No. 19-70115

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,

and

MONSANTO COMPANY, *et al.*,
Intervenors-Respondents.

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

MOTION OF AMERICAN FARM BUREAU FEDERATION, AMERICAN SOYBEAN ASSOCIATION, NATIONAL COTTON COUNCIL OF AMERICA, NATIONAL ASSOCIATION OF WHEAT GROWERS, NATIONAL CORN GROWERS ASSOCIATION, AND NATIONAL SORGHUM PRODUCERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONS FOR REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 29(b) and Ninth Circuit Rule 29-2, the American Farm Bureau Federation, American Soybean Association, National Cotton Council of America, National Association of Wheat Growers, National Corn Growers Association, and National Sorghum Producers (together, "the Growers") respectfully request leave to file the attached amicus curiae brief in support of the Petitions for Rehearing En Banc filed by Intervenors-Respondents Monsanto Company, BASF Corporation, and E.I. du Pont de Nemours and Company. The proposed amicus brief is attached as Exhibit 1. In support of this Motion, the Growers state as follows:

1. The Growers are six national trade associations that represent farmers, ranchers, and their families nationwide. The Growers' soybean, corn, wheat, sorghum, cotton, and other crops provide the United States and the world with food, fuel, feed, and fiber.

2. Founded in 1919, the American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents nearly six million member families through its state and county Farm Bureau organizations in all 50 states and Puerto Rico.

3. Founded in 1920, the American Soybean Association ("ASA") is a national, private, not-for-profit trade association representing U.S. soybean growers

on domestic and international issues of importance to the soybean industry. ASA represents the interests of more than 300,000 soybean farmers nationwide.

4. Founded in 1938, the National Cotton Council of America ("NCC") is the trade association for the U.S. cotton industry, representing the seven segments of the raw cotton industry: producers, ginners, warehousers, merchants, cottonseed processors and merchandisers, cooperatives, and textile manufacturers. NCC's mission is to ensure the ability of all U.S. cotton segments to compete effectively and profitably in the raw cotton, oilseeds, and manufactured textile product markets at home and abroad.

5. In 1950, a handful of wheat growers from across the country formed the National Association of Wheat Growers ("NAWG") to work toward common solutions and make decisions for the future of America's wheat producers. Decades later, the NAWG continues to focus on the policies of the U.S. government that affect the livelihoods of U.S. wheat producers as the primary representative in Washington, D.C. for wheat growers, working with a team of 20 state wheat grower organizations to benefit America's wheat producers.

6. Founded in 1957, the National Corn Growers Association is the trade association for U.S. corn growers. It represents the interests of more than 300,000 corn growers and works with 49 affiliated state organizations to create and increase opportunities for corn growers.

7. Founded in 1955 to increase demand for grain sorghum, National Sorghum Producers became the voice of the sorghum industry. For over 60 years, National Sorghum Producers has represented sorghum farmers nationwide on legislative and regulatory issues impacting the sorghum industry, and its mission is to lead positive change for sorghum farmers through effective policy and relationships.

8. Growers have direct and immediate interests in the Panel Opinion's vacatur of the registrations of the Dicamba Products. In particular, the Panel Opinion adversely affects the predictability, efficiency, and sustainability of Growers' farming operations and their ability to rely on predictable and science-based regulatory decision-making and governmental oversight.

9. If left undisturbed, the Panel Opinion's unprecedented weakening of Rule 15(a)(2)(C)'s notice requirement would leave the Growers and other interested parties guessing as to whether an administrative order is subject to invalidation on judicial review.

10. Likewise, the Panel Opinion's misconception and misapplication of FIFRA's substantial evidence standard conflicts with existing law and jeopardizes the Growers' ability to rely on predictable and expertise-driven regulatory decisions.

11. The Growers' first-hand experience places them in a unique position to provide the Court with helpful practical information about the importance of these legal issues.

12. Counsel for amici curiae attempted to obtain consent from all parties before filing this motion. Respondent EPA and Intervenors-Respondents Monsanto Company, EID, and BASF all consent to the filing of the brief. Petitioners have advised the undersigned that they take no position on the motion.

13. Accordingly, the Growers respectfully request leave to file the amicus curiae brief attached to this motion.

Respectfully submitted,

s/ Edmund S. Sauer
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1), this motion has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, and contains 676 words.

Dated: July 30, 2020

s/ Edmund S. Sauer
Edmund S. Sauer

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

s/ Edmund S. Sauer
Edmund S. Sauer

EXHIBIT 1

No. 19-70115

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BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION, AMERICAN SOYBEAN ASSOCIATION, NATIONAL COTTON COUNCIL OF AMERICA, NATIONAL ASSOCIATION OF WHEAT GROWERS, NATIONAL CORN GROWERS ASSOCIATION, AND NATIONAL SORGHUM PRODUCERS IN SUPPORT OF THE PETITIONS FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the American Farm Bureau Federation, American Soybean Association, National Cotton Council of America, National Association of Wheat Growers, National Corn Growers Association, and National Sorghum Producers state that none of them has a parent corporation, nor does any publicly held corporation own 10% or more of the stock of any of them.

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INTEREST OF AMICI CURIAE[1]

These *amici*—the American Farm Bureau Federation, American Soybean Association, National Cotton Council of America, National Association of Wheat Growers, National Corn Growers Association, and National Sorghum Producers (together, "the Growers")—are national trade associations that represent farmers, ranchers, and their families nationwide. The Growers' crops—which include soybeans, cotton, corn, wheat, and sorghum—provide the United States and the world with food, fuel, feed, and fiber.

Decades of progress in agricultural biotechnology and farm management have given Growers the ability to increase production in order to meet rising global demand and food-security needs. Agricultural innovation and advancements in biotechnology are essential to meeting the needs of a world population projected to reach ten billion by 2050.[2]

Growers have a direct and immediate interest in the continued availability of the three dicamba herbicides at issue in this case: XtendiMax, Engenia, and FeXapan

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[1] This brief is submitted with a motion for leave under Circuit Rule 29-2. Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Fed. R. App. P. 29.

[2] *See* Chris Clayton, *Future Global Food Gap Remains*, Progressive Farmer (Oct. 16, 2019), https://www.dtnpf.com/agriculture/web/ag/news/article/2019/10/16/ag-productivity-gains-needed-meet.

(collectively the "Dicamba Products"). Growers in numerous states use the Dicamba Products on soybean and cotton crops that have been genetically engineered to be resistant to dicamba. The "over-the-top" dicamba-tolerant technology is critical for Growers—it arms them with the tools they need to meet a pressing challenge to their soybean and cotton crops: weeds that are resistant to glyphosate.

The Panel Opinion's vacatur of the registrations of the Dicamba Products and *sua sponte* issuance of its mandate "forthwith" sent shockwaves through American agriculture. The widespread uncertainty and confusion[3] that followed occurred during the worst possible time for American farmers—right in the middle of the growing season. Several state agricultural commissioners captured the sentiment in farm country. In Minnesota, Agriculture Commissioner Thom Petersen called the vacatur "very untimely for our farmers as many had already purchased the herbicide for this growing season . . . [t]iming is critical for farmers to apply the products."[4] Missouri's Director of Agriculture concluded that "[a]n overnight decision making this tool illegal is not something that should be done mid-growing season."[5] The

[3] Bill Spiegel, *To Spray or Not: Confusion Reigns Over Dicamba Ruling*, Successful Farming (June 5, 2020), https://www.agriculture.com/news/crops/confusion-reigns-over-dicamba-ruling.
[4] *MDA Announces Changes in Use of Dicamba Herbicide*, Minnesota Department of Agriculture (June 8, 2020), https://www.mda.state.mn.us/mda-announces-changes-use-dicamba-herbicide.
[5] *Department of Agriculture Issues Statement on Dicamba Status*, Missouri Department of Agriculture (June 5, 2020), https://agriculture.mo.gov/news/newsitem/uuid/48dc40af-e9b4-4f88-a496-879a0edfe0b8.

Texas Agriculture Commissioner stated that the vacatur and mandate created "very significant confusion and chaos among soybean and cotton growers and applicators . . . who were *intending to apply the herbicide today, tomorrow and over the coming weeks*."[6]

While the EPA mitigated some of these effects with its June 8, 2020 Final Cancellation Order of Three Dicamba Products ("Cancellation Order"),[7] the Panel Opinion created a cloud of uncertainty and concern as to the legal status of the use of the Dicamba Products.[8] Due to these uncertainties, Growers have faced significant constraints and pressures in deciding whether and when to apply the Dicamba Products.[9]

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[6] *Statement from Texas Agriculture Commissioner Sid Miller on Ninth Circuit Ruling on Dicamba Registration*, Texas Department of Agriculture (June 4, 2020), https://www.texasagriculture.gov/NewsEvents/NewsEventsDetails/tabid/76/Article/6057/STATEMENT-FROM-TEXAS-AGRICULTURE-COMMISSIONER-SID-MILLER-ON-NINTH-CIRCUIT-RULIN.aspx (emphasis added).

[7] Among other things, the Cancellation Order authorized limited use of Dicamba Products (through July 31, 2020) that had been packaged, labeled, and released for shipment prior to the date of the vacatur.

[8] This uncertainty resulted from: (i) Petitioners publicizing threats against users of the Dicamba Products ("users that continue to not seek alternatives [to the Dicamba Products] should be on notice that they are using a harmful, defective, and unlawful product," *Statement on EPA's Dicamba Cancellation Order*, Center for Food Safety (June 8, 2020), https://www.centerforfoodsafety.org/press-releases/6034/statement-on-epas-dicamba-cancellation-order); (ii) Petitioners filing an emergency motion with the Court urging the Panel to overrule the Cancellation Order and immediately ban the use of the Dicamba Products (Doc. No. 127-1); and (iii) the potential for legal challenges by Petitioners or others to the Cancellation Order in a different venue.

[9] Under normal circumstances, growers apply the Dicamba Products based on

The Panel Opinion affects the predictability, efficiency, and sustainability of Growers' farming operations and their ability to rely on predictable and science-based regulatory decision-making and governmental oversight. If left undisturbed, the Panel Opinion's unprecedented weakening of Rule 15(a)(2)(C)'s notice requirement would leave Growers and other members of the public guessing as to whether an administrative order is subject to invalidation on judicial review. Likewise, the Panel Opinion's misconception and misapplication of FIFRA's substantial evidence standard directly conflicts with existing law and jeopardizes Growers' ability to rely on predictable and expertise-driven regulatory decisions. The Court should grant en banc review to address and resolve these important issues.

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factors such as growth cycle, levels of weed infestation, weather (e.g., rain and wind), and other factors. In many cases, growers legally cannot apply product if the label prohibits application during certain conditions. In 2020, if a grower waited even a day or two for legal clarity, they may have missed a narrow window of opportunity to apply the Dicamba Products that would be later foreclosed due to rain, wind, or other factors. Some growers may have decided to apply the Dicamba Products earlier than they would have preferred for fear of a negative court ruling—thus risking a late season weed infestation that could negatively impact crop yields.

ARGUMENT

I. THE COURT SHOULD GRANT EN BANC REVIEW TO ENSURE THAT AFFECTED PARTIES RECEIVE TIMELY NOTICE OF JUDICIAL CHALLENGES TO ADMINISTRATIVE ORDERS.

A. Federal Law Guarantees Interested Parties The Right To Receive Timely Notice Of And An Opportunity To Comment On Judicial Challenges To Agency Orders.

Due process is a fundamental requirement of American law. It ensures that interested parties receive notice of threatened state action and have "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotations omitted).

These important due process protections are embodied in Federal Rule of Appellate Procedure 15, which governs judicial review of agency orders. Rule 15(a)(2)(C) in particular provides that any petition for review of an agency order must "specify the order or part thereof to be reviewed."

Rule 15(a)(2)(C)'s specification requirement promotes finality, certainty, and predictability. It guarantees that parties to an administrative proceeding and others having a direct property interest in the agency order know whether an administrative determination is final or under judicial review. For example, BASF and EID cogently explain in their petitions for rehearing en banc why they were entitled to—and deprived of—notice that their registrations were being challenged in court and would be adjudicated in this appeal.

The importance of Rule 15(a)(2)(C)'s specification requirement, however,

extends far beyond those parties with immediate license or registration interests at stake. Because federal agencies frequently address and resolve important national policy issues through administrative orders, the validity of those orders frequently and substantially affects countless other members of the public as well.

For example, farmers purchase and use numerous FIFRA-registered pesticide products, including herbicides, insecticides, and fungicides. They make planting decisions and significant, up-front financial investments—totaling in the billions of dollars each year—based on the rules, regulations, and administrative orders in place at the time plans are made. Farmers (like many other market participants) depend on certainty and finality in making those decisions—they need to know the availability of certain products and whether those products might be declared unlawful in a subsequent judicial proceeding.

Here, in the 2020 growing season, soybean and cotton farmers planted an estimated 64 million acres of dicamba-tolerant crops.[10] Growers invested billions of dollars[11] to purchase dicamba-tolerant seeds and hundreds of millions of dollars in

[10] *See* Emily Unglesbee, *Soybean Decisions*, The Progressive Farmer (Oct. 17, 2019), https://www.dtnpf.com/agriculture/web/ag/crops/article/2019/10/17/review-herbicide-tolerant-soybean (estimating 54 million acres); National Cotton Council Letter to EPA, Attached as Ex. 4 to Growers' Amicus Brief on Petitioners' Emergency Motion at 1 (estimating 9.630 million acres).

[11] University of Missouri Extension, *Southeast Missouri Crop Budget*, https://extensiondata.missouri.edu/CountyPages/Scott/CropBudgets/Soybeans-RR-Extend.pdf (pricing dicamba-tolerant soybean seeds at $62/acre).

dicamba herbicides.[12] Combined with additional massive investments in fertilizer, farm machinery and equipment, and labor (among others), growers entered the 2020 growing season with billions invested and borrowed, and with their livelihoods on the line.[13]

Rule 15(a)(2)(C)'s specification requirement ensures that these stakeholders receive notice of any judicial challenge to administrative decisionmaking. This notice enables interested parties to intervene within 30 days of the petition's filing as Rule 15(d) explicitly requires, giving them an opportunity to be heard at a

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[12] American Soybean Association Letter to EPA, Attached as Ex. 3 to Growers' Amicus Brief on Petitioners' Emergency Motion at 1; University of Georgia, *Cotton Budgets*, https://agecon.uga.edu/extension/budgets.html (estimating cost of Xtendimax at $11.00/acre per application, for two applications).

[13] Moreover, soybean and cotton growers faced an already tenuous economic situation due to other factors, including ongoing trade tensions with China and the COVID-19 global pandemic. Since 2018, loss of market access in China caused cotton futures prices to fall from the mid-$0.90s in June 2018 to the upper-$0.50s in August 2019 and soybean prices to fall from $10.39 per bushel in May 2018 to $8.68 per bushel in June 2020. National Cotton Council, *The Economic Outlook for U.S. Cotton* 41 (2020), https://www.cotton.org/econ/reports/upload/20annmtg_FullVersion_Final.pdf and *Soybeans*, Business Insider, https://markets.businessinsider.com/commodities/soybeans-price. The COVID-19 pandemic caused livestock producers to reduce herd sizes, which led to a fall in demand for soymeal and a reduction in soybean prices. Christopher Walljasper, *Grains—Soybeans Fall Further on Coronavirus Demand Risks*, Successful Farming (Apr. 14, 2020), https://www.agriculture.com/markets/newswire/grains-soybeans-fall-further-on-coronavirus-demand-risks-0. The pandemic also caused a collapse in cotton demand, resulting in impacts across the cotton industry. *Cotton: COVID-19 Spurs Record Downward Adjustments to Global Demand*, AgFax (Apr. 17, 2020), https://agfax.com/2020/04/17/cotton-global-markets-covid-19-spurs-record-downward-adjustments-to-demand/.

meaningful time—*i.e.*, before the validity of the order is adjudicated. Even beyond participation, the required notice gives interested members of the public, including downstream consumers and other market participants, important information that is critical to make fully informed decisions, many of them on a daily basis.

To protect these interests in certainty, finality, and predictability, federal courts have strictly interpreted Rule 15(a)(2)(C)'s specification requirement. Although this Court has not previously addressed Rule 15(a)(2)(C), other federal circuits have consistently held that courts lack jurisdiction to consider agency orders that are not specifically designated in a petition for review. *See, e.g.*, *LaRouche's Comm. for a New Bretton Woods v. F.E.C.*, 439 F.3d 733, 739 (D.C. Cir. 2006) (holding that court lacked jurisdiction to consider order denying motion to reconsider because order was not specified in petition); *Sw. Bell Tel. Co. v. F.C.C.*, 180 F.3d 307, 313 (D.C. Cir. 1999) (holding that undesignated underlying order was unreviewable even though petition specifically appealed order denying reconsideration); *Gottesman v. U.S. I.N.S.*, 33 F.3d 383, 388 (4th Cir. 1994) (holding that petition designating preliminary order in administrative proceeding did not effectively bring up for review separate order).

Courts have correctly recognized that, under Rule 15(a)(2)(C), it does not matter if the petition designates another order within the same administrative proceeding as the undesignated order. For a court to exercise jurisdiction over an

order, the petition must "specific[ally]" designate it. *See, e.g.*, *Vill. of Barrington, Illinois v. Surface Transp. Bd.*, 892 F.3d 252, 266-67 (7th Cir. 2018) (holding that court lacked jurisdiction to consider order not designated in petition even though other related orders in same administrative proceeding were designated); *Small Bus. in Telecomm'ns v. F.C.C.*, 251 F.3d 1015, 1022 (D.C. Cir. 2001) (same); *John D. Copanos & Sons, Inc. v. Food & Drug Admin.*, 854 F.2d 510, 527 (D.C. Cir. 1988) (same).

Nor is it sufficient for the petition to mention the order sought to be appealed without specifically designating that order for appeal. *See, e.g.*, *Ogunbode v. Barr*, 780 F. App'x 628, 633 (10th Cir. 2019) (holding that references to order denying motion fell short of giving required notice that petitioner was seeking review of that order under Rule 15); *Entravision Holdings, LLC v. F.C.C.*, 202 F.3d 311, 314 (D.C. Cir. 2000) (holding that undesignated underlying order was unreviewable even though petition specifically appealed order denying reconsideration and mentioned the underlying order).

Rather, Rule 15(a)(2)(C)'s "plain language," *John D. Copanos & Sons, Inc.*, 854 F.2d at 527, requires petitioners to specify with particularity in the petition the order that is being challenged so that all interested parties know that the order itself is under review. Confusion and uncertainty would abound if Rule 15(a)(2)(c) allowed litigants or reviewing courts to expand the scope of judicial review beyond

the designated order to encompass other seemingly final and unappealed agency decisions.

Of course, courts do not apply Rule 15(a)(2)(C)'s specification requirement in an unnecessarily formalistic way. A mistaken or inexact specification may be effective "if the petitioner's intent to seek review of a specific order can be fairly inferred from the petition for review or from other contemporaneous filings, and the respondent is not misled by the mistake." *Entravision Holdings, LLC,* 202 F.3d at 313.

For example, a federal court exercised jurisdiction over an undesignated order even though the petition mistakenly designated a subsequent order denying rehearing because documents filed contemporaneously with the petition made the petitioner's intentions clear. *See Martin v. F.E.R.C.*, 199 F.3d 1370, 1372–73 (D.C. Cir. 2000). Exercising jurisdiction was proper in that case because the petitioner contemporaneously filed both a motion to stay the underlying order pending appeal and a docketing statement indicating an intention to challenge the underlying order, and "the agency was aware from the outset that [petitioner] meant to seek review of the [underlying order.]" *Id.*; *accord Am. Rivers v. Fed. Energy Regulatory Comm'n*, 895 F.3d 32, 44 (D.C. Cir. 2018) (review proper where petitioner's intent to appeal order was obvious given contemporaneous motion to consolidate, docketing statement, statement of issues, and underlying decisions attached to the appeal).

But this application of Rule 15(a)(2)(C)'s specification requirement is strictly and properly limited to circumstances where filings contemporaneous with the petition itself clearly and objectively convey an intention to challenge the undesignated order. Accordingly, a party's merits brief is too late to make the requisite designation. *See, e.g.*, *LaRouche's*, 439 F.3d at 739 (holding that exception was inapplicable because contemporaneous filings did not objectively indicate intention to appeal order denying motion to reconsider even though briefing did); *Sw. Bell Tel. Co.*, 180 F.3d at 313 (same). Likewise, a motion or other filing weeks or months after the petition is filed is too late. *See, e.g.*, *Small Bus. in Telecomm'ns*, 251 F.3d at 1022 (holding that motion filed four months after petition is too late to correct deficiency in petition).

B. The Panel Opinion Conflicts With Case Law In Other Circuits And Injects Jurisdictional Uncertainty Into An Important Area Of The Law Needing National Uniformity.

The Panel Opinion is the first in this Circuit to address and apply Rule 15(a)(2)(C)'s specification requirement. Its approach, however, cannot be squared with Rule 15(a)(2)(C)'s plain language, its underlying purpose, or existing case law. The Court should grant en banc review and adopt an approach that is faithful to Rule 15(a)(2)(C) and consistent with existing law. National uniformity is needed on this important jurisdictional issue and the Court should grant review here to restore it.

Like BASF and EID, America's farmers were not given the required notice

that the registration orders for Engenia and FeXapan were being challenged in this action. The EPA's registration order is the "final disposition" of the adjudicatory process that permits the sale or distribution of a pesticide product. 5 U.S.C. § 551(6). That registration order is the final agency action for purposes of judicial review. *See* 5 U.S.C. § 551(13); 7 U.S.C. § 136n(b). Thus, to challenge the registrations for XtendiMax, Engenia, and FeXapan, Petitioners were required to designate in their petition the registration orders for those products.

Petitioners, however, did not do so. Instead, they designated an agency decision document that was issued *before* the three registration orders were separately issued. That designated document does not constitute final agency action subject to judicial review. An action is generally final only if it both (1) "mark[s] the consummation of the agency's decisionmaking process" and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotations omitted). The document designated here did neither. It did not end the EPA's decisionmaking process—it was simply one step in the administrative process that ultimately terminated in reviewable registration orders. Nor did it authorize the distribution or sale of any product or conclusively determine any other legal rights. Consequently, Petitioners' designation of the EPA's nonfinal October 31 document was insufficient to confer jurisdiction over the subsequent registration orders. *See City of Benton v.*

Nuclear Regulatory Comm'n, 136 F.3d 825–26 (D.C. Cir. 1998) (holding that petition's designation of agency decision document issued approximately one week before final order did not satisfy Rule 15(a)(2)(C) even though the petitioner's docketing statement mentioned and attached copy of final order).

Despite Petitioners' failure to designate any of the registration orders, the parties appear to agree that, under the body of law discussed above, Petitioners' intent to challenge the XtendiMax registration "can be fairly inferred from the petition for review [and] from other contemporaneous filings." *Entravision Holdings, LLC,* 202 F.3d at 313. But while it is possible that the petition gave notice of Petitioners' intention to challenge XtendiMax's registration, it did not give notice of any intention to challenge the separate and distinct registrations for Engenia and FeXapan.

The petition cited EPA's regulatory docket for the XtendiMax registration (EPA-HQ-OPP-2016-0187-0968) and Petitioners' prior XtendiMax petition for review. Doc. No. 1-6. And the petition invoked the Court's prior order in No. 17-70196, which involved the EPA's 2016 XtendiMax registration and the 2017 amendment. Doc. No. 1-6 at 2. But the petition nowhere expressly or implicitly identifies any pesticide registration or regulatory docket other than XtendiMax. Consequently, any reasonable observer would infer an objective intention not to appeal the two undesignated registrations for Engenia and FeXapan.

Moreover, throughout the course of this litigation, Petitioners repeatedly reaffirmed that XtendiMax was the sole product that they were challenging. For example, shortly after the petition was filed, the EPA moved for a stay in light of a lapse in appropriations. Petitioners' opposition brief identified only "Monsanto's dicamba pesticide" and "Monsanto's XtendiMax." Doc. No. 8 at 2, 6. And when the EPA prepared and filed the administrative record of the XtendiMax registration only, and *not* the separate administrative records for Engenia and FeXapan, Petitioners never objected or otherwise indicated an undesignated intention to challenge those other two products. *See* Doc. No. 34-2 at 1–2.

It was not until months later in merits and post-argument letter briefing that Petitioners first indicated their desire to challenge Engenia and FeXapan. Under the uniform body of law collected above, those briefs are ineffective to confer jurisdiction because they are "plainly not . . . contemporaneous filing[s]." *Small Bus. in Telecommc'n*, 251 F.3d at 1022.

Despite these failings, the Panel Opinion ultimately found that it could still exercise jurisdiction over all three registration orders simply because Petitioners attached the October 31 decision document to their petition. But again, that decision document was not the final and appealable agency action as to any of the three registrations. And while a charitable reading of the petition's indirect references to XtendiMax may give rise to an inference that the petition sought to challenge that

product's registration, the petition made no comparable references to Engenia or FeXapan. Again, the fact that the petition referenced only one product manifests an objective intention not to challenge the other two.

If Petitioners wanted to challenge the registrations for Engenia or FeXapan, Rule 15(a)(2)(C) required them to give notice of their intention to do so by specifically designating those registration orders in their petition. At the very least, Petitioners needed to refer to those products in their petition or a contemporaneously filed document in a way making such an intention clear. Because Petitioners did neither, the Court lacks jurisdiction.

The Panel Opinion's novel interpretation of Rule 15(a)(2)(C)'s jurisdictional protection is problematic for another reason. Even if the petition effectively challenged the registrations for Engenia or FeXapan, this Court still would not have jurisdiction to reach those distinct registrations. FIFRA only gives federal circuit courts jurisdiction to review EPA "order[s] issued . . . following a public hearing." 7 U.S.C. § 136n(b). The EPA did not conduct any public hearing on the Engenia and FeXapan registrations. Thus, any challenge to those registrations must have been brought in the district court, not the court of appeals. 7 U.S.C. § 136n(a). This additional defect further demonstrates why BASF, EID, Growers, and countless others could reasonably think that the Engenia and FeXapan registrations were not put at issue—this Court did not even have jurisdiction to consider them.

C. The Court Should Grant En Banc Review To Clarify And Reaffirm Interested Parties' Rights To Receive Notice Of And An Opportunity To Comment On Judicial Challenges To Administrative Orders.

The Panel Opinion's conflicting interpretation of Rule 15(a)(2)(C)'s jurisdictional requirement is untethered to the rule's text and purpose and creates an unnecessary circuit split. Rule 15 requires that the petition "specify the order or part thereof to be reviewed." Fed. R. App. P. 15(a)(2)(C). The petition did not "specify" the registrations for Engenia or FeXapan in any way. Under prevailing law, that jurisdictional defect prevents the Court from invalidating those registrations.

The Panel Opinion's conflicting approach obstructs predictable and efficient review of administrative orders. It also introduces untenable jurisdictional uncertainty in an area of the law that requires national uniformity. Interested parties like Growers and the market in general need to know—for sure—whether an administrative order is final or subject to further judicial review. That critical information is necessary for parties to make countless decisions, including what pesticide Growers should use on their crops.

Like the pleadings in this case, news reports repeatedly indicated that this appeal challenged the XtendiMax registration only.[14] There was no mention of

[14] *See, e.g.*, Emily Unglesbee, *Dicamba Under Scrutiny*, The Progressive Farmer (Feb. 14, 2018), https://www.dtnpf.com/agriculture/web/ag/crops/article/2018/02/14/lawsuit-demands-epa-vacate-dicamba (identifying only Monsanto's XtendiMax as subject to the instant matter); Emily Unglesbee, *Dicamba Lawsuit*

Engenia or FeXapan or any other product. Consequently, amici's members—and countless other parties—reasonably could have believed that those products were not at issue and that their registrations were finally approved.

The Court should grant en banc review and restore the uniform view holding that Rule 15(a)(2)(C) prevents courts from expanding the scope of an administrative appeal beyond the order "specific[ally]" designated in the petition for review.

II. The Panel Opinion's Failure To Properly Apply FIFRA's "Substantial Evidence" Standard Further Warrants En Banc Review.

The Court should also grant en banc review to disavow the Panel Opinion's misconception and misapplication of FIFRA's "substantial evidence" standard. Under FIFRA, reviewing courts must sustain a registration so long as "it is supported by substantial evidence when considered on the record as a whole." 7 U.S.C. § 136n(b). That standard, the Supreme Court recently reiterated, "is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). "It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotations omitted).

Setback, The Progressive Farmer (Jan. 14, 2019), https://www.dtnpf.com/agriculture/web/ag/crops/article/2019/01/14/ninth-circuit-dicamba-battle-likely (same). Indeed, Petitioners themselves only referred to Monsanto's XtendiMax product in a press release issued on February 12, 2018 related to this litigation. *See Farmers, Conservationists Challenge Trump's EPA, Monsanto over Crop-Damaging Pesticide*, Center for Food Safety (Feb. 12, 2018), https://www.centerforfoodsafety.org/press-releases/5255/farmers-conservationists-challenge-trumps-epa-monsanto-over-crop-damaging-pesticide.

Although the Panel Opinion cites the "substantial evidence" standard, it does not apply that standard appropriately. Rather, the Panel Opinion simply substitutes its own judgment for the EPA's and vacates all three registrations without affording the EPA's fact-intensive findings or expertise any deference.

Growers share the concerns that BASF, EID, and Monsanto express about the Panel Opinion's precedential effects and the need for en banc review. FIFRA does not dictate precisely what costs and benefits the EPA must expressly consider in making its registration decisions or how it must balance them. Nor does FIFRA authorize this Court to cherry pick certain evidence, ignore conflicting evidence, and simply reweigh the EPA's balancing of the broad statutory factors.

The Panel Opinion faults the EPA for not expressly considering the alleged harm to the "social fabric" of farming communities from crop-damage disputes and the purported economic effects of farmers feeling coerced into buying dicamba-tolerant seeds. It is not clear how those "costs" fall within FIFRA's scope of review as opposed to other bodies of law, namely tort and antitrust. In any event, if FIFRA registrations could be vacated whenever a court found a purported cost that the EPA did not expressly consider, then numerous agency decisions would be subject to invalidation. This uncertainty would substantially undermine Growers' legitimate reliance on the EPA's ability to make science-based determinations without undue and unpredictable judicial invalidation.

CONCLUSION

For these reasons, the Court should grant en banc review.

Dated: July 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29(b) and 32, and Ninth Circuit Rule 29-2, this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, and contains 4,199 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: July 30, 2020

s/Edmund S. Sauer
Edmund S. Sauer

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

s/Edmund S. Sauer
Edmund S. Sauer