

No. 20-70787

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Petitioners.

v.

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

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**UNOPPOSED MOTION FOR LEAVE TO INTERVENE OF NATIONAL
ASSOCIATION OF WHEAT GROWERS, NATIONAL CORN GROWERS
ASSOCIATION, NATIONAL COTTON COUNCIL, AMERICAN
SOYBEAN ASSOCIATION, AMERICAN SUGARBEET GROWERS
ASSOCIATION, NATIONAL SORGHUM PRODUCERS, AMERICAN
FARM BUREAU FEDERATION, AGRICULTURAL RETAILERS
ASSOCIATION, NATIONAL ASSOCIATION OF LANDSCAPE
PROFESSIONALS, GOLF COURSE SUPERINTENDENTS ASSOCIATION
OF AMERICA, AND MONSANTO COMPANY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, proposed Intervenor-Respondents, through their undersigned counsel, state as follows:

The National Association of Wheat Growers has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The National Corn Growers Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The National Cotton Council of America has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The American Soybean Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The American Sugarbeet Growers Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

National Sorghum Producers has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The American Farm Bureau Federation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The Agricultural Retailers Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The National Association of Landscape Professionals has no parent

corporation and no publicly held corporation owns 10% or more of its stock.

The Golf Course Superintendents Association of America has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Monsanto Company is an indirect, wholly-owned subsidiary of Bayer AG. Bayer AG is a publicly held corporation.

Dated: April 20, 2020

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INTRODUCTION

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, the National Association of Wheat Growers, the National Corn Growers Association, the National Cotton Council of America, the American Soybean Association, the American Sugarbeet Growers Association, the National Sorghum Producers, the American Farm Bureau Federation, the Agricultural Retailers Association, the National Association of Landscape Professionals, and the Golf Course Superintendents Association of America (the Glyphosate Users), and Monsanto Company (Monsanto) (collectively, Intervenors), respectfully move to intervene in this matter in support of Respondent, the United States Environmental Protection Agency (EPA).¹

EPA regulates agricultural and nonagricultural uses of pesticides (including herbicides)² under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y. Glyphosate was first registered under FIFRA in 1974 and was re-registered in 1993. The EPA Interim Registration Review Decision challenged here (Interim Decision) is the latest iteration in a long line of regulatory

¹ A separate petition has been filed with this Court challenging the same EPA order. *See Rural Coal. v. U.S. EPA*, No. 20-70801 (9th Cir. filed Mar. 20, 2020), ECF No. 1. All Intervenors here have filed a similar motion to intervene in that case.

² Herbicides, fungicides, insecticides, and rodenticides are all types of pesticides under FIFRA. *See* 7 U.S.C. § 136. This motion uses the terms herbicide and pesticide interchangeably.

decisions and other findings concluding that glyphosate does not pose unreasonable risks to human health or the environment. The Interim Decision re-affirmed EPA's long-standing conclusion that glyphosate is non-carcinogenic, and matches similar conclusions reached by "virtually all other government agencies and health organizations that have reviewed studies on the chemical." *Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 851 (E.D. Cal. 2018). These conclusions followed years of rigorous scientific analysis and EPA's evaluation of thousands of comments from various stakeholders, including glyphosate registrants, grower groups, non-governmental environmental organizations, states, and members of the general public.³

³ See EPA, Office of Chem. Safety & Pollution Prevention, Response from the Pesticide Re-evaluation Division (PRD) to Comments on the Glyphosate Proposed Interim Decision at 2–9, EPA-HQ-OPP-2009-0361 (Jan. 16, 2020), <https://www.epa.gov/sites/production/files/2020-01/documents/response-from-prd-comments-glyphosate-proposed-interim-decision.pdf> (Interim Registration Response to Comments). Petitioners National Resources Defense Council and Pesticide Action Network North America also submitted public comments during the registration review process. See Nat. Res. Def. Council, Comment on Registration Review: Draft Human Health and/or Ecological Risk Assessments for Several Pesticides, EPA-HQ-OPP-2009-0361-2294 (July 3, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-2294>; Nat. Res. Def. Council, Comment on Registration Review: Draft Human Health and/or Ecological Risk Assessments for Several Pesticides, EPA-HQ-OPP-2009-0361-3119 (July 3, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-3119> (mass comment campaign); Beyond Pesticides, Comment on Glyphosate Proposed Interim Registration Review Decision, EPA-HQ-OPP-2009-0361-14389 (Sept. 3, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-14389> (on behalf of itself, Pesticide Action Network, and others);

There is no question that every proposed Intervenor here meets the well-established test for intervention in this Circuit. As set forth herein, the Glyphosate Users utilize and rely upon glyphosate-based pesticides as an essential tool in their agricultural and landscaping operations.⁴ The Glyphosate Users filed formal comments supporting EPA's proposed decision. EPA's Interim Decision evaluates and addresses application rates and other requirements for glyphosate, and many other factors essential to the appropriate use of glyphosate pesticides by members of these associations. It is well-established that product users can intervene to protect these kinds of interests. *See, e.g., Order, Safer Chem., Healthy Families v. U.S. EPA*, No. 17-72260 (9th Cir. filed Nov. 27, 2017), ECF No. 23 (*Safer Chemicals Order*) (granting chemical user and trade associations' motion to intervene); *see also Anderson v. McCarthy*, 2016 WL 2770544, at *4–5 (N.D. Cal. May 13, 2016) (granting motion to intervene for trade association whose members used EPA-registered pesticides); *El Comite para El Bienestar de Earlimart v. Helliker*, 2004 WL 7339773, at *5 (E.D. Cal. Dec. 16, 2004) (similar).

Monsanto likewise has multiple legally protectable interests that support its

Pesticide Action Network N. Am., Comment on Glyphosate Proposed Interim Registration Review Decision, EPA-HQ-OPP-2009-0361-4762 (July 3, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-4762> (mass comment campaign).

⁴ Members of the Agricultural Retailers Association sell glyphosate to their customers who rely upon it for weed control.

intervention here under well-established case law. Glyphosate is the active ingredient in a number of Monsanto product formulations, and Monsanto retains patents and other intellectual property rights protecting certain applications of glyphosate. Like the Glyphosate Users, Monsanto participated in the regulatory processes culminating in the Interim Decision. And the Interim Decision addresses certain labeling requirements for products containing glyphosate, including those produced by Monsanto. This Court routinely grants intervention in such circumstances, *see, e.g.*, Order, *Ctr. for Food Safety v. EPA*, No. 14-73359 (9th Cir. filed Dec. 11, 2014), ECF No. 12 (granting motion to intervene of Dow Agrosciences LLC to defend its registration of a pesticide); *Sierra Club v. U.S. EPA*, 762 F.3d 971, 976 (9th Cir. 2014) (intervention granted to applicant of challenged EPA permit); *Akiak Native Cmty. v. U.S. EPA*, 625 F.3d 1162, 1165 (9th Cir. 2010) (same), including very recently for Monsanto in cases involving herbicide registrations. *See* Order, *Nat'l Family Farm Coal. v. U.S. EPA*, No. 19-70115, ECF No. 29 (9th Cir. May 15, 2019); Order, *Nat'l Family Farm Coal v. U.S. EPA*, No. 17-70196, ECF No. 25 (9th Cir. filed May 4, 2017).

Intervenors have the right to intervene under Federal Rule of Appellate Procedure 15(d). All of the requirements for intervention are satisfied: (1) this motion is timely, filed within 30 days of the instant action; (2) Intervenors have protectable interests in glyphosate's registration review; (3) Petitioners' suit, if

successful, could impair those interests; and (4) the government does not adequately represent Intervenors.

Counsel for Intervenors has conferred with counsel for Respondents and Petitioners about this motion. Respondents and Petitioners have both stated that they take no position on the motion.⁵

BACKGROUND

EPA administers FIFRA, “a comprehensive regulatory statute” that “regulate[s] the use, . . . sale and labeling[] of pesticides,” including glyphosate. *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 437 (2005) (citations omitted). Under FIFRA, EPA considers whether a proposed use of a pesticide, *i.e.* “regist[r]ation,” would cause “unreasonable adverse effects . . . on the environment,” *id.* at 438 (citing 7 U.S.C. § 136a(c)(5)(C)), a defined term that includes “unreasonable risk to man” and any “human dietary risk,” 7 U.S.C. § 136(bb). FIFRA further provides that pesticide registrations must be reviewed every fifteen years. *See* § 136a(g)(1)(A)(iv); 40 C.F.R. §§ 155.50, 155.52. A pesticide may remain registered if it continues to meet the statutory standard for registration: that is, if it continues to perform its intended function without unreasonable effects on human health or the environment. *See* Interim Decision at 3.

⁵ If this motion is granted, Intervenors intend to file a joint merits brief.

Glyphosate is used to control weeds in agricultural, residential, aquatic, and other settings. Since EPA first registered glyphosate in 1974, glyphosate has become the world's most widely used herbicide. In the United States, glyphosate is approved for use in more than 250 agricultural crop applications, including pre-emergent, over-the-top, and desiccant uses.

In 1993, EPA re-registered glyphosate. *See* EPA, Glyphosate Reregistration Eligibility Decision (Sept. 1993), https://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-417300_1-Sep-93.pdf. At that time, the agency found the pesticide poses “minimal” human risk, “low acute toxicity,” and “evidence of *non-carcinogenicity*.” *Id.* at 2–4 (emphasis added). Since then, EPA has repeatedly evaluated glyphosate's health and safety risks and has concluded, among other things, that it is safe for human use when used according to its label and that it is non-carcinogenic. *See* 62 Fed. Reg. 17,723, 17,728 (Apr. 11, 1997); 67 Fed. Reg. 60,934, 60,935–43 (Sept. 27, 2002); 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008); EPA, Office of Pesticide Programs, Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential EPA's Office of Pesticide Programs, at 13 (Dec. 12, 2017), https://cfpub.epa.gov/si/si_public_file_download.cfm?p_download_id=534487; EPA, Office of Chem. Safety & Pollution Prevention, Letter from Michael L. Goodis, Dir. Registration Div., to glyphosate registrants (Aug. 7, 2019),

https://www.epa.gov/sites/production/files/2019-08/documents/glyphosate_registrant_letter_-_8-7-19_-_signed.pdf.

EPA began the current registration review process for glyphosate more than ten years ago, and in 2017 released two important draft documents for comment: A draft human health risk assessment and a preliminary ecological risk assessment.⁶ And in April 2019 EPA issued a proposed Interim Decision for comment as well. *See* EPA, Glyphosate Proposed Interim Registration Review Decision, Case No. 0178, EPA-HQ-OPP-2009-0361-2344 (Apr. 23, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-2344>. EPA issued the final Interim Decision at issue in this suit on January 22, 2020. After review of the scientific evidence, “the agency has determined that there are no risks to human health from the current registered uses of glyphosate and that glyphosate is not likely to be carcinogenic to humans” (EPA’s lowest risk category for carcinogenicity).⁷ In

⁶ *See* Press Release, U.S. EPA, EPA Releases Draft Risk Assessments for Glyphosate (Dec. 18, 2017), <https://www.epa.gov/pesticides/epa-releases-draft-risk-assessments-glyphosate>.

⁷ *See* Interim Registration Response to Comments at 4. This finding is consistent with the conclusions of international agencies that “have likewise concluded that there is insufficient evidence that glyphosate causes cancer, including the European Commission’s Health and Consumer Protection Directorate–General, multiple divisions of the World Health Organization besides the IARC, and Germany’s lead consumer health and safety regulator.” *Nat’l Ass’n of Wheat Growers*, 309 F. Supp. 3d at 852; *see also* Health Can., Pest Mgmt. Regulatory Agency, RVD2017-01, Re-evaluation Decision: Glyphosate at 1 (Apr. 28, 2017) (“Glyphosate is not genotoxic

issuing the Interim Decision, EPA committed to promptly concluding further elements of its registration review evaluations, including its assessment of whether glyphosate affects protected species under the Endangered Species Act and its endocrine disruption screening determination under the Federal Food, Drug, and Cosmetic Act (FDCA), before registration review is complete. *See* Interim Decision at 20.⁸

INTERESTS OF INTERVENORS

All proposed Intervenorors have substantial interests in the registration review of glyphosate.

The National Association of Wheat Growers is a federation of twenty state associations representing the needs of wheat producers nationwide. Its members

and is unlikely to pose a human cancer risk.”); Austl. Pesticides & Veterinary Meds. Auth., Australian Government, Final Regulatory Position: Consideration of the Evidence for a Formal Reconsideration of Glyphosate at 9 (Mar. 2017) (concluding “that the scientific weight-of-evidence indicates that . . . exposure to glyphosate does not pose a carcinogenic or genotoxic risk to humans”); Food Safety Comm’n of Japan, Risk Assessment Report: Pesticides: Glyphosate Summary (Sept. 2016); Korea Rural Dev. Admin., Safety of Pesticides Containing Glyphosate and Diazinon Confirmed (Mar. 10, 2017).

⁸ As EPA recognized in its Interim Decision, *see* 35–36, EPA has reached certain conclusions regarding endocrine disruption and glyphosate, including that “[b]ased on [the] weight of evidence” there is “no convincing evidence of potential interaction [of glyphosate] with the estrogen, androgen or thyroid pathways.” EPA, Office of Pesticide Programs, EDSP Weight of Evidence Analysis of Potential Interaction with Estrogen, Androgen or Thyroid Pathways, at 2 (June 29, 2015), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-0047>.

rely on glyphosate for effective weed control.⁹

The National Corn Growers Association represents nearly 40,000 dues-paying corn growers and the interests of more than 300,000 growers who contribute through corn checkoff programs in their states. Glyphosate is the cornerstone for many corn growers' comprehensive sustainable weed-management practices.¹⁰

The National Cotton Council of America is the central organization representing the interests of the U.S. cotton industry, including farms and businesses that employ approximately 125,000 workers. Cotton growers widely rely on glyphosate as a critical component of successful crop production and environmental stewardship.¹¹

The American Soybean Association has 26 affiliated state associations and represents soybean farmers in 30 soybean-producing states. Glyphosate has played

⁹ Nat'l Ass'n of Wheat Growers, Comment on Glyphosate Proposed Interim Registration Review Decision at 2, EPA-HQ-OPP-2009-0361-14421 (Sept. 3, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-14421> (NAWG Comment).

¹⁰ Nat'l Corn Growers Ass'n, Comment on Registration Review: Draft Human Health and/or Ecological Risk Assessments for Several Pesticides at 1–2, EPA-HQ-OPP-2009-0361-2009 (Apr. 30, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-2009> (NCGA Comment).

¹¹ Nat'l Cotton Council of Am., Comment on Registration Review: Draft Human Health and/or Ecological Risk Assessments for Several Pesticides at 1, EPA-HQ-OPP-2009-0361-1627 (Apr. 25, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-1627> (NCCA Comment).

a key role in helping soybean farmers manage weeds that can rob crop yields and destroy livelihoods.¹²

The American Sugarbeet Growers Association represents family farmers across all eleven sugarbeet-producing states, which collectively produce approximately 55% of all sugar produced in the United States. Sugarbeet growers are completely dependent on glyphosate and could not continue to effectively farm sugarbeets without this essential crop-protection tool.¹³

National Sorghum Producers represents sorghum producers and has affiliate organizations in fifteen sorghum-producing states. Its members rely on glyphosate for effective weed-control and a variety of conservation measures, such as no-till or reduced-till farming systems.¹⁴

The American Farm Bureau Federation is the nation's largest general farm

¹² Am. Soybean Ass'n, Comment on Glyphosate Proposed Interim Registration Review Decision at 1–2, EPA-HQ-OPP-2009-0361-10905 (Aug. 23, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-10905> (ASA Comment).

¹³ Am. Sugarbeet Growers Ass'n, Comment on Proposed Interim Registration Review Decision at 1–2, EPA-HQ-OPP-2009-0361-12387 (Aug. 28, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-12387> (ASGA Comment).

¹⁴ Nat'l Sorghum Producers, Comment on Glyphosate Proposed Interim Registration Review Decision at 1, EPA-HQ-OPP-2009-0361-13613 (Sept. 3, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-13613> (NSP Comment).

organization, representing farmers and ranchers in all fifty states and Puerto Rico. Its members rely on continued access to glyphosate for their agricultural operations.¹⁵

The Agricultural Retailers Association (ARA) represents agricultural retailers and distributors of agronomic crop inputs with members in 48 states and representing over 70% of all crop input materials sold to America's farmers. ARA believes continued access to glyphosate is essential to its members and customers.¹⁶

The National Association of Landscape Professionals is the national trade association representing nearly 100,000 landscape industry professionals specializing in lawn care, landscape design and installation, landscape maintenance, tree care, irrigation and water management, and interior plantscaping. These professionals rely on glyphosate for their day-to-day landscaping activities.

The Golf Course Superintendents Association of America is the professional association for more than 19,000 members who manage and maintain the game's most valuable asset—the golf course. Glyphosate is used by superintendents to

¹⁵ Am. Farm Bureau Fed'n, Comment on Glyphosate Registration Review at 1–2, EPA-HQ-OPP-2009-0361-0019 (Sept. 17, 2009), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-0019> (AFBF Comment).

¹⁶ Agric. Retailers Ass'n, Comment on Registration Review: Draft Human Health and/or Ecological Risk Assessments for Several Pesticides at 2, EPA-HQ-OPP-2009-0361-1874 (Apr. 30, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-1874> (ARA Comment).

renovate turfgrass and control grass weed species for which there are no or few other herbicide options.¹⁷

Monsanto is a registrant of glyphosate-based herbicide formulations.

LEGAL STANDARD

Federal Rule of Appellate Procedure 15(d) provides that a motion for leave to intervene “must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for invention.” The rule does not provide a substantive intervention standard, but appellate courts refer to Federal Rule of Civil Procedure 24 when reviewing motions to intervene in administrative review petitions like this one. *See Aerospace & Agric. Implement Workers Local 283 v. Scofield*, 382 U.S. 205, 216 n.10 (1965) (Federal Rule of Civil Procedure 24 policies “may be applicable in appellate courts.”); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–18 (7th Cir. 2004) (“Rule 15(d) does not provide standards for intervention, so appellate courts have turned to” Federal Rule of Civil Procedure 24); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same).

¹⁷ Golf Course Superintendents Ass’n of Am., Comment on Glyphosate Proposed Interim Registration Review Decision at 1, EPA-HQ-OPP-2009-0361-14398 (Apr. 30, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-14398> (GCSAA Comment).

Rule 24 requires courts to grant intervention where the following conditions are satisfied:

(1) the motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the parties to the action.

Wilderness Soc’y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc).

This Court, moreover, employs a “liberal policy in favor of intervention,” designed to “involv[e] as many apparently concerned persons as is compatible with efficiency and due process.” *Id.* at 1179 (citations omitted). This Court “accept[s] as true the non-conclusory allegations made in support of an intervention motion.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001). Permissive intervention is warranted if it is “timely,” the intervenor has a claim or defense that shares with the main action a common question of law or fact, and there would be no delay or prejudice resulting from the intervention. Fed. R. Civ. P. 24(b).

ARGUMENT

Intervenors satisfy all of the requirements for intervention of right. In the alternative, Intervenors meet the standard for permissive intervention.

I. INTERVENORS SATISFY THE STANDARD FOR INTERVENTION OF RIGHT

A. This Motion Is Timely

Intervenors filed this motion 30 days after Petitioners filed their petition for review. This filing is thus within the deadline of Federal Rule of Appellate Procedure 15(d); *see also* Federal Rule of Appellate Procedure 26(a)(1). In addition, no substantive motions or briefs have been filed, and no rulings have issued. Petitioners will suffer no prejudice from Intervenors' entry at this early stage of the litigation.

B. Intervenors Have Significantly Protectable Interests

A prospective intervenor has significantly protectable interests if “the interest is protectable under some law” and “there is a relationship between the legally protected interest and the claims at issue.” *Wilderness Soc’y*, 630 F.3d at 1176 (citation omitted). An interest is “relat[ed]” to a claim when resolution of the claim actually affects the movant’s interest. *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998). This is a “a practical, threshold inquiry. No specific legal or equitable interest need be established.” *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995) (quotations omitted). Both the Glyphosate Users and Monsanto have significantly protectable interests under well-established case law.

1. *The Glyphosate Users Have Significantly Protectable Interests*

The Glyphosate Users have significantly protectable interests in this case satisfying Rule 24(a)(2). The Glyphosate Users participated in and submitted comments during the regulatory proceedings that produced the Interim Decision. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397–98 (9th Cir. 1995) (holding that such participation gave rise to a legally protectable interest and affirming grant of intervention as of right). This is the same interest that allowed Petitioners to initiate this suit. *See* 7 U.S.C. § 136n(b) (petitioner must have “been a party to the proceedings” under review). And those comments show that the Glyphosate Users have demonstrable, significantly protectable interests in the Interim Decision.

Growers rate weed control as their number one crop production challenge—more significant than pests, diseases, frosts, and many other kinds of growing impediments.¹⁸ Weeds use resources, compete with crops for space, sunlight, nutrients, and moisture, and may release toxic compounds into crops.¹⁹ Thus, weed control is essential to maximize yields.²⁰ As the National Cotton Council has

¹⁸ *See* ASGA Comment at 1.

¹⁹ NCCA Comment at 1.

²⁰ *See, e.g.*, NCCA Comment at 1; ASA Comment at 2.

explained, weeds can reduce yields by an average of 30%.²¹ And for sorghum, the average crop loss due to uncontrolled weeds would be 47%.²² Before glyphosate, some growers would cope with weeds by using a combination of up to 13 different herbicides, all requiring complex application timing and other burdensome requirements.²³ Glyphosate allowed growers to use fewer and less toxic herbicides.²⁴ Glyphosate also produces numerous other benefits to growers. It conserves soil by reducing tillage;²⁵ satisfactory soil health for many growers “would not be possible without the use of glyphosate.”²⁶ Glyphosate is also a highly valuable product for growers “because of its ability to effectively control a broad spectrum of plants post emergent.”²⁷ Ultimately, many growers would not be able to achieve needed crop yields without glyphosate.²⁸

²¹ NCCA Comment at 1.

²² *See* NSP Comment at 1.

²³ ASGA Comment at 1.

²⁴ ASGA Comment at 2; NCGA Comment at 1.

²⁵ ASA Comment at 1; ASGA Comment at 3; NCCA Comment at 3; NSP Comment at 1; AFBF Comment at 2; ARA Comment at 1–2.

²⁶ NAWG Comment at 2.

²⁷ NAWG Comment at 2.

²⁸ *See* ASA Comment at 2 (“Glyphosate has played a key role in helping farmers manage weeds that can rob crop yields and quality”); NAWG Comment at 2 (“This unique product is critical to the sustainability of wheat production in the United States long term.”); ASGA Comment at 5 (“Without glyphosate our growers

Similarly, landscaping professionals rely on glyphosate to conduct their day-to-day operations. Glyphosate is the most commonly used post-emergence herbicide in managed landscapes, helping to control annual and perennial weeds, grasses, and broadleaves, for which there may be no or few other herbicide options.²⁹ Without glyphosate, landscaping professionals would be forced to rely on less effective, environmentally friendly, and economically efficient methods of weed control.

These interests plainly support intervention. *See, e.g., Safer Chemicals Order* (granting chemical user and trade associations' motion to intervene); *see also Anderson*, 2016 WL 2770544, at *4–5 (granting motion to intervene for trade association whose members used EPA-registered pesticides); *El Comite para El Bienestar*, 2004 WL 7339773, at *5 (similar).

2. *Monsanto Has Significantly Protectable Interests*

Monsanto has at least two bona fide interests here, each of which independently satisfies Rule 24(a)(2).

First, glyphosate is the key ingredient in many Monsanto products. For example, it is the active ingredient in many of Monsanto's Roundup® branded products. And Monsanto owns valuable patents and other intellectual property rights protecting certain glyphosate applications. EPA's Interim Decision, confirming

would be left with ineffective crop protection tools that would cause many of us to go out of business.”).

²⁹ *See, e.g., GCSAA Comment* at 1–2.

prior conclusions regarding glyphosate, is an important element supporting Monsanto's ability to capture the full value of its investments in that intellectual property. These interests are independently sufficient to establish Monsanto's right to intervene. *See, e.g., Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074–76 (D.C. Cir. 1998) (drug patent owner had protectable interest); *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984) (interest in receiving royalties supported intervention as of right); *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1482–83 (9th Cir. 1993) (city had sufficient interest to protect its EPA-issued permit under Clean Water Act).

Second, Monsanto has significantly protectable interests in the considerable efforts (and costs) it invested in the administrative process that led to the current registration. Monsanto invested substantial time and money in developing and submitting scientific data related to glyphosate, which EPA reviewed as part of its regulatory analyses under FIFRA.³⁰ Such “participat[ion] in the administrative process” that culminated in the challenged administrative action creates an interest sufficient to support intervention. *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397–98; *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (explaining that this Court has not had “any difficulty determining that the organization seeking to intervene had an interest in the subject of the suit” in cases “challenging the legality

³⁰ *See, e.g., Interim Registration Response to Comments at 3.*

of a measure which it had supported”); *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (holding sponsors of a ballot initiative had a significant protectable interest in defending initiative against challenge).

C. The Relief Sought By Petitioners Would Impair Intervenors’ Ability To Protect Their Interests

To satisfy the third part of the Rule 24(a)(2) test, Intervenors need only show that an unfavorable disposition of this action “may as a practical matter impair or impede” their ability to protect their interests. *See Wilderness Soc’y*, 630 F.3d at 1177; *see also id.* at 1180–81 (“A putative intervenor will generally demonstrate a sufficient interest for intervention of right . . . if ‘it will suffer a practical impairment of its interests as a result of the pending litigation.’” (quoting *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006))); *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (“If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general *rule*, be entitled to intervene.” (emphasis added)).

This Court has made clear that impairment is demonstrated where the “relief sought by p[etitioners] will have direct, immediate, and harmful effects upon [the proposed intervenors’] legally protectable interests.” *Berg*, 268 F.3d at 818 (quoting *Forest Conservation Council*, 66 F.3d at 1494). That standard is amply satisfied here. The relief requested by Petitioners could jeopardize EPA’s broader, years-long effort to finalize its registration review of glyphosate and may ultimately impact

glyphosate registrations more generally, thereby impairing Intervenors' substantial interests therein. *See Citizens for Balanced Use*, 647 F.3d at 898.

D. Intervenors' Interests Are Not Adequately Represented By The Existing Parties

As this Court has explained, a movant's "burden in showing inadequate representation is *minimal*: it is sufficient to show that representation *may* be inadequate." *Forest Conservation Council*, 66 F.3d at 1498 (first emphasis added) (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); *see also Berg*, 268 F.3d at 822–23. In considering the adequacy of representation, this Court must consider *inter alia* "whether the interest of a present party is such that it w[ould] undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Forest Conservation Council*, 66 F.3d at 1498–99.

Intervenors' interests in this action are not adequately represented by EPA. The Glyphosate Users and Monsanto have significant interests in ensuring continued access to glyphosate products, including through the successful resolution of the glyphosate registration review process. Likewise, Monsanto has a significant interest in protecting its financial investment and intellectual property related to many glyphosate product registrations, and ultimately in receiving revenue, in the form of sales and royalties, from glyphosate-based herbicides such as Roundup®.

See Greater Yellowstone Coal. v. Timchak, 2008 WL 4911410, at *4 (D. Idaho Nov. 13, 2008) (“Only [a proposed intervenor] . . . can portray [a] . . . more complete picture of the impact” of any relief on its financial interests.). Moreover, EPA’s “general interest” in seeing the Interim Decision upheld “does not mean [the parties’] particular interests coincide so that representation by the agency alone is justified.” *Am. Horse Prot. Ass’n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). To the contrary, “EPA’s interests, as the governmental body that regulates pesticides, necessarily differ from the interests of the regulated private parties” and therefore EPA cannot be presumed to adequately represent such parties. Mem. & Order 6, *Pesticide Action Network of N. Am. v. U.S. EPA*, No. 3:08-cv-01814-MHP (N.D. Cal. July 8, 2008), ECF No. 43 (emphasis added).

This Court has repeatedly recognized that the government does not adequately represent the specific, narrower economic and other interests of private parties that may be affected by the litigation. *See Forest Conservation Council*, 66 F.3d at 1498–99; *Berg*, 268 F.3d at 823–24; *see also Sierra Club v. Espy*, 18 F.3d 1202, 1207–08 (5th Cir. 1994). Indeed, the government’s duty to represent the interests of the public at large necessarily means its interests may not always align with those of private parties supportive of its actions. *See Kane County v. United States*, 928 F.3d 877, 892–95 (10th Cir. 2019) (finding the government’s representation of multiple and competing public interests did not adequately represent intervenor’s interests); *Fund*

for Animals, Inc. v. Norton, 322 F.3d 728, 736–37 & n.9 (D.C. Cir. 2003) (collecting cases recognizing that “governmental entities do not adequately represent the interests of aspiring intervenors”); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973–74 (3d Cir. 1998). Federal courts have recognized that this divergence of interests is especially apparent with FIFRA registrations. *See United Farm Workers v. Adm’r, U.S. EPA*, 2008 WL 3929140, at *2 (N.D. Cal. Aug. 26, 2008) (insecticide registration case in which court recognized “private companies . . . have a more parochial and financial interest not shared by the EPA”); *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (pesticide registrant’s “economic and proprietary interests” not shared by EPA).

For those reasons, there is no assurance that EPA would “undoubtedly make all [of Intervenor’s] arguments.” *Forest Conservation Council*, 66 F.3d at 1498–99. This risk is not merely hypothetical. In a case concerning the government’s approval of non-regulated status for genetically engineered alfalfa, the government directly opposed one of Monsanto’s efforts to defend the government’s action. *See Br. for the Fed. Resp’ts in Opp’n to Certiorari, Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (No. 09-475), 2009 WL 5017538. Monsanto was forced to seek certiorari over the government’s opposition—a petition that proved successful (and culminated in reversal) despite that opposition. And in another action—this one involving the government’s approval of genetically engineered sugarbeets—the

government dismissed its appeal of an adverse district court ruling, once again requiring Monsanto to vindicate its interests alone. *See* Mot. to Voluntarily Dismiss Appeal (No. 10-17334) of Fed. Defs.-Appellants, *Ctr. for Food Safety v. Vilsack*, No. 10-17719 (9th Cir. Dec. filed 29, 2010), ECF No. 12 (successful appeal brought by intervenor Monsanto). This history confirms that the government's interests cannot always be expected to parallel Intervenors' interests.

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS WARRANTED

In the alternative, Intervenors should be granted permissive intervention under Rule 24(b)(1)(B). “On timely motion, the court may permit anyone to intervene who. . . has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1). “The language of the rule makes clear that . . . if there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002). Intervenors also satisfy this standard for intervention.

As explained above, this motion is timely and intervention would not delay or substantially complicate the litigation. *See supra* at 13. The “common question of law or fact” requirement is similarly satisfied. Intervenors seek to address precisely the same issue as Petitioners (EPA’s glyphosate interim registration review decision), and have a significant interest in the case’s outcome. Because Intervenors

will raise issues “directly responsive to” Petitioners’ claims, they necessarily will “assert a claim or defense in common with the main action,” and therefore “satisf[y] the literal requirements of Rule 24(b).” *Kootenai Tribe*, 313 F.3d at 1110.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court grant the motion to intervene.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This forgoing motion complies with the type-volume limitation of Circuit Rules 27-1(d) and 32-3(2) because the document contains 5,107 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f) and Circuit Rule 27-1(d).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 Times New Roman 14-point font..

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