling and a violation of [FIFRA]." Dkt. 125 at 56. But that statement refers to *other* registered dicamba products—older, more volatile formulations than those at issue here—that are not registered for over-the-top use. Illegal over-the-top use of those products had been a problem in the past and was suspected to be one cause of off-target incidents in 2017 and 2018. EPA did not say that use of an unregistered pesticide is a violation of FIFRA, and, in citing that statement, the Court did not alter its holding or the remedy imposed.

The Court's vacatur order rescinded the three dicamba registrations, eliminating the legal license to sell or distribute the products, no more or less. It did not preclude the issuance of a cancellation order. And it did not and cannot dictate what measures EPA may take in exercising its statutory authority to address existing stocks. The Court should deny Petitioners motion.

III. Petitioners' motion is not the proper vehicle—and this court is not the proper tribunal—to review the Cancellation Order.

At bottom, Petitioners' motion seeks to have the Court declare EPA's Cancellation Order unlawful. That is improper. EPA's cancellation order is a separate administrative order, distinct from the now-vacated registration and reviewable on its own merits in an appropriate district court. *See* 7 U.S.C. § 136n(a); *see also Greater Bos. Television*, 463 F.2d at 287-88 & n.38 (holding that, unless a court retains jurisdiction over agency action following remand, any subsequent agency order must be subject to its own independent appellate process); *Geertson Seed Farms*, 561 U.S. at 162 (holding an agency order following remand is a new action that must be challenged in a new suit). The Court should not allow Petitioners to use a motion to "enforce" the vacatur, through recalling the mandate, contempt, or other means, as a back door to obtain judicial review of a new, separate agency action.

That is particularly true here, where district court, not the court of appeals, has jurisdiction to review the Cancellation Order. Because the Cancellation Order was not issued following a public hearing, FIFRA provides that judicial review is available only in an appropriate district court. 7 U.S.C. § 136n(a); *see* Cancellation Order at 11.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion.

Respectfully submitted,

/s/ draft
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Dated: June 16, 2020

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 Garamond 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 5195 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Sarah A. Buckley

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I hereby certify that on June 16, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all case participants are registered for the Appellate CM/ECF System and that they will be served by the CM/ECF system.

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