

NO. 17-71636

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**LEAGUE OF UNITED LATIN AMERICAN CITIZENS;
PESTICIDE ACTION NETWORK NORTH AMERICA;
NATURAL RESOURCES DEFENSE COUNCIL;
CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION;
FARMWORKER ASSOCIATION OF FLORIDA;
FARMWORKER JUSTICE GREENLATINOS;
LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT;
LEARNING DISABILITIES ASSOCIATION OF AMERICA; NATIONAL
HISPANIC MEDICAL ASSOCIATION;
PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE; AND UNITED
FARM WORKERS,**

Petitioners,

v.

**SCOTT PRUITT, ADMINISTRATOR OF UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,**

Respondents.

**MOTION FOR LEAVE TO INTERVENE
IN SUPPORT OF PETITIONERS BY THE STATES OF NEW YORK,
MARYLAND, VERMONT, WASHINGTON,
THE COMMONWEALTH OF MASSACHUSETTS,
AND THE DISTRICT OF COLUMBIA**

Pursuant to Rules 15(d) and 27 of the Federal Rules of Appellate Procedure
and Rule 15-1 of the Ninth Circuit Rules, the States of New York, Maryland,

Vermont, Washington, the Commonwealth of Massachusetts, and the District of Columbia hereby move for leave to intervene in this case in support of petitioners, the League of United Latin American Citizens, *et al.* For the reasons set forth below, leave to intervene should be granted.

Background

1. This case is related to another case currently before the Court, *Pesticide Action Network North America, et al. v. United States Environmental Protection Agency*, Case No. 14-72794 (hereinafter “*PANNA v. USEPA*”), in which two of the petitioners in this case obtained a writ of mandamus to compel the United States Environmental Protection Agency (“EPA”) to take final action on their administrative petition. The factual and procedural background of the related *PANNA v. USEPA* action is set forth below.

2. In September 2007, the Pesticide Action Network North America and the Natural Resources Defense Council (“PANNA/NRDC”) filed an administrative petition with EPA pursuant to Section 408 of the Federal Food, Drug and Cosmetic Act (“FFDCA”), 21 U.S.C. § 346a(b)(2), requesting that the agency revoke all food tolerances¹ for the pesticide known as chlorpyrifos. For several years, EPA did not act on the PANNA/NRDC petition.

¹ Tolerances are the allowable pesticide residues on food, which EPA sets by regulation in 40 C.F.R. Part 180. EPA established chlorpyrifos tolerances for 82 foods in 40 C.F.R. § 180.342.

3. In September 2014, PANNA/NRDC sought a writ of mandamus from this Court to compel the agency to take final action on their 2007 administrative petition to revoke all chlorpyrifos food tolerances.²

4. On August 10, 2015, the Court granted a writ of mandamus and ordered EPA “to issue either a proposed or final revocation rule or a full and final response to the administrative petition by October 31, 2015.” *Pesticide Action Network North America v. U.S. Environmental Protection Agency*, 798 F.3d 809, 814 (9th Cir. 2015).

5. In November 2015, EPA issued a notice of proposed rulemaking to revoke all chlorpyrifos tolerances, finding that the agency was “unable to conclude that the risk from aggregate exposure from the use of chlorpyrifos meets the safety standard of section 408(b)(2)” of the FFDCA, 21 U.S.C. § 346a(b)(2). 80 Fed. Reg. 69,080 (Nov. 6, 2015). EPA’s notice provided a sixty-day public comment period for interested parties to respond to the proposed rule.

6. In a December 10, 2015 order, this Court directed EPA “to take final action by December 30, 2016 on its proposed revocation rule and its final

² PANNA/NRDC first sought a writ of mandamus from this Court in April 2012 to compel EPA action on their administrative petition. EPA responded by issuing a partial denial of the administrative petition, and indicated that the agency would issue a final response by February 2014. The Ninth Circuit dismissed the writ without prejudice to PANNA/NRDC seeking the same relief if EPA failed to act by February 2014. When EPA failed to act by that date, PANNA/NRDC again sought a writ of mandamus, which the Court subsequently granted.

response” to the PANNA/NRDC 2007 administrative petition to revoke chlorpyrifos tolerances. *Pesticide Action Network North America v. U.S. Environmental Protection Agency*, 808 F.3d 402 (9th Cir. 2015).

7. In an August 12, 2016 order, the Court denied EPA’s motion for a six-month extension of the Court’s “final action” deadline. The Court instead directed EPA to take final action by March 31, 2017 (Case No. 14-72794, Docket Entry 51, p. 4). In its order, the Court noted that “[t]he panel shall retain jurisdiction over any further proceedings related to this petition.” *Id.*

8. In November 2016, EPA issued a second notice related to the proposed rule revoking all chlorpyrifos tolerances and reopened the public comment period to solicit comments on two revised risk assessments supporting the proposed rule.³ 81 Fed. Reg. 81,049 (Nov. 17, 2016). In the notice, EPA addressed certain recommendations of the agency’s Scientific Advisory Panel, but expressly noted that EPA’s analysis of chlorpyrifos “continues to indicate that the risk from potential aggregate exposure does not meet the FFDCSA safety standard.” *Id.* at 81,050.

9. On March 29, 2017, then newly appointed EPA Administrator Scott Pruitt issued an order (“Administrator’s Order”) denying the PANNA/NRDC 2007

³ *Chlorpyrifos: Revised Human Health Risk Assessment for Registration Review (2016) and Chlorpyrifos Registration Review Drinking Water Assessment (2016)*.

administrative petition to revoke chlorpyrifos tolerances for food. 82 Fed. Reg. 16,581 (April 5, 2017). The Administrator's Order opened a sixty-day period in which interested parties could file objections to the order and request an evidentiary hearing. The Administrator's Order took no further action, let alone final action, on EPA's proposed rule to revoke all chlorpyrifos tolerances.

Petitioners responded to the Administrator's Order in three ways.

10. First, on April 5, 2017, petitioners filed a motion in this Court in the related case of *PANNA v. USEPA* for an order directing EPA to take the "final action" required by this Court's December 10, 2015 order, as further ordered and extended by its August 12, 2016 order.

11. Second, on June 5, 2017, petitioners and several other non-governmental organizations filed the underlying petition for review of the Administrator's Order here. *League of United Latin American Citizens, et al. v. Pruitt* (Case No. 17-71636). The proposed State Intervenors seek leave to intervene in this case.

12. Third, also on June 5, 2017, petitioners filed with EPA administrative objections to the Administrator's Order, as that Order provided (EPA-HQ-OPP-2007-1005).

13. In addition to the petitioners' objections, the proposed State Intervenors also filed with EPA administrative objections to the Administrator's

Order on June 5, 2017 (EPA-HQ-OPP-2007-1005).⁴ The objections raise purely legal challenges to the Administrator's authority and EPA's compliance with the FFDCA. The proposed State Intervenors request EPA's response to the objections within sixty days, or by no later than August 5, 2017.⁵

Interests of the Proposed State Intervenors and Grounds for Intervention

14. Petitioners are seeking review of the EPA Administrator's Order, which denied the PANNA/NRDC 2007 administrative petition to revoke chlorpyrifos tolerances for food and leaves those tolerances in effect. The proposed State Intervenors have a compelling interest in participating in this case because the Administrator's Order implicates the health and safety of their citizens. In denying the 2007 PANNA/NRDC administrative petition, the Administrator's Order left in effect all chlorpyrifos tolerances for an indefinite period of time, but it did not contain the required finding under FFDCA Section 408(b)(2), 21 U.S.C. § 346a(b)(2), that those tolerances are safe. Indeed, EPA's proposed rulemaking expressly stated that EPA could not find the tolerances safe under the FFDCA. *See* 81 Fed. Reg. at 81,050; 80 Fed. Reg. at 69,090.

⁴ Prior to filing those objections, New York and Washington State previously participated in the regulatory process involving chlorpyrifos under various EPA-assigned docket numbers.

⁵ The District of Columbia did not join in the States' administrative objections filed with EPA by the other proposed State Intervenors, but supports those objections and joins in this motion.

15. Section 408(b) of the FFDCA identifies the standard that EPA must meet in order to leave chlorpyrifos tolerances in effect:

Standard. The Administrator may establish or leave in effect a tolerance for a pesticide chemical residue in or on food *only if* the Administrator determines that the tolerance is safe. The Administrator *shall modify or revoke a tolerance if the Administrator determines it is not safe.*

21 U.S.C § 346a(b)(2)(A)(i) (emphasis added). Thus, to leave a pesticide tolerance in effect under the FFDCA, whether acting in response to a petition or on his own initiative, the Administrator first must make a finding that the pesticide tolerance is safe.

16. Citizens of the proposed State Intervenors consume foods grown throughout the United States and the world that contain chlorpyrifos residues.⁶ The Administrator's Order results in the continued sale and consumption of food commodities with chlorpyrifos residues that EPA has not found to be safe, as required by FFDCA Section 408(b), 21 U.S.C. § 346a(b)(2)(A). Indeed, EPA has stated that chlorpyrifos tolerances cannot be found safe under the FFDCA standard. 81 Fed. Reg. at 81,050 (EPA's analysis of chlorpyrifos "continues to indicate that the risk from potential aggregate exposure does not meet the FFDCA

⁶ Although the proposed State Intervenors have the authority to regulate pesticides within their own borders under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v, any such regulation of chlorpyrifos on food crops would not be sufficiently effective, given the extensive national and international markets for foods.

safety standard”). The proposed State Intervenors have a significant interest in curtailing exposure to their citizens to pesticide chemicals that are not safe.

17. The proposed State Intervenors also have a significant interest in assuring appropriate federal regulatory action, including not only strict compliance with the FFDCA safety standard for pesticide food tolerances, but adherence to proper procedural protocols for rulemaking and other administrative actions that impact human health.

18. Under the FFDCA, it is EPA’s responsibility to protect Americans from unsafe chlorpyrifos residues on food because of the potential neurodevelopmental and other adverse health effects caused by exposure, as documented in the scientific literature. This is particularly true for sensitive populations like infants and children. The Administrator’s Order, which leaves chlorpyrifos tolerances in effect that EPA has not found to be safe, has potential adverse human health impacts and does not meet the FFDCA’s requirements or EPA’s responsibilities. The Administrator’s Order is directly contrary to the States’ interest in protecting the health and welfare of their citizens. Thus, the proposed State Intervenors have a significant interest in EPA’s issuance of a *final* decision now, based firmly on the agency’s extensive scientific record, on whether existing chlorpyrifos food tolerances are safe and may remain in effect.

19. The interests of the proposed State Intervenors will not be fully represented by the parties to the case. Although the interests of the proposed State Intervenors are closely aligned with petitioners' interests, those groups cannot represent the unique sovereign interests of state governments, who act as *parens patriae* for millions of citizens who are potentially exposed to unsafe chlorpyrifos residues on the foods they consume, and who are exposed in occupational scenarios, such as farm workers and pesticide applicators. Thus, the proposed State Intervenors have a strong interest in being heard on the merits in this case, without further delay and uncertainty due to EPA's arbitrary and unlawful actions.

Timeliness of the State Intervenors' Motion for Leave to Intervene

20. The proposed State Intervenors' motion for leave to intervene is timely. FRAP Rule 15(d) requires that a motion to intervene be filed within thirty days of the filing of the petition for review. This motion is being filed within thirty days of the petition's filing on June 5, 2017. Intervention will not unduly delay or prejudice the rights of any party, nor interfere with any schedule set by the Court because this case is in an early stage. Moreover, the proposed State Intervenors intend to comply with the Court's June 5, 2017 Time Schedule Order (Docket Entry 1-5) for filing briefs in support of the petition by August 24, 2017, in the absence of exigent circumstances.

Consent to Intervention

21. The proposed State Intervenors sought the consent to intervene in this action from both petitioners and respondents. On June 26, 2017, counsel for petitioners consented to the intervention in writing by electronic mail communication to the undersigned counsel for the State of New York. On June 26, 2017, the undersigned counsel for the State of New York contacted counsel of record for respondents Pruitt and EPA and requested their consent to intervention. In a June 30, 2017 email, respondents' counsel indicated that "EPA will reserve taking a position [on intervention] until after reviewing the States' motion."

22. The undersigned counsel for the State of New York represents that she was admitted to this Court on March 28, 2000, and further represents that the proposed State Intervenors listed as signatories below have joined in this motion to intervene. On June 23, 2017, the Office of the Clerk of the Court authorized all other counsel for the proposed State Intervenors to participate in this case without the necessity of obtaining formal admission to this Court pursuant to Ninth Circuit Rule 46-1.

For the foregoing reasons, the proposed State Intervenors respectfully request that this Court grant leave to intervene in this case.

Dated: July 5, 2017

Respectfully Submitted,

FOR THE STATE OF NEW YORK

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Attorney General of New York

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017, I electronically filed and served the foregoing Motion for Leave to Intervene with the Clerk of the Court for the United States Court of Appeals, Ninth Circuit, by filing same using the appellate CM/ECF system and thereby served the participants in the case who are registered CM/ECF users, as set forth below.

I further certify that the proposed State Intervenors, are not registered CM/ECF users in this case, but I have electronically mailed the foregoing Motion for Leave to Intervene to each of them, as set forth below.

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