No. 24-1098

IN THE
Supreme Court of the United States

MONSANTO COMPANY,
Petitioner,

v.

LARRY JOHNSON AND GAYLE JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF IN OPPOSITION FOR RESPONDENTS

ANDREW F. KIRKENDALL
KIRKENDALL DWYER LLP
4343 Sigma Road
Suite 200
Dallas, Texas 75244
(214) 271-4027

DAVID C. FREDERICK
Counsel of Record
DEREK C. REINBOLD
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

June 23, 2025

QUESTION PRESENTED

In *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), this Court held that the Federal Insecticide, Fungicide, and Rodenticide Act preempts only state-law labeling requirements that are broader than the statute's misbranding standard. State-law claims "that require manufacturers to design reasonably safe products" are not preempted because they impose no labeling requirements. *Id.* at 444. The same is true of claims that target product marketing, because they do not "require[] that manufacturers label or package their products in any particular way." *Id.*

Respondent Larry Johnson developed non-Hodgkin lymphoma after long exposure to petitioner Monsanto Company's weedkiller, Roundup. Johnson relied on Monsanto's off-label advertisements, which marketed Roundup as safe to spray without the need for personal protective equipment or other precautions. And he relied on Roundup's labeling, which contained no warning that the International Agency for Research on Cancer considers glyphosate, one of Roundup's ingredients, a probable human carcinogen.

The question presented is similar to the one in *Monsanto Co. v. Durnell*, No. 24-1068:

Whether this Court should issue an advisory opinion holding that the Oregon Court of Appeals correctly applied *Bates* in holding that Johnson's label-based failure-to-warn claim was not preempted when it was equivalent to FIFRA's misbranding standard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Monsanto has known for decades that its popular weedkiller, Roundup, can cause cancer. But the company has refused to make its product safer or to inform consumers that they should exercise caution when using it. Instead, Monsanto has marketed Roundup as safe to spray in a t-shirt and shorts.

Respondent Larry Johnson is one of Monsanto's victims. Unaware of the dangers, he used Roundup for decades before being diagnosed with non-Hodgkin lymphoma, a deadly blood cancer. When Johnson learned that Roundup had caused that cancer, he sued Monsanto for negligence, defective design, and failure to warn. The Oregon Court of Appeals remanded for trial of those three claims.

Monsanto now argues—as it has argued with little success for years—that it should be immune from Johnson's failure-to-warn claim, which it says is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, or FIFRA. That is the same argument the company has raised in *Monsanto Co. v. Durnell*, No. 24-1068, and this petition should be denied for the same reasons as that one: *First*, this Court's review would be purely advisory. FIFRA does not preempt claims that would not require manufacturers to "label or package their products in any particular way." *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 444 (2005). That describes Johnson's failure-to-warn claim, which covered off-label conduct like Monsanto's television advertisements of Roundup as safe, on which Johnson relied. And *second*, this case meets none of the traditional criteria for certiorari because there is no split in authority and the decision below is correct.

This case is even less worthy of review than *Durnell*. Monsanto's petition addresses only Johnson's failure-to-warn claim, but he also brought design-defect and negligence claims challenging Roundup's safety, not its labeling. In *Bates*, the leading case on FIFRA preemption, this Court held that it was "perfectly clear" that FIFRA does not preempt "claims for defective design" or negligence because they "require manufacturers to design reasonably safe products," not "label or package their products in any particular way." *Id.* So no matter the resolution of the question presented, this case will proceed to trial. And once the retrial has occurred, Monsanto will have every opportunity to pursue any appeals at that time. Monsanto offers no basis for the partial interlocutory review that it seeks here. The Court therefore should deny certiorari no matter its disposition of *Durnell*.

STATEMENT

The brief in opposition to certiorari in *Durnell* recounts the evidence relevant to preemption. *See* Br. in Opp. 5-13, *Monsanto Co. v. Durnell*, No. 24-1068 (U.S. June 9, 2025) ("*Durnell* BIO"). This brief therefore focuses on the facts specific to respondent Larry Johnson.

1. Johnson began spraying Roundup at his Oregon home in the 1970s, soon after Monsanto started selling the weedkiller. 10 Tr. 51:20-21; 2 Tr. 27:20-28:1.[1] Like the actors in Monsanto's commercials, Johnson sprayed Roundup in shorts, not wearing protective equipment like gloves, a face mask, goggles, or even long sleeves. 10 Tr. 101:13-20; 15 Tr.

[1] Citations to "Tr." are to the trial transcript in No. 21CV10291 (Or. Cir. Ct., Jackson Cnty.). Trial took place from May 23, 2022 to June 17, 2022.

234:4-19. Roundup would get on his skin, but that "didn't bother" him. 10 Tr. 66:2-67:10.

Johnson sprayed Roundup for four decades, unaware of any health risks. 10 Tr. 61:7-10; 2 Tr. 27:20-28:14. Monsanto never warned him that Roundup can cause cancer. 10 Tr. 96:6-98:13. Johnson would not have used the product if he had been warned of the risk. 10 Tr. 98:14-17.

In 2019, Johnson was diagnosed with non-Hodgkin lymphoma, a deadly blood cancer. 10 Tr. 79:23-80:25. The cancer caused a tumor on his aorta. 10 Tr. 81:14-17. To treat that tumor, doctors implanted a port in Johnson's chest that delivered chemotherapy. 10 Tr. 81:20-82:1. The chemo made Johnson "feel weak"—after a treatment session, he would "go home and go to bed, because [he] couldn't do anything." 10 Tr. 84:24-85:1, 86:5-10. He lost his memory. 10 Tr. 85:2-10. He lost his hair. 10 Tr. 86:3-4. And he became depressed. 10 Tr. 88:5-7.

Johnson's cancer has left a lasting mark. He still has difficulty with his memory. 10 Tr. 85:5-7. And he no longer is able to engage in recreational activities, such as hunting and fishing, "like [he] did before." 10 Tr. 89:20-22.

2. Johnson sued Monsanto in March 2021.[2] App.2. He brought negligence, design-defect, and failure-to-warn claims alleging that Monsanto "was negligent in both testing and designing Roundup and that [the company] knew or should have known that Roundup posed a risk of cancer yet failed to warn or provide adequate instructions for safe use." App.7.

---

[2] Johnson's wife, Gayle, also sued, but her claims are not at issue on appeal.

These claims were tried before a jury in May and June 2022. App.36.

At the close of Johnson's case in chief and the close of evidence, Monsanto moved for a directed verdict on preemption grounds. App.22. The trial court denied the motions. *Id.*

The trial court also excluded the testimony of one of Johnson's experts, Dr. Charles Benbrook. App.3. Benbrook, an agricultural economist and expert on pesticide regulation, would have helped explain EPA's regulation of glyphosate to the jury, including EPA's cancer-risk-assessment process. App.12, 13. He therefore would have shed light on "what inferences the jury should or should not draw from the EPA's approval of Roundup's label under FIFRA," one of Monsanto's key defense points. App.21.

The jury returned a verdict for Monsanto. App.36-40, 42.

3. Johnson appealed, arguing (among other things) that the trial court erred in excluding Benbrook. App.3. Monsanto cross-appealed on preemption. App.4.

The Oregon Court of Appeals reversed. It held that the trial court erred by excluding Benbrook and that the exclusion was not harmless. App.34.

The court then rejected Monsanto's preemption arguments. The court began by acknowledging that Johnson's claims based on Monsanto's "alleged tortious design and testing of Roundup" would receive a different preemption analysis than claims based on Roundup's labeling. App.31. The court then found none of the claims preempted. They were not expressly preempted because, under *Bates*, they imposed no "labeling or packaging requirement [that was] 'in addition to or different from' those required under

FIFRA." *Id.* And they were not impliedly preempted because EPA's "'repeated approvals of a label without a cancer warning do not mean the EPA necessarily would have rejected a label with a cancer warning.'" App.30 (quoting *Carson v. Monsanto Co.*, 92 F.4th 980, 997 (11th Cir. 2024)) (cleaned up). The court therefore remanded for a new trial. App.35.

Monsanto sought further review from the Oregon Supreme Court, which denied its petition. App.1.

REASONS FOR DENYING THE PETITION

The petition here should be denied for the same reasons as in *Durnell*. *See Durnell* BIO 16-35. This case has other features that render it unsuitable to further review. Monsanto's petition does not challenge Johnson's design-defect and negligence claims. FIFRA does not reach those claims, and they present an alternative basis to affirm the Oregon Court of Appeals. The petition therefore presents no preemption issue meriting this Court's review.

"The proper inquiry" when determining whether FIFRA preempts a common-law claim "calls for an examination of the elements of the common-law duty at issue." *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005). For a common-law claim to be preempted, it must set forth (1) "a requirement '*for labeling or packaging*'" (2) "that is '*in addition to or different from*'" one of FIFRA's requirements. *Id.* at 443-44 (quoting 7 U.S.C. § 136v(b)).

Monsanto's argument fails at the first step, as Johnson's design-defect and negligence claims imposed no labeling or packaging requirements. Monsanto simply ignores this issue, but it provides an independent basis to reject the company's petition.

Johnson's claims challenged Roundup's design and safety, not its labeling or packaging. The negligence claim required Monsanto to take due care when designing and testing Roundup. App.36. And the design-defect claim required Roundup not to pose an "unreasonabl[e] danger[] to the ultimate user as a result of a defective design." App.37. The jury heard evidence that Monsanto designed a deadly product with a toxic surfactant banned abroad, but never once tested whether it was carcinogenic. App.7 & n.2.

FIFRA does not preempt these claims because they did not require Monsanto to "label or package their products in any particular way." *Bates*, 544 U.S. at 444; *see id.* ("petitioners' claims for defective design," "negligent testing," and other theories "are not pre-empted"). Under Oregon law, design-defect liability aims to protect against "a product [that] fails to meet ordinary consumer expectations as to safety." *McCathern v. Toyota Motor Corp.*, 23 P.3d 320, 330 (Or. 2001). No matter how Monsanto labeled Roundup, it could have avoided liability by creating a safer product. As this Court held in *Bates*, "[i]t is perfectly clear" that common-law claims "that require manufacturers to design reasonably safe products" and "to use due care in conducting appropriate testing of their products" are not preempted. 544 U.S. at 444. Johnson's claims involved just such requirements, so are not preempted.

Because those unchallenged claims will remain, even Monsanto acknowledges (at 16) the "need for further proceedings on remand." Review now thus is unnecessary, as Monsanto's preemption arguments may "become quite unimportant by reason of the final result." *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW F. KIRKENDALL
KIRKENDALL DWYER LLP
4343 Sigma Road
Suite 200
Dallas, Texas 75244
(214) 271-4027

DAVID C. FREDERICK
Counsel of Record
DEREK C. REINBOLD
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

June 23, 2025