No. _____

In the
Supreme Court of the United States

MONSANTO COMPANY,

Petitioner,

v.

LARRY JOHNSON and GAYLE JOHNSON,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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April 18, 2025

QUESTION PRESENTED

This case presents the same question that is presently before the Court in *Monsanto Co. v. Durnell*, No. 24-1068 (docketed April 9, 2025). For all the reasons set forth in the petition in *Durnell*, this Court should grant the petition in No. 24-1068 and hold this case pending final resolution of that case.

The question presented is:

Whether FIFRA preempts a state-law failure-to-warn claim where EPA has repeatedly concluded that the warning is not required and the warning cannot be added to a product without EPA approval.

PARTIES TO THE PROCEEDING

Petitioner Monsanto Company was the respondent in the Oregon Court of Appeals. Respondents Larry Johnson and Gayle Johnson were the appellants.

CORPORATE DISCLOSURE STATEMENT

Petitioner Monsanto Company is an indirect, wholly owned subsidiary of Bayer AG, a publicly held corporation. No other publicly held corporation owns 10% or more of Monsanto's stock.

STATEMENT OF RELATED PROCEEDINGS

Johnson v. Monsanto Co., No. S071370 (Or.) (petition for review denied Dec. 19, 2024).

Johnson v. Monsanto Co., No. A179665 (Or. App.) (opinion and judgment issued July 10, 2024).

Johnson v. Monsanto Co., No. 21CV10291 (Or. Cir. Ct.) (judgment entered Aug. 2, 2022).

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PETITION FOR WRIT OF CERTIORARI

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") includes a "[u]niformity" provision that expressly preempts all state "requirements for labeling or packaging" that are "in addition to or different from those required under" FIFRA. 7 U.S.C. §136v(b). There is a square and acknowledged circuit split over the scope of that provision as applied to the particular product at issue here. Specifically, in evaluating suits against Petitioner for its Roundup product (of which there are many), the circuits have split over "whether, once the Environmental Protection Agency ('EPA') registers and approves a pesticide label that omits a particular health warning, a state-law duty to include that warning is preempted." *Schaffner v. Monsanto Corp.*, 113 F.4th 364, 370-71 (3d Cir. 2024).

In a thorough, 65-page opinion, the Third Circuit held that FIFRA preempted a state-law failure-to-warn claim that sought to hold Monsanto liable for failing to warn users of the alleged carcinogenic effects of glyphosate, the active ingredient in Monsanto's Roundup product. The Third Circuit explained that EPA "regulations promulgated to implement FIFRA require the health warnings on a pesticide's label to conform to the proposed label approved by the EPA during the registration process." *Id.* at 371. Thus, when EPA has conducted "extensive review of [the] scientific evidence" of a potential health issue (as it had with glyphosate) and "approved proposed labels omitting a [health] warning" on that issue, FIFRA preempts a "state-law duty to include" that same warning. *Id.*

As the Third Circuit recognized, however, its "analysis differs from" that of its "colleagues in other courts." *Id.* at 399. Like the Oregon Court of Appeals here, the Ninth and Eleventh Circuits (as well as intermediate appellate courts in California and Missouri) have held that FIFRA does not preempt state-law failure-to-warn claims that seek to hold Monsanto liable for not warning users of the alleged carcinogenic effects of glyphosate. *See Carson v. Monsanto Co.*, 92 F.4th 980 (11th Cir. 2024); *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021); *Durnell v. Monsanto Co.*, 2025 WL 451540 (Mo. Feb. 11, 2025), *appeal denied* No. SC100975 (Mo. 2025), *petition for cert. filed* No. 24-1068 (U.S. Apr. 4, 2025); *Pilliod v. Monsanto Co.*, 282 Cal.Rptr.3d 679 (Ct. App. 2021), *appeal denied*, No. S270957 (Cal. Nov. 17, 2021).

Monsanto has asked this Court to review that acknowledged and consequential split in authority in in *Monsanto Co. v. Durnell*, No. 24-1068 (docketed April 9, 2025). *Durnell* presents the question that has divided the circuits in an ideal posture as the case involves a full trial record, the jury rejected all of Durnell's claims save his failure-to-warn claim, and the judgment is unambiguously final. Accordingly, Monsanto urges this Court to grant the petition in *Durnell* and hold this case pending resolution of *Durnell* on the merits. In the alternative, this Court should grant this petition. Either way, the Court should review and resolve the question presented which has divided courts and arises in tens of thousands of cases involving Roundup alone.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals is reported at 554 P.3d 290 and reproduced at App.2-35. The Oregon Supreme Court's order denying Monsanto's petition for review is reported at 562 P.3d 237 (table) and reproduced at App.1. The judgment of the Oregon trial court is unreported but reproduced at App.41-43.

JURISDICTION

The Oregon Court of Appeals issued its opinion on July 10, 2024. The Oregon Supreme Court denied Monsanto's petition for review on December 19, 2024. Justice Kagan extended the time to file a petition to April 18, 2025. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179 (1988); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478-84 (1975).

STATUTORY PROVISIONS INVOLVED

The full text of 7 U.S.C. §136v(a)-(b) is reproduced at App.44.

STATEMENT OF THE CASE

A. Legal Background

Congress created FIFRA through a series of enactments to regulate the use, sale, and labeling of pesticides. *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). As originally enacted in 1947, *see* Pub. L. No. 80-104, 61 Stat. 163, FIFRA "was primarily a licensing and labeling statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)). In 1972, Congress "significantly strengthened FIFRA's registration and labeling standards" in response to "environmental and

safety concerns." *Id.*; *see also* Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973. The 1972 amendments effectively "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus*, 467 U.S. at 991).

Under FIFRA, no pesticide may be sold or distributed domestically without EPA registration. 7 U.S.C. §136a(a). To register a pesticide, EPA must determine (among other things) that the pesticide poses no unreasonable risk of adverse effects on human health and the environment, *see* 7 U.S.C. §§136a(c)(5)(C), 136(bb); 40 C.F.R. §152.112(e), and that its labeling complies with FIFRA's requirements, including its misbranding prohibition, *see* 7 U.S.C. §136a(c)(5)(B). "A pesticide is 'misbranded' if its label contains a statement that is 'false or misleading in any particular,'" *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 438 (2005), or "does not contain a warning or caution statement which may be necessary and if complied with[] … is adequate to protect health and the environment," 7 U.S.C. §136(q)(1)(G).

EPA has published regulations that govern the registration process. *See* 40 C.F.R. pt. 152. Under those regulations, manufacturers must submit voluminous scientific and safety data (including carcinogenicity studies), as well as proposed labeling that includes any precautionary statements regarding potential effects on human health. *E.g.*, 7 U.S.C. §136a(c); 40 C.F.R. §§156.10(a)(1)(vii), 156.60, 158.500. EPA reviews the scientific studies and safety data to ensure that the pesticide does not impose any unreasonable risk of adverse effects on human health,

including cancer. And it reviews and approves the proposed label to ensure that it complies with FIFRA's requirements. *See* 40 C.F.R. §§152.40-55. If EPA has reason to believe a pesticide violates FIFRA's provisions, EPA may issue "stop sale, use, or removal" orders, 7 U.S.C. §136k(a), seize and condemn the offending products, *id.* §136k(b), and seek civil and criminal penalties from the manufacturer, *id.* §136*l*. EPA must review a pesticide's registration every 15 years. *Id.* §136a(g)(1)(A)(iii)(II). This process requires EPA to consider whether any "labeling changes" are necessary given new information and whether the product still meets FIFRA's requirements, including its misbranding prohibition. 40 C.F.R. §155.58(b)(4).

Pesticide registrants have a continuing obligation to comply with FIFRA's labeling requirements. Once EPA approves a label, the "label is the law." EPA, Pesticide Registration Manual 3 (last updated April 2017), https://perma.cc/3GTB-3892. It is illegal to distribute a pesticide with labeling substantially different from the EPA-approved label. 7 U.S.C. §136j(a)(1)(B). And the manufacturer must seek approval for virtually any substantive change to that label. 40 C.F.R. §§152.44, 152.46; 7 U.S.C. §136a(c)(9)(C). While the manufacturer may make some "minor modifications" through a streamlined "notification" process, it may not change any "precautionary statements" via that notification process. *See* EPA, Office of Pesticide Programs, *Pesticide Registration Notice 2000-5* (May 10, 2000), https://perma.cc/ANB4-UGG9; EPA, Office of Pesticide Programs, *Pesticide Registration Notice 98-10* (Oct. 22, 1998), https://perma.cc/EZ7M-62MY; 40

C.F.R. §156.70(c). Instead, for such changes, it may proceed only by formal amendment.

FIFRA establishes a program for federal-state cooperation in regulating pesticides. *See Mortier*, 501 U.S. at 601-02. Section 136v, titled "Authority of States," sets forth key principles of that relationship. *See* 7 U.S.C. §136v. Section 136v(a) recognizes that, as a general matter, states retain their historic authority to regulate pesticide sale or use, provided that a state does not permit a sale or use that FIFRA, or EPA's implementing regulations, prohibit:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

Id. §136v(a).

But when it came to labeling, FIFRA sought to ensure that manufacturers would not have to comply with "50 different labeling regimes." *Bates*, 544 U.S. at 452. FIFRA thus forbids a state from imposing any additional or different requirements on pesticide labeling or packaging than those imposed under FIFRA:

> (b) Uniformity
>
> Such State shall not impose or continue 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).

B. Factual Background

Monsanto produces Roundup, "a weed-killer that employs glyphosate as its active ingredient." *Schaffner*, 113 F.4th at 373.[1] EPA has registered pesticides containing glyphosate since 1974. *See* EPA, *Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential* 12 (Dec. 12, 2017), https://perma.cc/UWM2-6BHB. EPA has repeatedly evaluated whether glyphosate is carcinogenic. *Id.* In 1986, for example, EPA found that the evidence did not support a conclusion that glyphosate causes cancer, and EPA prescribed "Required Labeling" with no cancer warning. *Id.*; *see also* EPA, Office of Pesticides and Toxic Substances, *Guidance for the Reregistration of Pesticide Products Containing Glyphosate as the Active Ingredient* 6-8, 20-34 (June 1986), https://perma.cc/DTH7-FR4V. In 1991, EPA's Carcinogenicity Peer Review Committee classified glyphosate "as a Group E chemical: 'Evidence of Non-Carcinogenicity for Humans.'" *Revised Glyphosate Issue Paper* 13. In 1993, EPA completed its statutory re-registration of glyphosate, concluding that "glyphosate products, labeled and used as specified [by EPA], will not pose unreasonable risks or adverse effects to humans." EPA, *Reregistration Eligibility Decision (RED) Glyphosate* 57 (Sept. 1993), https://perma.cc/528H-F4FN. And in subsequent years, EPA has reiterated its conclusion that glyphosate is not carcinogenic. *Revised Glyphosate*

[1] While courts have generally referred to a single Roundup product, in reality, Monsanto has produced dozens of Roundup-branded products over the decades, each of which has been approved by EPA for marketing without a cancer warning.

Issue Paper 12-13. In 2008, for instance, EPA determined that glyphosate is "not a carcinogen" based on its review of an "extensive database" of research. Glyphosate; Pesticide Tolerances, 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008). Public health regulators worldwide have similarly found that glyphosate does not cause cancer in humans. *See Hardeman*, 997 F.3d at 951.

In 2015, against that global consensus, a working group of the International Agency for Research on Cancer ("IARC") classified glyphosate as a "Group 2A" agent—meaning it is, in IARC's view, "probably carcinogenic to humans" based on "limited" evidence of cancer in humans. IARC, 112 Some Organophosphate Insecticides and Herbicides 398 (2015), https://perma.cc/9TPL-278R. IARC's classification reflected a hazard assessment, meaning a theoretical determination of carcinogenic potential; it did not assess the *actual* risk glyphosate poses under real-world conditions. *Id.* at 10-11; *see also In re Roundup Prods. Liab. Litig.*, 390 F.Supp.3d 1102, 1108, 1113-14 (N.D. Cal. 2018) (noting the "limited" and "abstract" nature of IARC's assessment).

When IARC released its assessment of glyphosate, EPA was already engaged in its statutory registration review. During that review, the agency developed an extensive database on the carcinogenic potential of glyphosate, reviewing 736 studies as part of an open literature review as well as "numerous studies … submitted to the agency" by independent parties. *Revised Glyphosate Issue Paper* 21-22. The agency specifically examined the studies "included in the evaluation by IARC." *Id.* at 23. It further

convened a scientific advisory panel to contribute to its analysis. After considering IARC's classification, EPA again determined that "[t]he strongest support" is for classifying glyphosate as "not likely to be carcinogenic to humans." *Id.* at 143. And in 2019, after accounting for public comments, EPA issued a proposed registration review decision in which the agency reiterated both its conclusion that glyphosate is not carcinogenic to humans and its disagreement with IARC—noting that its evaluation was "more robust" and "more transparent" than IARC's and "consistent with" those of "other regulatory authorities and international organizations." EPA, *Glyphosate Proposed Interim Registration Review Decision* 7-8 (Apr. 2019), https://perma.cc/8K63-HD36. EPA was hardly the only authority to reject IARC's findings. No shortage of national and international health organizations also rejected IARC's position, including the European Union's European Chemicals Agency, its European Food Safety Authority, and the national health authorities of Australia, Canada, Germany, and New Zealand. *See Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1270 (9th Cir. 2023).

In an August 2019 letter rejecting a cancer warning for glyphosate, EPA again reaffirmed its determination that glyphosate is "not likely to be carcinogenic to humans." Letter from EPA, Office of Chemical Safety & Pollution Prevention, Michael L. Goodis, Director, Registration Division to Registrants of Glyphosate (Aug. 7, 2019), https://perma.cc/WB3F-C5AQ. The proposed warning, which California law automatically requires because of IARC's classification, would have required manufacturers to add a label stating that glyphosate is "known" to cause

cancer. In its letter, EPA explained that it "disagrees with IARC's assessment" and that it had "considered a more extensive dataset than IARC." *Id.* "Given EPA's determination," EPA concluded that a warning stating glyphosate causes cancer would render a pesticide "misbranded pursuant to section 2(q)(1)(A) of FIFRA." *Id.*[2] That conclusion was consistent with how state environmental protection agencies had addressed glyphosate products for decades. Before California, *none* had attempted to require a cancer warning.

After considering public comments for a second time, EPA in 2020 finalized its interim registration review determination that glyphosate does not cause cancer and again approved labeling with no cancer warning. Various parties challenged that decision in the Ninth Circuit. In response to those suits and a change in administration, EPA again reviewed its decision in early 2021. The agency reaffirmed the view espoused without interruption over the last six administrations: "[G]lyphosate is not likely to be a human carcinogen and … it does not pose human-health risks of concern." EPA.Br.17, *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, Nos. 20-70787, 20-70801 (9th Cir. May 18, 2021). The Ninth Circuit

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[2] EPA more recently stated that it "could approve" labels noting *both* the IARC classification *and* the contrary findings of EPA and other regulatory authorities. Letter from Michal Freedhoff, Assistant Administrator, EPA, Office of Chemical Safety & Pollution Prevention to Lauren Zeise, Office of Environmental Health Hazard Assessment, California EPA (Apr. 8, 2022), https://perma.cc/2Q2x-B8L2. But it simultaneously reiterated its assessment that glyphosate is likely not carcinogenic and its rejection of a warning that glyphosate causes cancer. *Id.*

vacated EPA's 2020 Interim Decision in June 2022 after concluding that the agency failed to offer enough "analysis and explanation." *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 38 F.4th 34, 52 (9th Cir. 2022). Consistent with the Ninth Circuit's ruling, EPA announced that it will "revisit and better explain its evaluation of the carcinogenic potential of glyphosate," but that "EPA's underlying scientific findings regarding glyphosate, including its finding that glyphosate is not likely to be carcinogenic to humans," remain the same. Memorandum from Cathryn Britton, Branch Chief, Risk Management and Implementation Branch V, Pesticide Re-evaluation Division, to Glyphosate Registration Review Docket (EPA-HQ-OPP-2009-0361) at 5-6 (Sept. 21, 2022), https://perma.cc/3KDJ-JT2N. Since then, EPA has continued to approve labels of numerous glyphosate-based pesticide products without cancer warnings. *See* EPA, Chemical Name: Glyphosate, https://perma.cc/7PHA-8UXP.[3]

C. Procedural History

In the wake of the IARC decision, more than 100,000 plaintiffs filed lawsuits in federal and state courts nationwide, alleging that Roundup caused their cancer and that Monsanto is liable for failing to warn them of glyphosate's purportedly carcinogenic

[3] EPA has on at least two prior occasions approved labels that included a cancer warning. But EPA has acknowledged that those decisions were the result of an "implementation mistake." U.S.Br. at 17-19 & n.14, *Monsanto Co. v. Hardeman*, No. 19-16636 (9th Cir. filed Dec. 20, 2019).

properties.[4] In 2016, the Judicial Panel on Multidistrict Litigation centralized cases alleging that Roundup caused plaintiffs' non-Hodgkin's lymphoma in the Northern District of California, where several cases were already pending. *In re Roundup Prods. Liab. Litig.*, 214 F.Supp.3d 1346, 1348 (J.P.M.L. 2016); *see also, e.g., Hardeman v. Monsanto Co.*, No. 3:16-cv-00525 (N.D. Cal. filed Feb. 1, 2016). This tidal wave of litigation forced Monsanto to remove glyphosate from the consumer version of Roundup.

That removal—and the ongoing litigation—has sparked fear among American farmers that Monsanto will be forced to remove glyphosate from the agricultural version of Roundup as well. Farmers describe Roundup as "a fabulous tool" and "one of the least harmful chemicals [they] use." P. Cohen, *Roundup Weedkiller Is Blamed for Cancers, but Farmers Say It's Not Going Away*, N.Y. Times (Sept. 20, 2019), https://perma.cc/J2LQ-BEKS. Indeed, farmers "continue to depend on Roundup," especially given global "increases [in] the demand for food." *Id.* And while the glyphosate lawsuits have been "a boon to trial lawyers who have made a career and a fortune" off of them, they risk forcing American farmers to return to the "miserable," "mind-numbing," and "back-breaking labor" that was necessary before Monsanto

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[4] The massive volume of the litigation stems from two main factors. First, millions of Americans have used Roundup. And second, non-Hodgkin's lymphoma is a common and naturally occurring blood cancer. As of 2022, the plaintiffs' bar had spent an estimated $131 million on more than 625,000 television advertisements for Roundup litigation. *See* T. Joyce, Am. Tort Reform Ass'n, *When Plaintiffs' Attorneys Mislead the Public*, Bloomberg Law (Sept. 28, 2022), https://perma.cc/SV28-9BFW.

introduced glyphosate to the agricultural industry in the 1970s. B. Hurst, *Roundup Lawsuits Pose a Threat to My Missouri Farm*, Wall Street Journal (Sept. 13, 2024), https://perma.cc/M24F-TJTB. Moreover, removing glyphosate from shelves would force farmers to turn to other herbicides that are "harsher, more toxic[,] and more likely to drift and cause damage to surrounding vegetation." *Id.*

Since removing glyphosate from its consumer version of Roundup, Monsanto has settled many claims against it. But tens of thousands of claims remain pending in courts across the country. This is one of those cases.

In March 2021, Respondents Larry and Gayle Johnson sued Monsanto in Oregon state court, alleging that Mr. Johnson's use of Roundup caused him to develop non-Hodgkin's lymphoma. App.2. The Johnsons alleged that Monsanto "was negligent in 'both testing and designing Roundup and that [Monsanto] 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. Their claims were tried to a jury in June 2022. App.2-3; *see* Jury Instructions, *Johnson v. Monsanto Co.*, No. 21CV10291 (filed Jun. 23, 2022). Both at the close of the Johnsons' case in chief, as well as after the close of evidence, Monsanto moved for a directed verdict on the ground that FIFRA preempts the Johnsons' claims. App.22; *see* 6/07/2022 Motion and 6/16/2022 Motion, *Johnson v. Monsanto Co.*, No. 21CV10291. The court denied both motions. *See* App.22. Nevertheless, the jury returned a verdict for Monsanto. App.42.

Respondents appealed. They argued (as relevant here) that the trial court erred when it excluded one of their expert witnesses. In defending the verdict, Monsanto again argued that "plaintiff's claims are preempted by FIFRA," both because of "FIFRA's express preemption provision," 7 U.S.C. §136v(b), and because they "are impliedly preempted." App.22. The Oregon Court of Appeals held that the trial court erred by excluding Respondents' expert witness, and that the exclusion was not harmless. App.34. The court then went on to address Monsanto's preemption arguments, concluding that FIFRA did not preempt Respondents' claims. "[W]hether state law imposes requirements that are 'in addition to' or 'different from' FIFRA requires a comparison of what is required by FIFRA's misbranding prohibition, on the one hand, and what is required by state law, on the other." App.31. The court acknowledged that EPA approved Roundup's label. App.32. But because EPA approval "is merely '*prima facie* evidence' of compliance with FIFRA," the approval did not "conclusively establish that Roundup is not misbranded." App.32 (citing *Hardeman*, 997 F.3d at 956, and *Carson*, 92 F.4th at 992).

The court also rejected Monsanto's implied preemption argument. The court did not dispute that state tort claims are preempted if it is "'impossible' to comply with both state and federal requirements." App.33. Nor did it dispute that EPA had repeatedly concluded that glyphosate does not cause cancer in humans and repeatedly approved Roundup labels that did not include a cancer warning. App.31. The court nevertheless held that FIFRA did not impliedly preempt Respondents' claims 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*, 92 F.4th at 997). The court recognized that EPA stated in a 2019 letter that including a warning that glyphosate causes cancer would render the pesticide affirmatively misbranded. App.34. But the court cast that letter aside on the theory that it "did not carry the force of law." App.34 (citing *Carson*, 92 F.4th at 996, and *Hardeman*, 997 F.3d at 957).

The Oregon Supreme Court denied Monsanto's petition for discretionary review on December 19, 2024. App.1.

REASONS FOR GRANTING THE PETITION

This case presents the same question that is presently before the Court in *Monsanto Co. v. Durnell*, No. 24-1068 (docketed April 9, 2025). That question has divided the federal circuits and state courts.[5] The question is deeply consequential for Monsanto, for its entire industry, and for farmers nationwide. The question is also ripe for this Court's review. Back in 2019, the federal government told the Ninth Circuit that it agreed with Monsanto on the merits of the

[5] In addition to the decisions discussed *supra* at 1-2, Massachusetts and Hawaii courts have held that FIFRA preempts state-law claims that seek to hold Monsanto liable for failing to include a cancer warning on its Roundup products. *See* Mem. of Decision and Order on Defs.' Mot. for Summ. J., Dkt. 40, *Cardillo v. Monsanto Co.*, No. 2177CV00462 (Mass. Super. Ct. filed Oct. 21, 2024), *appeal granted*, No. 2024-P-1382 (Mass. filed Feb. 24, 2025); Order Granting Def.'s Mot. for Partial Summ. J., Dkt. 1058, *Peters v. Monsanto Co.*, No. 1CCV-20-0001630 (Haw. Cir. Ct. filed Oct. 25, 2023), *appeal granted*, *id.*, Dkt. 1166 (filed Mar. 13, 2024).

question presented. *See* U.S.Br., *Monsanto Co. v. Hardeman*, No. 19-16636 (9th Cir. filed Dec. 20, 2019). Then, in 2022, it told this Court that it need not "grant review unless and until a conflict in authority emerges." U.S.Br.19, *Monsanto Co. v. Hardeman*, No. 21-241 (U.S. filed May 10, 2022). That conflict has now emerged. The conflict could not be more square or acknowledged, as there is a conflict involving Monsanto's Roundup product and the Third Circuit deliberately parted company from its sister circuits.

Monsanto has already asked this Court to resolve this question in *Monsanto Co. v. Durnell*, No. 24-1068 (docketed April 9, 2025). *Durnell* is the ideal vehicle to resolve the question. The decision there is unambiguously final, and the question presented is unambiguously outcome-determinative as the jury sided with Monsanto on every claim except for Durnell's failure-to-warn claim. However this Court resolves the question presented in *Durnell*, the case will be at an end. Here, by contrast, while this case is final under *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), if this Court resolves the preemption question in Johnson's favor, there may be a need for further proceedings on remand. Accordingly, this Court should hold the petition here pending resolution of *Durnell* on the merits, and then dispose of this case in light of this Court's resolution of this critically important question in *Durnell*.

CONCLUSION

This Court should grant the petition in No. 24-1068 and hold this case pending final resolution of that case.

Respectfully submitted,

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April 18, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

SUPREME COURT OF OREGON

No. S071370

LARRY JOHNSON AND GAYLE JOHNSON,
Respondents,
v.
MONSANTO COMPANY; EAGLE POINT HARDWARE, LLC,
Appellants.

Filed: Dec. 19, 2024

ORDER

Review Denied.

Appendix B

COURT OF APPEALS OF THE STATE OF OREGON

No. A179665

LARRY JOHNSON AND GAYLE JOHNSON,
Plaintiffs-Appellants,
v.
MONSANTO COMPANY,
Defendant-Respondent,
and
EAGLE POINT HARDWARE, LLC, a corporation,
Defendant.

Argued and Submitted: May 23, 2024
Filed: July 10, 2024

Before: Tookey, Presiding Judge, Egan, Judge, and Kamins, Judge.

OPINION

Tookey, P.J.

Plaintiff sued defendant, Monsanto Company, alleging that his use of a pesticide, Roundup, which is manufactured by defendant, caused him to develop Non-Hodgkin's Lymphoma, which is a type of cancer.

A jury returned a verdict for defendant. Plaintiff appeals the resulting judgment.

On appeal, in plaintiff's third assignment of error, he contends that the judgment "should be reversed because of the trial court's error in excluding Charles Benbrook, Ph.D., plaintiff's expert regarding [Environmental Protection Agency (EPA)] regulation." We conclude that the trial court erred in excluding certain testimony of Dr. Benbrook and that that error was not harmless. That conclusion obviates the need to address plaintiff's first, second, and fourth assignments of error.[1]

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[1] Plaintiff's first and second assignments of error concern a jury instruction that the trial court gave regarding the EPA's role in regulating pesticides and in pesticide labeling. That instruction is set forth later in this opinion. ___ Or App at ___ (slip op at 6-7).

In plaintiff's first assignment of error, he asserts that the instruction was not "complete or accurate as to [Environmental Protection Agency] requirements under [the Federal Insecticide, Fungicide, and Rodenticide Act] applicable to [defendant's] 'designing or labelling the Roundup' and instead was reasonably capable of confusing or misleading the jury." In plaintiff's second assignment of error, he asserts that the instruction "constituted an improper comment on the weight of the evidence." As noted, however, we need not address those arguments, in light of our conclusion that the trial court erred in excluding Benbrook's testimony and that that error was not harmless. We emphasize, however, that, in declining to reach those assignments, we are not expressing the view that the jury instruction that the trial court gave regarding the EPA's role in regulating pesticides and in pesticide labeling was not erroneous.

Plaintiff's fourth assignment of error asserts that the trial court erred in denying his motion for a new trial. We need not address that argument either, also in light of our conclusions regarding the exclusion of Benbrook's testimony.

In a cross-assignment assignment of error, defendant contends that the trial court erred in denying its motion for a directed verdict, in which it argued that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) "expressly and impliedly preempts plaintiff's claims." We conclude that FIFRA does not preempt plaintiff's claims and that, therefore, the trial court did not err in denying defendant's motion for a directed verdict.

In light of those conclusions, we reverse and remand.

I. BACKGROUND

To provide context for our analysis, we begin with a brief overview of FIFRA, the factual background of this case, and the parties' respective theories of the case—insofar as those theories are relevant to our analysis—and we note the jury instruction regarding the EPA's role in regulating pesticides and pesticide labeling. We provide additional facts relevant to plaintiff's third assignment of error and defendant's cross-assignment of error later in this opinion when considering those assignments of error.

A. FIFRA

"FIFRA creates a comprehensive scheme for the regulation of pesticide labeling and packaging." *Welchert v. Am. Cyanamid, Inc.*, 59 F3d 69, 71 (8th Cir 1995). Specifically, it creates a "complex process of EPA review that culminates in the approval of a label under which a product may be marketed." *Id.*

Under FIFRA, all pesticide manufacturers—including defendant in this case—must "register their pesticides with the [EPA] before they can be sold."

Carson v. Monsanto Co., 92 F4th 980, 986 (11th Cir 2024) (citing 7 USC § 136a(a)). A manufacturer seeking to register a pesticide with the EPA "must submit a proposed label, as well as certain supporting data, to the [EPA]." *Id.* (citing 7 USC §§ 136a(c)(1)(C), (F)). The proposed label must address "a number of different topics, including ingredients, directions for use, and adverse effects of the products." *Welchert*, 59 F3d at 71. The EPA registers the pesticide if it determines "that the pesticide is efficacious; that the pesticide will not cause unreasonable adverse effects on humans and the environment; and that the pesticide's label complies with [FIFRA's] prohibition on misbranding." *Carson*, 92 F4th at 987 (internal citation omitted).

Once the EPA "approves a label during the registration process, manufacturers cannot change the label's contents without [the EPA's] prior approval and a new registration application except for minor modifications." *Id.* at 990 (internal quotation marks omitted).

Manufacturers have certain continuing obligations under FIFRA even after the initial registration of a pesticide: Among those obligations, manufacturers must reregister certain pesticides after a certain amount of time has passed—a process that "involves five phases," including data gathering and analysis and "the EPA's independent verification of that data's adequacy." *Id.* at 990. Manufacturers must also "report any adverse effects of the pesticide to the [EPA]" and must "adhere to FIFRA's labeling requirements." *Id.* at 987 (citing 7 USC §§ 136a(f)(1), 136d(a)(2)).

The labeling requirement that is principally at issue in this case is FIFRA's prohibition on "misbranding." FIFRA prohibits pesticide manufacturers selling any pesticide that is "misbranded." *Id.* (citing 7 USC § 136j(a)(1)(E)). "A pesticide is 'misbranded' if its label contains a statement that is 'false or misleading in any particular' or omits adequate instructions for use, necessary warnings, or cautionary statements." *Id.* (citing 7 USC §§ 136(q)(1)(A), (F), (G)).

The EPA's label review and registration of a pesticide, as described above, "does not absolve the registrant's liability if the pesticide is misbranded." *Id.* That is, "the registration process does not establish a safe harbor for pesticide manufacturers." *Id.* Instead, FIFRA provides that "'[i] n no event shall registration of an article be construed as a defense for the commission of any offense under [FIFRA].'" *Id.* (quoting 7 USC § 136a(f)(2); brackets in *Carson*). But registration does serve as "'prima facie evidence that the pesticide, its labeling and packaging comply with [FIFRA's] registration provisions.'" *Id.* (quoting 7 USC § 136a(f)(2)).

Regarding preemption of state law, FIFRA contains an "express-preemption provision," which provides that a state "'shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under'" FIFRA. *Id.* (quoting 7 USC § 136v(b)). Nevertheless, FIFRA also allows for states to have a role in pesticide regulation, providing that a state "'may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the

regulation does not permit any sale or use prohibited by'" FIFRA. *Id.* (quoting 7 USC § 136v(a)).

B. Factual Background and Theories of the Case

As noted, defendant is the manufacturer Roundup. Roundup contains a pesticide called glyphosate,[2] which, as required under FIFRA, has been registered with the EPA since the 1970s. The label for Roundup approved by the EPA under the provisions of FIFRA does not contain any warning regarding cancer.[3]

Plaintiff used Roundup for decades on his property and later developed Non-Hodgkin's Lymphoma. He came to believe that his Non-Hodgkin's Lymphoma was caused by his use of Roundup, and he brought suit against defendant alleging that defendant was negligent in "both testing and designing Roundup and that defendant knew or should have known that Roundup posed a risk of cancer yet failed to warn or provide adequate instructions for safe use." Plaintiff asserts that defendant spent "more than 40 years * * * not properly testing Roundup" to determine whether it was carcinogenic as used. Further, plaintiff asserts that "there was evidence that [defendant] spent decades manipulating and limiting what constituted 'available

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[2] Specifically, glyphosate is an herbicide.

[3] Roundup contains other ingredients, too, such as a surfactant. Plaintiff asserts that "there is evidence that surfactants are able to increase glyphosate absorption through the skin"; that is, plaintiff's theory is that Roundup is "more damaging to human DNA than its components considered in isolation." We note that defendant disputes that assertion.

data' for the EPA and others to consider" when determining if Roundup was safe.

With regard to the EPA's role in approving Roundup's label, among other points, plaintiff argued at trial that the "EPA does not do studies" in connection with registration of pesticides under FIFRA and that at times "the EPA didn't follow their own guidelines" with regard to Roundup.

Defendant disagrees with plaintiff. As defendant sees it, "Roundup is not a cancer risk" and "naturally occurring mutations explain plaintiff's cancer." At trial, during its closing argument, in arguing that Roundup did not cause cancer and that the jury should not hold it liable for plaintiff's cancer, defendant highlighted the EPA's role *vis-à-vis* Roundup's label:

> "[Defendant] is not out there making a decision about what goes on its label by itself. The EPA is right there with them. And the EPA has concluded that the label [defendant] has is accurate. They've concluded that the Roundup will not cause any unreasonable risk to humans or to the environment. And that's why the label is the way it is.
>
> "* * * * *
>
> "And Monsanto's working in an environment where the EPA doesn't think that Roundup causes cancer and [defendant] doesn't think so. It wouldn't be able to label the way they do if that weren't the case."

C. The Trial Court's FIFRA Instruction

In this case, at defendant's request, the trial court instructed the jury to consider, during its

deliberations, the role that the EPA plays in pesticide registration under FIFRA. Specifically, the trial court instructed the jury:

> "The Environmental Protection Agency (referred to as 'EPA') regulates pesticides and pesticide labeling. In order for a pesticide to be sold in the United States, it must be registered by the EPA, who must approve the labeling for the pesticide. Before the EPA may register a pesticide, the EPA must conclude that using the pesticide according to the label requirements will not cause any unreasonable risk to humans or the environment.
>
> "In considering whether [defendant] complied with the standard of care in designing or labeling the Roundup to which [plaintiff] was exposed, you may consider as evidence EPA requirements under [FIFRA].
>
> "As with other evidence, give it the weight, if any, to which you consider it is entitled."

Ultimately, the jury returned a verdict for defendant, and plaintiff appeals the resulting judgment.

II. PLAINTIFF'S THIRD ASSIGNMENT OF ERROR

As noted, in plaintiff's third assignment of error he contends that the trial court erred in excluding the testimony of "Charles Benbrook, Ph.D., plaintiff's expert regarding EPA regulation." Specifically, we understand that plaintiff wanted to call Benbrook to provide expert testimony regarding "the U.S. pesticide

regulatory scheme as well as the interplay between various pesticide regulations, including the EPA's pesticide cancer risk assessment process and policy."[4]

The trial court ruled that Benbrook's testimony was inadmissible under OEC 702, which provides:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

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[4] In addition, plaintiff sought to have Benbrook testify as to a variety of other issues, including:

> "[1] [Defendant's] testing, information sharing (or lack thereof), and labeling malfeasance * * *.
>
> "[2] The differences between the genotoxicity datasets evaluated by EPA and International Agency [for Research on] Cancer ('IARC'), a branch of the World Health Organization, in their respective evaluations of the carcinogenicity of glyphosate in order to explain why the EPA's current position that glyphosate is not carcinogenic is misplaced and only marginally relevant in cases such as these that arise from exposures to Roundup, as well as why IARC's position that glyphosate-based herbicides (including Roundup) are carcinogenic is well supported by the known science.
>
> "[3] [Defendant's] conduct compared to pesticide industry requirements and standards of care found in the federal statute regulating pesticide use, [FIFRA], the pesticide industry voluntary industry standards, and [defendant's] health and safety pledges to the public."

But we understand the trial court's exclusion of Benbrook's proposed testimony concerning "the U.S. pesticide regulatory scheme as well as the interplay between various pesticide regulations, including the EPA's pesticide cancer risk assessment process and policy" to be what is raised in plaintiff's third assignment of error.

> by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

Specifically, the trial court ruled that Benbrook was not qualified to provide expert testimony on the topic of the "the U.S. pesticide regulatory scheme" and that Benbrook's testimony would not be "helpful."

As explained below, we conclude that the trial court erred in excluding Benbrook's testimony and that that error was not harmless.

A. The Trial Court's Qualification Ruling

We "review for legal error whether a trial court properly applied OEC 702 in deciding whether an expert is qualified to testify." *Mall v. Horton*, 292 Or App 319, 323, 423 P3d 730, *rev den*, 363 Or 744 (2018). "Whether a witness is qualified to testify as an expert is relative to the topic about which the witness is asked to testify." *State v. Wagner*, 319 Or App 399, 405, 509 P3d 731, *adh'd to as modified on recons*, 321 Or App 79 (2022), *rev den*, 370 Or 714 (2023). "A witness does not need to have a particular education or degree to qualify as an expert." *Id.* "Rather, a witness testifying as an expert needs to have the necessary skill and knowledge to arrive at an intelligent conclusion about the subject matter in dispute." *Id.* (internal quotation marks omitted). Ultimately, OEC 702 sets "forth a liberal standard for qualifying expert witnesses." *Mall*, 292 Or App at 324.

We conclude that the trial court erred when it concluded that Benbrook was not qualified to testify as to the U.S. pesticide regulatory scheme as well as to the interplay between various pesticide regulations.

Benbrook holds a Ph.D. in agricultural economics.[5] During his career, he has served as Staff Director for the US House of Representatives Subcommittee on Department Operations, Research and Foreign Agriculture, "which had authorizing jurisdiction over pesticide regulation pursuant to [FIFRA]." In that role, he was "involved in analyzing compliance with FIFRA, including FIFRA's data requirements and responsibilities of pesticide registrants." Benbrook has published "over 40 peer-reviewed articles, many involving issues related to herbicide use, risk and regulation"—including a paper concerning how "the US EPA and [the International Agency for Research on Cancer] reach[ed] diametrically opposed conclusions on the genotoxicity of glyphosate-based herbicides." He has also written numerous "reports, papers, and book chapters on the subject of pesticides and pesticide regulations."

Further, Benbrook has worked as a consultant for federal and state government agencies, as well as private clients, "focusing on biotechnology, pesticide use, risks and regulation, * * * and impacts of federal environmental and food laws." He has conducted "multiple pesticide label reviews," and he assisted a company for "four or five years" with "developing [the] registration packages" for two pesticides registered with the EPA. He also assisted that company with their interactions with the EPA.

In addition, Benbrook has served as an expert witness in other litigation on this topic. *See State v.*

[5] As explained by Benbrook, "agricultural economists are often among the people that get heavily involved in the study of various policy issues, including things like pesticide regulation."

Rogers, 330 Or 282, 317, 4 P3d 1261 (2000) (in discussing expert's qualifications, considering that the expert had rendered opinions and conclusions in the past, including as part of civil and criminal proceedings); *see, e.g.*, *Pilliod v. Monsanto Co.*, 67 Cal App 5th 591, 607, 645 n 33, 282 Cal Rptr 3d 679, 694, 723 n 33 (2021), *cert den*, ___ US ___, 142 S Ct 2870 (2022) (characterizing Benbrook as "an economist with experience in pesticide use and regulation" and "plaintiff's regulatory expert," and noting that Benbrook "had been staff director of the congressional subcommittee with jurisdiction over FIFRA"); *Johnson v. Monsanto Co.*, 52 Cal App 5th 434, 442, 266 Cal Rptr 3d 111, 119 (2020) (noting that Benbrook testified as an expert "in pesticide regulation and pesticide risk assessment" and "explained the EPA's process to test a new pesticide and the differences between an [International Agency for Research on Cancer] analysis and an EPA risk assessment").

In arguing that Benbrook is not qualified to provide expert testimony on the topic of "the U.S. pesticide regulatory scheme as well as the interplay between various pesticide regulations, including the EPA's pesticide cancer risk assessment process and policy," defendant points out that "Benbrook admitted he had no direct responsibility for regulating pesticides." That is true, but that does not mean that Benbrook is not qualified to testify about pesticide regulation under FIFRA. Though "the expertise necessary to testify helpfully about a complex subject, requires more than general familiarity with the subject," *State v. Brown*, 294 Or App 61, 68, 430 P3d 160 (2018), it is not a prerequisite to have been a regulator at the EPA, or, for example, even a lawyer,

to testify about FIFRA, assuming the expert has other, relevant qualifications, *see Rogers*, 330 Or at 315 ("Whether he is the best expert witness on the specific subject or what credibility will be given to the witness's testimony are matters that go to the weight of his testimony and not to his qualification." (Internal quotation marks omitted.)).

Consequently, we conclude that the trial court erred in concluding that Benbrook was not qualified to testify as to "the U.S. pesticide regulatory scheme as well as the interplay between various pesticide regulations, including the EPA's pesticide cancer risk assessment process and policy."

B. The Trial Court's Helpfulness Ruling

The trial court also determined that Benbrook's testimony would not be "helpful" to the jury. To be helpful, "expert testimony must assist a trier of fact to understand the evidence or determine an issue of fact that it may not be able to understand or determine as well on its own." *State v. Jesse*, 360 Or 584, 594, 385 P3d 1063 (2016).

It is not clear from the record that the trial court's "helpfulness" determination was intended to be separate from its determination that Benbrook was not qualified to testify about the "U.S. pesticide regulatory scheme." One way to understand the trial court's ruling is that the trial court determined that because Benbrook was not qualified, his opinions would not be helpful.

Defendant posits an alternative understanding: that the trial court determined that Benbrook's testimony would not be helpful, because "his opinions

would merely interpret FIFRA, intruding on the trial court's domain."[6]

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[6] In its briefing, defendant also contends that the "trial court found that Dr. Benbrook was unreliable," and that, for that reason, it determined that his testimony would not have been helpful.

We observe that the trial court never used the term "unreliable" in its ruling regarding Benbrook. But, as defendant accurately points out in its brief, in its ruling, the trial court was critical of Benbrook's use of the internet for research and noted that Benbrook "seems to be ready to offer an opinion on any salient issue in the case."

On the former point—Benbrook's use of the internet for research—we understand the evidence that the trial court pointed to regarding Benbrook's use of the internet for research to reflect that Benbrook uses "raw data from the pesticide-use surveys conducted by the National Agricultural Statistics Service" in conducting his own research, and that he obtains that data from the internet. On this record, we perceive nothing in that method that would render Benbrook's testimony unreliable. It bears emphasis that, today, many scientific articles and reliable data are available via the internet.

On the latter point—that Benbrook "seems ready to offer an opinion on any salient issue in the case"—the trial court noted that "[i]t almost feels like [Benbrook] is a trial consultant, who now purports to be an expert on all the issues that we are addressing." But we think Benbrook's potential lack of qualification to testify with regard to certain topics on which plaintiff wanted him to opine does not mean that he is not qualified to opine on the U.S. pesticide regulatory scheme. Further, bias for plaintiff, or against defendant, is an appropriate subject of cross-examination, *see State v. Brown*, 299 Or 143, 150, 699 P2d 1122 (1985) ("[B]ias due to friendship, family relationship, etc., and interest in the form of amount of expert witness fees, etc., continue to be viable forms of impeachment[.]"), but does not necessarily render Benbrook's testimony unreliable.

In view of the parties' theories of the case as described above, we disagree with defendant that testimony explaining a relevant and complex regulatory scheme in a case such as this is an intrusion on the trial court's domain and that Benbrook's testimony would not have been "helpful" to the jury under OEC 702.

Under the federal counterpart to OEC 702, upon which OEC 702 was modeled, s*ee* Legislative Commentary to OEC 702 (1981) (noting that OEC 702 "is identical to Rule 702 of the Federal Rules of Evidence," and "adopt[ing] the commentary of the federal advisory committee"), courts have held that "[e]xperts generally may not testify on pure issues of law, such as the meaning of statutes or regulations," but they have "permitted regulatory experts to testify

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We are thus unpersuaded by defendant's "unreliability" argument

Additionally, we note that, at oral argument, defendant contended that the trial court excluded Benbrook's testimony because it would have been "cumulative" of various other evidence related to EPA regulations. But, specifically, what the trial court ruled was that Benbrook's "proposed testimony on EPA versus IARC would be cumulative." We understand that ruling to have been specific to one of the topics on which plaintiff sought to have Benbrook testify, *viz.*, "the differences between the genotoxicity datasets evaluated by EPA and International Agency [for Research] on Cancer." That is not the topic of Benbrook's proposed testimony that is at issue in this appeal, *i.e.*, "the U.S. pesticide regulatory scheme as well as the interplay between various pesticide regulations, including the EPA's pesticide cancer risk assessment process and policy." Thus, Benbrook's testimony regarding the U.S. pesticide regulatory scheme was not excluded by the trial court on the basis that it was cumulative as defendant contended at oral argument.

on complex statutory or regulatory frameworks when that testimony assists the jury in understanding a party's actions within that broader framework." *Antrim Pharm. LLC v. Bio-Pharm, Inc.*, 950 F3d 423, 430-31 (7th Cir 2020) (collecting case); *see also CFM Commc'ns, LLC v. Mitts Telecasting Co.*, 424 F Supp 2d 1229, 1240 (ED Cal 2005) ("Where complex administrative processes are at issue, expert testimony can be helpful to explain them to the trier of fact.").

That approach is consistent with how we have interpreted OEC 702. In *State v. Nistler*, 268 Or App 470, 342 P3d 1035, *rev den*, 357 Or 551 (2015), for example, the defendant had been convicted of, among other crimes, racketeering and securities fraud, and asserted that the trial court erred in admitting the testimony of the state's expert witness who testified regarding, among other topics, (1) the "definition of securities under Oregon law"; (2) the meaning of "common enterprise" in determining whether something is an "investment contract," and consequently, a "security," within the meaning of ORS 59.015(19)(a); and (3) that, "for purposes of securities regulation, it is immaterial whether parties call something an investment or a loan or a security—that it is the substance of the transaction that matters." *Id.* at 485. The defendant argued that that expert testimony "should have been excluded because that testimony was not necessary to assist the trier of fact to understand the evidence or to determine a fact in issue, but, instead, merely expressed [the expert's] opinion as to the application of the law." *Id.* at 484 (internal citation omitted).

In rejecting the defendant's argument, we explained that the Oregon Legislature, "in enacting OEC 702, adopted the commentary from the similarly worded federal rule," commentary which provides:

> "'Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. There is no more certain test for determining when experts may be used than the common sense inquiry whether *the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.*'"

Id. at 486 (emphasis in *Nistler*). We then reasoned that the trial court did not err in allowing the expert testimony regarding the regulation of securities, explaining:

> "This case is the archetype of the emphasized commentary: The regulation of securities is not within the purview of the average 'untrained layman'—nor, for that matter, most legally trained professionals. An overview of what is a security, and how securities are regulated, by someone with 'specialized understanding of the subject,' provides jurors with valuable context for understanding, and determining—for the ultimate determination is, most assuredly, theirs—whether particular transactions violated criminal laws prohibiting securities

> fraud. Indeed, it is * * * highly instructive, contextual grounding * * *."

Id. (quoting Legislative Commentary to OEC 702).

In *Nistler*, we also distinguished the expert's testimony, which, as noted, we concluded was admissible, from an expert's testimony in a different case, *Stokes v. Lundeen*, 168 Or App 430, 7 P3d 586, *rev den*, 331 Or 283 (2000), where we concluded that certain expert testimony was not admissible.

In *Stokes*, the defendant sought to introduce expert testimony on "the meaning of the phrase 'children are present'" in ORS 811.105(2)(c)(A) (1995). 168 Or App at 441. We concluded that the trial court did not err in excluding that expert testimony because "the meaning of the phrase 'children are present' was a matter of law for the court to determine and to instruct the jury as, indeed, it did." *Id.*

The difference between the expert testimony in *Stokes*, on the one hand, and *Nistler*, on the other, is that "whether 'children are present' is not a matter of 'specialized knowledge' beyond the ordinary experience of most jurors," but "the same cannot be said of the determination of whether certain transactions involved 'securities.'" *Nistler*, 268 Or App at 487.

In this case, as noted, defendant relied on the EPA's approval of Roundup's label in presenting its defense as to plaintiff's claims, and the trial court instructed the jury that it could consider the requirements of FIFRA in determining whether Monsanto "complied with the standard of care in designing or labeling the Roundup." Like the regulation of securities, the regulation of pesticides

under FIFRA is "'not within the purview of the average 'untrained layman'—nor, for that matter, most legally trained professionals.'" *Id.* at 486 (quoting Legislative Commentary to OEC 702). And an overview of how pesticides are regulated by someone with a specialized understanding of the subject, such as Benbrook, would provide "highly instructive, contextual grounding," *id.*, for the jury, should the jury find such an expert credible.

Moreover, we note that, particularly here, where defendant's liability was not ultimately governed by federal regulations, but by state law theories, including negligence, we do not think it would "intrud[e] on the trial court's domain" to allow an expert to testify regarding FIFRA, because that testimony would assist the jury in determining whether defendant complied with the standard of care in designing or labeling the Roundup to which plaintiff was exposed. *See In re Mirena IUD Products Liab. Litig.*, 169 F Supp 3d 396, 467 (SDNY 2016) ("[T]his case is not governed by federal regulations but by state law theories of negligence and strict liability"; "[e]xpert testimony regarding [defendant's] compliance with FDA regulations therefore will not usurp the Court's role in explaining the law to the jury, but will assist the jury in determining whether [defendant] acted as a reasonably prudent pharmaceutical manufacturer.").

Consequently, we conclude that the trial court erred in excluding as unhelpful Benbrook's testimony on the U.S. pesticide regulatory scheme and on the interplay between various pesticide regulations,

including the EPA's pesticide cancer risk assessment process and policy.[7]

C. Harmlessness

Finally, defendant contends that any error in excluding Benbrook's testimony was harmless. As indicated above, what inferences the jury should or should not draw from the EPA's approval of Roundup's label under FIFRA was an issue in this litigation, and the EPA's approval was the subject of a jury instruction and also referred to in closing argument. Benbrook's testimony was relevant to that issue and different from other testimony on that point. Consequently, we cannot say that the error in excluding Benbrook's testimony was harmless. *See State v. Johnson*, 225 Or App 545, 555, 202 P3d 225 (2009) ("[O]rdinarily, when scientifically based testimony by an expert witness is erroneously *admitted,* it weighs against a determination that the

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[7] Although the parties agree that we review the trial court's determination that Benbrook was not qualified to testify under OEC 702 for errors of law, neither party separately addresses what standard of review we should use to review the trial court's ruling that Benbrook's testimony would not be "helpful" to the jury.

In some circumstances, we review such a ruling for abuse of discretion, but in others we review for errors law. *State v. Garlinghouse*, 323 Or App 640, 654, 524 P3d 103, *rev den*, 371 Or 106 (2023) ("Whether a trial court has correctly determined that evidence offered under OEC 702 is helpful to the trier of fact is in some circumstances reviewed for errors of law and in other circumstances for abuse of discretion."). We need not resolve that issue with respect to the trial court's "helpfulness" ruling in this case, however, because under either standard we would conclude that the trial court erred.

error was harmless. It stands to reason that the erroneous *exclusion* of scientifically based testimony of an expert witness is to similar effect." (Emphasis in *Johnson*; internal citation omitted.)); *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) ("Oregon's constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict?"); *see also Mall*, 292 Or App at 328 (reversing and remanding where "we cannot say that there was little likelihood that the exclusion of [the expert's] testimony as an expert in biomechanical engineering and accident reconstruction affected the jury's verdict" where that testimony was "*qualitatively different* from the other evidence presented" (emphasis added)).

III. DEFENDANT'S CROSS-ASSIGNMENT OF ERROR

As noted, defendant cross-assigns error to the trial court's denial of its motion for a directed verdict in which it contended that plaintiff's claims are preempted by FIFRA. As defendant sees it, plaintiff's claims are preempted by FIFRA's express preemption provision, which provides, as noted above, that a state "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under" FIFRA. 7 USC § 136v(b). Defendant also contends that plaintiff's claims are impliedly preempted by FIFRA.

We review the trial court's denial of defendant's motion for directed verdict for legal error. *Miller v. Columbia County*, 282 Or App 348, 349, 385 P3d 1214 (2016), *rev den*, 361 Or 238 (2017). Further, we consider federal preemption principles to determine

whether Oregon law is preempted by federal law. *Newman v. Marion County Sheriff's Office*, 328 Or App 686, 691, 538 P3d 895 (2023).

The scope of preemption under FIFRA was addressed by the United States Court of Appeals for the Ninth Circuit in *Hardeman v. Monsanto Company*, 997 F3d 941 (2021), *cert den*, ___ US ___, 142 S Ct 2834 (2022). Although we are "not bound by the decisions of the Ninth Circuit—or any other federal circuit—even on questions of federal law," we "often give particular weight to [Ninth Circuit] decisions because Oregon lies in that circuit," and we consider such "cases for their persuasive value." *State v. Breedwell*, 323 Or App 172, 195, 522 P3d 876 (2022), *rev den*, 371 Or 106 (2023) (internal quotation marks omitted).

Ultimately, *Hardeman*, and a recent case from the United States Court of Appeals for the Eleventh Circuit, *Carson v. Monsanto Co.*, 92 F4th 980 (11th Cir 2024), provide a complete answer to defendant's preemption arguments in this case—an answer with which we agree. Accordingly, we describe those cases in some detail before we turn to defendant's preemption arguments. *See Miller v. Pacific Trawlers, Inc.*, 204 Or App 585, 613 n 23, 131 P3d 821 (2006) ("The fact that the Ninth Circuit appears to be in accord with the weight of federal authority, is also a factor for us to consider." (Internal citation omitted.)).

A. Hardeman v. Monsanto Co.

In *Hardeman*, the United States Court of Appeals for the Ninth Circuit considered whether a plaintiff's California state law failure-to-warn claim based on the labeling of Roundup was preempted either explicitly or impliedly by FIFRA.

Regarding express preemption, the Ninth Circuit explained that, under the Supreme Court's decision in *Bates v. Dow Agrosciences LLC*, 544 US 431, 437, 125 S Ct 1788, 161 L Ed 2d 687 (2005), a two-part test should be employed to determine whether FIFRA's preemption provision—*i.e.* 7 USC § 136v(b)—preempts a state law claim: "First, the state law must be a requirement '*for labeling or packaging*.' Second, the state law must impose a labeling or packaging requirement that is '*in addition to or different from*' those required under FIFRA." *Hardeman*, 997 F3d at 954-55 (quoting 7 USC § 136v(b); emphasis in *Hardeman*; internal citation omitted).

Regarding the first part of the *Bates* test, the Ninth Circuit concluded that that part was satisfied with respect to the plaintiff's failure-to-warn claim, because the plaintiff's complaint "was based on [the defendant's] failure to provide an adequate warning on a label under California law." *Id.* at 955.

But the Ninth Circuit determined that the second part of the *Bates* test was not satisfied. It explained that, in the second part of the *Bates* test, "'a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions,'" and that state law is "'equivalent to' and 'fully consistent with' FIFRA where both impose 'parallel requirements,' meaning that a violation of the state law is also a violation of FIFRA." *Hardeman*, 997 F3d at 955 (quoting *Bates*, 544 US at 447). That is, "if a violation of California's duty to warn would also be a violation of FIFRA's misbranding provision, then they impose parallel requirements fully consistent with each other," and a

California common law failure-to warn-claim would not be preempted by FIFRA. *Id.* at 955.

The Ninth Circuit then compared the California common law duty-to-warn claim with FIFRA's misbranding provision and concluded that "FIFRA's misbranding requirements parallel those of California's common law duty," and that, therefore, the plaintiff's "failure-to-warn claims effectively enforce FIFRA's requirement against misbranding and are thus not expressly preempted":

> "FIFRA's misbranding provision requires a pesticide label [to] 'contain a warning or caution statement which may be necessary and if complied with * * * is adequate to protect health and the environment.' § 136(q)(1)(G). Similarly, California common law requires a manufacturer to warn either of any health risk that is 'known or knowable' (in strict liability) or those risks 'a reasonably prudent manufacturer would have known and warned about' (in negligence). Thus, FIFRA—which requires a warning 'necessary' and 'adequate to protect health'—is broader than California's requirement under negligence (no warning needed if unreasonable to do so) and is, at minimum, consistent with California's requirement under strict liability (no warning needed if risk not known or knowable). § 136 (q)(1)(G)."

Id. at 955 (footnotes and some internal citation omitted; omission in *Hardeman*).

In so concluding, the Ninth Circuit rejected an argument by the defendant that "because the EPA

repeatedly registered Roundup for sale without a cancer warning, a jury's decision that Roundup should include such a warning would effectively impose a requirement 'in addition to or different from' that required by FIFRA." *Id.* at 956. It reasoned, among other points, that because the EPA's approval of a label is not conclusive of FIFRA compliance, but only *prima facie* evidence of FIFRA compliance, a judge or jury could find "that a label violates FIFRA" even though "it was approved by the EPA." *Id.* That is, "because EPA's labeling determinations are not dispositive of FIFRA compliance, they are similarly not conclusive as to which common law requirements are 'in addition to or different from' the requirements imposed by FIFRA." *Id.* at 956 (quoting 7 USC § 136v(b)).

Regarding implied preemption of the plaintiff's California common law failure-to-warn claim based on Roundup's labeling, the Ninth Circuit explained that "a state failure-to-warn claim is impliedly preempted if the relevant federal and state laws 'irreconcilably conflict'"; that is, where it is "impossible for a private party to comply with both state and federal requirements." *Id.* at 959 (some internal quotation marks omitted). To demonstrate such an "irreconcilable conflict" a private party must present "clear evidence" that "(1) the agency was fully informed of the justifications for the warning the plaintiff demands, (2) the agency has informed the manufacturer that it would not approve changing the label to include that warning, and (3) the agency's action carries the force of law." *Id.* (internal quotation marks, omission, and brackets omitted).

The Ninth Circuit concluded that the defendant had failed to meet that burden, in part because the EPA's actions that the defendant pointed to as causing the purported irreconcilable conflict—*e.g.*, registering Roundup and approving Roundup's label—did not "have the force of law." *Id.* at 958; *see also id.* at 957 ("FIFRA expressly states that EPA's decision to approve a label during the registration process raises only a rebuttable presumption that the pesticide and its label comply with FIFRA. § 136a(f)(2). It would defy logic to say a rebuttable presumption carries the force of law necessary to have preemptive effect, as doing so would deny any ability to rebut the presumption.").

In reaching the conclusion that implied preemption did not preempt the plaintiff's failure-to-warn claim, the Ninth Circuit also rejected an argument by the defendant that it would be "impossible to comply with both FIFRA and California's common law duty to warn," because "under EPA's regulations, [the defendant] could not have unilaterally changed Roundup's label." *Id.* at 958. The Ninth Circuit pointed out that "[o]nce a pesticide is registered, the manufacturer has a continuing obligation to adhere to FIFRA's labeling requirements," and that "[w]hen a label needs to be changed, the manufacturer has the responsibility to change the label by drafting and submitting the label to EPA for approval," which the EPA "'shall' approve if it determines the change will not violate FIFRA." *Id.* at 959. Further, the Ninth Circuit noted that the "EPA permits pesticide manufacturers to make certain changes to labels without prior approval" if the EPA is notified of the change and that the "EPA has

repeatedly permitted pesticide manufacturers to use the notification procedure to add notices related to cancer to their products labels." *Id.*

B. Carson v. Monsanto Co.

More recently, in *Carson*, also relying on *Bates*, the United States Court of Appeals for the Eleventh Circuit concluded that a plaintiff's Georgia common law failure-to-warn claim against the defendant based on Roundup's labeling was not preempted, either expressly or impliedly, for reasons similar to those in *Hardeman*.

Regarding express preemption, the Eleventh Circuit explained that "FIFRA's preemption provision applies to only those state requirements that are 'in addition to or different from' federal requirements," and—after comparing FIFRA's prohibition on misbranding to what a plaintiff is required to establish to prove a failure-to-warn claim under Georgia common law—concluded that Georgia common law does not impose duties "in addition to or different from" FIFRA's requirements because "Georgia common law is less demanding than the federal requirements." 92 F4th at 986. In so concluding, the Eleventh Circuit noted that, although "Georgia common law does not exactly track FIFRA's requirements," both "FIFRA and Georgia common law require pesticide manufacturers to warn users of potential risks to health and safety." *Id.* at 992; *see id.* (noting that "[i]f anything, Georgia common law about failure-to-warn claims imposes less of a duty on pesticide manufacturers than FIFRA" because "Georgia common law requires manufacturers to warn of nonobvious and foreseeable dangers of which they

know or reasonably should know" while "FIFRA imposes a blanket duty on pesticide manufacturers, regardless of knowledge or foreseeability"). The Eleventh Circuit also explained that FIFRA does not preempt state labelling requirements that are "narrower" that those under FIFRA. *Id.* ("After all, as the Supreme Court has reasoned, '[w]hile such a narrower requirement might be 'different from' FIFRA's requirements 'in a literal sense,' that would be 'a strange reason for finding pre-emption of a state rule insofar as it duplicates' FIFRA." (Quoting *Bates*, 544 US at 547; brackets in *Carson*.)).

Further, similar to the Ninth Circuit in *Hardeman*, the Eleventh Circuit rejected an argument by the defendant that the EPA approval process itself carries a preemptive effect. *Id.* at 993. Just as the Ninth Circuit did, it reasoned that the EPA's approval of a label provides only "*prima facia* evidence, not conclusive proof, that a pesticide is not misbranded," *id.* at 994, and misbranding is what FIFRA prohibits.[8]

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[8] We note that defendant argues that *Hardeman* was wrongly decided, in part because the Ninth Circuit erred in concluding that the "EPA's approvals must have the 'force of law' to expressly preempt state law requirements." In defendant's view, the "'force of law' element applies to implied preemption, not express preemption."

In *Carson v. Monsanto Co.*, 72 F4th 1261, 1267 (11th Cir 2023), the Eleventh Circuit, sitting *en banc*, agreed with that view of express preemption, holding that a "'force-of-law' inquiry is usually irrelevant where Congress has enacted an express preemption provision." Nevertheless, subsequently, in *Carson v. Monsanto Co.*, 92 F4th 980, 993 (11th Cir 2024)—discussed in the text of this opinion—a panel of the Eleventh Circuit determined that "individual [label] approvals are not 'requirements' under FIFRA" that are entitled to a preemptive effect. *See* 7 USCA

Regarding implied preemption, the Eleventh Circuit explained that "[i]mplied preemption occurs when it is impossible for a private party to comply with both state and federal requirements" and that the defendant (as the private party in *Carson*) had not established implied preemption because, among other reasons, the 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." *Id.* at 997.

C. Defendant's Arguments in this Case

In arguing in this case that all of plaintiff's claims are expressly and impliedly preempted by FIFRA, defendant raises a host of arguments that were rejected by the Ninth Circuit in *Hardeman* and by the Eleventh Circuit in *Carson*.

1. Express Preemption

Regarding express preemption, defendant's contention is that plaintiff's failure-to-warn claims meet the first part of the *Bates* test for preemption because they seek to impose state law requirements for labeling. *Hardeman*, 997 F3d 954-55. Further, defendant contends that plaintiff's other claims—

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§ 136v(b) (prohibiting states from imposing or continuing "in effect any requirements for labeling or packaging in addition to or different from those *required* under this subchapter" (emphasis added)).

Consequently, even if defendant were correct that the Ninth Circuit erred in its analysis in *Hardeman* because the "force of law element" is a consideration in implied preemption but not express preemption, the Eleventh Circuit's 2024 decision in *Carson* still leads to the conclusion that plaintiff's claims are not preempted by FIFRA.

which are based on defendant's alleged tortious design and testing of Roundup—are "disguised labeling claims that are also preempted."

Regarding the second part of the *Bates* test for preemption, defendant argues that plaintiff's "alleged common law labeling requirement [that his claims seek to impose] is 'in addition to' and 'different from' FIFRA's requirements," because the EPA "does not require any cancer warning on Roundup" and the "EPA has repeatedly approved Monsanto's labels for Roundup-related products, which do not contain a cancer warning." Therefore, defendant contends, "any state-law requirement to add such a warning would be "'different from' or 'in addition to' FIFRA's requirements and is thus preempted."

Assuming without deciding that the first part of the *Bates* test for preemption is met, we conclude that the second part related to whether the labeling or packaging requirement is "in addition to or different from" those required under FIFRA is not met. As *Hardeman* and *Carson* demonstrate, whether state law imposes requirements that are "in addition to" or "different from" FIFRA requires a comparison of what is required by FIFRA's misbranding prohibition, on the one hand, and what is required by state law, on the other. *Hardeman*, 997 F3d at 955; *Carson*, 92 F4th at 992. That is because "a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions"—*i.e.*, where a "violation of the state law is also a violation of FIFRA." *Hardeman*, 997 F3d at 955. Defendant has not undertaken that analysis in its brief on appeal, and we will not

undertake that analysis where defendant has failed to do so itself. *See Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n 2, 64 P3d 1193, *adh'd to as clarified on recons*, 187 Or App 472, 68 P3d 259 (2003) ("[I]t is not this court's function" to "make or develop a party's argument when that party has not endeavored to do so itself.").

Instead, in pressing its express preemption argument on appeal, defendant relies on the EPA's approval of the Roundup label and asserts that that approval—which does not include a cancer warning—preempts plaintiff's claims. But, in our view, as the courts in *Hardeman* and *Carson* concluded, the EPA's approval of a label under FIFRA does not preempt state law claims. *Hardeman*, 997 F3d at 956; *Carson*, 92 F4th at 992. It is merely "*prima facie* evidence" of compliance with FIFRA, but it does not conclusively establish that Roundup is not misbranded. *E.g.*, *Carson*, 92 F4th at 993 (EPA's approval provides only "'*prima facia* evidence,' not conclusive proof, that a pesticide is not misbranded" (quoting 7 USC § 136a(f)(2))).[9]

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[9] We note that, in its reply brief on its cross-assignment of error, defendant argues that *Hardeman* was wrong when it stated that, under FIFRA, a pesticide must contain a "warning 'necessary' and 'adequate to protect health.'" *Hardeman*, 997 F3d at 955. As defendant sees it, under 7 USC § 136(q)(1)(G), the warning must be *either* necessary (*i.e.*, approved by the EPA) *or* adequate to protect health; that is, it need not be both.

We disagree with defendant and consider the Ninth Circuit's analysis in *Hardeman* to be persuasive. *See* 7 USC § 136(q)(1)(G) (pesticide is misbranded if the "label does not contain a warning or caution statement which may be necessary *and* if complied with, together with any requirements imposed under section

2. Implied Preemption

Regarding implied preemption, defendant contends that it would be "impossible" to comply with both state and federal requirements, because the EPA has "made it abundantly clear that it would not approve a warning that glyphosate causes cancer," and the EPA's determinations "that glyphosate does not cause cancer * * * were reached through formal re-registration and registration review procedures" which "carry the force of law." That same argument was rejected in *Carson*. 92 F4th at 997 ("[T]he [EPA's] registration, interim registration review, and re-registration of glyphosate without a cancer warning do not show that a cancer warning would be impossible. Put differently, the [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. Nor does the [EPA's] concurrent classification of glyphosate as not likely to be carcinogenic to humans alter this conclusion.").

We also point out that, in support of its preemption arguments, defendant has filed a request for judicial notice of certain "facts" drawn from documents attached to its request for judicial notice, which plaintiff opposes. Any consideration of the documents attached to defendant's request for judicial

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136a(d) of this title, is adequate to protect health" (emphasis added)); *Breedwell*, 323 Or App at 195 (we consider cases from the Ninth Circuit for their "persuasive value"); *see also Carson*, 92 F4th at 991-92 ("So long as the pesticide's label omits a 'necessary' warning 'to protect health and the environment,' the manufacturer is liable under FIFRA." (Quoting 7 USC § 136(q)(1)(G))).

notice—including a 2019 letter from the EPA regarding glyphosate, which rejects the inclusion of a cancer warning under California's Proposition 65—would not alter our conclusion, for the reasons explained in *Carson* and *Hardeman*. *See, e.g.*, *Carson*, 92 F4th at 996 (2019 letter from the EPA concluding that glyphosate is not likely to be carcinogenic to humans and that California's warning of glyphosate's potential carcinogenic effects was "false or misleading" did not lead to conclusion that the plaintiff's state law claims were preempted because, among other reasons, the letter "did not carry the force of law because it neither reflected sufficient formality, nor created a rule of law that must be obeyed" (internal quotation marks omitted)); *Hardeman*, 997 F3d at 957 ("[T]he 2019 letter—stating that EPA believes any pesticide label with a cancer warning due to the presence of glyphosate will be misbranded—did not follow any formal administrative procedure that would give the letter the force of law." (Internal quotation marks omitted.)). To the extent that we were to consider those documents, it would not change our conclusion in this case and, therefore, we deny the motion as moot.

IV. CONCLUSION

In sum, on plaintiff's appeal, we conclude that the trial court erred when it excluded Benbrook's testimony on "the U.S. pesticide regulatory scheme as well as the interplay between various pesticide regulations, including the EPA's pesticide cancer risk assessment process and policy" and that the error was not harmless. Further, on defendant's cross-assignment of error, we are persuaded that *Hardeman*

and *Carson* are well-reasoned, and we conclude that defendant's FIFRA preemption arguments are foreclosed by the preemption analysis in those cases. We further deny defendant's request to take judicial notice as moot. Consequently, we reverse and remand.

Reversed and remanded; motion to take judicial notice denied as moot.

Appendix C

CIRCUIT COURT OF OREGON
FOR JACKSON COUNTY

No. 21CV10291

LARRY JOHNSON,
Plaintiff,
v.
MONSANTO COMPANY, a corporation,
Defendant.

Filed: June 17, 2022

SPECIAL VERDICT FORM

At least the same nine jurors must agree to the answer for each of the following questions that you answer.

We, the Jury, answer the questions submitted to us as follows:

CLAIM OF NEGLIGENCE

1. Was Monsanto negligent in designing, selling, labeling, or marketing Roundup?

Yes	No
☐	☒

If your answer to question 1 is Yes, answer question 2. If your answer to question 1 is No, proceed to question 4.

2. Was Larry Johnson's harm a reasonably foreseeable consequence of Monsanto's conduct?

Yes	No
☐	☐

If your answer to question 2 is Yes, answer question 3.
If your answer to question 2 is No, proceed to question 4.

3. Did Monsanto's negligence cause Larry Johnson's harm?

Yes	No
☐	☐

Proceed to question 4.

CLAIM OF DESIGN DEFECT

4. Was the Roundup Larry Johnson used in a defective condition that was unreasonably dangerous to the ultimate user as a result of a defective design?

Yes	No
☐	☒

If you answer to question 4 is Yes, answer question 5.
If your answer to question 4 is No, proceed to question 6.

5. Did the defective design of Roundup cause Larry Johnson's harm?

Yes	No
☐	☐

Proceed to question 6.

CLAIM OF FAILURE TO WARN

6. Was the Roundup used by Larry Johnson in a defective condition that was unreasonably dangerous to the ultimate user because it did not contain an adequate warning or instruction?

Yes	No
☐	☒

If your answer to question 6 is Yes, answer question 7. If your answer to question 6 is No, proceed to question 10.

7. Did Monsanto know or, by the application of reasonable, developed human skill and foresight, should it have known that Roundup can cause cancer?

Yes	No
☐	☐

If your answer to question 7 is Yes, answer question 8. If your answer to question 7 is No, proceed to question 10.

8. Did an adequate warning or instruction accompany the Roundup used by Larry Johnson?

Yes	No
☐	☐

If your answer to question 8 is Yes, proceed to question 10. If your answer to question 8 is No, answer question 9.

9. Did the lack of an adequate warning or instruction cause Larry Johnson's harm?

Yes	No
☐	☐

Proceed to question 10.

CLAIM FOR DAMAGES

If you answered Yes to question 3, 5, OR 9, then answer the questions below about damages. If you answered No or failed to answer questions 3, 5, AND 9, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What are Larry Johnson's damages, if any?

Past economic loss:	$_____	This amount may not exceed $787,133.
Future economic loss:	$_____	This amount may not exceed $787,133.
Past noneconomic loss	$_____	
Future noneconomic loss	$_____	

The combined amount of past and future noneconomic loss may not exceed $35,000,000.

PUNITIVE DAMAGES

11. Do you find by clear and convincing evidence that Monsanto showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety, and welfare of others?

Yes	No
☐	☐

If your answer to question 11 is Yes, answer question 12. If your answer to question 11 is No, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What amount of punitive damages do you award against Monsanto?

$_____. This amount may not exceed $40,000,000.

Signed: [handwritten: Juror #12]
Presiding Juror

Dated: [handwritten: 06-17-2022]

Appendix D

CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

No. 21CV10291

LARRY JOHNSON and GAYLE JOHNSON,

Plaintiffs,

v.

MONSANTO COMPANY, a corporation; EAGLE POINT HARDWARE, LLC, a corporation,

Defendants.

Filed: Aug. 1, 2022

GENERAL JUDGMENT AND MONEY AWARD IN FAVOR OF DEFENDANT MONSANTO COMPANY

THIS CASE came on regularly for trial from May 23, 2022, through June 17, 2022, before the undersigned judge and a jury. Plaintiff Larry Johnson ("Plaintiff") appeared personally and by and through his attorneys. Defendant Monsanto Company ("Monsanto") appeared by and through its attorneys.

Defendant Eagle Point Hardware, LLC, was dismissed by stipulation of the parties on May 20, 2022, and a limited judgment of dismissal was entered May 25, 2022. The Court, having heard oral argument on Monsanto's Motion for Directed Verdict at the Close of Plaintiffs' Case, dismissed the claims of plaintiff

Gayle Johnson and entered a limited judgment of dismissal of Mrs. Johnson on June 14, 2022.

Counsel made opening statements on behalf of their respective clients, introduced testimony, exhibits and other evidence in support of their respective cases, and rested. Arguments were made to the jury on behalf of the respective parties, and the jury, having been instructed on all matters of law, and having retired to deliberate on their verdict, returned into court a verdict on June 17, 2022, a true and correct copy of which is attached hereto as Exhibit "1."

NOW, THEREFORE, it is determined that the verdict on all of Plaintiff's claims is for Monsanto; and this matter now coming before the Court for judgment on the verdict,

IT IS ORDERED AND ADJUDGED that Monsanto has judgment against Plaintiff on each and all of Plaintiff's claims; that said claims are hereby dismissed with prejudice; that Monsanto is the prevailing party; and that Monsanto is entitled to recover its costs and disbursements pursuant to ORCP 68.

MONEY AWARD

* * *

8. Post-Judgment Interest	:	9% per annum from date of Judgment until paid
9. Attorney Fees	:	N/A
10. Costs and Disbursements	:	$2,749.20

[handwritten: signature]

Circuit Court Judge
Charles G. Kochlacs

Appendix E

RELEVANT STATUTORY PROVISION
7 U.S.C. §136v(a)-(b)

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.