

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

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