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8
 9 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA
 10 TUCSON DIVISION

11 CENTER FOR BIOLOGICAL DIVERSITY,
 ET AL.,

12 Plaintiffs,

13 v.

14 UNITED STATES ENVIRONMENTAL
 15 PROTECTION AGENCY, ET AL.,

16 Defendants,

17 and

18 BAYER CROPSCIENCE LP, ET AL.,

19 Defendant-Intervenors.
 20
 21
 22
 23
 24

No. 4:20-cv-00555-DCB

**BRIEF OF AMICI CURIAE
 IOWA, ALABAMA, ALASKA,
 GEORGIA, IDAHO, INDI-
 ANA, KANSAS, KENTUCKY,
 LOUISIANA, MISSISSIPPI,
 MISSOURI, MONTANA, NE-
 BRASKA, NORTH DAKOTA,
 OHIO, OKLAHOMA, SOUTH
 DAKOTA, TEXAS, AND
 WEST VIRGINIA IN OPPO-
 SITION TO PLAINTIFFS’
 MOTION FOR SUMMARY
 JUDGMENT AND IN SUP-
 PORT OF DEFENDANTS’
 AND DEFENDANT-INTER-
 VENORS’ CROSS-MO-
 TIONS FOR SUMMARY
 JUDGMENT**

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7 U.S.C. §§ 1366

16 U.S.C. § 13516

1 The States of Iowa, Alabama, Alaska, Idaho, Kansas, Kentucky, Louisi-
2 ana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Okla-
3 homa, South Dakota and West Virginia (“Amici States”) file this amicus brief
4 in opposition to Plaintiffs’ motion for summary judgment (Dkt. 155) and in sup-
5 port of Defendants’ and Defendant-Intervenors’ cross-motions for summary
6 judgment. (Dkt. 170; Dkt. 174.)
7

8 **IDENTITY AND INTEREST OF AMICI STATES**

9 *Amici* are the States of Iowa, Alabama, Alaska, Idaho, Kansas, Kentucky,
10 Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Ok-
11 lahoma, and South Dakota. Agriculture is vital to the Amici States’ economies
12 and their citizens’ livelihoods. The corn, soybeans, and cotton produced by farm-
13 ers in Amici States not only form a core component of those states’ economies,
14 but also contribute to the United States’ food security and Gross Domestic Prod-
15 uct. Amici States’ farmers, and the crops they grow, feed the world’s population,
16 contribute to the local, state, and national economies, and employ millions of
17 people.
18

19 Defendant-Intervenors manufacture the dicamba products and Defend-
20 ants register those products for sale and use. Those products are essential to
21 the ability of the farmers in these States to make those important contributions
22 to local, state, national, and global well-being. Farmers in Amici States rely on
23 dicamba to control weeds and other invasive vegetation both before and during
24

1 the growing season. Effective weed management is necessary to allow farmers
2 to maximize a given crops' yield. The benefits of higher yields accrue not only
3 to farmers, but to a multitude of related industries and to the prices eventually
4 paid by everyday consumers. Amici States benefit from agriculture's impact on
5 their economies, particularly the rural areas of those states. And much of agri-
6 culture depends on effective weed management and pest control. As the EPA
7 itself noted in 2020, "The significant adoption of [dicamba tolerant] technology
8 is directly responsive to the need to prevent economic losses, and these products
9 benefit soybean and cotton growers. In some states (i.e., Mississippi), [dicamba
10 tolerant] soybean may account for nearly 80% of planted acres." EPA, Memo-
11 randum Supporting Decision to Approve Registration for the Uses of Dicamba
12 on Dicamba Tolerant Cotton and Soybean 15 (Oct. 27, 2020),
13 <https://perma.cc/FQ3C-EEDU>.
14
15

16 Amici States' farmers must have stability and certainty in the federal
17 rulemaking process because financial investment in two of the most critical in-
18 puts to a farming operation—seeds and herbicides—occur well before the crop
19 season. EPA's registration of a particular herbicide for sale and use should
20 serve as a reliable signal to the farmers that, if they invest financial resources
21 in ordering that product, it will be available for use consistent with that regis-
22 tration. The Amici States believe that EPA's Registration Actions are legally
23 proper. Vacating the Registration Actions thus puts Amici States' farmers at
24

1 risk of significant economic hardship. For those reasons, if the Court determines
2 that the Registration Actions are legally deficient, the Court should remand to
3 EPA with direction, but without vacatur.

4 ARGUMENT

5 Plaintiffs sued EPA to challenge its registration of three dicamba-based
6 herbicide products (collectively, the “Registration Actions”). Plaintiffs assert the
7 Registration Actions are deficient under provisions of three federal statutes: the
8 Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.*
9 (“FIFRA”); the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”);
10 and the Endangered Species Act, 16 U.S.C. § 1351 *et seq.* (“ESA”).
11

12 Defendants defend the Registration Actions on the merits, so Amici
13 States focus on two discrete issues: first, Plaintiffs’ improper use of extra-record
14 evidence and second, the disruption that will result if the Court vacates the
15 Registration Actions.
16

17 Amici States bring a unique perspective to the Court in addressing those
18 issues. Amici States’ regulatory agencies regularly engage in policy- and rule-
19 making decisions subject to challenge under APA state analogs. Amici States’
20 regulatory agencies are statutorily tasked with governing the registration, la-
21 beling, and sale of FIFRA-related products within their borders. And under the
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1 principles of federalism, Amici States deal most directly with affected indus-
2 tries and farmers within their jurisdictions and thus have a deep understanding
3 of the impact vacatur of the Registration Actions will have.

4 **I. THE COURT SHOULD NOT CONSIDER THE EXTRA-RECORD
5 EVIDENCE IN ITS REVIEW OF THE REGISTRATION AC-
6 TIONS.**

7 The Court should decline to consider extra-record evidence presented by
8 Plaintiffs when reviewing the Registration Actions. Generally, when a court re-
9 views agency actions under the APA, it must limit its review to the administra-
10 tive record. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985);
11 *Lands Council v. Powell*, 395 F.3d 1019, 1029–30 (9th Cir. 2005). There is no
12 cause to depart from that general rule here.

13 A reviewing court’s assessment of an “agency decision typically focuses
14 on the administrative record in existence at the time of the decision and does
15 not encompass any part of the record that is made initially in the reviewing
16 court.” *S.W. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443,
17 1450 (9th Cir. 1996). The Ninth Circuit consistently applies that common-sense
18 rule. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th
19 Cir. 2014) (reversing district court for erring by engaging in extra-record re-
20 view); *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir.
21 2010) (affirming district court’s denial of a motion to expand the administrative
22 record). Yet Plaintiffs’ case rests largely on evidence not before EPA at the time
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24

1 of the Registration Actions. Consideration of that evidence improperly ventures
2 beyond the administrative record.

3 Limiting a court’s review to the administrative record in existence at the
4 time of the decision helps to ensure the Court affords the agency appropriate
5 deference. *See Locke*, 776 F.3d at 992. The APA gives agencies “substantial dis-
6 cretion ‘to rely on the reasonable opinion of its own qualified experts even if, as
7 an original matter, a court might find contrary views more persuasive.’” *Id.*
8 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)).
9

10 In certain circumstances, courts that review extra-record evidence may
11 “effectively conduct[] a de novo review of the agency’s action rather than limit-
12 ing itself to the deferential procedural review that the APA’s arbitrary or capri-
13 cious standard permits.” *Id.*

14 Amici States acknowledge that the Ninth Circuit has allowed a reviewing
15 Court to “examine extra-record evidence only in limited circumstances that are
16 narrowly construed and applied.” *Safari Club Intl. v. Haaland*, 31 F.4th 1157,
17 1177 (9th Cir. 2022), *cert. denied sub nom. Alaska v. Haaland*, 143 S. Ct. 1002
18 (2023) (quoting *Goffney v. Becerra*, 995 F.3d 737, 747–48 (9th Cir. 2021)). Those
19 limited circumstances exist where: “(1) admission of extra-record evidence is
20 necessary to ascertain whether the agency considered all relevant factors and
21 explained its decision; (2) the agency relied on documents not in the record; (3)
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1 clarification of technical matter is needed; or (4) the agency acted in bad faith.”
2 *Id.* (citing *Lands Council*, 395 F.3d at 1030).

3 The Plaintiffs rely on only one of the four limited circumstances: the “rel-
4 evant factors” exception. (Dkt. 108 at 16); see *Lands Council*, 395 F.3d at 1030.
5 While that “relevant factors exception permits a district court to consider extra-
6 record evidence to develop a background against which it can evaluate the in-
7 tegrity of the agency’s analysis,” it does not allow a Court to use that extra-
8 record evidence to judge the wisdom of an agency’s action. *Locke*, 776 F.3d at
9 992 (citing *Asarco*, 616 F.2d at 1160). The only purpose for which a reviewing
10 Court may admit that extra-record evidence under the relevant factors excep-
11 tion is to “help the court understand whether the agency complied with the
12 APA’s requirement that the agency’s decision be neither arbitrary nor capri-
13 cious.” *Id.* (citing *Asarco*, 616 F.2d at 1159). That narrow exception does not,
14 however, allow a reviewing court to look to the extra-record evidence “as a basis
15 for questioning the agency’s scientific analyses or conclusions.” *Id.* (citing
16 *Asarco*, 616 F.2d at 1160–61).

17 Plaintiffs ask this Court to disregard the Ninth Circuit’s instructions
18 from *Locke* and *Asarco*. Moreover, Plaintiffs ask the Court to expand what is
19 meant to be a narrow exception to view extra-record sources as it laid out in
20 *Lands Council*. Plaintiffs seek to use evidence created after the EPA took the
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1 Registration Actions, and thus after the Registration Actions were pending be-
2 fore the EPA, as a basis to question the agency’s analyses and conclusions. That
3 use of extra-record evidence for that purpose is impermissible. *Locke*, 776 F.3d
4 at 992. The Court should decline to consider any evidence not before EPA at the
5 time of the Registration Actions.

7 **II. THE APPROPRIATE REMEDY IS REMAND WITHOUT VACA-** 8 **TUR.**

9 If the Court finds the Registration Actions legally deficient in any respect,
10 the Court should not vacate the Registration Actions. Rather, while vacatur
11 may be the usual remedy when the Federal Courts declare an agency’s action
12 deficient, it is neither the exclusive remedy nor, sometimes, the appropriate
13 remedy. This Court’s review of the Registration Actions is one scenario under
14 which vacatur is not appropriate. Instead, the Court should provide direction
15 to EPA on remand to address legal deficiencies in the first instance.

16 Even “invalid agency” actions should be left “in place” when equity de-
17 mands it. *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022) (quot-
18 ing *Pollinator Stewardship Council v. U.S. Env’tl. Protec. Agency*, 806 F.3d 520,
19 523 (9th Cir. 2015)). In assessing whether to issue remand without vacatur, the
20 Court is guided by a two-factor test: first, the seriousness of the Registration
21 Actions’ deficiencies; and second, the disruptive consequences of an interim
22 change that may itself be changed. *Ctr. for Food Safety*, 56 F.4th at 663 (citing
23 *Cal Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012)); *Allied-*
24

1 *Signal, Inc. v. U.S. Nuclear Reg. Commn.*, 988 F.2d 146, 150 (D.C. Cir. 1993)
2 (citing *Int’l Union, UMW v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960,
3 966–67 (D.C. Cir. 1990)). That test looks to “whether the agency would likely be
4 able to offer better reasoning or whether such fundamental flaws in the agency’s
5 decision make it unlikely that the same rule would be adopted on remand.” *Ctr.*
6 *for Food Safety*, 56 F.4th at 663–64 (quoting *Pollinator*, 806 F.3d at 523).

8 *Center for Food Safety v. Regan* declined vacatur in the FIFRA context,
9 analogizing to a similar situation that rose in the D.C. Circuit. *Id.* at 664. In-
10 deed, even though that Court found “EPA’s failure to comply with the ESA” to
11 be “serious” it did not believe that serious infirmity “warrant[ed] vacatur based
12 on the record[.]” *Id.* As in the D.C. Circuit, the Ninth Circuit thought that EPA
13 could, in effect, cure its prior procedural error. *Id.* And despite the Court’s “se-
14 rious concern that EPA has continued to flout the ESA, [they] ultimately con-
15 clude that EPA could maintain the same registration decision once it makes an
16 effects determination and engages in any required consultation.” *Id.*

18 So too here. Plaintiffs’ alleged violations of the ESA and FIFRA can be
19 cured on a remand, while allowing farmers to continue to safely use the prod-
20 ucts until new rules issue. Vacatur of the Registration Actions place farmers
21 and the Amici States’ economy at risk of severe financial harm. Farmers in
22 Amici States are growing millions of acres of dicamba-tolerant crops. The seed
23

1 and herbicide costs for those crops total billions of dollars. Vacating the Regis-
2 tration Actions will leave growers largely defenseless against weeds that have
3 developed resistance to other herbicides. And as a result, those farmers will see
4 drastic reductions in the yields produced by their crops.

5 Farmers rely on FIFRA-regulated products and make significant up-front
6 investments based on EPA and Amici States' decisions governing those prod-
7 ucts' registration, labeling, and sale. In short, the Amici States' economic pro-
8 duction relies in part on certainty and stability in herbicide and pesticide regu-
9 lation. Congress acknowledged that need through providing reliability under
10 FIFRA.
11 FIFRA.

12 Some of Amici States are among the 34 states where the products under-
13 lying the Registration Actions are used. Amici States' role is to enforce the la-
14 beling restrictions under FIFRA. *See* 7 U.S.C. § 136w-1(a). Amici States, or any
15 other state in which dicamba products are authorized for use, can conclude that
16 products should be removed from the market. They can do that without any
17 action from EPA. Yet dicamba remains an important component of many states'
18 weed-fighting arsenal.
19

20 Rather than ban dicamba, Amici States conduct independent analyses
21 and make label modifications that fit the unique conditions found in each state.
22 For example, in 2021, EPA's dicamba label set a national application cutoff date
23 of June 30, 2021. Having determined that an earlier cutoff date would better
24

1 befit Iowans, however, the Iowa Department of Agriculture and Land Steward-
2 ship proposed an amended label for three dicamba products having a cutoff date
3 of June 20, 2021. That move aimed to limit dicamba's volatility and future com-
4 plaints. And those unique label requirements to mitigate volatility were effec-
5 tive. In 2021, Iowa conducted fewer herbicide misuse investigations than in
6 2020.
7

8 Vacatur will lead to disruptive consequences, in contravention of the
9 Ninth Circuit's two-factor test. *Ctr. for Food Safety*, 56 F.4th at 663. Plaintiffs'
10 position on vacatur ignores the Ninth Circuit's instruction that, when faced
11 with the prospect of causing substantial, real-world disruptions, vacatur is un-
12 necessary and ill-advised. And as to the first factor, vacatur is particularly in-
13 appropriate where the agency, after providing more analysis to support its de-
14 cision, would adopt the same rule on remand. There is no reason to believe EPA
15 would fail to approve dicamba after additional consideration.
16

17 At bottom, Plaintiffs' case relies on complaints made to state agencies—
18 often Amici States' agencies—alleging off-target dicamba drift. Amici States
19 and their regulatory agencies are in ongoing dialogue with EPA about those
20 complaints. Moreover, most of those complaints are unverified, many do not
21 accurately represent occurrences of dicamba drift, and few, if any, establish ac-
22 tual damage in the rare cases in which the dicamba drift is verified.
23
24

1 Considering those concerns, Amici States request that, if the Court finds
2 the Registration Actions to be legally deficient, that the Court provide instruc-
3 tion for remand but refrain from vacatur. FIFRA equips EPA and Amici States
4 with ample tools to address more localized concerns as they arise. Amici States
5 file this brief to ask the Court to permit their agencies to regulate in accord with
6 the framework established by Congress and to afford the stability and certainty
7 FIFRA was enacted to provide.

9 CONCLUSION

10 For the foregoing reasons, the Registration Actions should be upheld as
11 legally proper. If the Court finds the Registration Actions to be legally deficient,
12 the Court should remand to EPA with instructions and without vacatur. Vaca-
13 tur raises grave concerns for Amici States' farmers and economies. Plaintiffs
14 allege deficiencies that, if necessary, EPA could address through providing bet-
15 ter reasoning to satisfy concerns without deploying vacatur.

16 Dated: June 6, 2023

17
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