No. 24-1068

In the
Supreme Court of the United States

MONSANTO COMPANY,
Petitioner,
v.
JOHN L. DURNELL,
Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

There is an open and acknowledged split as to whether FIFRA preempts state-law failure-to-warn claims based on the content of pesticide product labels. Unable to deny that reality, respondent struggles mightily to convert the decision below into an "advisory" opinion. It is nothing of the sort, as it upholds a seven-figure damages award while rejecting Monsanto's preemption defense and the Third Circuit's reasoning in *Schaffner*. Respondent suggests the judgment may have rested entirely on Roundup advertisements, rather than the label, but that theory is a non-starter. It was never argued to the jury; in fact, respondent testified that advertisements did not influence his decision to use Roundup. Nor did the court below side-step FIFRA preemption by pointing to advertisements; it explicitly concluded that respondent's failure-to-warn claim is based on a state labeling requirement (as it *must be* under state law), and then proceeded to pick sides in the split, holding that such a labeling requirement is not preempted. Respondent's effort to read *Schaffner* more narrowly than the Third Circuit itself did in expressly creating a circuit split is implausible. And respondent's merits arguments are both unavailing and premature. Finally, the split has only deepened and increased in importance since the petition, as another Missouri appellate court recently affirmed a nine-figure damages award based on theories that are unavailable in the Third Circuit and elsewhere. In sum, the decision below is deeply flawed and profoundly consequential, and this case is a perfect vehicle to resolve the issue. There is no need for further delay, and every reason for this Court to grant certiorari.

I. The Decision Below Entrenches An Acknowledged And Deepening Split.

A. As the petition explained and amici echoed, courts are sharply divided on the question presented. Pet.17-23; Chamber.Br.11-12, 18-21; Croplife.Br.13-19. At the federal level, the Ninth and Eleventh Circuits hold that FIFRA does not preempt state-law failure-to-warn claims based on health warnings EPA has neither approved nor required, *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021); *Carson v. Monsanto Co.*, 92 F.4th 980 (11th Cir. 2024), whereas the Third Circuit holds that it does, *Schaffner v. Monsanto Corp.*, 113 F.4th 364 (3d Cir. 2024). State courts too are similarly divided. *See* Pet.19, 22 (collecting cases).

And the split has only deepened since the petition was filed. A Pennsylvania appellate court recently joined the no-preemption camp, *Caranci v. Monsanto Co.*, 2025 WL 1340970, at *9 (Pa. Super. Ct. May 8, 2025), which means there is now a split between state and federal appellate courts within the Third Circuit. Absent this Court's intervention, whether a Pennsylvania-law failure-to-warn claim is preempted or not will turn solely on whether the case proceeds in state or federal court. Needless to say, plaintiffs will have every incentive to add in-state defendants to prevent removal via diversity. That state-federal split within the Third Circuit is intolerable and illustrative of the broader split, which extends nationwide.

B. Despite all that, respondent tries to dismiss the split as "illusory." BIO.20-23. That would be news to the court below, *see* App.10-11, the Pennsylvania court in *Caranci*, *see* 2025 WL 1340970, at *11, the Third

Circuit in *Schaffner*, *see* 113 F.4th at 380-82, and even Congress, *see* Jason O. Heflin, Cong. Rsch. Serv., *Legal Sidebar: Preemption in the Federal Insecticide, Fungicide, and Rodenticide Act* 6-7 (2025), https://tinyurl.com/4yd3c7uh. Respondent's no-circuit-split-to-see-here position is particularly hard to credit given that his own counsel told the Third Circuit that *Schaffner* "create[d] a circuit split" that merited rehearing to "eliminate the need for Supreme Court review." En.Banc.Pet.17, 19, *Schaffner*, No. 22-3075 (3d Cir. Sept. 12, 2024) (capitalization altered); *see* BIO.20 n.12. Both the split and the need for Supreme Court review are irrefutable.

Unable to seriously dispute that courts are sharply divided, respondent claims this case does not implicate the split, because (he says) the jury could have found—or, more fancifully, actually found—liability based on Roundup advertisements rather than labeling. BIO.16-20. According to respondent, Monsanto's preemption defense therefore "fails at the first step, as Durnell's failure-to-warn claim imposed no labeling or packaging requirements." BIO.19. That revisionist history is even weaker than respondent's efforts to deny the split. The decision below explicitly rejects any suggestion that respondent's claim was based on anything other than a state labeling requirement, squarely holding that "Plaintiff's successful failure to warn claim is a common-law action which effectively imposes a state law requirement for labeling upon Monsanto." App.5-6; *see also* App.6 n.3 (again noting that Plaintiff's complaint is based on the labeling). Little wonder, then, that another Missouri appellate court recently invoked the decision below as conclusively resolving

both the express and implied preemption issues. *See Anderson v. Monsanto Co.*, 2025 WL 1497539, at *31 (Mo. Ct. App. May 27, 2025).

The court below plainly decided the FIFRA preemption question that has divided the courts, rather than side-stepping it by suggesting that the verdict could have rested on advertisements, not labels. That is unsurprising, as respondent did not even raise the advertisement theory at trial. Across 11 trial days, he made a single, fleeting reference to Roundup advertisements—in testifying that they did *not* "influence [his] decision to purchase Roundup." Supp.App.3. That omission was no accident, as Missouri law forces a plaintiff to focus on the label: The defendant's duty to warn can only be discharged by providing a warning "accompanying the product." *Nesselrode v. Exec. Beechcraft, Inc.*, 707 S.W.2d 371, 382-85 (Mo. 1986) (en banc). Hence, respondent's counsel made no mention of advertisements in closing argument, instead focusing repeatedly on alleged failure to warn *on the label*. *See* Supp.App.4-6.

As a last-ditch effort, respondent latches onto a footnote in *Schaffner* positing that "[a] plaintiff might conceivably argue that FIFRA required Monsanto to submit … an application" to change the label to add a cancer warning, and that "a state-law claim for breach of the duty to warn could satisfy the parallel-requirements test." 113 F.4th at 386 n.13. But that footnote is academic here, as respondent failed to raise any such failure-to-warn-the-EPA theory at trial. To be sure, respondent claims that he "argued all along that FIFRA requires Monsanto to seek EPA approval for a modified Roundup label." BIO.21. But, tellingly,

he cites nothing that supports that bare assertion—because nothing does. To the contrary, the jury was instructed that "you must find" Monsanto liable if "Roundup was … unreasonably dangerous when put to a reasonably anticipated use without … an adequate warning" and "Roundup being sold without an adequate warning directly [caused] or directly contributed to cause damage to [respondent]." Supp.App.4. That instruction left no room for the jury to consider whether Monsanto requested a label change, or whether respondent still would have been injured had it done so.

Ultimately, the only thing respondent has "argued all along" is that Monsanto could have, and should have, unilaterally modified its labels to warn that Roundup causes cancer. That trial strategy was understandable given that several courts of appeals have upheld such a theory as non-preempted. But the Third Circuit in *Schaffner* just as clearly rejected it. That is a square circuit split that amply justifies and necessitates this Court's review.

II. The Decision Below Is Wrong.

A. On express preemption, respondent largely rehashes the flawed reasoning of the decision below. In respondent's telling, his strict-liability failure-to-warn claim "functionally enforces" FIFRA's "statutory misbranding prohibition" because both require warnings "'necessary' and 'adequate to protect health.'" BIO.23. But assessing express preemption at such a high level of generality just resurrects the "nominal[] equivalen[ce]" standard *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), laid to rest. *See* Pet.26-27. Indeed, under respondent's (il)logic,

virtually *all* failure-to-warn claims are "consistent" with FIFRA's misbranding provision—which would leave juries free to impose all manner of labeling requirements for the same pesticide, no matter how different from what EPA requires or from what other juries have imposed. *See Schaffner*, 113 F.4th at 392-93. When *Bates* "cautioned against overstating the degree of uniformity" FIFRA demands, BIO.29—in a case about labeling issues on which "EPA never passed," *Bates*, 544 U.S. at 440—it obviously did not envision a reading of FIFRA that authorizes "50 different labeling regimes" prescribing the "wording of warnings," *id.* at 452.

Respondent claims that "EPA could have, through a notice-and-comment process, issued binding requirements or prohibitions governing chronic-hazard warnings for glyphosate." BIO.29-30. But EPA does not make product-specific wording decisions via regulation; it does so through a process *prescribed* by regulation. Pet.5-6. And, once approved, a "pesticide['s] label is a legal document. The label is the law!" EPA, *Pesticide Registration Manual* 3 (Apr. 2017), https://tinyurl.com/36uubv78; *see* Pet.6.

Respondent's contrary position contradicts *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2007), which interpreted the MDA's materially identical preemption provision. *See* Pet.25-26. Respondent claims that FIFRA is different because a "miscellaneous" provision elsewhere in the statute says "registration" is not "a defense for the commission of any offense under this subchapter," 7 U.S.C. §136a(f)(2), but he elides that §136a(f)(2) *does not address preemption of state law*, *see Schaffner*, 113

F.4th at 397; Pet.28. And while respondent is of course correct that EPA's registration decisions "are not dispositive of FIFRA compliance," BIO.27, that misses the point. Far from "support[ing] the conclusion" that "those determinations similarly are not conclusive" for "purposes of preemption," BIO.27, that §136a(f)(2) expressly imposes a limit on the effect of *registration* "cautions against inferring the same limitation in another provision," i.e., the *preemption* provision. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 34 (2016).

Regardless, Monsanto's preemption argument is not that *registration* alone is dispositive; it turns also on EPA's consistent statutory determination that no cancer warning is necessary. There is a material difference between treating "registration" as a defense and treating EPA's labeling determinations as one. If a manufacturer misbrands its pesticide by deviating from the EPA-approved label, then registration would obviously not prove compliance with FIFRA. But once EPA has made a conclusive determination that no cancer warning is required (and, in fact, would render the pesticide affirmatively misbranded), it would be nonsensical to preclude the pesticide manufacturer from asserting that labeling determination as a defense. Indeed, nothing in §136a(f)(2) addresses labeling determinations at all, let alone suggests that they cannot support a preemption defense.

Respondent says the MDA differs from FIFRA because "premarket approval is specific to individual devices" under the MDA, whereas FIFRA's misbranding provisions impose only "general standards." BIO.28. But the pesticide registration

process, like the premarket approval process, *is* product specific. Respondent ignores EPA's "specific" finding that glyphosate is "not likely to be carcinogenic to humans," App.38, and its consistent decision to register pesticides containing glyphosate since 1974 without requiring any cancer warning.[1] In ruling for respondent, the jury necessarily imposed a cancer warning requirement that EPA has consistently and repeatedly decided *not* to require.

Finally, respondent highlights the Ninth Circuit's 2022 decision vacating EPA's 2020 interim registration review. But respondent does not explain how a 2022 vacatur of a 2020 decision can alter what was required under FIFRA *before 2012*, the last time respondent used Roundup. *See* Pet.30 n.7. EPA registered glyphosate in 1974, and reregistered it in 1993. Those decisions have never been vacated. *See* EPA, *Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential* 12 (Dec. 12, 2017), https://perma.cc/UWM2-6BHB. The Ninth Circuit's 2022 decision does nothing to cast doubt on those prior registrations or EPA's conclusion that no cancer warning is required. In fact, EPA has reaffirmed post-vacatur that its "underlying scientific findings regarding glyphosate, including its finding that glyphosate is not likely to be carcinogenic to humans, remain the same." Pet.11. And since 2022, EPA has continued to approve glyphosate product labels without cancer warnings, necessarily determining

[1] Congress also sets general misbranding standards for devices, 21 U.S.C. §352, and EPA imposes requirements "specific to individual [pesticides]," BIO.28.

that those labels bore all warnings necessary to protect health. Pet.11-12.

B. Respondent fares no better on implied preemption. He begins by insisting that implied preemption "likely does not apply" because FIFRA contains an express preemption clause. BIO.31. But this Court has squarely held that an express-preemption provision "does not bar the ordinary working of conflict pre-emption principles." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

When respondent finally turns to Monsanto's implied-preemption arguments, he has little to say. Respondent attempts to distinguish *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617-19 (2011), on the theory that pesticide manufacturers have no "federal-law duty to keep the label the same." BIO.31-32. That is incorrect. Just as the FDCA prohibits generic drug manufacturers from modifying product labels without prior action by FDA or the brand-name manufacturer, FIFRA generally prohibits pesticide manufacturers from modifying their labels without EPA approval. *See* 7 U.S.C. §136a(c)(9)(C); 40 C.F.R. §§152.44, 152.46. And while pesticide manufacturers may amend a label on their own in certain narrow circumstances, EPA has clarified that such amendments cannot add the kind of precautionary health statement respondent requested here. Pet.6.

Respondent next argues that EPA's April 2022 letter shows that Monsanto could have crafted a warning the agency would have approved by advising consumers both of IARC's determination that Roundup poses cancer hazards and of EPA's disagreement with it. But respondent did not ask the

jury to find liability based on the lack of such an IARC-controversy warning. The theory he pressed and prevailed on was that Monsanto should have added a warning on the label that Roundup causes cancer. Furthermore, respondent's Roundup use ceased in 2012, three years before IARC categorized it as probably carcinogenic. Needless to say, Monsanto could not have included a "controversy warning" three years before the "controversy" emerged. Regardless, all available evidence from 2012 and earlier shows that EPA would have rejected any such warning. *See* Pet.7-8, 30-32.

Finally, EPA's April 2022 letter has subsequently been withdrawn, *see* EPA, *Letter to California's Office of Environmental Health Hazard Assessment on California Proposition 65* (last updated May 9, 2025), https://perma.cc/4UFP-Q9MQ, and even while operative confirmed that EPA would *still* reject any warning that goes further than noting that IARC has classified glyphosate as probably carcinogenic while EPA and others have found the opposite. The letter reaffirms EPA's August 2019 conclusion that a warning stating glyphosate is known to cause cancer would be misbranded—which is the only kind of warning respondent sought. *See* Pet.10-11, 30. Respondent simply has no answer for the reality that it would have been—and indeed remains—impossible for Monsanto to comply with both federal law and the jury's verdict.

III. The Question Presented Is Important, And This Case Is An Ideal Vehicle To Resolve It.

Respondent makes no meaningful effort to deny the importance of this issue. The most he can muster

is a halfhearted claim that this case implicates only "a single product line." BIO.33. That is wrong, and only highlights that courts have split on identical facts.

Nothing in *Durnell*'s reasoning—or in any of the other decisions that constitute the split—is limited to Roundup. Nor is this case just about one statute. *Contra* BIO.33-34. To be sure, the split concerns the scope of FIFRA preemption. But FIFRA's preemption provision is not unique, *see* Pet.35 (collecting statutes), and courts do not create interpretive rules that are good for one statute only. Instead, they are routinely "guided by … prior decisions interpreting similar language" in parallel statutes. *Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008).

Regardless, even if things *were* just limited to Roundup and FIFRA, the entrenched division of authority would still amply justify plenary review. Indeed, since the petition was filed, a Missouri appellate court relied on *Durnell* to affirm a verdict awarding nine figures in damages to three plaintiffs based on theories that would be plainly preempted in the Third Circuit and elsewhere. That case is just a tip of the iceberg. As of this month, there are approximately 60,000 pending cases over Roundup alone. Absent this Court's review, the mounting liability will force Monsanto to confront whether to remove Roundup completely from the U.S. market, which would be a disaster for the Nation's farmers and food supply. *See* Croplife.Br.25; Farmers.Br.6. Glyphosate is used on over 300 million acres of U.S. farmland. Removing it from the market would be devastating to the nation's food supply, driving prices up, and forcing American farmers to return to the

"miserable," "back-breaking labor" that glyphosate's introduction put in the past. Blake Hurst, *Roundup Lawsuits Pose a Threat to My Missouri Farm*, Wall St. J. (Sept. 13, 2024), https://perma.cc/M24F-TJTB. To the extent farmers turned to alternative pesticides, that could pose serious environmental risks. Croplife.Br.26; Farmers.Br.5.

Finally, there is no need to CVSG, and every reason to avoid any further delay. While respondent quotes liberally from the government's invitation brief in *Hardeman*, he ignores that even that CVSG brief acknowledged that this Court's review would be appropriate if a split developed—which, post-*Schaffner*, it unquestionably has. What is more, the *Hardeman* invitation brief broke from the SG-approved brief the Trump Administration filed in the Ninth Circuit. To the extent there is a division between administrations as well as among circuits, that only heightens the need for review. And nothing the Solicitor General could say in yet another invitation brief could eliminate the entrenched split. After all, the Third Circuit has already denied a request to revisit *Schaffner*, without recorded dissent.

In contrast, the risks of further delay—as staggering verdicts, like the one that another Missouri court recently affirmed on the strength of the decision below, continue to put pressure on the company to withdraw a product that is safe, effective, and vital to farmers—are substantial. Nor is this Court likely to find a better vehicle to review the issue, as the jury rejected all of respondent's other claims and rested its verdict squarely on his failure-to-warn claim. In short, there is no reason for further delay and every

reason for this Court to resolve this entrenched circuit split and put to bed respondent's theory of FIFRA non-preemption once and for all.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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Appendix A

Excerpts of Trial Transcript, Missouri Circuit Court, Twenty-Second Judicial Circuit, *Durnell v. Monsanto Co.*, No. 1922-CC00221 (Oct. 13, 2023)

* * *

[Direct Examination of Respondent John L. Durnell]

[2514] Q. All right. Mr. Durnell, let me change gears a little bit. Throughout your decades of using Roundup, did you believe it to be a safe product?

A. I'm sorry. I didn't hear you.

Q. Throughout your decades of using Roundup, did you believe it to be a safe product?

A. Yes, I did.

Q. And did you trust Monsanto to only sell safe products?

A. Yes, I did.

Q. And did you also trust that if there was some danger or risk associated with the product, that Monsanto would put that on the label or otherwise warn you?

A. Yes, I did.

Q. Okay. Did you ever see any warning like that on any Roundup that you ever bought?

A. No, I didn't.

[2515] Q. Did you ever see it in any -- well, I'll get to that.

A. Okay.

Q. Would you have liked for Monsanto to have put it on the bottles?

A. Yes. Then I would have had a choice.

Q. Would have you bought the bottle or the Roundup if it had a "This may cause non-Hodgkin's Lymphoma"?

A. No, I would not.

Q. Okay. In terms of advertisements, I think that when you were deposed you said that you'd seen one television advertisement for Roundup that you recall.

A. I remember an ad.

Q What do you recall about that?

A It was -- it sort of had a western theme for it, and the gentleman that owned the home was kind of using the small Windex-size bottle of Roundup sort of like a sharp shooter and was killing those weeds in his driveway.

Q And did that advertisement say anything about Roundup might cause cancer?

A. No.

Q. Did that advertisement say anything that Roundup might cause non-Hodgkin's lymphoma?

[2516] A. No, it did not.

Q. Did it tell you to wear any sort of personal protective equipment?

A. No, it did not.

Q. Do you have a recollection of what that gentleman who was doing the gun slinging was wearing?

A. It was sort of like a polo shirt, I think, and maybe a pair of khakis or something like that.

Q. A short-sleeve shirt?

A. Short-sleeve shirt, no gloves, just like you'd hang out.

Q. Khakis, were those khaki shorts?

A. I can't recall exactly on that.

MR. SHAW: Objection, your Honor. Leading.

THE COURT: He said he doesn't remember, so whether it was leading or not, he doesn't know the answer.

BY MR. BLAIR:

Q. Did that advertisement in particular influence your decision to purchase Roundup?

A. No, it didn't.

* * *

Appendix B

Excerpts of Trial Transcript, Missouri Circuit Court, Twenty-Second Judicial Circuit, *Durnell v. Monsanto Co.*, No. 1922-CC00221 (Oct. 13, 2023)

* * *

[Trial Court's Instructions to the Jury]

[3378] Instruction No. 9: In Part B of your verdict, you must find in favor of plaintiff John Durnell and against defendant Monsanto Company on plaintiff's claim for compensatory damages based on product defect and failure to warn, if you believe, first, defendant Monsanto sold Roundup in the course of defendant's business and, second, Roundup was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and third, defendant Monsanto did not give an adequate warning of the danger and, fourth, the product was used in a manner reasonably anticipated and, fifth, Roundup being sold without an adequate warning directly called [sic] or directly [3379] contributed to cause damage to plaintiff John Durnell.

* * *

[Closing Argument of Respondent John L. Durnell]

[3416] And shouldn't consumers know what's in something they're using every day? We go to the grocery store and sometimes we look on the label and we

see a bunch of chemical names and we decide, hey, I don't think I want that today. Or we see something else we might want to use, maybe it's if you're an auto mechanic, you work on cars, you might pick one particular product over another because one's got a warning on it and the other one doesn't, and you see things in each product like formaldehyde.

* * *

[3418] Three carcinogens, ethylene oxide, POEA, and, of course, we know that glyphosate has been determined by IARC and other scientists to be a probable human carcinogen. That's what's in the bottle. Why don't they just put it on the label? That would so [sic] easy for them to do.

They're going to try to say, hey, well, the EPA didn't require us to do.

* * *

[3421] Most companies in America will say we want every customer to know what's in that product. Most companies in America, if they had any cancer information at all, would share it with the public.

But what did Monsanto do? Minimize label restrictions, optimize freedom to operate.

* * *

[3422] At their own plant in Luling, Louisiana, where they make glyphosate, they tell their workers to [3423] wear gloves. They tell their workers to wear PPE. They tell their workers don't smoke, drink, or eat in the presence of glyphosate.

Wear a white Tyvek -- here's that they tell them: Wear a white Tyvek jacket, chemical gloves, full-face respirator, half-face respirator, whatever you can find for safety sake, wear it.

Nowhere on Mr. Guards label, the lawn and garden guy, nowhere.