

No. 19-70115

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

v.

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

and

**MONSANTO COMPANY,**  
*Intervenor-Respondent.*

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ON PETITION FOR REVIEW FROM THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

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**INTERVENOR-RESPONDENT MONSANTO COMPANY'S BRIEF IN  
SUPPORT OF EPA'S MOTION FOR LEAVE TO FILE RESPONSE TO  
PETITIONERS' LETTER BRIEF**

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On April 29, 2020, this Court requested simultaneous briefs from all parties addressing which registration order (or orders) are at issue in this suit. Petitioners' letter brief exceeds that mandate. In addition to addressing the scope of their challenge, Petitioners raise a brand new request for relief: They ask the Court to issue "a per curiam order granting the petition and vacating the registration, *halting any sale and use of these pesticide products*, and notifying the parties that the Court's reasons will be more fully explained in a forthcoming opinion." ECF No. 115-1 at 10 (emphasis added). Monsanto supports EPA's motion for leave to respond to this last-minute request, and agrees with EPA that the request is inappropriate.

To start, Monsanto agrees with EPA that Petitioners' request is procedurally improper. After four years of litigation about the 2016 and 2018 Registrations of XtendiMax, the merits of the most recent registration order are now pending before the Court. Having reviewed and made its own independent assessment of numerous registrant and academic studies, EPA imposed new conditions in the 2018 Registration that address *all* of the suggested causes of off-target movement. Monsanto believes this Court should conclude that EPA more than satisfied the requirements of FIFRA and the ESA, and that if the Court finds that EPA fell short in any respect it should order an appropriately tailored remedy, informed by supplemental briefing. Petitioners of course disagree on all counts. But, regardless of the outcome of those disputes, it is far too late for Petitioners suddenly to ask this

Court to take the extraordinary step of deciding this complex case (which also presents serious jurisdictional issues) in their favor in summary fashion with reasoning to follow.

The Court has taken that approach only in extreme circumstances requiring urgent action. Having never sought a stay of either registration order in the course of four years of litigation spanning three (now going on four) growing seasons, Petitioners cannot credibly insist that the circumstances here require such extraordinary relief. The record demonstrates that XtendiMax has assisted growers in addressing a significant nationwide weed resistance problem, and soybean and cotton yields have hit record highs nationwide during this litigation. Monsanto Br. at 9-10. To the extent Petitioners believed that, regardless, equity demands an immediate halt to all sale and use of this pesticide, they had every opportunity to seek that extraordinary remedy by motion or timely prayer for relief. But they had no legitimate grounds to smuggle such a request belatedly into their letter brief, as it was not even remotely responsive to the Court's question about which registration orders are properly before it in this case.

Monsanto also agrees with EPA that Petitioners' request for an order immediately halting all sales and uses of the pesticide invites legal error and potentially disastrous real-world impacts. Petitioners and EPA disagree about the legal effect of a vacatur of the 2018 Registration and about EPA's authority in the

wake of a vacatur to regulate future sales, distributions, and uses of the pesticide. Monsanto agrees with EPA that if the 2018 Registration were vacated “end users would be free to use their remaining stocks.” ECF No. 115-1 at 7. Monsanto further agrees that, if the Court vacates, EPA would retain authority to craft an appropriate order addressing existing stocks. 7 U.S.C. § 136d(a)(1); *see also id.* § 136k (granting EPA authority to stop sales). But regardless, these questions—what uses, if any, are lawful following vacatur, and the extent of EPA’s post-vacatur authority—are beyond the scope of the dispute in this case.

To the extent Petitioners are asking this Court to issue an order that preemptively decides those questions and constrains EPA’s post-decision authority, they invite additional error. The parties disagree on the proper remedy (remand versus partial or full vacatur) if the Court finds a deficiency in the registration. But if the Court were to vacate the 2018 Registration, it should do just that and nothing more. Jurisdiction would then return to EPA to determine whether and how to respond to the Court’s order in light of existing circumstances. Any court order addressing the lawfulness of future uses would be premature. And any court order prejudging EPA’s remedial authority or otherwise limiting the agency’s discretion *ex ante* would be invalid for the very same reason as the injunction that the Supreme Court overturned in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (vacating injunction against future agency action obtained by Center for Food

Safety); *see also* *Immigration & Naturalization Serv. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (explaining that “judicial judgment cannot be made to do service for an administrative judgment” and that an “appellate court [cannot] intrude upon the domain which Congress has exclusively entrusted to an administrative agency” (citations omitted)).

In addition to inviting legal error, Petitioners’ requested relief invites imprudence because EPA (*but not this Court*) has the benefit of substantial new data (including studies required by the 2018 Registration, and others completed in 2019 by independent academic scientists) that would inform the appropriate scope of any EPA order setting conditions on existing stocks. *See* ER0023 (documenting voluminous new data submission requirements that Monsanto and other registrants have fulfilled since the 2018 Registration was issued). This new data also provides valuable information bearing on the reliability of the studies that informed the 2018 Registration. And in addition to that data, EPA has access to substantial extra-record information bearing on what, if any, realistic alternatives farmers would have if deprived of the ability to use XtendiMax for weed control in the midst of the 2020 growing season, and the potentially significant consequences those alternatives might have for agriculture and the environment. Monsanto accepts that all of this extra-record data is irrelevant to the merits of the agency action currently under review. But it would be highly relevant to EPA’s determination how best to regulate

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