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10 UNITED STATES DISTRICT COURT FOR THE
11 NORTHERN DISTRICT OF CALIFORNIA

12	_____)	Case No. 17-cv-02162 EMC
13	FOOD & WATER WATCH, INC.,)	
14	et al.,)	
15	Plaintiffs,)	[Proposed] Amicus Curiae Brief of
16	v.)	Natural Resources Defense Council, Inc.,
17	U.S. ENVIRONMENTAL)	and Safer Chemicals, Healthy Families in
18	PROTECTION AGENCY, et al.)	Response to EPA's Motion to Limit Review
19	Defendants.)	(Supporting Neither Party on the Merits)
20)	
21	_____)	

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BRIEF AMICUS CURIAE

Section 21 of the Toxic Substances Control Act (TSCA) provides a petitioner seeking a new section 6(a) rule a right to have the petition considered by a district court “in a de novo proceeding,” if the Environmental Protection Agency (EPA) denies the petition. 15 U.S.C. § 2620(b)(4)(B). Nothing in section 21 limits a court’s consideration of such a petition to the “administrative record” of EPA’s denial. To the contrary, the language, structure, and history of section 21 all support the district court’s consideration of new evidence.¹

I. The plain language of TSCA section 21 provides for a de novo proceeding

“The starting point in statutory interpretation is the language of the statute itself.” *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001). In section 21 of TSCA, Congress gave disappointed citizen petitioners a right to a “de novo proceeding” in court. 15 U.S.C. § 2620(b)(4)(B). Congress could hardly have spoken in plainer terms.

“De novo” means “anew,” *Black’s Law Dictionary* 529 (10th ed. 2014), or “a fresh, independent” judicial consideration, *Doe v. United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987). Of course, “de novo” takes on different meanings depending on what noun it modifies. A de novo *trial* is “[a] new trial on the *entire* case—that is, on both questions of fact and issues of law—as if there had been no trial in the first instance.” *Timmons v. White*, 314 F.3d 1229, 1233 (10th Cir. 2003) (alteration in original) (quoting *Black’s Law Dictionary* (7th ed. 1999)). By contrast, de novo *judicial review* generally refers to a standard of judicial review of a lower court’s or agency’s ruling, in which the reviewing court determines legal issues, at least, nondeferentially. See *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000). EPA apparently believes that section 21 provides for this kind of de novo judicial review of the Agency’s decision.

¹ Amici take no position on whether the plaintiffs here may demand a jury trial. Nor do amici take any position on the merits of the plaintiffs’ rulemaking petition.

1 Section 21 does not direct “de novo review,” however.² Instead, Congress
2 through section 21 gave the disappointed citizen petitioner a right to have a petition
3 considered by a district court “in a de novo *proceeding*.” 15 U.S.C. § 2620(b)(4)(B)
4 (emphasis added). A “proceeding” is a “legal action.” See *Merriam-Webster Dictionary*
5 (online ed.), <https://www.merriam-webster.com/dictionary/proceeding>. The word is
6 understood to mean “[t]he regular and orderly progression of a lawsuit, including all
7 acts and events between the time of commencement and the entry of judgment.” *Black’s*
8 *Law Dictionary* 1398 (10th ed. 2014).

9 The plain import of Congress’s decision to grant a “de novo” district court
10 “proceeding” is that the proceeding—the entire proceeding—is de novo. The district
11 court is not reviewing EPA’s decision on the agency’s record, but conducting a new
12 proceeding. And where Congress uses language that “neither imposes unique
13 evidentiary limits in district court proceedings nor establishes a heightened standard of
14 review for factual findings by the [agency],” the courts should generally not impose
15 such evidentiary limits themselves. *Kappos v. Hyatt*, 566 U.S. 431, 437 (2012).³

17 ² EPA’s reliance on Employment Retirement Income Security Act (ERISA) cases is
18 puzzling. See EPA Br. 4 (citing *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*,
19 46 F.3d 938, 944 (9th Cir. 1995)). The de novo “review” standard those cases apply reflects a
20 judicial interpretation of common-law trust principles. See *Firestone Tire & Rubber Co. v.*
21 *Bruch*, 489 U.S. 101, 112-13, 114 (1989). ERISA does not call for a “de novo proceeding,”
and the ERISA cases have no discernible relevance to the meaning of TSCA section 21.

22 ³ *Kappos* involved a statutory scheme somewhat like section 21. The statute allowed a
23 patent applicant, whose patent was denied, to sue the patent office in district court. 566
24 U.S. at 433. The statute did not specify that the proceeding was de novo, but the Court
25 held that it was—and that the applicant-plaintiff could introduce new evidence subject
26 only to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. *Id.* at 436,
27 444. “The district court must assess the credibility of new witnesses and other evidence,
and decide what weight the new evidence deserves.” *Id.* at 444.

1 EPA's contrary theory rests on an atextual sleight of hand: The Agency argues
2 that because a petition must state "the *facts* which it is *claimed* establish" the need for a
3 new rule, *see* 15 U.S.C. § 2620(b)(1) (emphasis added), the petition must also "present to
4 EPA the *evidence* it believes establish" these facts and, thus, the new rule's necessity,
5 EPA Br. 2. But TSCA section 21(b)(1) does not require "evidence." Substantively, it
6 requires only that a petition state what *facts* the petitioner claims justify the new rule.

7 "Evidence" and "facts" are not synonyms. In legal proceedings, evidence (such
8 as relevant documents, testimony, admissions, and the like) is submitted to prove a fact.
9 *See, e.g.,* Fed. R. Evid. 401 (stating that "[e]*vidence* is relevant if . . . it has any tendency to
10 make a *fact* more or less probable than it would be without the evidence" (emphasis
11 added)). While a petitioner may have an incentive to submit evidence with a petition—
12 because doing so may encourage EPA to grant the petition and initiate a new
13 rulemaking—section 21(b)(1) nowhere requires a petition to attach evidence. Section 21
14 first uses the word "evidence," not in establishing requirements for petitions, but in
15 describing the *de novo* proceeding that a disappointed petitioner may bring in district
16 court. *See* 15 U.S.C. § 2620(b)(4)(B) ("If the petitioner demonstrates to the satisfaction of
17 the court by a preponderance of the evidence . . .").

18 Section 21(b)(1)'s requirement that a petition state the facts that a petitioner
19 contends justify a new rule is functionally similar to the requirement of Rule 8 of the
20 Federal Rules of Civil Procedure that a complaint allege "enough fact[s] to raise a
21 reasonable expectation that discovery will [later] reveal evidence" that supports the
22 plaintiff's claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Thus, Rule 8
23 demands that a complaint allege facts that, if proven, would demonstrate an entitlement
24 to relief, but it does not require a complaint to include the plaintiff's evidence. Nor does
25 TSCA section 21(b)(1) require such evidence to be included with a citizen petition.⁴

26
27 ⁴ This understanding is consistent with the structure of section 21, which gives EPA
28 ninety days to grant or deny a petition. 15 U.S.C. § 2620(b)(3). That is slightly more time

1 **II. Congress’s specification of record review in other relevant contexts confirms**
 2 **that a section 21 de novo proceeding is not a record-review proceeding**

3 When Congress has specified something in one statute, but not another, that
 4 tends to indicate that Congress “knows how to say” what “it means to” say. *See City of*
 5 *Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981). Congress has specified record review
 6 in other relevant contexts. It did not do so in section 21 of TSCA.

7 One need not look far to find contrasting examples. TSCA section 19 provides
 8 that judicial review of EPA’s TSCA rules is conducted pursuant to the judicial-review
 9 provisions of the Administrative Procedure Act (APA), with certain adjustments. *See* 15
 10 U.S.C. § 2618(c)(1)(B) (incorporating 5 U.S.C. § 706). The APA, of course, generally
 11 requires judicial review to be based on the record of the agency’s proceedings, *see* 5
 12 U.S.C. § 706, rather than on a new record created in the district court, *see Citizens to Pres.*
 13 *Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). Section 19’s express incorporation of the
 14 APA’s judicial-review provisions thus incorporates the APA’s record-review
 15 requirement, except as modified in section 19 itself.⁵

16 _____
 17 than EPA typically is given to respond to a district-court complaint, *see* Fed. R. Civ. P.
 18 12(a)(2), but far less than the three-plus years EPA is given to complete a section 6(b) risk
 19 evaluation, *see* 15 U.S.C. § 2605(b)(4)(G), or the two-to-four years EPA is given to
 20 complete a section 6(a) rulemaking, *see id.* § 2605(c)(1). As this Court pointed out in
 21 denying EPA’s motion to dismiss, “[i]f the EPA is correct that a citizen petitioner must
 22 present *all* scientific information related to *all* conditions of use of a chemical substance,
 23 then the EPA would essentially be required to perform a potentially wide ranging
 24 plenary review within three *months* perhaps approximating what the EPA would
 25 otherwise have three-and-a-half *years* to complete.” Order at 18 (ECF No. 42). EPA’s
 renewed suggestion that a section 21 petition must include all supporting evidence again
 assumes, improbably, that EPA could both evaluate the citizen petitioner’s evidence and
 gather and evaluate the Agency’s own evidence in just three months.

26 ⁵ In section 19, Congress allowed a reviewing court to direct EPA to accept new
 27 evidence “in the proceeding before the Administrator.” 15 U.S.C. § 2618(b).
 28

1 Section 21, in contrast, does not mention the APA's judicial-review provisions.
 2 Instead, it specifies a "de novo proceeding" in district court. EPA offers no reason to
 3 believe that Congress's decision to provide a de novo proceeding, rather than review on
 4 an administrative record, was a mistake. When "Congress includes particular language
 5 in one section of a statute but omits it in another section of the same Act, it is generally
 6 presumed that Congress acts intentionally and purposely in the disparate inclusion or
 7 exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). This is why, in
 8 *Environmental Defense Fund v. Reilly*, the D.C. Circuit contrasted a section 21 proceeding,
 9 in which the plaintiff "is entitled to de novo consideration of his petition for issuance of
 10 a new rule," with APA review, which "save in rare instances, must be conducted on the
 11 administrative record." 909 F.2d 1497, 1506 (D.C. Cir. 1990).⁶

12 Congress's intention that a TSCA section 21 "de novo proceeding" be a truly "de
 13 novo proceeding" is further underscored by Congress's enactment, ten days after its
 14 enactment of TSCA, of a statute that requires district judges to "make a de novo
 15 determination of those portions of the [magistrate judge's] . . . findings or
 16 recommendations to which objection is made." Act of Oct. 21, 1976, Pub. L. No. 94-577,
 17 § 1, 90 Stat. 2729. In *United States v. Raddatz*, the Supreme Court held that this "de novo
 18 determination" provision does not require a district court to take new evidence at a
 19 hearing. 447 U.S. 667 (1980). *Raddatz* reasoned that Congress had required only a "de
 20 novo determination" of specific objections to the magistrate's report, not a "de novo
 21 hearing." *Id.* at 673-76. "Congress purposefully used the word *determination* rather than

22
 23 ⁶ While EPA dismisses *Reilly's* analysis of section 21 as a dictum, the case's comparison
 24 of section 21 and the APA was key to the court's reasoning; the analysis could not be
 25 "deleted without seriously impairing the analytical foundations of the holding." *Sarnoff v.*
 26 *Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). By contrast, the single line on
 27 which EPA relies from *Trumpeter Swan Society v. EPA*, 774 F.3d 1037, 1042 (D.C. Cir. 2014),
 28 see EPA Br. 3, is not part of that court's reasoning, and appears to have been "made
 casually and without analysis," *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001).

1 *hearing*” to indicate that the district court could rely on the evidence received by the
2 magistrate judge, without necessarily taking new evidence. *Id.* at 676.

3 The clear implication of *Raddatz* is that, if Congress had specified a “de novo
4 hearing,” a district court would have to allow new evidence when resolving objections
5 to a magistrate judge’s findings. *See id.* TSCA specifies a “de novo proceeding,” rather
6 than a “de novo hearing,” but the phrases serve a similar function: The entire section 21
7 judicial proceeding, including the court’s receipt of evidence, is conducted “de novo.”
8 Such a de novo proceeding is not limited to an administrative record.

9 **III. TSCA’s legislative history shows that Congress expected courts to take new**
10 **evidence in de novo section 21 proceedings**

11 TSCA’s legislative history confirms what section 21 plainly says. The Senate
12 committee report on TSCA stated that, in a section 21 proceeding, a court would
13 “gather[] evidence in a de novo procedure.” S. Rep. No. 94-698, at 9 (1976) (emphasis
14 added), *reprinted in* 1976 U.S.C.C.A.N. 4491, 4499. A court does not normally “gather
15 evidence” in a record-review case. The conference report on TSCA explains *why*
16 Congress thought the district court would need to gather evidence: Section 21 “affords
17 greater rights to a person petitioning for the issuance of a rule or order,” the conferees
18 explained, “because in such a situation [EPA] will not previously have addressed the
19 issue.” H.R. Conf. Rep. No. 94-1679, at 98 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4539,
20 4583; *see Reilly*, 909 F.3d at 1503. In other words, Congress made the section 21
21 proceeding de novo in part because it believed that the court would need to consider
22 evidence that EPA—having denied the petition—had not yet gathered.⁷

23 **CONCLUSION**

24 A de novo section 21 proceeding is not conducted on an administrative record.

25
26 ⁷ In *Raddatz*, by contrast, the committee report stated that Congress did *not* intend to
27 require district courts to take new evidence. *Raddatz*, 447 U.S. at 675 (quoting H. Rep.
28 94-1609, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6161, 6163).

1 January 5, 2018

Respectfully submitted,

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[Proposed] Amicus Br. of NRDC and SCHF re Mot. to Limit Review
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