Case No. 19-70115

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION *et al.*,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondents,

and

MONSANTO COMPANY, BASF CORPORATION, AND E.I. DU PONT DE NEMOURS AND COMPANY,
Intervenor-Respondents.

ON PETITION FOR REVIEW FROM THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MOTION OF CROPLIFE AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR-RESPONDENTS' PETITIONS FOR REHEARING EN BANC

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2, CropLife America ("CLA") respectfully moves for leave to submit the attached brief as *amicus curiae* in support of the petitions of Intervenor-Respondents Monsanto Company, E.I. du Pont de Nemours and Company, and BASF Corporation for en banc rehearing of this Court's June 3, 2020 Opinion ("June 3 Order") immediately vacating the FIFRA registrations for XtendiMax, Engenia, and FeXapan, three pesticide products containing the active ingredient dicamba. Pursuant to Circuit Rule 29-3, CLA contacted counsel for the parties in an effort to obtain their consent to this motion. Respondent U.S. Environmental Protection Agency ("EPA" or the "Agency") and Intervenor-Respondents Monsanto Company, E.I. du Pont de Nemours and Company, and BASF Corporation consent to CLA's motion. Petitioners take no position on this motion.

CLA'S STATEMENT OF INTEREST

CLA is a national, non-profit trade association representing companies that develop, register, and sell pesticide products in the United States. CLA's member companies produce most of the crop protection and pest management products regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq*. CLA represents its members' interests by, among other things, monitoring federal agency actions and related litigation of

concern to the crop protection and pest control industry, and participating in such actions as appropriate.

CLA has a direct and immediate interest in the Court rehearing the Panel's June 3 Order. The Panel's June 3 Order concluded that EPA's 2018 approval of the dicamba registrations violated FIFRA and directed the immediate vacatur of the registrations. In so holding, the Panel improperly substituted its own assessment of the risks of the dicamba products for EPA's, divesting the Agency of its Congressionally prescribed role in balancing the risks of registration with benefits and discounting substantial record evidence supporting EPA's decision.

CLA seeks leave to participate as *amicus curiae* because its members have a strong interest in ensuring that EPA's pesticide registration decisions requiring complex scientific judgments are given appropriate judicial deference. Allowing EPA to assess complicated scientific issues not only fulfills Congress's intent but also provides much-needed certainty and predictability to registrants who are CLA's members. CLA can provide unique insight into the legal and policy issues raised by the Panel's order, allowing the Court to fully appreciate the impact of its decision on the regulated community.

The Panel's June 3 Order raises novel and complex issues of law, policy, and science, with the potential to have broad-ranging impacts that extend beyond the parties and products at issue. Accordingly, CLA respectfully requests that the

motion be granted, and that the attached *amicus* brief be accepted and considered by the Court.

ARGUMENT

This Court has broad discretion to allow participation of *amici curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). The "classic role" of *amici curiae* is three-fold: (1) to assist in a case of general public interest; (2) to supplement the efforts of counsel; and (3) to draw the court's attention to law that escaped consideration. *Miller-Wohl Co. v. Comm'r of Labor & Indus*., 694 F.2d 203, 204 (9th Cir. 1982). The Court may also exercise its discretion to grant amicus status in order to avail itself of the benefit of "thorough and erudite legal arguments." *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987).

A. CLA Has a Substantial Interest in the Court's Disposition of the Petitions for Rehearing.

CLA member companies have invested considerable resources to obtain and maintain EPA registrations, both for the dicamba products at issue and many others. They have developed and submitted voluminous data and information to EPA and participated extensively in EPA's administrative processes under FIFRA. CLA has a compelling interest in ensuring that the risk/benefit analyses Congress directed EPA to conduct under FIFRA is accorded appropriate deference by reviewing courts. If the Panel's June 3 Order is allowed to stand, it would create

significant uncertainty within in the regulated community, negatively impacting the rights and interests of CLA's members and the growers who rely on their products.

This Court has allowed the participation of *amici* in support of a petition for rehearing where, as here, such participation provides different perspectives regarding the effect of a panel ruling. *See, e.g.*, *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 852 n.3 (9th Cir. 2018) ("In connection with en banc proceedings, we received . . . amicus briefs from a broad array of interested parties . . . . The briefs were helpful to our understanding of the implications of this case from various points of view. We thank amici for their participation."); *see also* Order, *Newton v. Parker Drilling Mgmt. Servs., Ltd.*, No. 15-56352 (9th Cir. Apr. 27, 2018), ECF No. 52 (granting motion for leave to file brief as *amicus curiae* in support of petition for rehearing en banc). Indeed, CLA regularly participates in litigation before this Court in cases raising issues that impact the rights of CLA members, including at the rehearing stage. *See, e.g.*, Order, *Nat'l Family Farm Coal. v. EPA*, No. 19-70115 (9th Cir. June 19, 2020), ECF No. 164; Order, *League of United Latin Am. Citizens v. Wheeler*, No. 17-71636 (9th Cir. Nov. 13, 2018), ECF No. 138 (granting motions of CLA and others to file amicus briefs in support of EPA petition for rehearing en banc). The attached proposed brief will similarly allow

this Court to consider the potential ramifications of the Court's June 3 Order on members of the regulated community.

B. CLA Will Provide Helpful Information to the Court.

The Court will be aided in its consideration of Intervenor-Respondents' petitions by CLA's substantial experience with FIFRA's registration process, including the risk/benefit analysis EPA conducts to make decisions concerning approvals of new pesticide products. CLA can provide additional authorities explaining Congress's intent in crafting this risk/benefit framework, and recognizing the need and the standard for deference to the expert Agency's scientific judgments. CLA can also provide a unique perspective on the disruptive consequences the Panel's June 3 Order will have on the regulated community.

CONCLUSION

For the foregoing reasons, CLA respectfully requests this Court to grant its motion for leave and accept the proposed *amicus* brief in support of Intervenor-Respondents' petitions for rehearing en banc.

July 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I 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 30, 2020.

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

/s/ Karen Ellis Carr
Karen Ellis Carr

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* CropLife America respectfully submits the following Corporate Disclosure Statement:

CropLife America is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

INTRODUCTION AND STATEMENT OF INTEREST[1]

Amicus curiae CropLife America ("CLA") is a national, non-profit trade association representing companies that develop, register, and sell pesticide products in the United States. CLA's member companies produce most of the crop protection and pest management products regulated by Respondent-U.S. Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq*. CLA represents its members' interests by, among other things, monitoring federal agency actions and related litigation of concern to the crop protection and pest control industry, and participating in such actions as appropriate.

On June 3, 2020, a panel of this Court issued an Opinion (the "June 3 Order") directing the immediate vacatur of the FIFRA registrations for three pesticide products containing the active herbicide ingredient dicamba: XtendiMax, Engenia, and FeXapan, held by Intervenor-Respondents Monsanto Company, BASF Corporation, and E.I. du Pont de Nemours and Company ("EID"), respectively. The Panel found that EPA downplayed or failed to acknowledge certain risks, including off-target drift, potential product misuse, anti-competitive

[1] This brief was not authored in whole, or in part, by counsel for a party, and no party or party's counsel contributed money intended to fund the preparation or submission of the brief. Fed. R. App. P. 29(a)(4)(E). No party has contributed funds in addition to the dues paid to CLA in the ordinary course of its membership.

effects, and harm to the "social fabric" of farming communities. In doing so, the Court assumed the role of the Administrator and conducted its own *de novo* review of EPA's decision, usurping the role Congress intended for EPA in evaluating applications to register pesticides and discounting substantial record evidence supporting EPA's assessment of the risks and benefits of the dicamba registrations at issue here.

CLA urges the Court to grant en banc rehearing of the June 3 Order to prevent the harm that the June 3 Order would cause CLA's members, the public, and the pesticide registration framework established by Congress if allowed to stand. Intervenor-Respondents, who are CLA member companies and the registrants of the dicamba products at issue, have invested considerable resources to obtain and maintain their EPA registrations for over-the-top dicamba use. CLA is deeply concerned that the June 3 Order departs from established precedent governing judicial review of agency action and casts aside the risk/benefit analysis Congress intended *EPA*, not courts, to conduct under FIFRA, undermining the regulatory certainty upon which CLA's members rely.

For reasons outlined in Intervenor-Respondents' petitions and set forth below, CLA respectfully submits that en banc rehearing of the June 3 Order is warranted.

ARGUMENT

I. EPA Has Long Regulated Pesticides Pursuant to a Rigorous, Science-Based Framework Under FIFRA.

Congress, through FIFRA, authorized EPA to regulate pesticides under a comprehensive, science-based regime that renders pesticides among the most heavily regulated substances in the United States. FIFRA §§ 2–35, 7 U.S.C. §§ 136–136y. Under FIFRA, all pesticides must be registered by EPA before they can be marketed, distributed, or sold in the United States. FIFRA § 3(a), 7 U.S.C. § 136a(a).

As originally enacted, "FIFRA was primarily a licensing and labeling statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). In 1972, as a result "of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest," Congress transferred authority over pesticides to the newly formed EPA and made other significant revisions to FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972 ("FEPCA"), Pub. L. No. 92-516, 86 Stat. 973 (1972). *Id.* Congress's intent in 1972 was "to change FIFRA from a labeling law into a comprehensive regulatory statute that will … more carefully control the manufacture, distribution, and use of pesticides." H.R. Rep. No. 92-511, at 1 (1971).

Key to the 1972 amendments was Congress's express intent to provide EPA with a framework for balancing the growing importance to American agriculture of using pesticides to minimize crop damage from weeds, insects, and other harmful crop pests with the risk of harm to humans and the environment potentially posed by those products. As the House Agriculture Committee stated:

> [t]his bill is in part a result of the growing awareness of possible undesirable effects of pesticides and a realization of the necessity of considering the disadvantages along with the beneficial effects realized through protection of public health and enhancement of agricultural productivity. . . . [FIFRA] needs to be thoroughly overhauled in order to better serve the Nation [and] . . . to properly balance all of the many factors interrelated with our current management of pesticides.

H.R. Rep. No. 92-511, at 4. To achieve a "reasonable balance" that "recognize[s] both the benefit and risk of these materials in society," *id.*, at 5, Congress "added a new criterion for registration" by EPA: that use of a pesticide in accordance with its label will "not cause 'unreasonable adverse effects'" "when used in accordance with widespread and commonly recognized practice."[2] *Monsanto Co.*, 467 U.S. at 992 (citing FIFRA § 3(c)(5)(C) and (D), 7 U.S.C. § 136a(c)(5)(C) and (D)); *see also* 40 C.F.R. § 152.50. Incorporating this risk/benefit balance, Congress defined

[2] Congress considered but rejected the goal of "complete" risk avoidance because such protection ignored the benefits of pesticide use. H.R. Rep. No. 92-511, at 5, 14; S. Rep. No. 92-838, at 5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3393, 3996–97. As the Senate Committee on Agriculture and Forestry commented, "appropriate pesticides properly used are essential to man and his environment. . . . Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential." 1972 U.S.C.C.A.N. at 3996.

"unreasonable adverse effects" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of [the] pesticide." FIFRA § 2(bb), 7 U.S.C. § 136(bb).

The process EPA undertakes to assess an application for registration under FIFRA's no "unreasonable adverse effects" standard is time-consuming, costly, exceptionally rigorous, and grounded in science. Registration applicants must submit to EPA extensive scientific studies, tests, and other data and information relevant to the potential risks of the pesticide and its intended use. *See* 40 C.F.R. pt. 158.[3] FIFRA and its implementing regulations also confer on EPA broad authority and flexibility to demand additional data and information from applicants where necessary to address potential risks associated with the proposed uses, both before and after registration. *See* 40 C.F.R. § 158.30; FIFRA § 3(c)(2)(B), 7 U.S.C. § 136a(c)(2)(B). EPA may register a new pesticide or pesticide use only when satisfied that its use in accordance with its proposed label is adequately protective of health and the environment.[4] FIFRA § 2(q)(1)(F), (G), 7 U.S.C. § 136(q)(1)(F), (G).

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[3] An applicant seeking a registration must also submit to EPA information regarding how the product will be packaged and a copy of the proposed label. *See* 40 C.F.R. § 152.50. Use of a pesticide in a manner inconsistent with its label is unlawful. FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G).

[4] FIFRA authorizes EPA to conditionally register a pesticide under certain circumstances, including "for a period reasonably sufficient for the generation and submission of required data." FIFRA § 3(c)(7)(C), 7 U.S.C. § 136a(c)(7)(C). As

In addition to study data supporting the product, EPA sometimes imposes further obligations on pesticide registrants to educate growers and other users on proper use of their products in order to mitigate pesticide resistance and avoid adverse impacts on health and the environment. These additional regulatory requirements represent another iterative tool that EPA employs to ensure that a registration continues to meet FIFRA's registration standard after approval, and require the investment of considerable time and resources by the registrant. FIFRA also requires EPA to conduct periodic reassessments of all registered pesticides, to ensure that they continue to satisfy FIFRA's safety standard as scientific capabilities evolve and as policies and practices change over time. FIFRA § 3(g)(1)(A)(iii)–(iv), 7 U.S.C. § 136a(g)(1)(A)(iii)–(iv).

EPA and its expert scientists have been engaged in these activities for nearly five decades and, during that time period, have amassed extensive experience in assessing from a science perspective the risks and benefits of particular pesticide products and uses. Pesticide registrants, including CLA's members, participate in these assessments and reassessments, and routinely submit comments and other information to the Agency to inform its decisional process.

While FIFRA's standards for assessing environmental and human health

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with all pesticide products, "conditionally" registered products must satisfy FIFRA's stringent "unreasonable adverse effects" standard for registration. *Id.*

drive testing and labeling registration standards, as mentioned above, FIFRA registrations also operate as product-specific licenses and confer on registrants legally protectable property rights. *See Reckitt Benckiser, Inc. v. Jackson*, 762 F. Supp. 2d 34, 36 (D.D.C. 2011) (pesticide registrants have a legally cognizable property interest in a pesticide registration, which operates as a "product-specific license"); *Ctr. for Biological Diversity v. EPA*, No. 11-cv-00293, 2013 WL 1729573, at *6-7 (N.D. Cal. Apr. 22, 2013) ("The applicants are owners of the pesticide registrations, and thus have property and financial interests in the registrations."). Congress intended pesticide registration under FIFRA to be risk-based and provide certainty and transparency to all participants in the value chain—developers and manufacturers, distributers, and growers—as they make business decisions and invest in products to improve farming, strengthen the American agricultural economy, and promote a sustainable U.S. food supply. *See* H.R. Rep. No. 92-511, at 4. The sophisticated balancing of risk and benefit Congress entrusted in EPA, as well as the property rights of registrants and the need of growers and other pesticide users for certainty, all require reviewing courts afford the appropriate level of deference to EPA's decisions.

II. The Panel's June 3 Order Usurped the Agency's Role and Failed to Accord Appropriate Deference to EPA's Decision-making.

A. The Dicamba Registrations Are the Product of EPA's Rigorous Review and the Registrants' Substantial Investment.

The three dicamba registrations at issue in this proceeding are the product of both EPA's rigorous scientific review under FIFRA and enormous investments of time and resources by CLA's members, who have collectively invested tens of millions of dollars to meet the rigorous requirements necessary to achieve registration.

Congress made clear that in order to assess whether a particular pesticide use meets FIFRA's no "unreasonable adverse effects" standard, EPA—as the agency with the necessary scientific and technical expertise—is to undertake a comprehensive assessment of the risks and benefits of registration of the particular use at issue. Pursuant to its authority under FIFRA, EPA conducted an exhaustive review of the risks and benefits of over-the-top dicamba use, based on an extensive scientific record and input from numerous stakeholders. EPA concluded that the registrations and labeled uses satisfied FIFRA's no "unreasonable adverse effects" safety standard. To protect against adverse impacts, EPA imposed various conditions for registration, including best management practices, labeling requirements, confirmatory data requirements, and monitoring requirements (including for off-target incidents and dicamba-resistant weeds). *See* EPA,

Registration Decision for the Continuation of Uses of Dicamba on Dicamba Tolerant Cotton and Soybean at 22–24, https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0187-0968 (Oct. 31, 2018). EPA's decision is precisely the kind of complex, scientific judgment that EPA, as the expert agency, is uniquely qualified to make. *Nat'l Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1201 (D.D.C. 1996) ("EPA rulemaking involves consideration of complex scientific data and sophisticated analysis fit primarily for those tutored in the field."), *aff'd in part sub nom. Troy Corp. v. Browner*, 120 F.3d 277 (D.C. Cir. 1997).

For their part, CLA's members have participated extensively in EPA's administrative review process for these registrations—they have developed and submitted voluminous data and information, prepared comments and analyses, and spent countless hours meeting with EPA personnel to support the finding that the over-the-top uses of dicamba meet FIFRA's no "unreasonable adverse effects" safety standard. They have made business decisions and investments based on EPA's approval of their registrations, and rely on revenues from the distribution and sale of their dicamba products. CLA and its members thus expect that major decisions resulting in the potential removal of these innovative products from the market will be entrusted to EPA—the expert Agency designated by Congress to assess the registration of pesticide products under the FIFRA standard.

B. By Substituting its Policy Preferences for EPA's Scientific Review, the Panel Exceeded the Boundaries of Review under the "Substantial Evidence" Standard.

In addition to establishing FIFRA's risk/benefit framework, Congress also established the standard of judicial review to be applied by courts reviewing EPA decisions under FIFRA, providing that an EPA registration decision "*shall be sustained* if it is supported by substantial evidence when considered on the record as a whole." FIFRA § 16(b), 7 U.S.C. § 136n(b). The "record as a whole" necessarily includes the risk/benefit analyses Congress instructed EPA to undertake in connection with registrations under FIFRA. The Supreme Court has described "substantial evidence" as a "term of art" used in administrative law "to describe how courts are to review agency factfinding." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citation omitted). "[T]he threshold for such evidentiary sufficiency is not high." *Id.*; *see also Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) ("Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

Courts owe even more exacting deference where an agency makes decisions based on its scientific and technical expertise. The Supreme Court has directed that a reviewing court in such a circumstance "be at its most deferential." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983). Indeed, numerous

courts have recognized that EPA is entitled to special deference on complex scientific and technical issues within the Agency's expertise. *See, e.g., Davis v. EPA*, 348 F.3d 772, 779, 781–783 (9th Cir. 2003) ("[d]eference [to the Agency] is particularly great where EPA's decision is based on complex scientific or technical analysis.") (citation omitted); *League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (deference to EPA's judgment "is highest when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise"); *accord New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988) (when a court is reviewing determinations "within an agency's area of special expertise, at the frontiers of science, the 'court must generally be at its most deferential'") (quoting *Baltimore Gas & Elec. Co.*, 462 U.S. at 103).

According greater deference to agency decisions on complex scientific and technical issues not only comports with Congress's intended framework but provides regulatory certainty and predictability to the regulated community. This is particularly important for CLA's members, who invest significant sums to develop products and obtain and maintain their FIFRA licenses. *See* Phillips McDougall, *Evolution of the Crop Protection Industry since 1960* at 8, https://croplife.org/wp-content/uploads/2018/11/Phillips-McDougall-Evolution-of-the-Crop-Protection-Industry-since-1960-FINAL.pdf (Nov. 2018) (average cost to

bring a new pesticide to market was $286 million in 2014). It is also important for growers who rely on CLA's members' products to ensure a sustainable supply of food and fiber.

As described in Intervenor-Respondents' petitions for rehearing, the Panel, in finding that EPA's approval of the dicamba registrations violated FIFRA, ignored substantial record evidence supporting EPA's decision-making, substituted its judgment for EPA's, and intruded on the domain Congress delegated to the Agency. *See Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1180 (9th Cir. 2004) ("We are presented with a technical issue that requires scientific expertise. Our judicial role is not to second-guess the decisions of the agency…."); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658–59 (2007) (in deciding the issues for the agency, the Ninth Circuit "erroneously deprived the Agency of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions"). The Panel's erroneous decision has the potential to destabilize the framework Congress crafted and EPA has implemented to encourage the development of new agricultural tools and to ensure "a modern and efficient agricultural industry in this Nation." H.R. Rep. No. 92-511, at 4.

Allowing the June 3 Order to stand poses the risk of significant harm and disruption to CLA's members and the users of their products. Subsequent registrants will face uncertainty regarding their registrations, which may face threats from an artificially lowered bar for a reviewing court's deference to agency decision-making. Like Intervenor-Respondents BASF and EID here, whose dicamba registrations were not properly before this Court but were nevertheless swept into the Court's June 3 Order, they risk having their rights determined without the opportunity to defend themselves. *See Indus. Safety Equip. Ass'n v. EPA*, 656 F. Supp. 852, 856 (D.D.C. 1987), *aff'd*, 837 F.2d 1115 (D.C. Cir. 1988) ("It is well settled that an agency license can create a protectible [sic] property interest, such that it cannot be revoked without due process of law."). And growers will face uncertainty with respect to available tools. *See* Amicus Curiae Brief of the American Farm Bureau Federation, *et al.* CLA thus supports rehearing en banc of the Panel's June 3 Order for reasons outlined in the Respondent-Intervenors' petitions, and to ensure that its members can depend on EPA's ability to carry out its mandate of making pesticide registration decisions based on the weight of the scientific evidence.

CONCLUSION

For the foregoing reasons, CLA supports Respondent-Intervenors' request that the Court grant the petition for rehearing en banc.

July 30, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because this brief contains 2,948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Times New Roman 14 point.

/s/ Karen Ellis Carr
Karen Ellis Carr

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