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 OF AMICUS CURIAE THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Veterans of Foreign Wars of the United States ("VFW") is a congressionally chartered veterans service organization representing millions of veterans who have served in the Armed Forces, including those deployed to combat theaters around the globe. The VFW's membership includes a high percentage of veterans who have sought recognition and assistance for toxic exposure–related conditions, including those addressed under the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 (PACT Act).

This case directly implicates the same principles underlying the PACT Act and its adoption of a Toxic Exposure Risk Activity ("TERA") framework. It presents the question whether federal regulatory approval of a product label—and what warning was or was not required based on the information available at a particular moment in time can operate as a categorical bar to claims that warnings were inadequate in light of risks that are later revealed or become known.

For the population VFW represents, this question is not theoretical. If the content of a label can act as a bar to claims, it would risk incentivizing manufacturers to limit the development and disclosure of information regarding the human health effects of toxic

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

chemicals, including those implicated in, for example, chemical exposures at Camp Lejeune, burn pits, and FIFRA-registered substances. Historical experience, including Vietnam-era exposures, demonstrates that scientific understanding often evolves only after widespread exposure, and in some instances after information known to manufacturers was not fully disclosed to the public until after it was discovered during the course of litigation.

Amicus fears that if federal law is construed to restrict warnings for toxic chemicals within FIFRA's ambit and to foreclose claims based solely on prior registration of labels, the consequences for veterans—and for the system Congress has established through the PACT Act—would be substantial. The recognition of toxic exposure through the PACT Act would be forced to coexist with a legal regime that denies any corresponding mechanism for accountability, effectively shifting the burden of harm onto veterans and the public benefits system while insulating manufacturers from liability.

VFW in this brief does not take a position on the scientific questions regarding any particular substance. Rather, it seeks to ensure that the Court's interpretation of federal law is consistent with the realities reflected in the PACT Act and the TERA framework: that toxic exposure risks often emerge over time, and that legal systems must remain capable of addressing harms when they do. Amicus believes that the Court's resolution of the question presented will therefore have significant implications not only for pesticide regulation, but for the future effectiveness of

the nation's response to all toxic exposures affecting veterans.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has granted the following question for review: "Whether the Federal Insecticide, Fungicide, and Rodenticide Act preempts a label-based failure-to-warn claim where EPA has not required the warning?"

For 79 years—ever since the original version of FIFRA was passed into law in 1947—the answer to this question has never been "yes." Given the number of toxic chemicals at issue, along with exposure to these poisons by every person living in this country, a "yes" answer would upend almost 80 years of both understanding and jurisprudence regarding the ability of Americans to remedy the adverse personal and property costs from toxic chemicals they are knowingly or even unknowingly exposed to.

Indeed, this Court's question implicates a vast array of toxic substances. FIFRA broadly defines what have been collectively labeled "pesticides." The EPA registers over 1,200 active ingredients and over 57,000 full formulations and products under FIFRA,[2] which include "any substance or mixture of substances in-

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[2] *Advocates Call for Striking Entire Pesticide Section in GOP Farm Bill to Preserve Fundamental Protections*, Beyond Pesticides (Feb. 20, 2026), https://beyondpesticides.org/dailynewsblog/2026/02/advocates-calls-for-striking-entire-pesticide-section-in-gop-farm-bill-to-preserve-fundamental-protections/.

tended for preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u). 40 C.F.R. § 152.5(c) defines "pest" broadly, including "any plant growing where not wanted."

Petitioner and its amici repeatedly state that FIFRA registration means that when a toxic chemical is registered under FIFRA, it means it is safe for human exposure. This is not the case. Section 136a(c)(5) never seeks a "safe" determination but rather a cost benefit analysis based on reasonability and then only after the manufacturer submits supporting documentation and drafts the label that is to be used.

At the time of first registration, the poison's effect on humans must rely on animal studies, as toxicity studies on humans cannot be ethically undertaken—in contrast to the substances at issue in cases this Court has considered where medical clinical trials have been performed. For this reason, among others, toxic chemical compounds have repeatedly had to be pulled off the market—often decades after they were first registered and well after their health and environmental harms have been the basis for private tort lawsuits.

When registration cancellation does finally occur, veterans are more likely to have had toxic exposure than their civilian counterparts due to the inherently dangerous nature of military service. Indeed, veterans have been repeatedly injured by FIFRA-registered chemicals well before their registrations were cancelled. 2,4,5-T in Agent Orange had its registration cancelled over a decade after hundreds of thousands of veterans were exposed to it. Lindane, a toxic insecticide implicated in Gulf War Syndrome, did not have

its registration cancelled until a decade after its use in Iraq. "Forever chemicals" organochlorines (chlordane, aldrin, dieldrin, toxaphene, and heptachlor) did not have their registrations cancelled until long after they had contaminated Department of Defense bases all over the country.

In the absence of private litigation, FIFRA itself does not provide any real consequences for the failure to disclose material safety information after registration is granted—at least until renewal fifteen years later. Congress understood this when it repeatedly retained the language of Section 136a(f)(2) that has encouraged private tort lawsuits. By adding the words "prima facie evidence" to the statute in 1972, Congress reenforced that it intended there to be an adjudicatory process.

If Congress had meant to preempt the civil justice system, Congress would no doubt have legislated severe regulatory penalties when the foundation for the registration determination changes and the toxin continues to be sold despite real adverse human and/or environmental outcomes. Notably, Congress did not provide any such Federal remedy.

If the question is entirely what a label said, or did not say, and that this can act as a ceiling and a bar to claims, it is unfathomable that Congress would not have stated this explicitly. Congress would have understood the severe adverse implications for the health of all veterans and all other Americans. Congress would have considered that it stands to reason this would incentivize manufacturers to conduct the bare minimum level of research on a toxic chemical's

risk to human health to prepare a more favorable label. In the wake of the banning of DDT, Congress would have well understood that significant adverse human health information not publicly known about a toxic substance, undisclosed internal studies, and critical environmental information would quite possibly never be revealed if discovery in tort litigation was foreclosed. Veterans, the public generally, and the EPA would then all be deprived of this information.

In response, Petitioner argues several policy reasons for preemption that are at their core, just attacks on federalism and our jury system. Their real argument is one that private tort suits cost money and adversely impact pesticide sales. But, on the other hand, if federal law is construed to foreclose claims based solely on prior regulatory approval, the consequences for veterans—and for the system Congress has established through the PACT Act—would be much more substantial. In determining the presumptive nature of toxic exposures, the VA gives great deference to the EPA. The recognition of toxic exposure through TERA would be forced to coexist with a legal regime that denies any corresponding mechanism for accountability. Congress in 1972, shortly after forming the EPA, would have meant to increase accountability, not diminish it.

ARGUMENT

I. WHEN FIFRA AGREES TO REGISTER A LABEL, IT DOES NOT CERTIFY THE TOXIN TO BE "SAFE" AS THAT WORD IS NORMALLY UNDERSTOOD.

In its Brief for Petitioner, Monsanto makes the following statement: "EPA's decision to register a pesticide thus signals the agency's pesticide-specific determination that the pesticide *is safe* when used in accordance with the label approved by EPA during the registration process." Pet. at 25 (emphasis added). It also represents that such registration means the product is "safe and effective." *Id.* at 50.

However, the statutory text expressly never seeks a "safe" determination from the EPA. Instead, the determination is a qualified one:

> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5).

FIFRA defines "unreasonable adverse effects on the environment" to mean "any unreasonable risk to man or the environment," which requires EPA to balance the "economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). Under FIFRA, "safety," therefore, comes with a caveat. *See* Pet. at 42.

As Petitioner spells out, the EPA's registration process involves a "cost benefit analysis," not a pure safety analysis. *Id.* at 43. Acknowledging this, Petitioner twice quotes FIFRA's legislative record. First, it states that:

> as EPA noted, a 'no-risk concept for pesticide regulation is neither reasonable nor legally tenable. Most pesticides are intended to inflict harm on some form of life, or in some way to modify its structure or development. We thus expect pesticides to impose some degree of hazard; indeed, they would be no good to us if they did not.

Id. at 7 (quoting H.R. Rep. No. 94-1105, at 4 (1976)). Later, it quotes Congress as follows: "[T]here is a degree of risk which must be accepted in order to derive the substantial benefits afforded to society by pesticides." *Id.* at 51.

Petitioner's real conclusion is that it can be necessary to keep chemicals on the market "based on risks that are real but reasonable." *Id.* The result is a registration with "adequate safety for humans and the environment." *Id.* What is adequate then must be determined in relation to the toxin's cost and benefit. Over time, the calculation for all three of these – costs, benefits, and safety – likely changes. However, regardless of changes in any of these factors, absent a special and highly contested cancellation procedure,[3] FIFRA only

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[3] If the EPA finds a pesticide doesn't satisfy FIFRA's standards, it can initiate cancellation proceedings to rescind a pesticide's registration (7 U.S.C. §§ 136a(g)(1)(A)(v), 136d(b); 40 C.F.R. § 155.40(a)(2)) or require mitigation measures to reduce risk to acceptable levels (40 C.F.R. § 155.58). In practice, these drag out for years while the product in question continues to be sold.

requires registration review every 15 years, 7 U.S.C. § 136a(g)(1)(A)(iii)–(iv), and these reviews are generally long, drawn out affairs whenever they occur for a product still being sold on the market.

Thus, it might be true for regulatory enforcement purposes that: "[o]nce EPA approves a label," the "label is the law!" *Pesticide Registration Manual: Introduction*, EPA, https://perma.cc/RRQ4-S928 (last updated May 21, 2025), but that statement applies only to the ability to sell the product in question as having complied with registration requirements. Once registered, for regulatory purposes, manufacturers cannot distribute pesticides with substantially different labels from the EPA-approved label. *See* 7 U.S.C. § 136j(a)(1)(B). However, it makes no sense to believe that Congress set this cost/benefit/safety analysis in stone for, at minimum, the following 15 years regardless of what might be learned regarding health risks in the interim.

If Congress had meant to preempt the civil justice system, Congress would no doubt have legislated severe regulatory penalties when the foundation for the registration determination changes and the toxin continues to be sold despite real adverse human and/or environmental outcomes. But nothing in the statute articulates adverse financial consequences for actions once the label is approved and registered. Preemption under these circumstances would amount to a "Get Out of Jail Free" card.

Further, even in the extraordinary event of a cancellation proceeding that Petitioner argues cures problems with adverse health and environmental risks, EPA must still "take into account the impact" of the

cancellation "on production and prices of agricultural commodities, retail food prices," and the "agricultural economy." 7 U.S.C. § 136d(b). Once again, human safety is only one component of EPA's decision-making process.[4]

II. THE TEXT OF FIFRA MAKES IT CLEAR THAT CONGRESS CHOSE NOT TO PREEMPT CIVIL LITIGATION BUT RATHER TO ALLOW PROBLEMATIC CONDUCT TO BE SUBJECT TO THE SCRUTINY OF THE CIVIL JUSTICE SYSTEM.

FIFRA regulates "the use, as well as the sale and labeling, of pesticides." *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 437 (2005). FIFRA also proscribes the marketing of misbranded pesticides. 7 U.S.C. § 136j(a)(1)(E). A pesticide is "misbranded" if its label contains a statement that is "false or misleading," 7 U.S.C. § 136(q)(1)(A), or omits adequate instructions for use, necessary warnings, or cautionary statements, *id.* at § 136(q)(1)(F)–(G). But when can civil actions be brought for misbranding? In *Bates*, this Court answered that question, holding it was "perfectly clear" that FIFRA does not preempt claims that would not require manufacturers to "label or package their products in any particular way." *Bates*, 544 U.S. at 444.

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[4] Of course, the product manufacturer is still free to exercise its own "cancellation," as Monsanto's owner Bayer did in 2021 when it announced the discontinuance of its glyphosate-based products sold in the lawn-and-garden market, using other ingredients in Roundup for that market. *See Managing the Roundup™ Litigation*, Bayer, https://www.bayer.com/en/managing-the-roundup-litigation (last updated March 4, 2026).

In *Wyeth v. Levine*, which was decided after *Bates*, this Court held that preemption jurisprudence "must be guided by two cornerstones":

> First, "the purpose of Congress is the ultimate touchstone in every pre-emption case" . . . Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied," . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)).

Petitioner Monsanto's argument regarding FIFRA here exactly mirrors Wyeth's rejected contentions. There, the Petitioner contended that the controlling statute, the Federal Food, Drug, and Cosmetic Act (FDCA) "establishe[d] both a floor and a ceiling" for regulation such that, "[o]nce the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate." *Id.* at 573–74. In rejecting preemption in *Wyeth*, this Court highlighted two aspects of the FDCA that equally apply to the FIFRA statute. Just as in the case of FIFRA, which was amended in part due to the tragic history of DDT, Congress enacted the FDCA to bolster consumer protection against harmful products. And again, in FIFRA, just as in the FDCA, "Congress did not provide a federal

remedy for consumers harmed by unsafe or ineffective [products]."[5]

Given this lack of a remedy, this Court went on to conclude: "Evidently, [Congress] determined that widely available state rights of action provided appropriate relief for injured consumers. It may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings." *Id.* at 574; *see also id.* ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history."). *Bates* is in accord: "The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption." 544 U.S. at 432–33. "If Congress had intended to deprive injured parties of a long available

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[5] In *Wyeth*, this Court also held that there must be "clear evidence" that a federal agency (in that case, the FDA) would not have approved the warning that state law requires. 555 U.S. at 571. Here, there is no evidence Monsanto ever proposed a cancer warning for formulated Roundup, and, therefore, the EPA has never rejected one. As part of a failed proposed settlement of multidistrict litigation, Bayer/Monsanto agreed to seek permission from the EPA to add the following on Roundup labels "links to relevant scientific evidence and materials related to whether exposure to Roundup Products causes [non-Hodgkin lymphoma]" going forward. Settlement Agreement at 167, *In re Roundup Prods. Liab. Litig.*, No. 3:16-md-2741-VC (N.D. Cal. Feb. 3, 2021), Dkt. No. 12509-2. Monsanto never made this request to the EPA but instead kept this warning as a settlement bargaining chip.

form of compensation, it surely would have expressed that intent more clearly." *Id.*

But Congress provided no relief under FIFRA for injured consumers. Rather than expressly preempt such suits, Congress chose to include language enabling them and stated in no uncertain terms that:

> In no event shall registration of an article be construed as a defense for the commission of any offense under this subchapter.

7 U.S.C. § 136a(f)(2). *See also Bates*, 544 U.S. at 438 ("[R]egistration does not provide a defense to the violation of the statute").

This language was written into law as soon as FIFRA was adopted during the Truman administration in 1947. *See* Pub. L. No. 80-104, § 4(c), 61 Stat. 163, 168 (1947). The language was retained in 1964 when Congress strengthened the registration requirements. Pub. L. No. 88-305, § 3, 78 Stat. 190, 190–91 (1964).

In 1972, during the Nixon administration, Congress put the recently created EPA in charge of registration, while passing "extensive amendments that 'transformed FIFRA from a labeling law into a comprehensive regulatory statute.'" *Bates*, 544 U.S. at 437. As part of this amendment, rather than preempt civil litigation, Congress retained this language. There can be no question that Congress considered this language and meant to retain it. Instead of striking the language, Congress added to it with the following: "as long as no cancellation proceedings are in effect registration of a pesticide shall be *prima facie* evidence that

the pesticide, its labeling and packaging comply with the registration provisions of the Act." Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, § 3(f)(2), 86 Stat. 973, 982 (1972).

If Congress had intended registration to be preemptive, it would have said so. Instead, it placed the fact of registration into the ambit of the civil justice system. By making the registration "prima facie evidence," it reenforced that there would be an adjudicatory process. In what other forum would "prima facie evidence" be relevant? The term means "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Evidence, Black's Law Dictionary (12th ed. 2024). Evidence by its very nature requires submission to a judicial forum where the matter will be adjudicated.

When Congress chose to add this language, there thus can be no reasonable argument other than that Congress never intended to preempt review in a judicial forum. Congress did not make regulatory approval a shield from liability. It instead provided that registration is only "prima facie evidence" of compliance—not a conclusive determination. 7 U.S.C. § 136a(f)(2). Petitioner's rule would invert that design, turning preliminary approval into a permanent bar to accountability.

III. THE RAMIFICATIONS OF TOXIC EXPOSURE TO VETERANS, THEIR FAMILIES, AND OTHERS REINFORCE THE FACT THAT CONGRESS NEVER MEANT TO IMMUNIZE THESE POISONS FROM THE PURVIEW OF THE CIVIL JUSTICE SYSTEM.

Stripped to its core, Petitioner's argument is that FIFRA bars all failure-to-warn claims for all registered substances when the EPA has not required a particular warning on a label. This is an incredibly broad request, especially given that almost every suit brought against a pesticide manufacturer includes**,** at minimum**,** a failure-to-warn cause of action—and sometimes only this cause of action. If Petitioner gets what it is seeking, many cases would be dismissed along with the unwanted side effect of enabling manufacturers to hide adverse health effects and environmental information that would have been revealed in discovery. Absent private litigation, FIFRA itself does not provide any real consequences for a failure to disclose material safety information after registration is granted—at least until renewal 15 years later.

Petitioner's attempt to buttress its preemption argument by citing this Court's jurisprudence ignores the seismic differences between the agency actions reviewed in *Wyeth*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), and *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), with the EPA's very different process and requirements undertaken under FIFRA. Unlike in those situations, to comply with FIFRA it is the manufacturer that both submits the supporting documentation and then drafts the label. In the initial course of this process, EPA's regulations only require two rodent studies on carcinogenicity. *See* 40 C.F.R. § 158.500(d) (toxicology data requirements table, Guideline No.

870.4200). Based on the material submitted, EPA then determines whether to approve the label.[6]

At the time of first registration, unique toxic effects to humans are generally unknown, because unlike pharmaceuticals, no human clinical trials can be arranged on compounds that are always, by their very nature, designed to kill organic life (the suffix "-cide" coming from the Latin *caedere*, or "to kill"). As such, at this time, there can be no epidemiology gauging the long term adverse human health consequences before the pesticide is used on the market, and even then, such studies can often take decades to evaluate after initial human exposure. Additionally, what might later be revealed to be enduring pernicious long term environmental contamination can rarely be determined at this time.

Repeatedly, chemical compounds have had to be pulled off the market as unsafe, often long after they were first registered and harm has already occurred. It is these harms that eventually result in private tort suits. At times, significant adverse human health information not publicly known about a toxic substance is only revealed after discovery in tort litigation uncovers previously withheld safety data that was never disclosed, buried in internal studies, or disclosed as part of studies that were manipulated.

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[6] When label changes are necessary, the registrant drafts and submits revised labeling to the EPA after which the EPA "shall" approve the change if it complies with FIFRA. 7 U.S.C. § 136a(f)(1); 40 C.F.R. § 152.50(e).

Veterans face unique barriers in seeking redress for such harms and are more likely to have toxic exposure than their civilian counterparts due to the inherently dangerous nature of military service (for example, veterans comprise roughly 8% of the U.S. population but account for about 30% of mesothelioma deaths in the country).[7] Meanwhile, the Feres Doctrine generally precludes suits against the government, and VA benefits, while essential, provide limited compensation and do not impose accountability on manufacturers. As a result, claims against third-party manufacturers who fail to provide adequate warnings frequently represent one of the only meaningful avenues for accountability. Indeed, it is not infrequent that veterans have been exposed to dangerous FIFRA registered toxic chemicals.

1. Vietnam-Era War Veterans.

During the Vietnam War era many veterans were exposed to a group of herbicides now collectively referred to as "Agent Orange." The most toxic of these herbicides was 2,4,5-T, which constituted 50% of Agent Orange itself. 2,4,5-T was used as a defoliant to strip jungle canopy, destroy enemy crops, and clear base perimeters.[8] 2,4,5-T was first registered under FIFRA in 1948 with its use canceled by the EPA in 1985, thirty-seven years after it was first registered.

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[7] Asbestos Nation, *The Hidden Enemy: Asbestos' Long, Deadly Toll on U.S. Veterans* 2 (2017).

[8] National Academies of Sciences, Engineering, & Medicine, *Veterans and Agent Orange: Update 11* (Nov. 15, 2018), https://pubmed.ncbi.nlm.nih.gov/30629395/.

Agent Orange has been related to the following adverse health conditions: bladder cancer; chronic B-cell leukemia; Hodgkin's disease; multiple myeloma; non-Hodgkin's lymphoma; prostate cancer; respiratory cancers (including lung cancer), some soft tissue sarcomas; AL amyloidosis; chloracne (or other types of acneiform disease like it); diabetes mellitus type 2; high blood pressure; hypertension; hypothyroidism; ischemic heart disease; monoclonal gammopathy of undetermined significance (MGUS); Parkinsonism; Parkinson's disease; early onset peripheral neuropathy; and porphyria cutanea tarda.[9]

As to the question of whether there has been litigation and discovery related to Agent Orange before its cancellation, the answer is, "Yes." Lawsuits for veteran exposure to Agent Orange were widely filed beginning around 1979. These were settled for $180 million in 1984. *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

2. Gulf War-Era Veterans.

Gulf War veterans had a variety of exposures which collectively caused what has come to be called Gulf War Syndrome. One of the most toxic of these exposures was to methyl carbamate organochlorine pesticides ("lindane").**[10]** Lindane was broadly used to

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[9] *Agent Orange Exposure and Disability Compensation*, U.S. Dep't of Veterans Aff., https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange/ (last updated Sept. 16, 2025).

[10] EPA, Lindane (Gamma-Hexachlorocyclohexane) 58-89-9,

Footnote continued on next page.

treat uniforms as an insecticide. Its health effects include severe neurotoxicity, as well as adverse effects on the kidney, liver and immune system. Lindane was first registered under FIFRA in 1951 with its registration cancelled fifty-six years later in 2007.[11]

As to the question of whether there has been litigation and discovery related to lindane before its cancellation, the answer is, "Yes." For instance, lindane was identified as one of the most prominent contaminants of the contamination around the infamous Love Canal. Many "Love Canal" suits for chemical exposure and contamination were filed, beginning in 1979.[12] The private resident suits settled in 1983.[13]

3. Department of Defense Bases.

Almost 150 bases have been declared Superfund sites.[14] Hundreds of others have had to undergo mas-

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https://www.epa.gov/sites/default/files/2016-09/documents/lindane.pdf (last updated Sept. 2016).

[11] Lindane; Cancellation Order, 71 Fed. Reg. 74905 (Dec. 13, 2006), https://www.federalregister.gov/documents/2006/12/13/E6-21101/lindane-cancellation-order.

[12] *Love Canal: Timeline and Photos*, SUNY Buffalo, https://research.lib.buffalo.edu/love-canal/timeline-and-photos (last updated Mar. 6, 2026); *Love Canal, NY*, Lindane Educ. & Rsch. Network, https://www.lindane.org/lindane/love_canal.htm.

[13] Mark A. Zaremba, *Love Canal - An Introduction*, Online Ethics Ctr. (2004), https://onlineethics.org/cases/love-canal-collection/love-canal-introduction.

[14] *See, e.g.*, *DOD Superfund Sites*, DOD Base Fam. Hous., https://www.basefamilyhousing.info/dod-superfund-sites/#.

sive cleanups. Much of this has been due to contamination from so-called "forever chemicals," particularly including polyfluoroalkyl substances (PFAS) which are mostly not registered under FIFRA (though they were as inert ingredients, i.e. surfactants, dispersants, and spreading agents when used in pesticides) and organochlorine compounds. Organochlorines have been implicated in contamination and adverse health effects at numerous military bases. This is due to their high stability, environmental persistence, and tendency to bioaccumulate in human fat tissue.

Organochlorines chlordane, aldrin, dieldrin, toxaphene, and heptachlor were registered between 1947 and 1972. They were broadly used at military bases to control mosquitoes, termites, and fire ants, as well as for use as herbicides. All their registrations were cancelled between 1988 and 1990. On exposed humans, they can cause nervous system, liver, kidney, and immune system problems. The EPA also classifies each as a probable human carcinogen.[15]

As to the question of whether there has been litigation and discovery related to organochlorines before their cancellations, the answer is, "Yes." In fact, in 1989 the court in a private chlordane exposure case, *Cox v. Velsicol Chemical Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989), held that FIFRA did not preempt state tort claims against manufacturers for failure to warn of risks. Thus, 47 years ago the *Velsicol* court rejected many of the same arguments Petitioner raises here.

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[15] *See, e.g.*, EPA, Chlordane 57-74-9, https://www.epa.gov/sites/default/files/2016-09/documents/chlordane.pdf

Congress's acknowledgment of the many injuries "FIFRA-regulated" toxins have caused to service personnel recently resulted in the passage of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 ("PACT Act").[16] Amicus spearheaded efforts in Congress to pass the PACT Act but remains concerned for the many veterans exposed to toxic chemical compounds not yet acknowledged as eligible for compensation under the Act. Further, in the future many new chemicals will no doubt be designed to substitute for the large swath of banned toxic chemicals from the past.

This case directly implicates the same principles as those behind the passage of the PACT Act. It presents the question whether federal regulatory approval of a product label—and what warning was or was not required based on the information available at a particular moment in time—can operate as a categorical bar to claims that warnings were inadequate in light of risks that later become known or are later revealed. For the population the VFW represents, that question is not theoretical. Further, if the question of what a label said, or did not say, can act as a bar to claims, it stands to reason this would incentivize manufacturers to conduct the bare minimum level of research on the chemical's risk to human health to get a more favorable label. Veterans adversely affected by FIFRA-labeled toxic substances often experience serious health consequences only connected to that sub-

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[16] *See PACT Act and Toxic Exposure Information*, VFW, https://www.vfw.org/PACTActInfo (last visited Mar. 30, 2026).

stance after years or decades, when scientific understanding has evolved beyond what was known or revealed at the time of initial approval.

When determining whether to treat these veterans' conditions as presumptive, the VA includes, and gives great deference to, EPA's research and studies on toxic chemicals and their effect on human health. Incentivizing less data to encourage an immutable label directly impacts VA's presumptive determinations which likely will detrimentally impact veterans seeking compensation for conditions and illnesses caused by said toxic chemical(s).

Clearly, the sooner an "unreasonably" poisonous pesticide can be pulled from the market—often in response to tort litigation—the better it is for future generations who have not yet been exposed. Absent the publicity and findings of tort litigation, often toxic substances will continue to be used and continue to harm veterans for years.

Service members do not choose their exposures. They follow orders and use the products their missions require, trusting that what was known about those products had been honestly disclosed—to regulators, to commanders, and ultimately to the people bearing the risk. That trust creates a direct accountability obligation: where a manufacturer knew—or should have known—of serious long-term health risks and failed to warn users who had no practical ability to protect themselves, the case for holding that manufacturer responsible is at its strongest. The harm from concealment does not fall evenly. It falls on those least able to avoid it and these too often have been men and women

serving our country. Preemption will only exacerbate this.

IV. IN BATES, THIS COURT ALREADY ADDRESSED THE PUBLIC POLICY ARGUMENTS ADVANCED BY PETITIONER AND FOUND THEM WITHOUT MERIT; ANY PUBLIC POLICY CONSIDERATION FAVORS RESPONDENT.

Failing to make a case that Congress wrote FIFRA to incorporate preemption of state law actions, Petitioner resorts to a litany of complaints repeatedly reiterated by almost every corporate defendant about the civil justice system: (1) Petitioner complains about a "patchwork of overlapping and potentially inconsistent state-law" results, Pet. at 52; (2) Petitioner argues that the threat of liability disincentivizes the development of new products, *id.* at 53; (3) Petitioner complains about our federal system of government, agonizing that laws of 50 different states may be different, *id.*; and, finally, (4) Petitioner excoriates the judicial system and the right to juries, stating that "lay juries are ill-equipped to understand" the information presented to them and lay juries are overly sympathetic to injured plaintiffs who are suffering, *id.* at 52.

Each of these policy complaints would be little different if they had come from an auto, tire, pharmaceutical, or any other type of manufacturer. It is especially strained when the product is an intended poison. But the bottom line is that not one of these complaints is uniquely tethered to pesticides or FIFRA. Any remedy for these policy questions belongs in a legislative forum—not a judicial forum.

Furthermore, this Court has already considered and rejected these complaints in *Bates*. Specifically, this Court addressed Monsanto's patchwork quilt argument, finding "the disruptive effects of using common-law suits to enforce the prohibition on misbranding" exaggerated. *Bates*, 544 U.S. at 451. "FIFRA has prohibited inaccurate representations and inadequate warnings since its enactment in 1947, while tort suits alleging failure-to-warn claims were common well before that date and continued beyond the 1972 amendments." *Id.* As to juries, this Court found that "it bears noting that lay juries are in no sense anathema to FIFRA's scheme: In criminal prosecutions for violation of FIFRA's provisions, *see* 7 U.S.C. § 136l(b), juries necessarily pass on allegations of misbranding." *Bates*, 544 U.S. at 452.

In fact, this Court noted the importance of state tort law actions in the overall regime of providing the public protection from what can be highly toxic chemicals, stating that "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder," FIFRA's functioning. *Id.* at 451.

> [A] state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labelling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits.

Id. (quoting *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C. Ct. App. 1984)).

A notable example of a highly publicized misrepresentation regarding the 2,4,5-T in Agent Orange was the litigation discovery that Monsanto manipulated its epidemiological studies of 2,4,5-T. In 1949, an explosion occurred at a Monsanto chemical factory in Nitro, West Virginia. As a result, many workers in the plant were exposed to the herbicide 2,4,5-T. Later, Monsanto scientists conducted several epidemiological studies on the exposed workers, comparing their health against the health of a similar group of workers who were supposedly not exposed. When the underlying data was reviewed during the course of discovery, it was clear that 5 deaths from the exposed group were omitted and four workers who had been exposed were put in the unexposed group to decrease the death rate in the exposed group and increase the death rate in the unexposed group. In a morbidity study of this same accident, medical records showed there were 28 cancers rather than the 14 the study reported in the exposed group, and only 2 rather than the 6 the study said were in the smaller unexposed cohort. Monsanto publicized the results of these studies widely, resulting in the false pronouncement that based on these studies 2,4,5-T did not cause cancer or death.[17] These

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[17] Alastair Hay & Ellen Silbergeld, *Dioxin Exposure at Monsanto*, Nature 320, 569 (Apr. 1, 1986). https://doi.org/10.1038/320569a0; *Dioxin and Cancer: Fraudulent Studies*, Rachel's Hazardous Waste News #171 (Env't Rsch. Found. Mar. 7, 1990), https://cdn.toxicdocs.org/ga/gap372dQ8865OVD6R5O4mqvVN/gap372dQ8865OVD6R5O4mqvVN.pdf.

studies were then used to defend civil litigation and help delay compensation for exposed veterans.

Absent the ability to conduct discovery, the problems with these studies would never have been found and these studies would have continued to have been used to deny veterans a service connection for Agent Orange exposure. The ultimate public policy argument should then not be the manufacturer's one of the impacts on pesticide sales but rather one of protection, particularly for the men and women serving this country. Amicus agrees with this Court that:

> In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement.

Bates, 544 U.S. at 451 (quoting *Ferebee*, 736 F.2d at 1541–1542). If federal law is construed to foreclose claims based solely on prior regulatory approval, the consequences for veterans—and for the system Congress has established through the PACT Act—would be substantial. The recognition of toxic exposure through TERA would have to coexist with a legal regime that denies any corresponding mechanism for accountability, effectively shifting the burden of harm onto veterans and the public health benefits system while insulating manufacturers from liability for risks that were not fully understood at the time of use. That outcome would undermine the broader framework through which toxic exposure harms are identified, understood, and addressed.

CONCLUSION

For the foregoing reasons, the judgment of the Missouri Court of Appeals should be affirmed.

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Respectfully submitted,

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