Order and Mandate Issued on June 3, 2020

No. 19-70115

Before: Michael Daly Hawkins, M. Margaret McKeown, and William A. Fletcher, Circuit Judges

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,

and

MONSANTO COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITIONERS' COMBINED REPLY IN SUPPORT OF EMERGENCY MOTION TO ENFORCE THIS COURT'S VACATUR AND TO HOLD EPA IN CONTEMPT

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INTRODUCTION

Core constitutional principles require that, while EPA has discretion to take future actions on the OTT new uses, its discretion is not unbridled: any action must be consistent with this Court's mandate. Respondent EPA agrees. ECF 144 at 13 (actions must be "consistent with the Court's vacatur"). Therein lies the rub. Respondents' "consistency" arguments are based on their contortion of this Court's decision and remedy, and an open acknowledgement that, if they are to be believed now, they have deceived the Court to get to this point.

For Respondents' current view to be correct (that existing OTT use was never at risk from vacatur, always could be continued by EPA, under the same label, without a new registration decision), then all their remand without vacatur arguments—about the purchased pesticides becoming "*unusable*" for the "2020 growing season" as a "consequence" if the Court vacated, *e.g.*, ECF 48-1 at 74—were intentional fabrications. Farmers at imminent risk from dicamba drift, including those Petitioners represent, were fooled into thinking spraying could ever be halted by judicial intervention.

For Respondents' view to be correct, then the Court's careful weighing of the remedy, its rationale, and ultimate decision to vacate, was all just a rigged game. *Nat'l Family Farm Coal. v. EPA*, --- F.3d ---, 2020 WL 2901136, at *18-19 (9th Cir. June 3, 2020) (*NFFC*). When the Court believed it was halting harmful new use, according to EPA now, the Court was unknowingly allowing *even worse*, *unbridled* new use. *E.g.,* ECF 144 at 3. EPA's argument and interpretation of the Court's decision is straight out of *Through the Looking Glass*.[1]

In reality, the Court was aware of EPA's potential misuse of "cancellation" to continue OTT use, because EPA presented it in post-argument briefing. The plain meaning of the Court's remedy decision is a flat rejection of EPA's view, and that, in the Court's view, vacatur *would* halt use. The Court said that it knew the "practical effects" of its decision, which included the "adverse impact" on growers that had already bought the products "relying on the availability of the herbicides for post-emergent use." *NFFC*, 2020 WL 2901136, *19-20.

[1] LEWIS CARROLL, *Through the Looking Glass & What Alice Found There, in* JOURNEYS IN WONDERLAND, 124 (Derrydale 1979) ("When I use a word ... it means just what I choose it to mean neither more nor less.").

And that vacating the OTT new uses would stop the use of "registered dicamba products" that were "not registered specifically for post-emergence use" because it would be a label violation. *Id.* The Court intentionally quoted EPA on this point, likely to highlight this very situation: the OTT new uses are no longer registered uses, and post-vacatur cannot be used OTT, precisely like other, older forms of dicamba. In reality, EPA simply did not get the message, or more likely, defied it, in a contempt worthy action.[2]

Taken to its logical conclusion, Respondents' argument is that there could be *no* remedy for the unlawful OTT new use registration: OTT use could *never* be halted. More fundamentally, no court can ever restrict the use of a pesticide, no matter how harmful; EPA alone has that authority. Respondents' claims for an injunction ring hollow and prove too much, because an injunction could do no better under their

[2] EPA has it exactly reversed that the Court denied Petitioners' request for further briefing; the Court denied *EPA's* motions. EPA's motion for leave was indeed "unnecessary" (ECF 144 at 10, n.4) in light of the vacatur: just not for the illogical reason EPA claims. Rather, it was unnecessary because on its face the Court's decision *rejected* EPA's claim that OTT use could continue after vacatur, as made abundantly clear by this Court's denial of EPA's request for remand without vacatur. *NFFC*, 2020 WL 2091136, at *20.

theory. Agencies could flout Court decisions by repeatedly issuing allegedly "new" decisions undermining them. But that view is contrary to the very core of our judicial system since its founding: "[E]very right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). That is why courts can and must enforce their mandates.

First, because the challenged decision is only EPA's decision to register conditionally these OTT new uses, and that is what the Court vacated, the entire purported justification for the agency's implementing action allowing continued use is illusory. The Court should correct EPA's manipulation of its decision and intended result. Second, EPA's implementing action flies in the face of the merits decision and remedy this Court handed down. What EPA did was not just inconsistent with the Court's decision but antithetical to it. EPA had lawful options, but this was not one of them. Finally, the Court has broad latitude to fashion the necessary relief to right this wrong. The Court should recall the mandate, enforce its decision, issue declaratory relief, and find EPA in contempt.

I. EPA VIOLATED THE MANDATE.

A. The Court Vacated EPA's Decision to Register the OTT New Uses.

First, this case is about the OTT new uses on cotton and soybean of the dicamba pesticides at issue. The challenged approval was an amendment of the existing registration to add "New Use," the OTT spraying. ER1, ER5, ER16-19 (EPA considers the amendment a "new use" and is taking action under the registration provision for them); 7 U.S.C. § 136a(c)(7)(B) (registration standards for "additional uses" of an existing pesticide registration).

This case is not about other conventional uses of the same products, uses had been previously registered, before the challenged 2018 decision. *See infra* 6-7; 40 C.F.R. § 152.3 (defining "new use" as an "additional use pattern"). This entire case—and all of EPA's assessments—focused only on the new and additional OTT *use* of these registered pesticides. *E.g.,* ER19-24. So did the Court's opinion. *See NFFC*, 2020 WL 2901136 at *8 (describing the challenged action as "EPA's 2018 decision to conditionally amend the registrations of XtendiMax, Engenia, and FeXaPan, permitting the OTT use of dicamba on DT soybeans and cotton for another 2 years."). Accordingly, the

Court's vacatur was logically of the decision to register those unlawful OTT new uses, not every use of the products.

Respondents fixate (ECF 144 at 4, ECF 146 at 7) on the Court's line noting the "registrations" were vacated, as somehow meaning the Court intended to vacate the conventional product uses not at issue. This is a word game. "Registration" refers to both product registrations and registered uses, depending on the context. Here it mean the uses, as in to register additional uses. That is clear from the title: "Registration Decision for the Continuation of Uses of Dicamba on Dicamba Tolerant Cotton and Soybean." ER1. It is not an *entirely new registration, for all uses*; it is an amendment and extension of the existing registration, adding these OTT new uses.

Respondents' sole argument, *on which their entire position rests*, is that the Court's vacatur *had* to be an all-or-nothing remedy, leaving no lawful uses. They argue that EPA lumped in previously approved uses on crops other than DT cotton and soy and so those too were necessarily vacated. This is far from clear, as those uses were registered previously, for different crops, and conventional, not OTT; the 2018 new use action only added the OTT new use for cotton and soy. *Compare* ECF 123-3 at

4 (2014 master label) *with* ER0026 (2018 label only adding uses on "cotton with XtendFlex Technology, Roundup Ready 2 Xtend Soybean, and XtendFlex Soybean").[3]

However, even if the prior approved conventional product uses were so lumped into the 2018 decision, vacatur is not a blunt axe but a sharp scalpel: FIFRA expressly grants the Court the power to vacate an order "in whole or *in part*," 7 U.S.C. § 136n(b) (emphasis added); *e.g.*, *NRDC v. EPA*, 735 F.3d 873, 881-85 (9th Cir. 2013) (vacating registration in part). After vacatur of the 2018 registration, the *status quo ante* is the 2014 registration of other uses; the prior approval was unconditional and had no expiration date. ECF 127-1 at 18-19; ECF 123-3 (2014 registration). The same is true applying remedial equity principles, where courts have discretion to remand without vacating,

[3] Respondents claim the post-vacatur previous OTT label would still be on products, ECF 146 at 12, but this can be easily solved by label amendment and notifying stakeholders, especially since much of the "labels" exist electronically (e.g. www.xtendimaxapplication requirements.com, ER0040; ER0068: "website becomes 'labeling' under FIFRA"). *See also* ER066 (example of re-labeling). The users are certified applicators well-versed with label changes. EPA had no problem hearing from the affected parties on this topic. The problem is that EPA stayed silent and then undermined the Court's decision rather than telling them to stop the vacated OTT use.

vacate, or resolve in between, like prospective vacatur. *E.g., Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers*, 2020 WL 3100829, *6-*8 (W.D. Wash. June 11, 2020) (vacating permit in part and prospectively). With its use/product distortion corrected, EPA's entire rationale for its administrative action being consistent with the Court's mandate evaporates.

Second, EPA falsely claims that this Court "recognized" and agreed with its view in *Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir. 2015). ECF 144 at 1, 12. As Petitioners explained, ECF 127-1 at 19 n.8, *Pollinator Stewardship* was fundamentally different, since *all uses were at issue*, 806 F.3d at 523, which tellingly Respondents do not dispute. It is squarely inapposite.

Moreover, even for cases dealing with entire registrations, EPA grossly misstates its import. EPA asked the panel in *Pollinator Stewardship* to revise the *introduction* section, to remove "use." *See id.* at 522. Those amendments did not change the remedy. *Id.* at 532-33. The petitioners did not oppose, instead filing a motion for the mandate to issue, because the requested revision was non-substantive. *Pollinator Stewardship*, ECF 61 at 1 (the request "does not seek to modify the

Court's remedy in this case"). EPA sought rewording of what EPA itself admitted was "dicta" in the introduction, and dicta that was "unrelated to the Court's rationale for vacating the sulfoxaflor registration." *Id.* at 2-3. Hence, this particular issue was not disputed, and certainly not analyzed or construed by the Court.

Third, even for whole registrations, Respondents' "there-must-be-rogue-use-after-vacatur-absent-cancellation" argument—which no Court has adjudicated, anywhere—fails. ECF 146 at 4. This is not a cancellation, it is vacatur, and they are *not* the same. ECF 127-1 at 13-14. Respondents have no response to that fundamental difference.

Moreover Respondents' view is contrary to FIFRA's text and purpose. The provision on which they rely by *its plain language* speaks only to the cancellation or suspension. 7 U.S.C. § 136(a)(1). EPA did not establish its contrary vacatur-equals-cancellation interpretation in rulemaking; it is a *post hoc* litigation position relying on a 30-year old guidance that also fails to speak to vacatur. ECF 127-1 at 13-14. Further, even for *cancellations*, EPA is wrong. Read as a whole, as statutes must be, FIFRA plainly covers unregistered use. *See* 7 U.S.C.

136a(a).[4] Congress strengthened EPA's authority to "safeguard[] the public interest" through amendments that "transformed FIFRA from a labeling law into a comprehensive regulatory statute" that "regulate[s] the use, as well as the sale and labeling" of pesticides. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 991 (1984); *Foundation on Econ. Trends v. Thomas*, 637 F. Supp. 25, 26 (D.D.C. 1986) (FIFRA "prohibits the registration, and hence the use and marketing of pesticides which cause unreasonable adverse effects on the environment.").

Contrary to even more fundamental canons of construction, EPA's view also leads to absurd results like those here, such as the inability to return a pesticide to the manufacturer, or the ability to spray with

[4] The Stop Sale Use or Removal provision alone proves EPA is wrong, a power that Respondents admit EPA could have used. ECF 146 at 17. Whenever EPA has "reason to believe … that [a] pesticide … is in violation of any of the provisions of this subchapter … or when the registration of the pesticide has been canceled … the Administrator may issue a written 'stop sale, use, or removal' order to any person who owns, controls, or has custody of such pesticide, and after receipt of such order no person shall sell, use, or remove the pesticide…." 7 U.S.C. § 136k(a). The distinction between violations of "any of the provisions" of FIFRA and cancellations of registrations establishes EPA authority to stop the use of unregistered pesticides without initiating cancellation proceedings. *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (statutes should be construed "so to avoid rendering superfluous" any statutory language).

abandon despite vacatur, not to mention the Court's inability to remedy a FIFRA violation. And it would have dangerous consequences: the perverse incentive to stockpile products during litigation, inoculated from later liability. ECF 123-1 at 11-12.

Fourth and finally, even *arguendo* if EPA were right about *all* the above—registration is all or nothing, vacatur is all or nothing, vacatur must equal cancellation, and the alleged post-cancellation hole in its oversight requiring it to take some action post-vacatur—*it still does not make what EPA did lawful*. The agency still must act consistent with the Court's decision and mandate, and it most decidedly did not. ECF 127-1 at 7-12; *infra* 15-18.

Here EPA should have simply terminated all the OTT new uses—existing stock or not—on June 3, 2020, the effective date of the vacatur. Had EPA done so, it would have resolved the "regulatory limbo" EPA self-created, since FIFRA makes it unlawful "to violate any cancellation order." 7 U.S.C. § 136j(a)(2)(K). EPA exercised that authority in November 2019, charging Intervenor Monsanto for unlawfully spraying

a cancelled—and thus unregistered—pesticide.[5] Other than EPA's unwillingness, nothing in FIFRA prohibits EPA from simply effectuating the Court's Order through its administrative order.

B. Mandate Recall and Contempt Holding Is Warranted.

EPA does not dispute this Court's ability to enforce its mandate, only arguing that these circumstances do not warrant recall. But EPA itself recognized that the Court took "the extraordinary step of issuing the mandate immediately" in order to effectuate immediate relief. ECF 144 at 1. Indeed it is only because of that extraordinary step that recall is needed.

Contrary to EPA's mischaracterization, Petitioners do not seek any different relief than what the Court had already ordered: immediate vacatur of the 2018 OTT new use registrations. Petitioners saw no need for further clarification from this Court until EPA defied it

[5] Press Release, U.S. Attorney's Office, *Monsanto Agrees to Plead Guilty to Illegally Spraying Banned Pesticide at Maui Facility* (Nov. 21, 2019), https://www.justice.gov/usao-cdca/pr/monsanto-agrees-plead-guilty-illegally-spraying-banned-pesticide-maui-facility.

with its administrative order.[6] In so doing EPA chose to ignore another 16-million pounds of dicamba spewed into the environment, more millions of acres of crop damage, and harm to protected species and the environment as extraordinary harms, and this Court must recall and clarify its mandate "to prevent injustice" and "to protect the integrity of [its judgment and mandate]."[7] *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988) (citations omitted). This is a well-established power, precisely for these situations. *E.g., Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922-23 (D.C. Cir. 1984) (striking down emergency rule suspending the effect of the court's vacatur for 120 days, criticizing the agency's rule justification as "merely a repeat of the argument … that already has been rejected by the court"); *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) (appellate court

[6] EPA's defiance of this Court's vacatur based on FIFRA also means endangered species harm continues; the Court should account for those harms in deciding this motion. ECF 127-1 at 23-25.

[7] BASF also seeks recall, but for the extraordinary request of staying its issuance to allow BASF to petition for rehearing. ECF 145 at 2-3, 17-20. The Court already considered BASF's failure to timely intervene, and still issued the mandate immediately in order to prevent harm to agriculture and the environment. *See* ECF 151-1. The interests of justice and protection of the integrity of this Court's process mean that the Court should deny BASF's request even if it grants intervention.

has power to "correct any misconception of its mandate by a[n] . . . administrative agency subject to its authority"); *see Iowa Utilities Bd. v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998) (noting failure to enforce its mandate would "reward bureaucratic misconduct and encourage judicial anarchy") (quoting *Dep't of the Navy v. Fed. Labor Relations Auth.,* 835 F.2d 921, 923 (1st Cir.1987)), *rev'd on other grounds*, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 1133 (U.S. 1999).

Similarly, EPA's contempt defense (ECF 144 at 15-16) rests entirely on its nonsensical view that, despite this Court holding that OTT use harms were unreasonable and would continue to *increase*, and issuing the mandate immediately, this Court did not specifically and definitively order that such OTT uses be halted. But the *Court stopped the OTT uses when it issued vacatur*, and did so while recognizing that its decision would negatively impact users who had already purchased the technology. *NFFC*, 2020 WL 2901136, *19; ECF 127-1 at 7-12. The Court should also hold EPA in contempt. *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 70, 75 (D.D.C. 2003) ("This Court has the inherent power to protect its integrity and to prevent abuses of the judicial process by holding those who violate its orders in contempt.").

II. EPA DISREGARDED THIS COURT'S ORDER

A. EPA's Action Is Antithetical to the Court's Order.

Inexplicably, EPA argues that its order continuing OTT dicamba use for the 2020 season does not violate the vacatur, or at the "very least … represents substantial compliance." ECF 144 at 18; ECF 146 at 5, 14; ECF 145 at 4-5. The opposite is true: this Court vacated the new uses, issuing its mandate to stop the spraying, and five days later EPA simply reinstated the spraying, in direct contravention. *Supra* 5-12.

From top to bottom, EPA simply disregarded the Court's findings and holdings. ECF 127-1 at 7-12. In "evaluating" the risks of continued OTT new use, EPA acknowledged that "the court found that the labels were difficult to follow," but still concluded without further analysis that use according to its infeasible label is better than unrestricted use, and therefore the order was needed to "prevent unreasonable adverse effects to the environment." Admin Order at 5. But the Court found EPA *completely ignored* "[e]xtensive evidence in the record indicat[ing] that there is a risk of substantial non-compliance with the EPA-mandated label for the 2019 and 2020 growing seasons," and that "[n]on-compliance with the restrictions, of course, will result in dicamba

damage." *NFFC*, 2020 WL 2901136, at *15. EPA cannot claim with a straight face that its order allowing the use to continue under the defective label, which *will result in dicamba damage*, is somehow *preventing* unreasonable adverse risks to the environment and endangered species.[8] Even if its action was procedurally proper, it does not come close to complying with the Court's order regarding the risks of continuing dicamba OTT use.

B. EPA Had Other Lawful Options, But Cannot Simply Allow Continued OTT Uses.

The Court's vacatur and Petitioners' emergency motion to enforce the vacatur are fully consistent with administrative law principles. ECF 144 at 10-11, 13. It is EPA who has acted beyond its authority by attempting to override judicial vacatur with an administrative order greenlighting those same vacated uses running afoul of the Constitution's separation of powers.

[8] Nor is it clear that EPA complied with FIFRA's cancellation provisions. The 12-page order, put together in a few days, nowhere explains how it is (or could be, in light of the Court's decision) supported by the requisite substantial evidence standard for all EPA FIFRA actions. 7 U.S.C. §§ 136a; 136n(b).

The Court simply vacated the OTT new use registrations, which was entirely within the bounds of administrative law and FIFRA, and all it had to do to stop the unlawful action under the Supreme Court's instruction. 7 U.S.C. § 136n(b); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156, 158-59 (2010) (lower court acted lawfully in vacating agency's deregulation decision, but erred in enjoining agency from taking new deregulation action, even in part, until it prepared and Environmental Impact Statement). In each of the cases EPA relies on, ECF 144 at 10-11, the court overstepped its authority and ventured into administrative proceedings. Asking the Court to enforce its vacatur in light of EPA's administrative order that defies it is fully within the Court's powers. *Supra* 13-14.

EPA had lawful options. EPA could have issued a new registration decision, one consistent with this Court's holding, as discussed in *Geertson*. *See* ECF 127-1 at 12. Monsanto admits the same. ECF 146 at 17. It could have asked this Court to recall the mandate, issue a stay, and seek rehearing. But, each of these lawful paths would have put the burden on *EPA* to address the mounds of evidence this Court relied upon in vacating. Instead, EPA chose the most expedient way to

"mitigate" (ECF 127-1 at n.1) the Court's ruling: an administrative order allowing continued use and flipping the burden to Petitioners to stop it.

EPA's order, in effect, exercises judicial power vested solely in the courts: Article III establishes an independent Judiciary, and review of decisions of Article III courts is "off limits" to officials in the Executive Branch and Congress. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016) (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)). Review of a court judgment by the Executive Branch is an unconstitutional restriction on judicial power. *Id.* at 1332 (Roberts, C.J., dissenting) (quoting *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (judgments of Article III courts are "binding and conclusive" on the parties and are not "subject to later review or alteration by administrative action")). "Hamilton warned that the Judiciary must take 'all possible care . . . to defend itself against [the] attacks' of the other branches." *Id.* at 1335 (*quoting* The Federalist No. 78, at 466). This Court should protect its independent authority and hold that EPA cannot override it through an administrative order.

III. THIS IS THE PROPER COURT FOR THIS DISPUTE.

Respondents argue that this motion belongs in district court, in a new case challenging EPA's "separate" action,[9] ECF 144 at 21; ECF 145 at 5-6, but EPA cannot be allowed to use its devious "cancellation order" device to deprive this Court of jurisdiction.

First, this Court has jurisdiction to enforce its mandate, *supra* 13-14, and the administrative order is simply not a proper separate and new action when EPA issued it to override this Court's vacatur. While cancellation orders issued when EPA cancels a pesticide would be their own separate agency actions, that is not the case here: there is nothing to cancel, because the new use registration is null and void. ECF 127-1 at 14, 19 n.8 (just because EPA has done this before when registrations are vacated, past unlawful conduct does not make EPA's attempt to flout the Court's vacatur here lawful). This Court's jurisdiction does not change just because EPA styles its action in a way "clearly calculated so as to evade ordinary appellate review." *Iowa Utilities Bd.*, 135 F.3d at 541; *see also CropLife America v. E.P.A.*, 329 F.3d 876, 883 (D.C. Cir.

[9] Where of course it would be exceedingly difficult, if not impossible, to secure relief in time to prevent most of the illegal spraying EPA has purported to authorize.

2003) ("the agency's characterization of its own action is not controlling if it self-servingly disclaims" that action is judicially reviewable).

EPA's own statements make clear that it is not a separate order, but only action to implement the Court's vacatur. Admin Order (ECF127-3) at 1 ("issued in light of" vacatur order); ECF 144 at 1 (administrative order "fully complied with" and "reinforces" the vacatur order). EPA further argues that vacatur and cancellation are one and the same, *id*. at 5-6, but if EPA is merely implementing vacatur, then EPA cannot *also* claim that this is a separate order that requires review by a whole different court in a whole new challenge. EPA's allowance of spraying through July 31 is much more akin to when EPA amended the label continuing OTT new uses in 2017 with no new analysis. *NFFC v. EPA*, No. 17-70196 (9th Cir. Jan. 22, 2018), ECF 68 (order granting petitioners' motion to amend petition).

Second, and alternatively, even if EPA *were* right, this Court *still* has the authority to enforce its mandate, *supra* 12-14, and can retain jurisdiction to adjudicate the order.[10] *See Ruud v. U.S. Dept. of Labor,*

[10] In that alternative, Monsanto (ECF 146 at 5, 21) claims the Court lacks jurisdiction under 40 C.F.R. § 23.6, but courts may

347 F.3d 1086, 1090 (9th Cir. 2003) (holding "court of appeals should entertain a petition to review an agency decision made pursuant to the agency's authority under two or more statutes, at least one of which provides for direct review in the courts of appeals, where the petition involves a common factual background and raises a common legal question" which "avoids inconsistency and conflicts" and ensures "timely and efficient resolution"). Given that EPA did no further analysis between the June 3 vacatur and its June 8 order, retaining jurisdiction here supports judicial efficiency and avoids duplication, as Congress intended. 7 U.S.C. § 136n(b) (exclusive jurisdiction to Court of Appeals); *Envt'l Defense Fund v. Costle*, 631 F.2d 922, 930-931 (D.C. Cir. 1980).

Finally, Respondents rely on *Geertson*, which is important, but not for the reasons Respondents claim.[11] ECF 144 at 21; ECF 146 at 14;

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disregard the rule to afford litigants "their right to preliminary relief." 50 Fed. Reg. 7268, 7269 (Feb. 21, 1985).

[11] EPA also cites *Greater Boston Television v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), for the proposition that unless a court specifically retains jurisdiction, any subsequent agency order must be subject to its independent appellate process. ECF 144 at 21. Of course, here the Court vacated the registrations without a remand so it is not surprising

ECF 145 at 5. In fact it shows their arguments prove too much and must be wrong. First, Petitioners followed it to the letter: when the less "drastic and extraordinary" remedy of vacatur will redress Petitioners' injuries, it, not injunction, is the appropriate remedy, and that is what Petitioners sought and achieved. 561 U.S. at 165-66. Second, *Geertson* is about an *injunction* being overbroad by attempting to bind an agency from any future new GE seed deregulation (the equivalent of a FIFRA registration but under the Plant Protection Act). *Id.* at 161. Thus Respondents' cries that Petitioners should have sought an injunction are hollow: the application of their argument would result in the *same outcome*: in their view, the Court has no power to stop them. After

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that the Court did not expressly retain jurisdiction. Nevertheless, EPA ignores that the court in *Greater Boston Television* emphasized that "each case calls for an analysis of the statutory system governing the agency." 463 F.2d at 287. FIFRA grants exclusive jurisdiction to the Court of Appeals. And while "the distinctive powers and procedures vested in the administrative agencies must be given due consideration," this "assum[es] adherence to rules of fair play." *Id.* at 281. In *Greater Boston Television*, there was no claim of any misconduct on the part of the agency. *Id.* at 291. Here the "doctrines deeply rooted in equity jurisprudence permit a recall of an appellate mandate of affirmance to avoid an unconscionable injustice growing out of misconduct undercutting the integrity of the administrative or judicial process." *Id.* *See supra* 12-14.

vacatur or an injunction, EPA could go on making a purported "new decision" re-establishing use on their terms. Even if the Petitioners successfully challenged *that*, EPA could just repeat the process, with another "new decision," over and over again, while irreparable harm continued, unabated. That is not the law, nor what *Geertson* holds. The law does not give EPA *carte blanche* to propose a new registration or otherwise address the OTT uses the Court vacated without adhering to "authority vested in the agency by law." *Id.* at 161. Even EPA admits that its discretion "to take future actions" must be "consistent with the Court's vacatur." ECF 144 at 13. That is the point: the administrative order is *wholly inconsistent* with vacatur. EPA can try a new registration, and no doubt, will. But it cannot override this Court's decision in this particular "cancellation" order of vacated new uses.

IV. THE RELIEF PETITIONERS SEEK.

The Court's decision was clear: Both the Court's declination to entertain EPA's "cancellation" route in further briefing, and the Court's unequivocal statements of the results of its remedy decision can only be understood as a rejection of EPA's position that vacatur of the new uses should not halt use.

Thus, there is no purported tension (ECF 146 at 6) between Petitioners' request for clarification/instruction and EPA's contempt: They are reinforcing. The Court's Order was plain; EPA simply refused to acknowledge that conclusion and outcome. EPA went ahead with its tactic, which the Court had already rejected, both in the words of its opinion as well as its denial of EPA's motion for leave to raise it further. Hence the need for clarification, instruction to the agency, and a contempt finding.

The relief Petitioners now seek is well within the Court's discretion, in the form it deems most appropriate. ECF 1-6 (Petition for review, including request the Court "grant relief as may be appropriate"). Federal courts have "broad latitude in fashioning equitable relief" as "necessary to remedy an established wrong." *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (""The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."") (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

This could be re-iterating the vacatur remedy for EPA, confirming that EPA's misapplication of it is incorrect: The registration the Court immediately vacated was only the OTT new uses, not other registered uses of the products. The Court's remedy was not to allow *unbridled* use, but to *prohibit* the harmful use at issue.

It could also take the form of declaratory relief, establishing the Court's holdings and their import. That the OTT new uses were *vacated* not cancelled, and that cancellation is inapposite to this context. And that while EPA *can* take subsequent action with regards to these new uses, such as a new registration, it must be *consistent* with the Court's opinion. And that this "cancellation" order, based on a contortion of the decision's remedy, completely ignoring its findings and holdings, and purporting to re-establish harmful use, without making any new registration decision, violates the Court's order. *Supra* 15-16.

This is precisely declaratory relief's purpose, to "clarify and settle the legal relations at issue" and to "afford relief from the uncertainty and controversy giving rise to the proceedings." *E.g.*, *NRDC v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992) (declaratory relief "delineates important rights and responsibilities" to the parties "but also to the public" with

"significant educational and lasting importance") (and further citations therein); *United States v. Washington*, 759 F.2d 1353, 1365 (9th Cir. 1985) (similar rationale, affirming "the mechanism of declaratory relief" to "resolve the environmental issue" where it would "advance the interests of the parties"). Courts presume litigants will act in accord with declaratory judgments, even though such judgments are non-coercive. *Steffel v. Thompson*, 415 U.S. 452, 468-470 (1974). Moreover, in *Rincon Band of Mission Indians*, 618 F.2d 569 (9th Cir. 1980), the Ninth Circuit affirmed the district court's grant of declaratory relief, and explicitly recognized that if further relief should become necessary at a later point, the court has the power to grant supplemental relief, including even injunctive relief, pursuant to "the inherent power of the court to give effect to its own judgment" as well as the Declaratory Judgment Act. *Id.* at 575 (citing *Terry v. Adams*, 345 U.S. 461 (1953); *Powell v. McCormack*, 395 U.S. 486 (1969). Injunctive relief should not be necessary here, but to be sure the Court has the power to issue it.

CONCLUSION

The Supreme Court said just this morning that "the Government should turn square corners in dealing with the people," not "cut[] corners." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 17 (2020). EPA did not just cut a regulatory street corner here; it drove right through the Court's stop sign. As in *Regents*, the "basic rule here is clear," *id.*: EPA's action had to be consistent with this Court's decision, and it was not. For these reasons Petitioners respectfully request the Court grant their Motion.

Respectfully submitted this 18th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief contains 5,449 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ George A Kimbrell

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