No. 24-1068

In the
Supreme Court of the United States

MONSANTO COMPANY,

Petitioner,

v.

JOHN L. DURNELL,

Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Retail Litigation Center, Inc. (the "RLC") is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for hundreds of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 250 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been helpful to courts throughout the United States, as evidenced by citation to RLC amicus briefs in numerous precedential opinions. *See, e.g., South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542–43 (2013); *Chewy, Inc. v. U.S. Dep't of Lab.*, 69 F.4th 773, 777–78 (11th Cir. 2023); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

The RLC's members sell many products regulated by the federal government, from pesticides and pool products to pet foods and prescription drugs, and they necessarily depend on the uniformity of labeling laws

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission.

for the products they sell. Whether retailers, large and small, can rely upon the federal government's labeling determinations, or whether they must instead second-guess those determinations based on the risk of state-law claims insisting on contradictory labeling, is an issue of significant importance to the RLC and its members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decision below is as pernicious as it is wrong, and it will broadly harm retailers and their customers. In the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Congress directed the Environmental Protection Agency ("EPA") to administer a regime of uniform, federal labeling requirements for regulated products. To ensure federal supremacy over pesticide labeling, Congress included in FIFRA an express preemption clause, which displaces any "requirements for labeling or packaging" imposed by state law that are "in addition to or different from those required under" FIFRA.

The Missouri Court of Appeals fundamentally misapplied this provision, holding that state law could require a warning that glyphosate causes cancer, even though EPA has never required that warning and has rejected it in the not-too-distant past. The Missouri court also mishandled its analysis of conflict preemption, essentially reasoning that state and federal law do not conflict because EPA could change its mind in the future. Under its ruling, the question of how to label a product governed by FIFRA no longer belongs to federal regulators and their staff of

scientists, as provided by statute, but rather to a jury of laymen.

The Missouri court's reasoning directly harms retailers across the country. A retailer may sell hundreds or even thousands of products governed by FIFRA. Even though retailers generally do not design or manufacture pesticides, they remain litigation targets under failure-to-warn theories like the one espoused in this case. Plaintiffs routinely allege that retailers are liable for not having placed a so-called "shelf warning" next to the challenged product to supersede or supplement the manufacturer's EPA-approved label.

But requiring a retailer to second-guess the labeling decisions of a federal regulator and a manufacturer for thousands of regulated products on its shelves, as the decision below demands, defeats the very uniformity mandated by Congress under FIFRA. It also makes little practical sense—a retailer simply cannot investigate the safety of every regulated product on its shelves and reach its own independent conclusion about whether the product's EPA-approved label adequately warns of all potential hazards. Indeed, this is why most retailers enter into contracts with their suppliers requiring the latter to warrant that the supplied product conforms with all applicable laws and standards, including federal regulatory standards. Manufacturers further contract to indemnify retailers for any harm caused by their products. The approach sanctioned below, under which retailers cannot rely on their manufacturers' promises, threatens to upend these carefully calibrated contractual arrangements.

These failure-to-warn lawsuits thus create a catch-22 for retailers: If they trust EPA's decisions, as federal law entitles them to do, they are vulnerable to a deluge of claims from plaintiffs who insist that their views on safety should trump those of neutral government scientists charged by Congress with protecting public health. But if a retailer, rather than relying on its manufacturer's promises and federal guidance, acquiesces to the demands of the plaintiffs' bar and provides its own, contradictory product warning, it then opens itself up to potential litigation on multiple fronts, including trade-libel or product-disparagement actions from manufacturers, and, worse, civil or *criminal* liability via a misbranding enforcement action.

Beyond litigation risks, there are significant business concerns retailers must consider. Conflicting warnings would cause customer confusion, and the retailer and its associates would be ill-equipped to dispel it. Many manufacturers, and particularly those involved in active litigation, would rather pull their products from a retailer's shelves than allow them to be featured next to cancer warnings with which neither the manufacturer nor EPA agrees.

Congress chose uniformity in labeling, protected by federal preemption, as the cure for these and other ills. But the decision below robs FIFRA of its preemptive force, undermining the very standardization Congress sought to ensure. To prevent a patchwork of conflicting labeling requirements that would harm manufacturers, retailers, and their customers alike, the Court should reverse.

ARGUMENT

I. FIFRA Expressly And Impliedly Preempts State-Law Failure-To-Warn Claims.

In FIFRA, Congress adopted a "comprehensive regulatory statute" governing the sale, use, and labeling of pesticides and other household products. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 437 (2005) (quoting *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 991 (1984)). Among its many goals was to create uniform federal labeling requirements for regulated products. To that end, Congress expressly forbade states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b).

Congress delegated to EPA broad authority to supervise the pesticide industry, including by reviewing and approving product labels as part of the registration process. *See id.* § 136a(c)(1)(C), (F). EPA will register a pesticide upon the satisfaction of several conditions, including that the proposed labeling complies with FIFRA's misbranding prohibition. *Id.* § 136a(c)(5)(B), (9)(B); *Bates*, 544 U.S. at 438 ("A pesticide is 'misbranded' if its label contains a statement that is 'false or misleading in any particular,'" or "if its label does not contain adequate instructions for use, or if its label omits necessary warnings or cautionary statements." (quoting 7 U.S.C. § 136(q)(1)(A))). Once approved, a registrant generally cannot alter a pesticide's label without EPA's approval. *See Schaffner v. Monsanto Corp.*, 113 F.4th 364, 382–85 (3d Cir. 2024).

Exercising this authority, EPA has determined again and again that glyphosate—the main active ingredient in Roundup—is not a carcinogen. *See Schaffner*, 113 F.4th at 373 ("EPA has repeatedly evaluated the health risks posed by glyphosate," and concluded "that glyphosate is not carcinogenic."). In fact, as recently as 2019, EPA concluded that putting a cancer warning on Roundup would "constitute a *false and misleading* statement," such that "pesticide products bearing the … warning statement" would be "misbranded" under FIFRA. App.38–39 (emphasis added).

As explained in Monsanto's brief, FIFRA preempts any state-law claim that would require Roundup's label to bear a warning deemed "false and misleading" by EPA. Whether analyzed as a question of express or implied preemption, the result is the same. Plaintiff's failure-to-warn claim is *expressly* preempted because it would impose a labeling requirement for Roundup "in addition to or different from" what EPA requires. 7 U.S.C. § 136v(b); *Bates*, 544 U.S. at 443. And it is *impliedly* preempted because any cancer warning required by state law would render Roundup misbranded, such that compliance with both federal and state law is impossible. *See Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 303, 314–15 (2019) (state-law failure-to-warn claim preempted where there is "clear evidence" that FDA would not approve the warning required under state law).

This Court held in *Bates* that the imposition of labeling requirements under state law is permissible only where those requirements are perfectly

"'parallel'" to FIFRA, such that they are "equivalent to, and fully consistent with," FIFRA's provisions. 544 U.S. at 447 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996)). It is not enough that the state labeling requirements are "nominally equivalent" to FIFRA; they must be "*genuinely* equivalent" so that a manufacturer cannot be "held liable under a state labeling requirement … unless the manufacturer is also liable for misbranding as defined by FIFRA." *Id.* at 454 (emphasis in original).

Here, Monsanto could not be held liable for misbranding under FIFRA because the label that Monsanto placed on Roundup is one that EPA expressly approved after determining that such labeling complies with FIFRA's misbranding provisions. *See* 7 U.S.C. § 136a(c)(5)(B). Because Monsanto is not "liable for misbranding as defined by FIFRA," it cannot be "held liable under a state labeling requirement." *Bates*, 544 U.S. at 454. Under *Bates*, the preemption analysis here is that simple.

The Missouri Court of Appeals held that Missouri's duty to warn was "fully consistent" with FIFRA only by comparing the general objects of state law with the general objects of FIFRA:

> The "practical effect" of both FIFRA's prohibition on misbranding under section 136(q)(1)(G) and a strict liability failure to warn claim in Missouri are the same: both require a pesticide manufacturer to adequately warn users of the potential dangers of using its product, regardless of the manufacturer's knowledge or intent.

App.6–7.

But that kind of highly generalized reasoning, resting as it does on a nominal equivalence between state and federal law, glosses over the actual application of FIFRA *in this case*. Because Monsanto cannot be held liable for misbranding under FIFRA, any state-law labeling requirement that would impose liability on Monsanto substantively diverges from FIFRA. In this case, state law may be "nominally equivalent" to FIFRA at an abstract level, but it is not "genuinely equivalent" in application. *Bates*, 544 U.S. at 454 (emphasis omitted).

In fact, under the Missouri court's high-level reasoning, virtually any failure-to-warn claim would escape preemption as parallel because it, like FIFRA's misbranding provision, would require a product to bear adequate warnings. But if no failure-to-warn claim were ever preempted, the disposition in *Bates* makes little sense. *Id.* at 453 (remanding for lower courts to consider "whether [7 U.S.C. § 136v(b)] preempts petitioners' fraud and failure-to-warn claims").

Conducting the preemption analysis at a stratospheric level of generality reduces the "parallel requirement" test announced by this Court in *Bates* to an irrelevancy, and it all but erases Congress's express provision for FIFRA preemption under § 136v(b). Furthermore, it causes intractable conflicts between federal and state law for manufacturers and retailers who are supposed to be able to depend on a uniform federal labeling regime. For all these reasons, the decision below should be reversed.

II. The Ruling Below Carries Dire Consequences For Retailers Who Rely On Uniform Labeling Laws.

If left to stand, the decision below will invite the very multistate patchwork of product labeling requirements that Congress designed FIFRA to prevent. The costs of that patchwork will be borne not only by manufacturers but also by retailers and their customers.

A uniform labeling regime is critically important to retailers, many of whom stock their shelves with scores of products subject to scrutiny under FIFRA. "[I]magine 50 different labeling regimes," imposed under state law, "prescribing the color, font size, and wording of warnings." *Bates*, 544 U.S. at 452. Such requirements, this Court noted, would "create significant inefficiencies for manufacturers." *Id.*

For retailers, these "inefficiencies," to say the least, are even worse.[2] A retailer generally does not manufacture the products it sells or develop their labels, and usually it sells many more types of products than any one manufacturer makes. As a necessary consequence of that business model, a retailer lacks intimate familiarity with every product

[2] Of course, retailers typically have other defenses to liability under state law apart from federal preemption, including that they lack a duty to police the labeling on their shelves. But the point of FIFRA's express preemption clause is to create regulatory certainty through a uniform federal standard, and it would flip that principle on its head if retailers were required to establish their lack of liability on the merits in all fifty states. Preemption also serves as a bulwark against any future attempt to expand the liability of retailers under state law.

it stocks. And the scope and range of products subject to federal regulatory oversight under FIFRA is wide-ranging—it covers any product intended for preventing, destroying, repelling, or mitigating any pest, those intended for use as a plant regulator, defoliant, or desiccant, and nitrogen stabilizers. *See* 7 U.S.C. § 136(u). As such, in addition to things anyone would understand to be pesticides, FIFRA covers, for example, everything from biopesticides containing citronella or black pepper oil and household sanitizers and disinfectants to antimicrobial dish drainers, some varieties of bleach,[3] and even certain children's toys.[4]

A large retailer could conceivably stock thousands of these products. No retailer, regardless of size, could satisfactorily investigate the safety of every product on its shelves and reach its own independent conclusion about whether the product's EPA-approved label adequately warns of all potential hazards. Nor, even if a retailer could do so, would its provision of supplemental shelf warnings further the federal goal of uniformity in labeling.

Common sense notwithstanding, retailers remain prominent litigation targets, sued for nothing more than selling a product bearing an EPA-approved label. For example, in the Roundup litigation, the nation's

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[3] Retail Compliance Ctr., Fact Sheet: Federal Insecticide, Fungicide, and Rodenticide Act 1, 2 (2023), https://perma.cc/A39V-LXWU.

[4] *See* Press Release, EPA, EPA Acts to Prevent Playskool Toy Manufacturer Hasbro, Inc., from False Claims About Protecting Children from Microbial Infections (Apr. 18, 1997), https://perma.cc/TV8X-JTTH.

retailers have borne expensive fees and discovery in numerous cases that federal preemption should have stopped in their tracks. *See, e.g., Barnes v. Monsanto Co.*, No. 21-A-444 (Ga. Cobb Cnty. Ct. filed Feb. 3, 2021); *Biddle v. Lowe's Home Ctrs. LLC*, No. 50-2019-CC-011405 (Fla. Cir. Ct. filed Aug. 27, 2019); *Boyette v. Lowe's Home Ctrs., LLC*, No. 19-cv-04119 (W.D. Ark. filed Sept. 13, 2019); *Cardillo v. Monsanto Co.*, No. 2177CV00462 (Mass. Super. Ct. filed Apr. 27, 2021); *Fagundes v. Home Depot*, No. CACE-20-005126 (Fla. Cir. Ct. filed Mar. 21, 2020); *Gregorio v. Home Depot U.S.A., Inc.*, No. CACE-21-002428 (Fla. Cir. Ct. filed Feb. 4, 2021); *Hanna v. Walmart Inc.*, No. 20-cv-01075 (C.D. Cal. filed May 22, 2020); *Jewell v. WalMart, Inc.*, No. 19-cv-4088 (W.D. Ark. filed Aug. 12, 2019); *Lamerson v. Walmart Stores Inc.*, No. 50-2019-CC-009139 (Fla. Cir. Ct. filed July 15, 2019); *Mesecher v. Lowes Cos.*, No. 17-cv-00299 (E.D. Wash. filed Aug. 25, 2017); *Morley v. Ace Hardware Corp.*, No. CONO-19-010648 (Fla. Cir. Ct. filed Sept. 6, 2019); *Pilliod v. Monsanto Co.*, No. RG17862702 (Cal. Super. Ct. filed June 2, 2017); *Salas v. Monsanto Co.*, No. 2021-00615-CA-01 (Fla. 11th Cir. filed Jan. 11, 2021); *Shelly v. Target Corp.*, No. 50-2019-CC-010718 (Fla. Cir. Ct. filed Aug. 14, 2019); *Taylor v. Costco Wholesale Corp.*, No. 20-cv00655 (E.D. Cal. filed Mar. 27, 2020); *Weeks v. Home Depot U.S.A., Inc.*, No. 19-cv-06780 (C.D. Cal. filed Aug. 5, 2019); *Williams v. Lowes Home Ctrs., LLC*, No. 20-cv-01356 (C.D. Cal. filed July 6, 2020); *Wyzik v. Monsanto Co.*, No. CACE-21-002871 (Fla. Cir. Ct. filed Feb. 10, 2021).

Some of these cases have settled, some have been dismissed, and still others remain pending. But the common thread is that the plaintiffs in these and other

cases have demanded that retailers disregard EPA entirely, determine for themselves that glyphosate can cause cancer, and add a warning accordingly. Even if that were feasible, however, it would create far more problems for the retailer than it would solve. As one federal court put it, "[e]very regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does." *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1259 (E.D. Cal. 2020). Thus, placing a shelf warning on glyphosate products would be "at a minimum misleading." *Id.* at 1261. Requiring a retailer to add a warning label to glyphosate—or any number of other products—might satisfy one set of plaintiffs, but it would open the door to a host of claims by others, including suits by the manufacturer itself who, seeking to defend the safety and integrity of its products, could file trade-libel or product-disparagement claims.

Then there is EPA, which wields considerable enforcement authority. Should EPA determine that a retailer has "misbranded" a pesticide with "false or misleading" labeling,[5] the retailer could be open to both civil and criminal liability, with civil penalties of nearly $25,000 per violation and criminal penalties of a $25,000 fine and up to 1 year imprisonment. 7 U.S.C. § 136(q)(1)(A) (misbranding standard); *id.* § 136*l*(a)(1)

[5] FIFRA defines "labeling" to include "other written, printed, or graphic matter … *accompanying the pesticide or device at any time*." 7 U.S.C. § 136(p)(2) (emphasis added).

(civil penalty); *id.* § 136*l*(b)(1)(B) (criminal penalties).[6] Given that EPA has already concluded that putting a cancer warning on Roundup would "constitute a *false and misleading* statement," such that "pesticide products bearing the … warning statement" would be "misbranded" under FIFRA, App.38–39, enforcement actions from EPA would surely follow should a retailer place a shelf warning on glyphosate products. Indeed, as recently as 2024, EPA used its civil enforcement authority to police a retailer suspected of selling misbranded pesticides. The alleged offense? Selling citronella candles with a label that "did not match the operative EPA-accepted label." *In re Walmart, Inc.*, 2024 WL 773320, at *5 (EPA Feb. 21, 2024).

Beyond litigation, retailers face business concerns as well. Conflicting shelf messaging will erode consumer trust. Retail associates, faced with questions beyond their expertise, will be forced to play amateur scientist. Manufacturers defending the integrity of their products (and their use of the EPA-approved label) will resist retailer-level postings implying that their label is false or misleading. At best, retailers risk strained relationships. At worst, they risk inventory disruptions as those manufacturers pull their products from shelves to avoid having them featured next to disputed warnings.

Nor would retailers' issues stop and end with FIFRA. Other federal labeling regimes use text that is

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[6] The statutory civil penalty is $5,000, but that figure is adjusted for inflation each year; it currently sits at $24,885. *See* 40 C.F.R. § 19.4; *see also* Civil Monetary Penalty Inflation Adjustment, 90 Fed. Reg. 1375, 1377 (Jan. 8, 2025).

materially identical to § 136v(b). The Poultry and Poultry Products Inspection Act provides: "Marking, labeling, packaging, or ingredient requirements … in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia" 21 U.S.C. § 467e. And the Federal Meat Inspection Act provides: "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia." 21 U.S.C. § 678. Big-box retailers, and even neighborhood grocery and convenience stores, stock meat and poultry along with FIFRA-regulated products. Eroding preemption here will compound compliance and litigation burdens across their portfolios.

The labeling claims sanctioned by the decision below harm manufacturers, retailers, and their customers. Contrary to this Court's holding in *Bates*, Missouri has greenlit liability under state law for a label that does not violate FIFRA's misbranding prohibition but rather has been blessed by EPA. If the decision were to stand, preemption under FIFRA would be a hollowed-out shell of what Congress intended. The whims of lay jurors would trump EPA's considered judgment. And uncertainty, rather than uniformity, would reign.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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