IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RED RIVER VALLEY SUGARBEET GROWERS ASSOCIATION, et al., Petitioners, v. MICHAEL S. REGAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY and U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondents.	No. 22-1294

PROSPECTIVE *AMICI*'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR A PARTIAL STAY PENDING REVIEW

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INTRODUCTION

Petitioners ask this Court for an extraordinary order. On a rushed schedule of their own making, Petitioners ask the Court to stay the effective date of a rule that a sister appellate court ordered Respondent Environmental Protection Agency ("EPA") to promulgate. Petitioners present underlying claims that run directly counter to the federal laws ensuring the safety of pesticides in food in this country, and Petitioners fail to present the Court with basic information about the significant harm to children's health caused by the organophosphate pesticide chlorpyrifos and the full history of litigation leading to the rule challenged here. Prospective *Amici*—a group of organizations dedicated to protecting human health, farmworkers and their families, and children with learning disabilities who have prosecuted cases concerning chlorpyrifos for 15 years and who plan to seek leave to file an *amicus* brief on the merits—respectfully ask the Court to protect children's health and deny the stay.

Chlorpyrifos is an acutely toxic pesticide that poisons people by suppressing cholinesterase, an enzyme that regulates nerve impulses. Respondent EPA has long set safety levels for chlorpyrifos at 10% cholinesterase inhibition measured in red blood cells to prevent acute poisonings. Yet for more than 14 years, the core health issue before EPA and the courts has been the need to protect children from

learning disabilities caused by exposures below levels those that produce 10% cholinesterase inhibition.

In 2007, two of the Prospective *Amici*—Natural Resources Defense Council and Pesticide Action Network—filed a petition to ban the use of chlorpyrifos on food, based on published, peer-reviewed studies correlating low-level prenatal exposures with a significantly elevated risk of autism, attention-deficit disorder, and reduced IQ in children. Upon reviewing the scientific evidence, both EPA and its Scientific Advisory Panel ("SAP") repeatedly confirmed that such low-level prenatal exposures to chlorpyrifos cause learning disabilities and other neurodevelopmental harm. The Prospective *Amici* challenged EPA's delays in acting on the 2007 Petition and its ultimate decision denying the petition despite these scientific findings.

Their lawsuits ultimately led to the Ninth Circuit decision in *League of United Latin American Citizens v. Regan*, 996 F.3d 673 (9th Cir. 2021) ("*LULAC*"), which held that EPA's denial of the 2007 Petition and subsequent objections violated EPA's legal duty to base its pesticide tolerance decisions solely on human safety, and that EPA's reasons for denying the petition were arbitrary and capricious. *LULAC* reviewed the many EPA and SAP findings of neurodevelopmental harm from low-level chlorpyrifos exposures. 996 F.3d at 683-89. In its 2014 human health risk assessment, EPA found that exposures to

chlorpyrifos below levels that produce 10% cholinesterase inhibition cause permanent neurodevelopmental harm to children. *Id*. at 685. EPA proposed to revoke chlorpyrifos tolerances in 2015 because of unsafe drinking water exposures. *Id*. at 685-86. It subsequently produced an updated risk assessment based on an exposure limit that would protect against the risk of neurodevelopmental harm to children, which found children 1-2 years of age would be exposed to 14,000% of safe levels in food and, based on a refined drinking water assessment, drinking water exposures would be unsafe. *Id*. at 687-89. *LULAC* ordered EPA to grant the 2007 Petition and issue a final rule revoking or modifying chlorpyrifos tolerances if it could find the modified tolerances, when aggregated, safe for infants and children. *Id*. at 703-04. To comply with this order and meet the court deadline, EPA issued the Chlorpyrifos Tolerance Revocation Rule, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (Nash Long Decl., Ex. A) ("Revocation Rule").

Petitioners seek to stay and ultimately vacate that rule. This Court should deny the stay because Petitioners are not likely to succeed on the merits and the requested stay would cause irreparable harm to children and workers and be contrary to the public interest.

As to the merits: (1) Petitioners challenge the Revocation Rule based on the its economic impacts, but the Food Quality Protection Act ("FQPA") mandates that tolerances be based solely on health; (2) Petitioners argue that EPA must issue

an order allowing the sale and use of existing stocks order, but the FQPA precludes EPA from allowing use of existing stocks of an unsafe pesticide; (3) Petitioners argue that EPA had to make individualized tolerance determinations, but the FQPA directs EPA to make tolerance determinations based on aggregate dietary exposures from all uses with tolerances; and (4) Petitioners argue that EPA had to convert a December 2020 proposal into its Revocation Rule, but that proposal used the same endpoint that *LULAC* concluded would not protect children, and it is merely a proposal that EPA can finalize only after addressing extensive public comments, which it admittedly has not yet done.

As to the balance of the equities, a stay would cause irreparable harm because chlorpyrifos causes learning disabilities and permanent neurodevelopmental harm to children and acute poisonings of workers, including from uses that would continue under the stay Petitioners seek. *LULAC* and earlier Ninth Circuit cases ordered EPA to stop egregious delays in protecting children and workers from harm from chlorpyrifos. *In re PANNA*, 798 F.3d 809, 811, 814 (9th Cir. 2015) (issuing writ of mandamus to put an end to "egregious" delays in addressing the "considerable human health interests" presented by chlorpyrifos); *LULAC v. Wheeler*, 922 F.3d 443, 445 (9th Cir. 2019) (en banc) (order to rule on objections); *LULAC*, 996 F.3d at 703 (ordering EPA to revoke most or all tolerances by August 2021 to end the egregious delay that exposed a generation of

American children to unsafe levels of chlorpyrifos). It is not in the public interest to ask one court to stay agency action effectively dictated by another court after exhaustive consideration of the underlying merits. This is especially true when six of these Petitioners, including national soybean, sugar beet, and farm bureau organizations, participated in *LULAC* as *amici* and alleged essentially the same economic harm they press here.[1]

I. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

A. Petitioners Are Not Likely to Succeed on Their Economic-Based Claims Because the FQPA Makes Safety the Sole Factor for EPA Tolerances.

In 1996, Congress unanimously passed the FQPA to require that EPA's pesticide authorizations protect children. It prescribed a health-protective standard, allowing EPA to "establish or leave in effect a tolerance for a pesticide chemical residue in or on a food only if the Administrator determines that the tolerance is safe." 21 U.S.C. § 346a(b)(2)(A)(i) (emphasis added). It defined "safe" to mean "there is a reasonable certainty that no harm will result from aggregate exposure" to the pesticide. *Id*. §§346a(b)(2)(A)(ii) (to the population as a whole), 346a(b)(2)(C)(ii) (to children). In determining safety, EPA must afford added

[1] American Sugarbeet Growers Association, American Farm Bureau Federation, American Soybean Association, National Association of Wheat Growers, Florida Fruit and Vegetable Association, and National Cotton Council of America participated as *amici* in *LULAC*. Declaration of Patti A. Goldman ("Goldman Decl."), Exhibit 1.

protection to children (called a safety factor) to account for pre- and post-natal toxicity, exposure patterns, special sensitivities, and gaps in available data to assess such risks. *Id*. § 346a(b)(2)(C)-(D).[2]

In *LULAC*, the Ninth Circuit described EPA's obligations in making tolerance decisions as mandatory and "linked to a single issue, safety." 996 F.3d at 693. The FQPA "abrogated" EPA's prior approach of balancing safety against other considerations, such as economic factors. *Id*. at 692. As a result, "assurance of safety for human health" is an uncompromising limitation on EPA's authority. *Id*. at 678, 692; *id*. at 695 (burden of persuasion always rests on the party claiming that tolerance is safe).

Petitioners argue that EPA had to consider their reliance interests in revoking tolerances. Specifically, Petitioners argue that growers have relied on chlorpyrifos for decades and Gharda relied on the then-existing tolerances when it recently decided to ramp up its production and exports of chlorpyrifos to the United States. However, Congress determined that food safety and children's health are paramount and cannot be balanced against economic interests. Because FQPA mandates that EPA make tolerance decisions based solely on health, Petitioners are not likely to succeed on this claim.

[2] The FQPA amended the Federal Food, Drug, and Cosmetic Act's food safety provisions.

B. Petitioners Are Not Likely to Succeed on Their Existing Stocks Claim Because EPA Cannot Allow Existing Stocks of an Unsafe Food Pesticide to be Used.

The FQPA harmonized the new food safety standard and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which regulates pesticide use through EPA registrations of pesticides. It did this by codifying the strengthened food safety standard in FIFRA, which allows EPA to register a pesticide only if EPA determines it will not have "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(a). FIFRA has long defined such an unreasonable adverse effect as "any unreasonable risk to [people] or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *Id*. §§136a(c)(5); 136(bb). The FQPA amended FIFRA's definition of "unreasonable adverse effects" to include "a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under [the FFDCA]." *Id*. § 136(bb). If a pesticide fails to meet the FQPA standard, it cannot be used on food and registrations for such uses must be canceled.

Petitioners further argue that the FQPA's direction to coordinate tolerance revocations with FIFRA cancellations "[t]o the extent practicable," 21 U.S.C. § 346a(l), requires that EPA allow existing stocks of chlorpyrifos to be produced and

used well into the future. It makes this argument for all chlorpyrifos uses, including those that all of EPA's risk assessments deemed unsafe.

The direction to coordinate concerns the different FQPA and FIFRA procedures for ending a pesticide's use. EPA revokes tolerances under FQPA by issuing regulations, 21 U.S.C. § 346a(b)(1), while it cancels registrations under FIFRA by issuing a notice of intent, which can then be challenged in quasi-adjudicative evidentiary proceedings. 7 U.S.C. § 136d(b). In lieu of a formal cancellation proceeding, a registrant can request that EPA voluntarily cancel a registration. *Id*. § 136d(f) (EPA may approve voluntary cancellation requests after notice and comment). When EPA revokes tolerances, it must try to coordinate the revocation with the required registration cancellation.

Such coordination is procedural; it does not change the substantive food safety standard. For food uses of pesticides, the legal standard is the same, now that the FQPA standard has been codified in FIFRA. If EPA cannot find a pesticide safe, it must revoke the tolerances and cancel the associated registrations. As the *LULAC* court held, Congress amended the law to explicitly prohibit EPA from balancing safety against economic or policy concerns; as a result, the alleged widespread use of chlorpyrifos cannot be a valid legal consideration for retaining tolerances or allowing continued sale and use of unsafe pesticides. 996 F.3d at 696. The direction to coordinate tolerance and cancellation processes is not a

license to erode FQPA's health-based standard through a FIFRA backdoor. Petitioners are therefore highly unlikely to succeed in their argument that EPA must allow the continued use and sale of existing stocks of an unsafe pesticide.

C. Petitioners Are Unlikely to Succeed on Their Claim that EPA Must Make Chlorpyrifos Tolerances Determinations Individually Because the FQPA Directs EPA to Base Them on Exposure to All Foods With Tolerances.

Petitioners assert in their Motion (at 15) that the FQPA directs EPA to make tolerance determinations "on an individual basis" and that it, therefore, had to make tolerance-by-tolerance decisions. To the contrary, the FQPA requires EPA to ensure reasonable certainty that no harm will result "from aggregate exposure" to a pesticide, 21 U.S.C. §§346a(b)(2)(A)(ii), 346a(b)(2)(C)(ii)(I), and aggregate exposure includes "dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue." *Id*. § 346a(b)(2)(D)(vi). Petitioners are not likely to succeed on their argument that EPA must make tolerance decisions for each food in isolation.

D. Petitioners Are Not Likely to Succeed on their Claim that EPA Acted Arbitrarily by not Turning a December 2020 Proposal into the Revocation Rule Before Reconciling that Proposal with *LULAC* and Addressing Extensive Public Comments.

Petitioners contend that EPA acted arbitrarily and capriciously by not retaining some tolerances based on a 2020 proposed registration review decision that came out after EPA's denial of the 2007 petition, but before *LULAC*. Long

Decl., Ex. B. Petitioners are mistaken because the 2020 proposed decision: (1) uses the same safety standard that *LULAC* deemed underprotective of children; and (2) is merely a proposal that received extensive, critical public comments that EPA must address before refining and finalizing it.

The 2020 proposal, like the 2014 risk assessment, used 10% cholinesterase inhibition as the regulatory endpoint. *LULAC* deemed this endpoint insufficient to ensure children would be protected from learning disabilities. Specifically, the court stated that "EPA must determine the greatest exposure amount that poses no risk of harm" to children and must ensure that children will not be exposed to higher levels of chlorpyrifos. 996 F.3d at 680.[3] Based on over a decade of EPA and SAP findings that chlorpyrifos harms children's brains at exposures below those associated with cholinesterase inhibition (that is, below the 10% regulatory threshold), the court concluded:

> On the present record, the only reasonable conclusion the EPA could draw is that the present tolerances are not safe within the meaning of the FFDCA. The EPA can find a tolerance safe only if there is "a reasonable certainty" of "no harm," and for nearly a decade, the EPA and its SAPs have concluded that there is *not* a reasonable certainty of no harm[.]

Id. at 700 (emphasis added).

[3] In its 2016 assessment, EPA identified an exposure that would protect children from neurodevelopmental harm and found chlorpyrifos unsafe in food and drinking water, *LULAC*, 996 F.3d at 687-89, but the 2020 assessment abandoned that approach.

Acknowledging the 2020 proposal, the Ninth Circuit stated: "If … EPA can now conclude to a reasonable certainty that modified tolerances or registrations would be safe, then it may modify chlorpyrifos registrations rather than cancelling them." *Id*. at 703. Petitioners seize on this opening to argue that EPA erred by not retaining tolerances for the 11 uses the 2020 proposal indicated might be safe.

To prevail on this claim, Petitioners would bear the burden of proving safety and EPA would need to find reasonable certainty of no harm. *Id*. at 703 n.168. EPA could not just take the 2020 proposal off the shelf and turn it into tolerances. Petitioners are wrong in asserting (at 18) that "[n]o data review would have been required." The December 2020 proposal was just a proposal, one that garnered extensive comments going to the core of the proposal that EPA has yet to address.

First, the proposal was predicated on the 10% cholinesterase inhibition endpoint that *LULAC* called into question. Leading scientists and other commenters have documented how lower exposures to chlorpyrifos cause neurodevelopmental harm to children. *See*, *e.g.*, Goldman Decl., Ex. 2 (Comments of over 50 leading scientists and health professionals on 2020 proposal); Ex. 3 (2016 Decl. of Dr. Phillip Landrigan submitted with comments on 2020 proposal and in earlier chlorpyrifos dockets); Ex. 4 (Comments of Heartland Health Research Alliance on 2020 proposal); Ex. 5 (LULAC Comments on 2020 proposal); Ex. 6 (LULAC Comments submitted in Objections process). The

Revocation Rule itself reiterated the past EPA and SAP findings that a 10% cholinesterase inhibition limit is not sufficiently protective of children. 86 Fed. Reg. at 48,321-24. The Revocation Rule further explained that EPA must first respond to the extensive comments on the 2020 risk assessment and proposal, which it will do later in the registration review process. *Id*. at 48,334.

In addition to leading scientists, the nine states that were petitioners in *LULAC* submitted comprehensive comments explaining how the 2020 proposal failed to accord with the scientific record on neurodevelopmental harm to children. Goldman Decl., Ex. 7 (States Comments) at 15 (recent academic review confirming neurotoxicity from low-level exposures). The California Department of Pesticide Regulation ("CDPR") submitted additional comments describing its comprehensive scientific evaluation, based largely on recent low-dose animal studies, which concluded that chlorpyrifos was a neurodevelopmental toxicant. This finding led it to initiate cancellation proceedings that ended almost all use and sales of chlorpyrifos in California. Goldman Decl., Ex. 8 (CDPR Comments) at 1-6. Applying its developmental neurotoxicity endpoint to EPA tolerances, CDPR found that EPA's tolerances allow exposures that are greater than EPA's benchmarks for safe tolerances. *Id*. at 9-10.[4]

[4] Several other states have also adopted chlorpyrifos bans, as have many countries. States Comments (Goldman Decl., Ex. 7) at 21-27.

The court's rationale in *LULAC* adopted the substance of many of these comments. *LULAC* held that EPA could not find "reasonable certainty of no harm" because exposures below EPA's regulatory endpoint cause neurodevelopmental harm to children. 996 F.3d at 700. The EPA could not validly rely on the 2020 proposal without first fully addressing *LULAC* and these public comments.[5]

Second, the 2020 proposal abandoned EPA's longstanding drinking water models. Instead, it was predicated on drinking water assessment models that had not been fully vetted by the public, peer reviewed by experts, or previously applied to regulatory decisions. Further, EPA staff and external peer reviewers raised concerns that the new models used in the 2020 proposal had not been appropriately calibrated with relevant real-world monitoring data. LULAC Comments (Goldman Decl., Ex. 5) at 36-37; States Comments (Goldman Decl., Ex. 7) at 20. In addition to using the underprotective 10% cholinesterase inhibition endpoint:

> EPA's new drinking water modeling is also flawed because it underestimates exposures. It fails to consider groundwater, is based on case studies drawn from only one part of the country and small sample sizes, and

[5] Retaining a tenfold safety factor because of chlorpyrifos's neurotoxicity is necessary but not sufficient because the two risk assessments that derived a limit to protect children from neurodevelopmental harm set far lower limits than those based on 10% cholinesterase inhibition—three to four orders of magnitude lower in EPA's 2016 risk assessment and 47-150 times lower in CDPR's risk evaluation. LULAC Comments (Goldman Decl., Ex. 5) at 20-23; CDPR Comments (Goldman Decl., Ex. 8) at 9-10.

> produced more low-confidence rankings than high-confidence ones. EPA acknowledged that real-world water monitoring has detected chlorpyrifos at levels above EPA's drinking water levels of concern. EPA indicated it is unable to determine whether the drinking water contamination is from any of the uses Corteva is seeking to retain. It also noted that drinking water levels of concern might be exceeded if chlorpyrifos is used on more than one crop in the watershed.

LULAC Comments (Goldman Decl., Ex. 5) at 9; *see also id*. at 36-41; States Comments (Goldman Decl., Ex. 7) at 20.

EPA could not finalize the 2020 proposal until it addressed these comments, just as it had to address the *LULAC* rationale. Petitioners are therefore not likely to prevail on their claim that EPA erred by not basing the Revocation Rule on its 2020 proposal.

II. A STAY WOULD CAUSE IRREPARABLE HARM TO HUMAN HEALTH.

Petitioners seek two types of stays: (1) a stay of the Revocation Rule for 11 uses based on the 2020 proposal; and (2) a stay of the Revocation Rule's effective date as to all other uses until EPA issues "an appropriate existing stocks order." Both would cause irreparable harm to human health.

The indefinite stay request pending an existing stocks order would allow uses of chlorpyrifos that EPA has consistently found unsafe because they would expose children to unacceptable risks of learning disabilities and neurodevelopmental harm. This request goes beyond seeking to maintain the status quo during this case. Petitioners are asking the Court to stay the

effectiveness of the Revocation Rule until EPA issues an "appropriate existing stocks order." Motion at 26-27. To do so, the Court would need to adjudicate the merits and issue a mandatory injunction via a motion for a stay. This is procedurally improper in addition to unquestionably putting public health in danger.

Staying the Revocation Rule as to the 11 uses featured in the 2020 proposal would cause irreparable harm to human health in numerous ways. It would expose children to chlorpyrifos in food and drinking water that EPA's 2016 risk assessment found cause neurodevelopmental harm and to chlorpyrifos residues that California's risk evaluation found cause such harms. Astonishingly, EPA's 2020 assessment estimated that 1% of infants would experience 10% or greater cholinesterase inhibition, which would translate into 38,000 babies born every year at risk of both acute poisonings and learning disabilities from chlorpyrifos. States Comments (Goldman Decl., Ex. 7) at 16.

Putting children at risk of irreversible and long-lasting neurodevelopmental disabilities constitutes irreparable harm. Learning disabilities take their toll on children, their families, and school systems. They reduce academic achievement, diminish quality of life, and can lower earning potential. Landrigan Decl. (Goldman Decl., Ex. 3), ¶ 33. The harm to children and their families is incalculable, but recent studies have quantified the substantial societal savings

from preventing exposures to neurotoxic chemicals. *Id*. ¶¶34-36. Three recent published studies estimate that infant exposure to chlorpyrifos and other pesticides in the same class have caused millions of children to lose at least one IQ point and societal costs of $30-50 billion annually. LULAC Comments (Goldman Decl., Ex. 5) at 70.

The requested stay would also cause serious, irreparable harm to workers. While risks to workers are addressed under FIFRA, not the FQPA, the Court should consider this harm in balancing the equities. When the Ninth Circuit issued a writ of mandamus in 2015 ordering EPA to act on the petition to revoke chlorpyrifos tolerances, it referenced EPA's assessment of the dangers to human health, not only from drinking water, but also to farmworkers exposed to chlorpyrifos. *In re PANNA*, 798 F.3d 809, 814 (9th Cir. 2015). EPA took no action to protect workers from these risks. Unsurprisingly, the 2020 risk assessment continued to find that most workers who mix or apply chlorpyrifos face unacceptable risks. For many workers, the risks are more than an order of magnitude greater than what EPA deemed acceptable, even using 10% cholinesterase inhibition. This is true for six of the 11 uses Petitioners want this Court to allow to be continued, as well as approximately a dozen other crops that Petitioners want subject to an existing stocks order. 2020 Human Health Risk Assessment, Appendix 10-1; LULAC Comments (Goldman Decl., Ex. 5) at 64

(severe risks include soybeans, sugar beets, cherries, wheat, cotton, and asparagus). Aerial spraying and the most common forms of ground spraying are so dangerous that the 2020 proposal might, when finalized, end all aerial spraying and many types of ground applications. 2020 Proposal at 55, 57-58.

The 2020 assessment also found that workers who enter fields after chlorpyrifos applications would face unacceptable risks unless they were kept out of the fields for longer periods of time than required by current registrations. It made these findings for many of the 11 uses. LULAC Comments (Goldman Decl., Ex. 5) at 55 (apples, cherries, peaches, citrus, alfalfa, strawberries, and cotton). The Revocation Rule spares workers these unacceptable risks to their health, but a stay would put them back in harm's way.[6]

Petitioners erroneously claim the stay would "present no concerns for food safety or public health." Motion at 26. Their motion ignores the harms from chlorpyrifos documented in EPA's assessments, the SAP's findings, and the Ninth Circuit's decisions in the unreasonable delay cases, as well as in *LULAC*. It argues

[6] Chlorpyrifos also causes environmental harm. EPA's 2020 draft ecological risk assessment found chlorpyrifos toxic to mammals, birds, and fish, with use on citrus and cherries posing some of the highest risks. https://www.regulations.gov/document/EPA-HQ-OPP-2008-0850-0940; LULAC Comments (Goldman Decl., Ex. 5) at 70. Chlorpyrifos has been responsible for fish and bee kills, causes surface waters to violate state water quality standards, and has been found to cause population-level harm to fish that are on the Endangered Species Act list. LULAC Comments at 70-71.

for a stay based on asserted economic harms, but monetary losses are rarely considered irreparable harm. *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996). While loss of consumer goodwill can be irreparable in some circumstances, *id*., deciding to produce, market, sell, or use a product that causes learning disabilities and reduced IQ in children is not one of those circumstances.

Petitioners' claims of economic harm should be discounted because the asserted harms are due to the choices Petitioners made in the face of prolonged proceedings in EPA and the courts, moving toward revocation of chlorpyrifos tolerances. After EPA issued the 2015 proposal to revoke tolerances, the Ninth Circuit gave EPA a March 2017 deadline to take final action on the 2007 petition and indicated there would be no further extensions. *In re PANNA*, 840 F.3d 1014, 1015 (9th Cir. 2016). EPA's 2015 proposed rule would have revoked chlorpyrifos tolerances within six months, and had it been finalized by the March 2017 deadline, the tolerance revocation would have become effective in October 2017. 80 Fed. Reg. 69,079, 69,106 (Nov. 6, 2015). Due to EPA's further unreasonable delays, growers have had many more years to shift to alternatives; indeed, growers have already made that shift in states that have banned chlorpyrifos. *See* Heartland Health Research Alliance Comments (Goldman Decl., Ex. 4) at 15-21, 61 (describing alternatives to chlorpyrifos); States Comments (Goldman Decl., Ex. 7) at 21-24 (describing state bans). The Grower Petitioners knew of the formidable

court challenges and EPA's 2015 proposal to revoke chlorpyrifos tolerances. Indeed, six of the Grower Petitioners participated in *LULAC* as *amici.* While they may have held out hope that the revocation would never happen, this Court should not reward that type of wishful thinking.

Faced with a California cancellation action and dozens of liability lawsuits from families harmed by chlorpyrifos, Dow (now called Corteva) Agrosciences agreed to end almost all uses in California and stopped making chlorpyrifos altogether. Petitioner Gharda viewed this as an opportunity to expand its production and share of the U.S. market to reap profits in the near term, knowing full well that chlorpyrifos use in the U.S. would likely soon end. This Court should give little weight to alleged economic harm that results from Gharda's risk-taking.

In similar situations, courts have refused to countenance self-inflicted harms that companies brought upon themselves. In *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 996-97 (8th Cir. 2011), this Court upheld a preliminary injunction stopping further construction of a nearly built power plant because the company's claims of economic harm were largely self-inflicted; the company proceeded "at its own risk," ignoring pending administrative and legal challenges. *See also Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (in remanding to enjoin a highway project, court discounted monetary harm because the party was

largely responsible for the harm when it assumed a pro forma result in pending environmental litigation and entered into contracts); *Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc*., 143 F.3d 800, 806 (3rd Cir. 1998) (court discounted economic harms because of the "self-inflicted nature of any harm suffered"). This Court should not reward Petitioner Gharda's opportunistic actions.

The requested stay would cause irreparable harm to human health and that harm outweighs the asserted economic harm. A stay is also not in the public interest given the overriding priority Congress has assigned in the FQPA to protecting food safety and children. In addition, it is not in the public interest and runs counter to principles of judicial comity for one court to stay agency action that was effectively dictated by another court after thorough consideration and resolution of the merits. *See Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971) (courts avoid "serious interference with or usurpation of" another court's "continuing power" to supervise and modify injunctive relief); *Lapin v. Shulton, Inc*., 333 F.2d 169, 172 (9th Cir. 1964) (same).

CONCLUSION

Prospective *Amici* respectfully ask the Court to deny the motion for a stay.

Dated: February 18, 2022.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 27(d)(2), the undersigned certifies that this motion complies with the applicable type-volume limitations and that, exclusive of the parts exempted by Federal Rule of Appellate Procedure 32(f), this motion contains 4,662 words. This certificate was prepared in reliance on the word count of the word processing system (Microsoft Word) used to prepare this motion. The undersigned also certifies pursuant to Eighth Circuit Local Rule 28A(h)(2) that the electronic copy of the motion has been scanned for viruses and the electronic copy of the motion is virus free.

Dated: February 18, 2022.

/s/ Patti Goldman
PATTI A. GOLDMAN

Counsel for Prospective Amici *League of United Latin American Citizens, Pesticide Action Network North America, Natural Resources Defense Council, California Rural Legal Assistance Foundation, The Farmworker Association of Florida, Inc., Farmworker Justice, GreenLatinos, Labor Council for Latin American Advancement, Learning Disabilities Association of America, National Hispanic Medical Association, Pineros y Campesinos Unidos del Noroeste, United Farm Workers, and United Farm Workers Foundation*

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing *Motion for Leave to File* was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via the Court's CM/ECF system and served on all parties of record.

Dated: February 18, 2022.

/s/ Patti Goldman
PATTI A. GOLDMAN

Counsel for Prospective Amici *League of United Latin American Citizens, Pesticide Action Network North America, Natural Resources Defense Council, California Rural Legal Assistance Foundation, The Farmworker Association of Florida, Inc., Farmworker Justice, GreenLatinos, Labor Council for Latin American Advancement, Learning Disabilities Association of America, National Hispanic Medical Association, Pineros y Campesinos Unidos del Noroeste, United Farm Workers, and United Farm Workers Foundation*