

Exhibit 1

**In the United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

Consolidated Case Nos. 22-1422, 22-1530

RED RIVER VALLEY SUGARBEET GROWERS ASSOCIATION; U.S. BEET SUGAR ASSOCIATION; AMERICAN SUGARBEET GROWERS ASSOCIATION; SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE; AMERICAN CRYSTAL SUGAR COMPANY; MINN-DAK FARMERS COOPERATIVE; AMERICAN FARM BUREAU FEDERATION; AMERICAN SOYBEAN ASSOCIATION; IOWA SOYBEAN ASSOCIATION; MINNESOTA SOYBEAN GROWERS ASSOCIATION; MISSOURI SOYBEAN ASSOCIATION; NEBRASKA SOYBEAN ASSOCIATION; SOUTH DAKOTA SOYBEAN ASSOCIATION; NORTH DAKOTA SOYBEAN GROWERS ASSOCIATION; NATIONAL ASSOCIATION OF WHEAT GROWERS; CHERRY MARKETING INSTITUTE; FLORIDA FRUIT AND VEGETABLE ASSOCIATION; GEORGIA FRUIT AND VEGETABLE GROWERS ASSOCIATION; NATIONAL COTTON COUNCIL OF AMERICA; AND GHARDA CHEMICALS INTERNATIONAL, INC.,

Petitioners,

v.

MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for Review of an Order of the
Environmental Protection Agency

**PETITIONERS' MOTION TO EXPEDITE BRIEFING ON
MOTION FOR RELIEF UNDER THE ALL WRITS ACT AND TO
EXPEDITE APPEAL**

Petitioners respectfully move to expedite briefing on their motion for relief under the All Writs Act or, in the alternative to expedite the pending appeal. As Petitioners showed in their motion, EPA is proceeding with an accelerated registration cancellation that has a reasonable likelihood of improperly divesting this Court of jurisdiction. That cancellation is currently before an EPA administrative law judge (“ALJ”). Expedited review of Petitioners’ motion is appropriate here because as of September 5, 2023, briefing on the accelerated cancellation is completed, and a decision from the ALJ could be issued at any time. The Petitioners request that this Court act pursuant to Rules 2 and 27 of the Federal Rules of Appellate Procedure to amend the time for briefing the motion as follows:

1. Respondents shall file any response to the motion on or before September 15, 2023.
2. Petitioners shall file any reply in support on or before September 20, 2023.

Respondents will not be prejudiced by such schedule because the issues are straight-forward and are similar to those briefed in this litigation and EPA’s cancellation proceeding.

September 8, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) this document contains 183 words.

I further certify that Petitioners' Motion complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (a)(6), as it was prepared in a proportionally spaced typeface using Word 14-point Century Schoolbook typeface.

Pursuant to Eighth Circuit Rule 28A(h)(2), I certify that the electronic version of this Motion has been scanned for viruses and is virus-free.

September 8, 2023

s/ Nash E. Long
Nash E. Long

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2023, a true and accurate copy of the foregoing Motion was electronically filed with the United States Court of Appeals for the Eighth Circuit. An original and 3 copies will be filed as required by Federal Rule of Appellate Procedure 27(d)(3).

I also hereby certify that I have, on this day, served by overnight mail a copy of the foregoing Motion upon the parties below.

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INTRODUCTION

Since oral argument in this case, and without awaiting a decision from this Court, the U.S. Environmental Protection Agency (“EPA”) has leveraged the Final Rule¹ to take additional adverse action against Petitioners. EPA has initiated proceedings to cancel all of Gharda’s registrations for chlorpyrifos under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), including for the Safe Uses at issue here, citing as the sole basis for doing so the Final Rule and its revocation of food use tolerances. EPA’s actions represent a thinly-veiled attempt to deprive this Court of jurisdiction to decide the validity of the Final Rule and grant effective relief.

In the last few months, an Administrative Law Judge (“ALJ”) and EPA’s Environmental Appeals Board (“EAB”) overseeing EPA’s cancellation proceedings have made clear two things: (1) the agency will not hold in abeyance its cancellation of Gharda’s registrations to await the outcome of this litigation, and (2) despite the fact that the cancellation rests solely on the tolerance revocation effected by the

¹ Chlorpyrifos; Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (“Final Rule”).

Final Rule, Petitioners will not be allowed to argue the validity or lawfulness of the Final Rule in opposition to the cancellation. A final order from EPA cancelling Gharda's registrations could come at any time.

If EPA succeeds in cancelling Gharda's registrations before this Court issues its decision, the cancellation will at a minimum significantly interfere with this Court's ability to grant Petitioners effective relief, if not moot Petitioners' challenge to the Final Rule entirely. The process for re-registering a pesticide is a long and expensive one that would last a minimum of three years, causing significant further harm to Petitioners. Even worse, if EPA succeeds in cancelling the chlorpyrifos registrations before this Court issues its decision, EPA will likely argue that this case has become moot by pointing to the cancellation as an additional reason that chlorpyrifos can no longer be used or sold.

It is thus necessary and appropriate for this Court to exercise its authority under the All Writs Act, 28 U.S.C. § 1651, to order EPA to hold in abeyance its cancellation proceedings, pending a decision from this Court. Alternatively, if this Court does not grant such relief,

Petitioners respectfully request that this Court issue an order stating the outcome of this case, with a full opinion to follow, so that the parties know the legal status of the Final Rule and can avoid the needless expenditure of resources in the administrative proceeding.

BACKGROUND

As this Court is aware, on December 14, 2022—the day before oral argument of this case—EPA announced that it would cancel registrations of three pesticide products for which Petitioner Gharda is the registrant. December 2022 Rule 28(j) Letter, at 1, Dkt. 5227503 (“Dec. 28(j) Letter”) (discussing *Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations*, 87 Fed. Reg. 76,474 (Dec. 14, 2022) (“the Cancellation”)). EPA based the Cancellation exclusively on the Final Rule’s revocation of all chlorpyrifos tolerances—the legality of which is before this Court. *Notice of Intent to Cancel Pesticide Registrations*, 87 Fed. Reg. 76,474 (Dec. 14, 2022). Petitioners asked EPA to stay or withdraw the Cancellation pending review by this Court of the Final Rule’s revocation of tolerances for the Safe Uses. January 2023 28(j) Letter, at 1, Dkt. 5237033 (“Jan. 2023 28(j) Letter”). EPA denied that request. *Id.*

Petitioners then submitted objections to the Cancellation. *Id.* at 2; *see* 7 U.S.C. § 136d(b), (d). Among other objections, Petitioners renewed their arguments that the Final Rule—the lynchpin for the Cancellation—is unlawful. Jan. 2023 28(j) Letter, at 2. Gharda further provided amended product labels that would add application rates for each of the Safe Uses, leaving no doubt that EPA had everything it needed to approve labels consistent with EPA’s determination of the Safe Uses in the 2020 Proposed Interim Registration Review Decision (“PID”). *Id.* Thus, Gharda made a formal request to amend its registrations to conform to the relief sought in this Court—reinstatement of the tolerances as to the defined Safe Uses (as EPA itself defined them).² Although EPA opened up an administrative

² Before the Final Rule, Gharda had made a written commitment to change its registrations and product labels to narrow them to conform to the Safe Uses. Pet. App. 1611–25; Decl. of Ram Seethapathi, ¶ 24 (Mar. 4, 2022), Dkt. 5133345 (“Seethapathi Decl.”). Gharda did not submit formal amendments at that time because EPA told Gharda it would be notified when to do so. *Id.* Indeed, EPA’s PID stated that the deadline for “revised labels and requests for amendment of registrations” would be “within 60 days following issuance” of a forthcoming registration review decision, A.R. 40 at 63; Pet. App. at 418, which EPA never issued. At no time prior to the Final Rule did EPA change that deadline or issue notice that action on chlorpyrifos registrations was necessary. EPA did not provide such notice until

docket for Gharda's request to amend its labels to conform to the PID's definition of the Safe Uses, EPA's sworn testimony in the Cancellation proceedings confirms that EPA has no intention of allowing the amendments and will instead cancel all registrations. Verified Written Statement of Witness, Dana Friedman, in Support of Resp't's Notice of Intent to Cancel at 6, *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (filed July 14, 2023) (ALJ Dkt. 24.19) (Add. 34–40).

Petitioner Gharda's objections also included a request for a stay of the Cancellation pending a decision from this Court. Gharda's Request for Hearing & Statement of Objections & Request for Stay, *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (Jan. 13, 2023) (ALJ Dkt. 3) (Add. 1–14).³ The ALJ denied the motion, without entertaining further briefing from Petitioners. Order on Pet'r Gharda's Motion to Stay, *In re FIFRA Section 6(b) Notice of Intent to Cancel*

after the effective date of the Final Rule. *Notice of Intent to Cancel Pesticide Registrations*, 87 Fed. Reg. 76,474 (Dec. 14, 2022).

³ The Petitioner Growers' objections included objections to EPA's refusal to stay the Cancellation, pending a decision by this Court.

Pesticide Registrations for Chlorpyrifos Products, Docket No. FIFRA-HQ-2023-0001 (Mar. 31, 2023) (ALJ Dkt. 10) (“Stay Denial”) (Add. 16–22). Both the ALJ and the EAB then denied Petitioners’ requests to appeal the ALJ’s Stay Denial. Order Denying Pet’rs’ Request For Certification to the Env’tl. Appeals Board, *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (May 22, 2023) (ALJ Dkt. 19) (“Certification Order”) (Add. 26–33); *In re Gharda Chems. Int’l, Inc. & Red River Valley Sugarbeet Growers Ass’n*, 19 E.A.D. 1 (EAB 2023) (Add. 49–55).

On August 25, 2023, EPA moved for an accelerated decision on the Cancellation—akin to a motion for summary judgment—relying on the purported validity of the Final Rule. Resp’t’s Mot. For Accelerated Decision & Mem. In Support, *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (filed Aug. 25, 2023) (ALJ Dkt. 34) (“EPA Motion”) (Add. 56–57).⁴ Petitioners filed their response on September 5,

⁴ Amici here intervened in these proceedings in support of EPA, and also seek accelerated cancellation.

2023, Pet’rs’ Response to Mot. for Accelerated Decision, *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (filed Sept. 5, 2023) (“Pet’rs’ Response”) (Add. 86–115), and a decision is imminent.⁵

Should EPA succeed in cancelling Gharda’s registrations, it would require a minimum of 36 months and significant expense for Gharda to get its registrations reinstated by EPA. Cancellation of its registrations puts Gharda back at square one, requiring it to submit a new application for registration of the safe food uses and associated tolerances. *See* Verified Written Statement: Stephanie H. Stephens Statement ¶ 8, *Chlorpyrifos: Notice of Intent to Cancel Pesticide Registrations, In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket Nos. FIFRA-HQ-2023-0001 (dated July 14, 2023) (Add. 42–48). That process, from application to EPA approval, would take over three years and cost Gharda over \$1 million in fees. *Id.* More significantly, it would also disrupt the agricultural economy and harm growers who would be

⁵ The ALJ has stated several times her intent to move quickly and not wait for this Court to issue a decision. Stay Denial at 4, 7; Certification Order at 6.

unable to use chlorpyrifos during the re-registration process. EPA itself estimated that elimination of the Safe Uses would cause \$53 million in losses per year. Decl. of Neil Anderson, ¶ 15, Resp'ts' Opp. to Motion for Stay (filed Mar. 11, 2022), Dkt. 5135786.

ARGUMENT

EPA is attempting to race this Court to the finish line. Because FIFRA does not allow the use of a pesticide at all without an EPA-approved registration, 7 U.S.C. § 136a(a), the Cancellation threatens to erect another barrier to any food uses of chlorpyrifos—including the Safe Uses defined by EPA in the PID. Thus, a Cancellation that pre-dates this Court's decision on the Final Rule at best undermines this Court's ability to provide effective relief and at worst moots Petitioners' present challenge. The All Writs Act, 28 U.S.C. § 1651, provides this Court the tools for just such a situation.

This Court should order EPA to hold in abeyance its cancellation of Gharda's chlorpyrifos registrations pending a decision from this Court on the legality of the Final Rule. Alternatively, Petitioners request that this Court provide clarity to the parties about the legality

of the Final Rule by issuing an order setting forth the outcome of this case, with a full opinion to follow at a later date.

I. Pursuant to the All Writs Act, this Court should enjoin EPA from proceeding with the Cancellation.

The All Writs Act authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). The Supreme Court “has consistently applied the Act flexibly” to allow federal courts to halt actions by parties and nonparties alike who might “frustrate the implementation of a court order or the proper administration of justice.” *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 173–74 (1977). The All Writs Act functions as “a residual source of authority to issue writs that are not otherwise covered by statute.” *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). Any relief granted under the Act must be (1) in aid of the court’s jurisdiction; (2) necessary or appropriate; and (3) consistent with established principles of law. 28 U.S.C. § 1651(a); *see Shoop v. Twyford*, 142 S. Ct. 2037, 2045 (2022); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35, 537 (1999). An order directing EPA to hold its Cancellation in abeyance satisfies all three criteria.

A. An order directing EPA to hold its Cancellation in abeyance is in aid of this Court’s jurisdiction.

There can be no doubt as to this Court’s jurisdiction over Petitioners’ challenge to the Final Rule under 21 U.S.C. § 346a(h)(1)—as acknowledged by both parties, Pet’rs’ Opening Br. at 1 (May 24, 2022), Dkt. 5160660; Resp’ts’ Br. at 3 (July 26, 2020), Dkt. 5180922, and this Court, Order Denying Motion for a Partial Stay Pending Review (Mar. 15, 2022), Dkt. 5136844. EPA’s insistence on moving forward with the Cancellation, however, “is an attempt to interfere with [this Court’s] jurisdiction.” *City of Cherokee v. Interstate Commerce Comm’n*, 671 F.2d 1080, 1085 (8th Cir. 1982).

EPA conceded in its brief in support of its Motion before the ALJ that “Petitioners are correct that the [Cancellation] is ultimately based on the Final Rule.” EPA Motion at 15. EPA also explained its theory behind the Cancellation: “Because there are no chlorpyrifos tolerances in place under the FFDCA [Federal Food, Drug, and Cosmetic Act],”—the result of the Final Rule—“no food uses of chlorpyrifos can remain registered.” EPA Motion at 11–12.⁶ A decision from this Court

⁶ EPA nowhere argued any other basis for the Cancellation. Notably, EPA has not contended that use of chlorpyrifos as defined in

regarding the legality of the Final Rule would sink or save EPA's theory in support of Cancellation. Yet rather than await such a decision, EPA sought an *accelerated* cancellation.

If granted, the Cancellation will likely cause EPA to ask this Court to dismiss Petitioners' case as moot: reasoning that without any chlorpyrifos registrations in place, the tolerance revocations in the Final Rule have no practical effect because chlorpyrifos cannot be used without registrations. EPA's proceeding with the Cancellation, particularly on an expedited timeline, is plainly an attempt to interfere with this Court's jurisdiction.

This Court has found an attempt to interfere with its jurisdiction on similar facts involving agency action. In *City of Cherokee*, the court reversed a certificate issued by the Interstate Commerce Commission ("ICC") allowing a railroad to abandon a particular railroad line and remanded so the ICC could reconsider the public interest under a new standard. 671 F.2d at 1082. But before the mandate issued, the railroad and ICC approved an artificially high tariff. This Court saw

the PID (the Safe Uses) would not meet the applicable safety standard. *Notice of Intent to Cancel Pesticide Registrations*, 87 Fed. Reg. 76,474 (Dec. 14, 2022).

clearly that the tariff was intended to “fundamentally alter the reopened abandonment proceedings” and thus “interfere with” this Court’s “remand of the abandonment question, if not . . . render the abandonment proceedings moot.” *Id.* at 1082–83.

Other courts have reached similar conclusions. Most analogous here, the Ninth Circuit recently held that an agency rule that threatened to moot a pending class action “would interfere with the court’s jurisdiction.” *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006 n.6 (9th Cir. 2020). To take another example, the Fourth Circuit invoked the All Writs Act to invalidate a district court order vacating a gag order that had been challenged in the Court of Appeals on a petition for a writ of mandamus. *In re Murphy-Brown, LLC*, 907 F.3d 788, 794 (4th Cir. 2018). The vacatur, entered “on the very eve of oral argument” in the appellate court, “plainly undercut the court of appeals in the orderly exercise of its own jurisdiction” to review the gag order. *Id.* As the Fourth Circuit explained, “[t]he district court should have allowed [the Fourth Circuit’s] responsibilities to run their due course rather than revisiting its order right before plenary appellate review” and setting up “an endless game of cat and mouse.” *Id.*

Given that Petitioners’ challenge to the Final Rule—the predicate to the Cancellation—remains pending before this Court, EPA’s decision to push forward with the Cancellation “is more than suspect.” *City of Cherokee*, 671 F.2d at 1082; *see also Murphy-Brown*, 907 F.3d at 794 (“The mischief of the trial court’s action should be apparent.”). EPA’s game plan is clear; it is trying to create facts on the ground that would allow it to argue to this Court that the case is moot since chlorpyrifos cannot be used after the last remaining registrations (held by Gharda) are cancelled. By depriving any order from this Court in Petitioners’ favor of practical effect, EPA has sought to interfere with this Court’s jurisdiction, *City of Cherokee*, 671 F.2d at 1083, and “mak[e] a mockery of [this Court’s] consideration of” Petitioners’ case, *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1059 (1st Cir. 1980).

This Court need not definitively decide whether the Cancellation would moot this case—only that EPA’s actions reasonably threaten to undermine the ability of this Court to effectively remedy Petitioners’ harm. For example, in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, the Supreme Court explained that the court of appeals had ample authority under the All Writs Act to

prevent the Comptroller of the Currency from issuing a certificate in reliance on a Federal Reserve Board decision while the court of appeals considered the legality of the Board’s decision. 379 U.S. 411, 425–26 (1965). Though the *Whitney* challengers’ legal argument attacked the soundness of the Board’s decision, their ultimate aim was to prevent the Comptroller from issuing that very certificate. *See id.* at 413, 418; *see also FTC v. Dean Foods Co.*, 384 U.S. 597, 605 (1966) (upholding the court of appeals’ power to issue a preliminary injunction to prevent a merger that, once completed, would be “virtually impossible” to undo through “an effective remedial order” if it turned out to be illegal). So too in *City of Cherokee*: the challengers’ aim was to prevent abandonment of the railroad, but the ICC’s actions would “effect a de facto abandonment” and “interfere with [this Court’s] remand of the abandonment question, if not . . . render the abandonment proceedings moot.” 671 F.2d at 1082–83.

EPA’s actions to expedite the registration cancellation reasonably threaten to undermine the ability of this Court to effectively remedy Petitioner’s harm—the inability to use chlorpyrifos for the Safe Uses. If EPA can cancel Gharda’s registrations before the Court rules, then

Petitioners still will not be able to use chlorpyrifos until Gharda can get the product re-registered, or the Cancellation set aside. *Supra* at 7–8. The re-registration process would consume a substantial amount of resources from Gharda and take a minimum of three years, *supra* at 7–8, during which time losses and pest pressures attributable to EPA’s actions on chlorpyrifos would continue to accrue. *See* A.R. 40 at 42; Pet. App. at 407. EPA’s own analyses show that removing chlorpyrifos from the market results in \$53 million per year in losses in the agricultural economy—losses falling primarily on growers like the Grower Petitioners here. *Supra* at 7–8.⁷ In other words, unwinding the Cancellation after it occurs, once it is shown to have been based on an unlawful Final Rule, would require Petitioners to suffer more of the harm they sought to abate with their challenge to the Final Rule in this Court.

⁷ Unsurprisingly, the U.S. Department of Agriculture has objected to EPA’s revocation of tolerances and cancellation of registrations. Dec. 28(j) Letter, Ex. C, at 1.

B. An order directing EPA to hold its Cancellation in abeyance is necessary and appropriate.

When a party moving for relief under the All Writs Act has made “a prima facie showing that” the action complained of “is an attempt to interfere with [the court’s] mandate, it is necessary and appropriate [for the court] to protect [its] jurisdiction under the All Writs Act.” *City of Cherokee*, 671 F.2d at 1083 & n.3. Petitioners have made such a showing here. EPA is proceeding apace with the Cancellation, even though there is no urgent need to do so because Gharda has formally sought to amend its labels to limit the registrations to the Safe Uses and has committed not to sell the relevant products until the corresponding tolerances are reinstated. Jan. 2023 28(j) Letter at 2. EPA’s actions appear designed to moot this case and deprive this Court of jurisdiction, thereby evading judicial review of the Final Rule. That is enough to support issuance of an order under the All Writs Act.

When the All Writs Act refers to writs “necessary” in aid of the court’s jurisdiction, it means “reasonably necessary.” *Price v. Johnston*, 334 U.S. 266, 279 (1948), *abrogated in part on other grounds*, 28 U.S.C. § 2244. A writ is “reasonably necessary” when an action works to deprive litigants of their chance to “effectuate [their] rights,”

N.Y. Tel., 434 U.S. at 175 n.23, especially when the litigants lack “alternative remedies,” *Goldsmith*, 526 U.S. at 537. Actions deprive litigants of an opportunity to effectuate their rights when the action threatens to moot a pending appeal. *See Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995) (“Absent a stay, Michael would suffer irreparable injury through deportation, thereby mooting this case.”); *see also Renaissance Arcade & Bookstore v. Cook Cnty.*, 473 U.S. 1322, 1323 (1985) (Stevens, J., in chambers) (declining to grant a stay under the All Writs Act because the applicant did not argue that the appeal would otherwise become moot).

Relief under the All Writs Act is also necessary and appropriate because Petitioners have no alternative remedies. *See Goldsmith*, 526 U.S. at 537 (noting that whether a writ is “necessary” or “appropriate” will turn on whether alternative remedies are available). Petitioners first requested the agency to stay its cancellation, pending a ruling from this Court, in a letter to Administrator Regan dated January 6, 2023. The agency refused, triggering Petitioners’ obligations to file objections to the Cancellation in order to avoid the automatic cancellation. Jan. 2023 28(j) Letter at 1; *Notice of Intent to Cancel Pesticide Registrations*,

87 Fed. Reg. 76,474 (Dec. 14, 2022). Petitioners then asked the ALJ to stay the Cancellation. The ALJ denied that request. Petitioners then sought to appeal that decision but were denied by both the ALJ and the EAB. Petitioners have exhausted all possible administrative remedies and all options short of asking this Court to protect its own jurisdiction.

Nothing about the Ninth Circuit’s *LULAC II* decision makes an order directing EPA to hold the Cancellation in abeyance less “necessary” or “appropriate.” 28 U.S.C. § 1651(a); *see League of United Latin Am. Citizens v. Regan*, 996 F.3d 673 (9th Cir. 2021) (*LULAC II*). That court ordered EPA to issue a final regulation with regard to the chlorpyrifos tolerances under the FFDCA “within 60 days following issuance of the mandate,” and to “modify or cancel related FIFRA registrations for food use in a timely fashion.” 996 F.3d at 703–04. Unlike the 60-day deadline for the FFDCA regulation, the Ninth Circuit provided a *relative* timeframe to act on the FIFRA registrations. *See* AMERICAN HERITAGE DICTIONARY (5th ed. 2016) (defining “timely” as “Occurring at a suitable or opportune time; well-timed.”). The court purposely provided EPA flexibility to plan and modify its action on the FIFRA registrations based on subsequent developments spurred by the

Final Rule. An order from this Court directing EPA to hold its Cancellation in abeyance until the legality of the Final Rule—which EPA acknowledges is the lynchpin of the cancellation—is fully consistent with the Ninth Circuit’s directive that EPA act in a “timely fashion” with regard to the registrations. *See LULAC II*, 996 F.3d at 704. No action conforming registrations to the Final Rule is “timely” so long as challenges to the legality of the Final Rule remain pending.

In short, an order directing EPA to hold its Cancellation in abeyance is “necessary [and] appropriate,” 28 U.S.C. § 1651(a), to “maintain the status quo” and preserve this Court’s jurisdiction. *Whitney*, 379 U.S. at 426; *Dean Foods*, 384 U.S. at 604.

C. An order directing EPA to hold its Cancellation in abeyance is agreeable to the usages and principles of law.

Relief under the All Writs Act need not mirror “the precise forms of th[e] writ[s] in vogue at the common law or in the English judicial system,” but must serve “the rational ends of law” that have been recognized by our judicial system without contravening other legal authority. *Price*, 334 U.S. at 282-84 (citation omitted); *see, e.g., Shoop*, 142 S. Ct. at 2044–45; *N.Y. Tel.*, 434 U.S. at 176–78. An order directing

EPA to hold its Cancellation in abeyance is agreeable to the usages and principles of law.

Courts have previously issued orders to protect their jurisdiction under the All Writs Act consistent with Petitioners' requested "ends of law" here (pausing the Cancellation). *See Dean Foods*, 384 U.S. at 605 (allowing "a preliminary injunction upon a showing that an effective remedial order" would be rendered "virtually impossible"); *Whitney*, 379 U.S. at 426 ("[T]he Court of Appeals can appropriately fashion an order designed to compel [a party] . . . to refrain from acting" in a way that would undermine the court's ability to grant relief.); *City of Cherokee*, 671 F.2d at 1085 (enjoining the agency from implementing a surcharge upon "a prima facie showing that the surcharge is an attempt to interfere with our jurisdiction"); *Murphy-Brown*, 907 F.3d at 794 (granting mandamus "to invalidat[e]" a court order "that threaten[s] to undermine" the appellate "system of review"); *Martinez*, 626 F.2d at 1059 ("requir[ing] [the] deposit of evidence pending appeal" based on a "reasonabl[e] belie[f]" it would be destroyed). And an order directing EPA to hold the Cancellation in abeyance is analogous to authority courts exercise in other contexts to halt outside adversarial proceedings

when necessary to protect their own jurisdiction. *See, e.g.*, 28 U.S.C. § 2283 (Anti-Injunction Act exception); *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359 (8th Cir. 2007) (foreign anti-suit injunctions).

Indeed, an order directing EPA to hold Cancellation in abeyance would be *more* in line with the usages and principles of law than similar exercises of judicial power that courts have deemed permissible under the All Writs Act. For example, injunctions to stay proceedings in state courts raise serious federalism concerns even when the Anti-Injunction Act does not forbid them. *Smith v. Bayer Corp.*, 564 U.S. 299, 306 (2011). Similarly, injunctions to prevent suits in foreign courts implicate concerns of comity. *Goss Int’l*, 491 F.3d at 360–61. Yet federal courts have still issued orders to courts of the States and other jurisdictions halting their proceedings in order to protect the federal court’s jurisdiction over a matter. In contrast, action by administrative agencies is *presumptively* subject to federal-court scrutiny. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486–89 (2015).

Additionally, an order directing EPA to hold its Cancellation in abeyance would not “circumvent statutory requirements or otherwise

binding procedural rules.” *Shoop*, 142 S. Ct. at 2044. Petitioners do not rely on the All Writs Act to avoid applicable exhaustion requirements. Petitioners have requested this same relief from EPA itself, but to no avail. *Supra* at 3. Nor would ordering EPA to hold its Cancellation in abeyance put this Court in the position of prematurely reviewing a non-final agency order. *See* 5 U.S.C. § 704. EPA need only pause to await a decision from this Court on the validity of the Final Rule to determine its legal authority to move forward with the administrative proceedings. *See Whitney*, 379 U.S. at 425–26. If EPA then moves forward, any challenge to that final order will go through the ordinary mechanisms for review.

II. In the alternative, this Court should expedite its decision with an opinion to follow.

If this Court decides not to grant Petitioners’ relief under the All Writs Act, it should instead issue an order stating the outcome in this case, with an opinion to follow. This Court has taken this approach in the past, *see, e.g., United States v. McDougal*, 92 F.3d 701, 702 (8th Cir. 1996) (per curiam); *Henderson v. Bodine Aluminum, Inc.*, No. 95-2469 EMSL, 1995 WL 394046 (8th Cir. June 16, 1995), *order clarified*, No. 95-2469, 1995 WL 506941 (8th Cir. July 21, 1995), as have other courts,

see, e.g., Yang v. Kosinski, 805 F. App'x 63, 65 (2d Cir. 2020); *United States v. Watkins*, 940 F.3d 152, 157 (2d Cir. 2019); *In re DBSD N. Am., Inc.*, 627 F.3d 496, 497 (2d Cir. 2010); *Santiago v. Rumsfeld*, 403 F.3d 702, 702 (9th Cir. 2005); *Wisconsin v. Weinberger*, 736 F.2d 438, 438 (7th Cir. 1984). In fact, the Second Circuit describes the practice as a “common” one. *Hassoun v. Searls*, 976 F.3d 121, 129 (2d Cir. 2020).

Such an order is appropriate here to provide clarity to the parties (and the ALJ) regarding the legality of the Final Rule that forms the sole basis for the pending cancellation. *See United States v. McDougal*, 103 F.3d 651, 652 & n.2 (8th Cir. 1996) (explaining that the court granted counsel’s request for an initial order without opinion so that the parties could arrange their affairs accordingly). If this Court finds unlawful and sets aside the Final Rule, it is undisputed that there is no legal basis for the Cancellation, *see* EPA Motion at 15, and the parties can save the resources that are being expended in the ALJ proceeding.

CONCLUSION

This Court should exercise its authority under the All Writs Act to order EPA to hold the Cancellation in abeyance, pending this Court’s decision on whether the Final Rule is unlawful with respect to the Safe

Uses. Alternatively, this Court should issue an order stating the outcome of this case with an opinion to follow, so that the parties know the status of the Final Rule as they dispute the validity of the Cancellation.

September 8, 2023

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) this document contains 4,782 words.

I further certify that Petitioners' Motion complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (a)(6), as it was prepared in a proportionally spaced typeface using Word 14-point Century Schoolbook typeface.

Pursuant to Eighth Circuit Rule 28A(h)(2), I certify that the electronic version of this Brief has been scanned for viruses and is virus-free.

September 8, 2023

s/ Nash E. Long
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2023, a true and accurate copy of the foregoing Motion was electronically filed with the United States Court of Appeals for the Eighth Circuit. An original and 3 copies will be filed as required by Federal Rule of Appellate Procedure 27(d)(3).

I also hereby certify that I have, on this day, served by overnight mail a copy of the foregoing Motion upon the parties below.

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