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

INTERVENOR-RESPONDENT MONSANTO COMPANY'S PETITION FOR REHEARING EN BANC

Philip J. Perry
Richard P. Bress
Stacey L. VanBelleghem
Andrew D. Prins
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Intervenor-Respondent Monsanto Company

July 20, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Respondent Monsanto Company (Monsanto), through its undersigned counsel, states as follows:

1. Monsanto is an indirect, wholly-owned subsidiary of Bayer AG.

2. Bayer AG is a publicly held corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

ORDERS AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION AND RULE 35 STATEMENT

Over the past three decades, American agriculture has experienced unsurpassed productivity and crop yields, due in large part to farmers' use of glyphosate-based herbicides to control weeds in major crops. But certain weeds developed a resistance to glyphosate, threatening future yields. This case concerns a solution to that critical problem—use of a different herbicide, dicamba, to control those persistent weeds. After evaluating extensive scientific evidence concerning three dicamba-based herbicide products, including numerous studies by independent academic experts, EPA concluded that use of those products—including Monsanto's—would have no "unreasonable adverse effects" on the environment, as required by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). EPA accordingly issued orders registering them for use on certain soybean and cotton crops. In the middle of the growing season, however, a panel of this Court issued an immediate nationwide vacatur of those product registrations, causing massive disruption to the farming community. *See* ECF No. 125-1 (opinion by Fletcher, J.).

The panel's decision raises two issues of exceptional importance that warrant *en banc* review. First, the decision upends established separation-of-powers principles by granting administrative agencies unprecedented power unilaterally to defer judicial review of final, indisputably effective agency orders. In order to reach

the merits, the panel gave a jurisdictional pass to a petition for review filed 71 days after Monsanto's registration issued and became effective—11 days past the 60-day deadline specified by Congress. The panel excused petitioners' failure to file within the *statutory* 60-day jurisdictional window based on an *EPA regulation* providing that the agency's orders generally are not "entered" for purposes of judicial review until "two weeks after" they are signed. The panel ignored EPA's contemporaneous acknowledgement that this two-week deferral rule would not and could not apply to orders issued with immediate effect—like the orders at issue here—because deferral in such instances would create a gap during which fully effective agency orders are not subject to judicial review. The panel's decision conflicts with precedent of the Supreme Court, this Court, and other courts of appeals and, if left in place, will enable regulators to trammel the rights of affected parties by shielding their effective orders from immediate judicial review.

Second, although the panel recited the "substantial evidence" standard applicable to judicial review of FIFRA orders, the panel diluted that standard beyond recognition by affording no deference whatsoever to the agency's expert judgments, and cherry-picking the record for evidence supporting vacatur—in effect, substituting its judgment of the highly technical scientific evidence for EPA's. Op. at 26-53. This aspect of the decision was contrary to foundational principles of

administrative law and also departs radically from this Court's and the Supreme Court's precedent.

On both accounts, rehearing is warranted.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves EPA's registration of herbicide products that have proven to be a critical tool in farmers' battle against herbicide-resistant weeds. Under FIFRA, all herbicide products sold or distributed in the United States must first undergo a comprehensive review to obtain EPA registration. 7 U.S.C. § 136a(a), (c). The touchstone of this process is a "cost-benefit analysis to ensure that there is no unreasonable risk created for people or the environment from a pesticide." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 522-23 (9th Cir. 2015). Whether an "unreasonable risk" exists turns on "economic, social, and environmental costs and benefits." 7 U.S.C. § 136(bb).

The vast majority of farmers use herbicides to control weeds on their crops. But some of the most destructive weeds have developed resistance to common herbicides. To address this severe problem, Monsanto engaged in two parallel efforts: It developed soybean and cotton varieties that would tolerate applications of another herbicide—dicamba; and it developed a new dicamba formulation, XtendiMax™ with VaporGrip™ Technology ("XtendiMax"), incorporating

features to reduce the herbicide's volatility (*i.e.*, its tendency to vaporize) and minimize its movement off the treated field. ER0212; ER0228; ER1213.

In 2016, EPA registered XtendiMax for use over-the-top of dicamba-tolerant soybean and cotton, with extensive label conditions designed to further minimize the potential for off-target movement. ER0243; ER0247; ER0259; ER0270. The subsequent growing season proved extraordinarily successful, as evidenced by publicly available USDA yield reports showing that nationwide production of soybean and cotton hit record levels despite adverse weather conditions. ER0310-11. Most of the same petitioners here challenged that registration order, but the registration expired in November 2018 before that challenge could be fully adjudicated, and the action was dismissed as moot. *Nat'l Family Farm Coal. v. EPA*, 747 F. App'x 646, 648 (9th Cir. 2019).

On November 1, 2018, EPA issued the new two-year registration for XtendiMax that is at issue here, with an expanded record and new conditions to address stakeholder comments regarding the prior registration. ER0065-66; *see also* ER0001-03 (October 31, 2018 explanatory registration decision). As part of that process, EPA evaluated a host of "new data, including field volatility and vapor exposure toxicity studies submitted by the registrants and large field studies conducted by academic researchers." ER0012. Those studies reflected that, when used as directed, XtendiMax would *not* leave treated fields in meaningful

concentrations. *See*, *e.g.*, ER0017-18. Petitioners nonetheless challenged the new registration, and the prior panel ordered *sua sponte* that it would remain the tribunal to decide the new challenge. *See* ECF No. 69. The panel then brushed aside a clear-cut statutory bar to its jurisdiction and, in a decision that afforded the agency no deference whatsoever, vacated the registration in the midst of the 2020 growing season.

First, the panel maintained that it had jurisdiction even though FIFRA limits court of appeals jurisdiction to petitions filed within 60 days of an order's entry, and these petitioners waited 71 days to file theirs. The panel cited an EPA rule stating that the "date of entry" for purposes of judicial review is generally "'the date that is two weeks after [the order] is signed.'" Op. at 22 (quoting 40 C.F.R. § 23.6). The panel did not dispute that this registration was effective immediately upon its issuance on November 1, 2018, but held that, regardless, the statutory 60-day filing window did not open until November 15, 2018 and therefore did not close until January 14, 2019, three days after petitioners filed their petition for review. *Id*. Although the issue was extensively briefed, the panel offered no response to the fatal flaw in its jurisdictional theory: Under established precedent—and as EPA acknowledged when it promulgated the regulation—an agency has no unilateral

power to defer judicial review of already-effective agency orders. *See id.*[1]

Second, having determined it would reach the merits, the panel proceeded to conduct its own *de novo* assessment of the record. The panel acknowledged "[a]mple evidence" that the 2018 registration would "provid[e] soybean and cotton growers an additional tool for managing difficult-to-control weeds, and delay[] weed resistance to other herbicides." *Id.* at 33. But in the panel's view, EPA should have given more weight to the potential costs, based on largely unverified complaints of off-field drift during the 2017 and 2018 growing seasons. *Id.* at 26-53. In fact, EPA had addressed those concerns at length. It had evaluated the likely acreage of future dicamba use, the scope and scale of prior complaints, and the potential causes of reported off-field effects—including by reviewing scores of laboratory and field tests demonstrating that, used properly, XtendiMax was unlikely to drift from a treated field in meaningful quantities. ER0343-76; ER0413-22. And EPA had also imposed extensive new application restrictions to address the potential causes of past incidents and minimize any risk of future drift. ER0019-22. It was on these grounds that EPA found the benefits of registration outweighed the risks. ER0013-22. But rather than crediting the substantial evidence that supported EPA's conclusion, the

[1] Nor was this the first time Monsanto briefed this issue to this panel. Remarkably, many of the very same petitioners missed the same 60-day window, and Monsanto thus raised the same jurisdictional objection, in the litigation over the previous registration.

panel overruled EPA based on its own assessment of conflicting evidence, affording no deference to the expert agency. Op. at 26-53.

Finally, the panel acknowledged that issuing a vacatur in the midst of the growing season could have serious repercussions on farmers—and then opted to exacerbate those repercussions by not only vacating the registrations but also *sua sponte* directing that its mandate issue "forthwith," without making either of the findings necessary for such an extraordinary action under Circuit Rule 41-1. *Id.* at 53.[2]

REASONS FOR GRANTING REHEARING

I. The Panel's Jurisdictional Holding Warrants *En Banc* Rehearing

Under FIFRA, a petition for review challenging "any order issued by the [EPA] following a public hearing" must be filed "within 60 days after the entry of such order." 7 U.S.C. § 136n(b). That time limit is jurisdictional. *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1089-90 (9th Cir. 2017). Yet the panel held that EPA had the power unilaterally to change the jurisdictional limitations imposed by Congress, eliminating this Court's review jurisdiction for the first fourteen days after

[2] Following issuance of the mandate, EPA partially mitigated the harms of the panel's decision by authorizing restricted, temporary distribution, sale, and use (through July 31, 2020) of existing stocks of XtendiMax by certain individuals. *See* EPA, Final Cancellation Order for Three Dicamba Products at 11-12 (June 8, 2020). But the panel's decision still rendered immediately unlawful Monsanto's further distribution and sale of XtendiMax.

an order becomes effective, and extending the Court's jurisdiction to cover petitions filed as much as 74 days after an order becomes effective.

The panel did not dispute that the XtendiMax registration was issued and effective on November 1, 2018. Nor could it. On that date, EPA issued its Notice of Registration—an action that, in EPA's own words, was "the 'final disposition' of the adjudicatory process that permits the sale or distribution of the pesticide product." ECF No. 112 at 2; *see also* ER0065 (specifying "11/1/18" date of issuance and stating that the "pesticide is hereby registered under [FIFRA]"). As of this date, Monsanto was required to relabel "[a]ll product currently in the channels of trade" with the newly approved labeling. ER0067. And by November 10, 2018, among other things, users were required to possess a copy of the new label before using XtendiMax. ER0066, ER0068. Yet Petitioners waited a full 71 days after the Notice of Registration became effective (and 62 days after the new labelling conditions became binding on users) to file their petition for review. ECF No. 1.

The panel nonetheless held the challenge was timely, based on an EPA regulation providing that unless "'the Administrator otherwise explicitly provides in a particular order, … the … date of entry of an order issued by the Administrator following a public hearing … shall be … on the date that is two weeks after it is signed.'" Op. at 22 (quoting 40 C.F.R. § 23.6). Under the panel's reasoning, EPA's regulation eliminated Article III jurisdiction for the first 14 days after EPA's order

became effective. *See* ECF No. 61 at 17-18. Despite extensive briefing on this issue, the panel's decision does not address how the agency had the power to do that. Nor does the decision address the rule's preamble, which makes clear that *even EPA* did not believe it possesses such a remarkable power: EPA explained that, under this rule, its orders must be deemed "entered," at the latest, when they become effective, and that the agency's 14-day deferral therefore would not apply to orders made immediately effective. *Id.* at 17 (citing 50 Fed. Reg. 7268, 7269 (1985)); *see also* 45 Fed. Reg. 26,046, 26,048 n.12 (1980) (EPA acknowledging that it lacks authority to defer judicial review "later than the date a[n] [agency action] becomes enforceable"). In other words, while granting EPA the unprecedented power to obstruct judicial review of an effective agency order, the panel *ignored* the agency's contemporaneous proclamation that it lacked both the authority and the intent to assert such a power.

The panel's jurisdictional ruling contradicts established precedent in two respects.

First, the panel purported to defer to an EPA regulation interpreting the statutory framework for judicial review. But it is settled law that this Court does *not* defer to an agency's determination of when the Court has jurisdiction. *See, e.g.*, *Dandino, Inc. v. U.S. Dep't of Transp.*, 729 F.3d 917, 920 n.1 (9th Cir. 2013) (where an agency sets a rule that alters the timing of this court's jurisdiction, "[t]he Agency's

position on [the Court's] jurisdiction is not entitled to deference under *Chevron*"). Although agencies can of course determine when to sign or publish their rules and when those rules become effective, it is Congress that decides whether and when agency rules are subject to judicial review, and absent a delegation from Congress, agencies have no power to alter or authoritatively interpret the statutory bounds of such jurisdiction. *See id.*; *see also Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 860-61 (9th Cir. 2007) (it is Congress that defines the lower federal courts' jurisdiction; "an executive agency does not have that same authority").

The panel's contrary holding conflicts with the uniform understanding of the circuits that an agency can neither expand nor contract a federal court's jurisdiction. For instance, in *Utah v. EPA*, the Tenth Circuit concluded that EPA lacked authority to correct its own procedural mistake by opening a new 60-day window for judicial review. 750 F.3d 1182, 1185-86 (2014). As the court explained, neither EPA nor the court itself could "expand our jurisdiction to avoid hardships even when they are inequitable." *Id.* Likewise, in *Selco Supply Co. v. EPA*, the Eighth Circuit invalidated an EPA rule that purported to toll the period for judicial review of a FIFRA penalty order. 632 F.2d 863, 865 (1980). As that court observed, FIFRA "requires that a petition for judicial review be filed within 60 days after the entry of the order," and "[f]ederal courts may exercise only that judicial power provided by the Constitution and conferred by Congress." *Id.* So too here.

Second, the panel's ruling allows EPA unilaterally to create a gap during which a rule that is immediately effective is not subject to review. But there is a strong presumption in favor of judicial review, and the Supreme Court has long made clear that, absent delegated authority from Congress, an agency cannot shield its actions from judicial scrutiny. *See, e.g.*, *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 417-19 (1942) ("If an administrative order has that effect *it is reviewable*." (emphasis added)).[3]

Just last month, the D.C. Circuit sitting *en banc* emphatically rejected the Federal Energy Regulatory Commission's ("FERC") contention that it had the power to defer judicial review of effective agency action. *Allegheny Defense Project, v. FERC*, No. 17-1098, __ F.3d. __, 2020 WL 3525547, at *9-13 (2020). Under the Natural Gas Act, parties desiring judicial review of FERC orders must first seek rehearing with the agency. *Id.* at *1. If FERC fails to act within 30 days, however, the rehearing petition may be deemed denied, and the petitioner can immediately seek judicial review. *Id.* at *1-2. For decades, FERC has routinely employed "tolling orders" to extend its time to review rehearing petitions and thereby "prevent aggrieved parties from obtaining timely judicial review" of FERC

[3] Of course, *Congress* can provide for a gap between reviewability and effectiveness, and authorize an agency to issue rules to demarcate such gaps. *See W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985). But that does not mean that agencies can do so unilaterally.

rulings. *Id.* at *6-7. The *en banc* court concluded that these tolling orders are invalid, because "the Commission has no authority to erase and replace the statutorily prescribed jurisdictional consequences of its inaction" or "indefinitely evade" the "prospect of judicial review." *Id.* at 11-12. That is, agencies cannot override the terms of judicial review specified by Congress—particularly when doing so would delay Article III review of agency orders that are already effective. Similarly, the Fourth Circuit recognized in *Virginia Electric & Power Company v. EPA* that while EPA has discretion to set a "triggering device" for the time when judicial review provided by statute may occur, an agency may not "postpone for any period of time past the substantive effectiveness of regulations their exposure to judicial review." 610 F.2d 187, 189 (1979). Yet the panel here granted such a power, without mentioning the fact that EPA's registration decision was immediately effective, admitting to the inter-circuit split it had created, or acknowledging its extraordinary departure from established precedent.

This is an exceptionally important issue. Although EPA had no such intent here, the panel's decision provides agencies a blueprint to manipulate federal court jurisdiction, and potentially eliminate *any* meaningful review of emergency petitions and other time-sensitive suits. If left in place, it will radically alter the relationship between administrative agencies and the federal courts in this Circuit.

This possibility is not merely speculative. In *Allegheny Defense Project*, the D.C. Circuit explained that by issuing tolling orders, FERC routinely delayed judicial review of its decisions until private property had been seized and pipelines had been built—in many instances mooting the controversy and preventing review. 2020 WL 3525547, at *6-7 (collecting cases). The panel's holding in this case would permit other agencies likewise to delay or escape judicial oversight. There is no reason why U.S. Immigration and Customs Enforcement could not similarly delay review of deportation or family separation orders, or why the Mine Safety and Health Administration could not similarly delay review of mine closure orders. *See, e.g.*, 30 U.S.C. § 816(a) (challenge must be filed within 30 days of order "issuance"); 8 U.S.C. § 1252(b)(1). *En banc* rehearing is necessary to prevent this sort of gamesmanship and the obvious harms that would follow from allowing agencies to modify Congress's provisions for judicial oversight.

II. The Panel's *De Novo* Review Of EPA's Cost/Benefit Analysis Warrants *En Banc* Rehearing

The panel correctly recited that it must sustain EPA's registration decision under FIFRA "if it is supported by substantial evidence when considered on the record as a whole." Op. at 26; *see also Nat. Res. Def. Council v. EPA*, 857 F.3d 1030, 1035-36 (9th Cir. 2017) (similar); *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (similar). But instead of granting "'due deference to EPA's findings,'" Op. at 26 (quoting *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 877 (9th Cir. 2013)),

the panel cherry-picked anecdotes and facts that supported its own contrary view of the record. The panel identified six purported errors by EPA, but in each instance the panel failed to credit substantial evidence supporting EPA's conclusions, and failed to explain why the contrary evidence justified setting aside EPA's scientific judgment:

1. The panel faulted EPA for relying on a "prediction" that "40 million acres of [dicamba-tolerant] soybeans would be planted in 2018," when it was *possible* that "as many as 50 million [acres]" were actually planted, and thus EPA *might* have "underestimated … the amount of dicamba herbicides applied in 2018" by "as much as 25 percent." Op. at 34. But the panel never explained why such a difference in dicamba use, if it came to be, would undermine EPA's weighing of the *balance* of the herbicide's benefits and costs, much less sufficiently to warrant vacatur.

2. The panel faulted EPA for supposedly failing to provide any "explanation for [a] spike in [drift] complaints in 2017 and 2018 other than the new conditional registration of dicamba." Op. at 35-37, 52. But EPA *had* provided another explanation: That "there may be issues of overreporting" because those complaints were "largely caused by other herbicides, including the older formulations of dicamba, applied on nearby corn fields" *without* the strict application restrictions governing XtendiMax. *Id.*; *see also id.* at 31. The panel rejected that

position as "speculat[ion]" because it believed, based on a *2014* United States Department of Agriculture report, that "dicamba use on corn had been decreasing in recent years." *Id*. at 31, 36-37. But, as of *2018*, more recent data showed that use of dicamba herbicides other than XtendiMax had *increased* in recent years, including over corn. *See* ER0319 (reflecting near doubling in application of other dicamba herbicides from 2014 to 2017); Robert Klein *et al*., *Considerations for Postemergence Dicamba-Based Herbicide Applications to Corn*, Univ. Of Neb.-Lincoln (May 31, 2018), http://cropwatch.unl.edu/2018/considerations-post-herbicide-dicamba-applications-corn (explaining that "[a]pplication of dicamba-based herbicides [other than XtendiMax and the other new, low-volatility formulations at issue in this case] … has increased in corn in recent years").

3. The panel likewise faulted EPA for "refus[ing] to quantify or estimate the amount of damage caused by OTT application of dicamba herbicides." Op. at 38-40. But (i) EPA cited substantial evidence that the potential damage from applications under the 2018 registration could not be quantified with precision, ER0492, (ii) FIFRA does not require a "precise quantification" of such indeterminate risks, *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 809 (9th Cir. 1980), (iii) EPA accepted for purposes of its decision that many acres of non-dicamba-tolerant plants could be at risk absent adequate restrictions on use, ER0016, ER0019-22, and (iv) EPA addressed that concern by imposing strict and enhanced

use restrictions designed to address all potential causes of off-target movement. *Id*. By focusing on largely unverified reports of off-target movement from 2017-2018, the panel failed to engage with EPA's reasons for concluding that the *new 2019-2020 registration* would pose no unreasonable risks.

4. The panel also faulted EPA for not acknowledging the possibility that applicators might misuse the herbicides because the detailed restrictions on the products' labels are allegedly "difficult to follow." Op. at 41-45. The panel's conclusion misconceived EPA's task under FIFRA, which prohibits use of an herbicide inconsistent with its label, 7 U.S.C. § 136j(a)(2)(G), and requires EPA to base its decisions on "widespread and commonly recognized practice," *id.* § 136a(c)(5)(D), not speculation about illegal activity. In addition, the panel's conclusion rested entirely on selective anecdotes of some applicators' difficulties with a *previous* product label. Op. at 41-45. EPA was well aware of those historical complaints, *see, e.g.*, ER0020, and addressed concerns about misuse by modifying the label to clarify its instructions and limiting use of the product to certified applicators, "individuals with the highest level of pesticide application training." ER0019-22. The panel's selective citation of dated complaints about the prior label provided no basis to reject EPA's conclusion that certified applicators would be able to follow the new label required by the 2018 registration. *See* Op. at 41-45.

5. The panel next faulted EPA for "fail[ing] to acknowledge" the "risk" that, by registering the *herbicides*, "DT [dicamba-tolerant] soybeans, and possibly DT cotton, will achieve a monopoly or near-monopoly" in the *seed* market. Op. at 46-48. This supposed "risk" came from left field—it was invented by the panel *sua sponte*, not advanced by any party to the case. And there are good reasons no party raised it: FIFRA does not vest EPA with responsibility over antitrust concerns—those are issues for the Department of Justice or the Federal Trade Commission; DT soybean and cotton *seeds* are regulated by *USDA—not EPA* (*see* 7 C.F.R. Part 340); and contrary to the panel's wholly unsubstantiated assumption, there is robust competition in the soybean and cotton seed markets. *See, e.g.*, RER0423 (discussing Dow's Enlist™ seed system); ER1259 (similar, citing USDA, Final Environmental Impact Statement for 2,4-D-Resistant Corn and Soybean Varieties).

6. Finally, the panel faulted EPA for failing to consider anecdotal claims that dicamba "drift" injures the "social fabric of many farming communities" based on a handful of stories of local disagreements over herbicide use. Op. at 48-49. But EPA *did* discuss social issues, ER0007, it was unclear how many of these anecdotes (if any) were traceable to XtendiMax (rather than other dicamba formulations more prone to off-target movement), and barring thousands of farmers from using the herbicide they believe most effective to combat destructive weeds would of course lead to social strife as well. In any event, EPA reasonably concluded that the claimed

harms were outweighed by the clearly proven benefits of the herbicide's use. ER0007, ER0013-19. The agency was required to do no more.

By engaging in this roving, *de novo* review of the record, and "supplant[ing] the agency's findings merely by identifying alternative findings that" in the panel's view "could be supported by substantial evidence," *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992), the panel turned the substantial-evidence standard upside down and lost all sight of the deference that underlies this standard of review. Contrary to the panel's approach, courts may not substitute their own views for the scientific judgment of expert federal agencies, and must affirm agency actions—even those with which judges may disagree—so long as they are supported by substantial record evidence. *En banc* rehearing is warranted to prevent further erosion of this fundamental principle.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted,

s/ Philip J. Perry
Philip J. Perry
Richard P. Bress
Stacey L. VanBelleghem
Andrew D. Prins
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
philip.perry@lw.com

Attorneys for Intervenor-Respondent Monsanto Company

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 19-70115

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is *(select one)*:

[**X**] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains the following number of words: 4,153.
(Petitions and answers must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Philip J. Perry **Date** July 20, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I, Philip J. Perry, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 20, 2020, which will send notice of such filing to all registered CM/ECF users.

s/ Philip J. Perry
Philip J. Perry