

No. 21-10994

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JOHN D. CARSON, SR.,
Plaintiff-Appellant,

v.

MONSANTO COMPANY,
Defendant-Appellee.

Appeal from the U.S. District Court for the
Southern District of Georgia
No. 4:17-cv-00237-RSB-CLR

**EN BANC BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN
IN SUPPORT OF PLAINTIFF-APPELLANT**

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February 13, 2023

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, Public Citizen provides the following list of the persons and entities that have or may have an interest in the outcome of this appeal:

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Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that amicus curiae Public Citizen, Inc. is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly held corporation has an ownership interest in it.

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INTEREST OF AMICUS CURIAE¹

Public Citizen is a non-profit consumer-advocacy organization. Appearing on behalf of its nationwide membership before Congress, administrative agencies, and courts, Public Citizen works for the enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, including as amicus curiae in cases in the United States Supreme Court and the federal appellate courts.

Public Citizen has a longstanding interest in fighting broad claims that federal regulation preempts state laws that protect consumers, and it has appeared as amicus curiae in many cases raising preemption issues. Public Citizen submits this amicus curiae brief because defendant-appellee Monsanto's overly broad reading of the preemptive scope of the Federal Insecticide, Fungicide, and Rodenticide Act, if adopted by this Court, would decrease pesticide manufacturers' incentive

¹ Public Citizen has moved for leave to file this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

to disclose safety risks and deprive consumers of redress for injuries they suffer due to exposure to pesticides with inadequate warnings.

STATEMENT OF THE ISSUE

Whether the Federal Insecticide, Fungicide, and Rodenticide Act preempts plaintiff-appellant's failure-to-warn claim.

BACKGROUND

A. Statutory Background

Pesticides can be regulated at the federal, state, and local level. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, establishes the federal component of the regulation. Among other things, FIFRA requires pesticides to be registered with the Environmental Protection Agency (EPA). *Id.* § 136a(a). As part of the registration process, the manufacturer submits various data about the pesticide and a copy of its labeling. *See id.* § 136a(c)(1). EPA “shall register a pesticide” if it determines that the pesticide’s composition warrants the claims made for it, that its labeling and other materials comply with FIFRA’s requirements, that it will not cause unreasonable adverse effects on the environment when performing its intended

function, and that it will not generally cause unreasonable effects on the environment when used in accordance with widespread and commonly recognized practice. *Id.* § 136a(c)(5). EPA must “periodically review[]” pesticide registrations. *Id.* § 136a(g)(1)(A)(i).

FIFRA also prohibits the distribution or sale of any pesticide that is misbranded. *Id.* § 136j(a)(1)(E). One way that a pesticide can be misbranded is if its “label does not contain a warning or caution statement which may be necessary and if complied with ... is adequate to protect health and the environment.” *Id.* § 136(q)(1)(G).

A pesticide can be “registered but nevertheless misbranded,” and pesticide “manufacturers have a continuing obligation to adhere to FIFRA’s labeling requirements.” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 438 (2005). FIFRA specifies that although registration of a pesticide is generally prima facie evidence that the pesticide complies with FIFRA’s registration provisions, “[i]n no event shall registration of an article be construed as a defense for the commission of any offense” under FIFRA. 7 U.S.C. § 136a(f)(2).

Although it regulates pesticides, FIFRA “preserves a broad role for state regulation.” *Bates*, 544 U.S. at 450. “Most significantly, States may

ban or restrict the uses of pesticides that EPA has approved.” *Id.* (citing 7 U.S.C. § 136v(a)). At the same time, FIFRA contains a “narrow” preemption provision, *Bates*, 544 U.S. at 452, that forbids states from “impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.” 7 U.S.C. § 136v(b). For a state requirement to be preempted under this provision, “it must satisfy two conditions.” *Bates*, 544 U.S. at 444. “First, it must be a requirement ‘*for labeling or packaging.*’” *Id.* Second, “it must impose a labeling or packaging requirement that is ‘*in addition to or different from those required under this subchapter.*’” *Id.* A state-law requirement is not “in addition to or different from” federal requirements, and is therefore not preempted by section 136v(b), “if it is equivalent to, and fully consistent with, FIFRA’s misbranding provisions.” *Id.* at 447. “[A] state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive preemption,” *id.* at 453, but it “need not explicitly incorporate FIFRA’s standards as an element of a cause of action” nor “be phrased in the *identical* language as its corresponding FIFRA requirement.” *Id.* at 447, 454.

B. Procedural Background

Plaintiff-appellant John D. Carson, Sr., was diagnosed with cancer after decades of routinely applying defendant-appellee Monsanto's pesticide Roundup to his lawn. Mr. Carson filed this case against Monsanto, asserting, as relevant here, a claim of failure to warn. The district court granted Monsanto's motion for judgment on the pleadings as to the failure-to-warn claim, holding that the claim was preempted by 7 U.S.C. § 136v(b). The district court stated that requiring a warning on Roundup that glyphosate—its active ingredient—causes cancer “would be in direct conflict with the EPA's approved label,” and cited an August 2019 letter from the director of EPA's pesticide registration division to certain pesticide registrants, in which the director stated that placing a California Proposition 65 warning about glyphosate on a pesticide's label would render the pesticide misbranded. Appellant's App. 8.

A panel of this Court reversed. The panel explained that “only federal action with the force of law has the capacity to preempt state law.” *Carson v. Monsanto Co.*, 51 F.4th 1358, 1362 (11th Cir. 2022). It concluded that EPA's registration process did not have the force of law because “it at most creates a rebuttable presumption of compliance with

FIFRA’s registration process and nothing more.” *Id.* at 1364. The panel likewise concluded that various other EPA documents relied on by Monsanto, including the August 2019 letter, lacked the force of law. *Id.* at 1364–65.

Comparing the Georgia law underlying Mr. Carson’s claim to FIFRA’s labeling provisions, “which obviously carry the force of law,” the panel determined that the state law was not “different from or in addition to” those federal requirements. *Id.* at 1363. The panel therefore held that the claim was not preempted under section 136v(b). *Id.* at 1365.

SUMMARY OF ARGUMENT

FIFRA’s preemption provision provides that a state may not “impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under” FIFRA. 7 U.S.C. § 136v(b). Federal “requirements” under section 136v(b) are federal rules regarding packing and labeling that conclusively establish, with the force of law, what is required by FIFRA.

The state-law requirements underlying Mr. Carson’s failure-to-warn claim are “equivalent to, and fully consistent with FIFRA’s misbranding provisions,” which require pesticides to contain a warning

or caution statement adequate to protect health and the environment. *Bates*, 544 U.S. at 447. EPA’s registration of Roundup without a cancer warning does not cause the state law underlying Mr. Carson’s claim to diverge from FIFRA’s requirements. FIFRA makes clear that the pesticide registration process is not determinative of whether the pesticide and its labeling comply with FIFRA’s requirements. *See* 7 U.S.C. § 136a(f)(2). The preemption analysis is likewise not altered by the August 2019 letter that the director of EPA’s pesticide registration division sent to pesticide registrants stating that a California Proposition 65 warning on products containing glyphosate would render those products misbranded. That letter lacks the force of law and thus does not set forth any “requirements” under FIFRA.

Because the state-law requirements underlying Mr. Carson’s failure-to-warn claim are not “in addition to or different from” FIFRA’s requirements, FIFRA does not expressly preempt the claim.²

² As Public Citizen explained in its amicus brief before the panel, FIFRA also does not impliedly preempt Mr. Carson’s failure-to-warn claim.

ARGUMENT

I. The federal “requirements” to which section 136v(b) refers are federal rules of law that conclusively establish what is required by FIFRA.

FIFRA’s preemption provision provides that a state may not “impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under” FIFRA. 7 U.S.C. § 136v(b). In *Bates*, the Supreme Court held that a state law is not preempted by section 136v(b) if “it is equivalent to, and fully consistent with, FIFRA’s misbranding provisions.” 544 U.S. at 447. The Court instructed that, to determine whether a state requirement is equivalent to FIFRA’s misbranding provisions, the state law should be measured against the standards in FIFRA’s text and “any relevant EPA regulations that give content to FIFRA’s misbranding standards.” *Id.* at 453. “[A] manufacturer should not be held liable under a state labeling requirement subject to § 136v(b),” the Court explained, “unless the manufacturer is also liable for misbranding as defined by FIFRA.” *Id.* at 454.

Bates thus makes clear that the federal requirements to which section 136v(b) refers are rules of law that “give content to FIFRA’s

misbranding standards,” *id.* at 453, conclusively establishing what FIFRA requires with respect to labeling and packaging, such that their violation is a “violation of FIFRA’s misbranding provision.” *Hardeman v. Monsanto Co.*, 997 F.3d 941, 955 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2834 (2022). These requirements include both the standards in FIFRA’s text and relevant EPA regulations. *Bates*, 544 U.S. at 453.

To establish such a requirement, federal action must have the force of law. As the Supreme Court explained in *Bates*, “[a] requirement is a rule of law that must be obeyed.” *Id.* at 445. Agency action that does not establish a “rule of law” does not establish a “requirement” under section 136v(b) and is therefore irrelevant to the preemption analysis.

II. EPA’s registration of a pesticide does not conclusively establish what FIFRA requires with respect to the pesticide’s labeling.

Monsanto contends that any state-law duty it had to warn about Roundup is necessarily “different from or in addition to” FIFRA’s requirements because Roundup went through EPA’s registration process—which required the agency to determine if the pesticide’s labeling complies with FIFRA’s requirements—and registered Roundup without a cancer warning. Renewed Reh’g Pet. 8. EPA’s registration

process, however, does not conclusively establish what FIFRA requires with respect to labeling. Thus, as the United States explained just last year when invited by the Supreme Court to file a brief addressing the petition for a writ of certiorari in *Hardeman*, “EPA’s approval of labeling that does not warn about particular chronic risks does not by itself preempt a state-law requirement to provide such warnings.” Br. for U.S. as Amicus Curiae at 6, *Monsanto Co. v. Hardeman*, No. 21-241 (U.S., filed May 10, 2022) (hereafter “U.S. Br., *Hardeman*”); see also *id.* at 12 (explaining that EPA’s approval of labeling without a chronic risk warning “is not naturally characterized as a FIFRA ‘requirement’ that no such warning appear”).

As the Supreme Court expressly recognized in *Bates*, a pesticide can be “registered but nevertheless misbranded.” 544 U.S. at 438. Although registration is generally prima facie evidence that the pesticide and its labeling comply with FIFRA’s registration provisions, the statute specifies that “[i]n no event shall registration of an article be construed as a defense for the commission of any offense under” FIFRA. 7 U.S.C. § 136a(f)(2). “The Act thus makes clear that a particular pesticide may be found to violate FIFRA’s misbranding prohibition even though EPA

approved the labeling when registering the pesticide.” U.S. Br., *Hardeman*, at 8. That is, EPA’s approval of the label in the registration process “is not conclusive of FIFRA compliance.” *Hardeman*, 997 F.3d at 956. “And because EPA’s labeling determinations are not dispositive of FIFRA compliance, they similarly are not conclusive as to which common law requirements are ‘in addition to or different from’ the requirements imposed by FIFRA.” *Id.*

Bates confirms that a state-law claim based on the inadequacy of a registered pesticide’s labeling is not necessarily based on a requirement that is in addition to or different from a requirement imposed by FIFRA. In *Bates*, as here, EPA had registered the pesticide at issue and approved the labeling in the course of the registration. Nonetheless, the Supreme Court held that the plaintiff’s failure-to-warn claims were not necessarily preempted. Instead, the Court remanded for a determination whether the state labeling requirements were equivalent to FIFRA’s requirements. *See* 544 U.S. at 453. As the Third Circuit has explained, “the remand established that mere inconsistency between the duty imposed by state law and the content of a manufacturer’s labeling approved by the EPA at registration did not necessarily mean that the

state law duty was preempted.” *Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc.*, 617 F.3d 207, 222 (3d Cir. 2010).

Indeed, rather than holding that FIFRA broadly preempts claims based on the inadequacy of a registered pesticide’s labeling, the Supreme Court recognized that state-law actions based on the failure to include warnings on the label of a registered pesticide could “aid ... the functioning of FIFRA.” 544 U.S. at 451. “By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides,” the Court explained, a state failure-to-warn action “may aid in the exposure of new dangers associated with pesticides.” *Id.* (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541 (D.C. Cir. 1984)). “Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labeling 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*, 736 F.2d at 1541). It is inconceivable that the Supreme Court would have extolled the ability of failure-to-warn claims to convince manufacturers and EPA to revise a pesticide’s labeling if the

fact that the warning at issue was not already on the label meant that the failure-to-warn claim was preempted.

Monsanto attempts to distinguish *Bates*—and to avoid the clear import of the remand in that case—by noting that *Bates* involved a failure-to-warn claim related to efficacy, rather than safety, and that EPA had waived conducting a review of the pesticide’s efficacy. Renewed Reh’g Pet. 12 n.3. According to Monsanto, it is “not that ‘registration’ preempts” but that the “safety and labeling determinations” EPA makes during the registration process impose “requirements” under FIFRA. *Id.* at 11. *Bates* did not indicate, however, that the state-law claims at issue were not preempted because EPA had not conducted an efficacy review. *See, e.g., Holyfield v. Chevron U.S.A., Inc.*, 533 F. Supp. 3d 726, 732 (E.D. Mo. 2021) (“The Supreme Court did not limit its analysis in *Bates* to claims regarding pesticide efficacy.”). And the Court quoted *Ferebee* for the proposition that “a state tort action *of the kind under review* may aid in the exposure of new dangers associated with pesticides.” *Bates*, 544 U.S. at 451 (quoting *Ferebee*, 736 F.2d at 1541; emphasis added). Notably, the action under review in *Ferebee* involved a failure to warn related to safety, not efficacy. *See* 736 F.2d at 1539.

More fundamentally, that EPA cannot register a pesticide without first determining that its labeling complies with FIFRA and that the product will not have unreasonable adverse effects on the environment does not mean that those determinations conclusively establish what is required by FIFRA. To the contrary, FIFRA's specification that "[i]n no event shall registration of an article be construed as a defense for the commission of any offense under" FIFRA, 7 U.S.C. § 136a(f)(2) (emphasis added), makes clear that the assessments EPA makes in the registration process are not dispositive of whether the pesticide's labeling complies with FIFRA's requirements and do not conclusively establish what FIFRA requires. *See, e.g., Hardeman*, 997 F.3d at 957 n.8 (explaining that a determination that glyphosate is not carcinogenic made as part of an EPA registration decision "is not necessarily at odds with [a] future failure-to-warn claim," because the registration decision "only supports presumptive (not conclusive) compliance with FIFRA"); *Carias v. Monsanto Co.*, 2016 WL 6803780, at *7 (E.D.N.Y. Sept. 30, 2016) ("[I]f the EPA's registration decision [under FIFRA] is not preemptive, it follows that the factual findings on which it relied in making that decision also are not preemptive." (citation omitted)).

Moreover, the Ninth Circuit has held that EPA's 2020 determination in its registration review of glyphosate that glyphosate is not likely to be carcinogenic to humans was not supported by substantial evidence. *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 51 (9th Cir. 2022). Explaining that the agency's determination was "in tension with parts of the agency's own analysis and with the guidelines it purports to follow," *id.* at 46, the court vacated the human-health portion of the agency's interim registration review decision and remanded to the agency for further proceedings, *id.* at 52.

Monsanto contends that "[l]abeling determinations made in the registration process" have the force of law because the "process is so formal" and "Congress delegated to EPA to make those determinations in that process." Renewed Reh'g Pet. 15. But even putting aside the recent vacatur of the human-health portion of EPA's interim registration review decision for glyphosate, the problem with Monsanto's argument about the registration process is not that the registration procedures are insufficiently extensive or that the process is not within EPA's authority. It is that the process does not conclusively establish whether FIFRA requires a pesticide's label to have a warning on it. "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.” *Hardeman*, 997 F.3d at 957 (citing 7 U.S.C. § 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.” *Id.*

Section 136a(f)(2) meaningfully distinguishes cases concerning FIFRA from *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), with which Monsanto claims the panel’s decision conflicts. *See* Renewed Reh’g Pet. i. *Riegel* held that an express preemption provision in the Medical Device Amendments (MDA) to the Food, Drug, and Cosmetic Act expressly preempts claims challenging the safety and effectiveness of a medical device that received premarket approval from the Food and Drug Administration (FDA). Like FIFRA’s preemption provision, the MDA’s preemption provision preempts certain state requirements that are different from, or in addition to, certain federal requirements. *See* 21 U.S.C. § 360k(a). The MDA does *not*, however, contain a provision similar to 7 U.S.C. § 136a(f)(2), which makes clear that the agency’s registration of a pesticide does not conclusively determine whether the label complies

with the statute's requirements. *See Hardeman*, 997 F.3d at 956 n.6; *see also Crespo v. S.C. Johnson & Son, Inc.*, 394 F. Supp. 3d 260, 272 (E.D.N.Y. 2019) (“[T]o the extent that the defendant relies upon cases involving federal statutes that do not contain a similar warning about the ongoing, post-registration duty to comply with the statutory scheme, these cases are not persuasive to the court.”).

In an effort to downplay section 136a(f)(2), Monsanto cites the pre-*Bates* decision in *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 n.4 (5th Cir. 1994), in which the Fifth Circuit stated that section 136a(f)(2) “has no bearing” on preemption because a common-law claim is “not an offense under FIFRA.” *See* Renewed Reh’g Pet. 11. *MacDonald*, however, is inconsistent with the Supreme Court’s construction of FIFRA in *Bates*. *MacDonald* made the statement cited by Monsanto in a footnote in which it averred that, where a pesticide’s labeling has been approved, “it is unnecessary to compare specifically the common law labeling requirements asserted by the [plaintiffs] with FIFRA’s labeling requirements.” 27 F.3d 1021, 1025 n.4. According to *MacDonald*, a state-law claim that “chemical manufacturers failed to provide an adequate warning” on an approved pesticide “necessarily” sought warnings “in

addition to or different from those required’ by FIFRA.” *Id.* In *Bates*, in contrast, the Supreme Court held that a state law claim that a pesticide manufacturer did not place adequate warnings on its registered pesticide does *not* necessarily rest on requirements that are in addition to or different from FIFRA’s requirements and, thus, that it *is* necessary to compare specifically the state law requirements for packaging or labeling with FIFRA’s labeling requirements. *See* 544 U.S. at 453–54. Although section 136a(f)(2) might have been irrelevant under *MacDonald’s* incorrect understanding of FIFRA preemption, it *is* relevant to the analysis set forth in *Bates*, demonstrating that the fact that a pesticide has gone through the registration process does not conclusively establish that its labeling complies with FIFRA’s requirements.

Monsanto also relies on an example in *Bates* in which the Supreme Court explained that a “failure-to-warn claim alleging that a given pesticide’s label should have stated ‘DANGER’ instead of the more subdued ‘CAUTION’ would be pre-empted because it is inconsistent with 40 CFR § 156.64 (2004), which specifically assigns these warnings to particular classes of pesticides based on their toxicity.” 544 U.S. at 453. The Supreme Court used the DANGER/CAUTION example, however, as

part of its explanation that requirements set out in EPA *regulations*, as well as requirements set out in the statute, can have preemptive effect. *See id.* (“State-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA’s misbranding standards.”). That uncontroversial proposition does not suggest that EPA’s registration of a pesticide, or assessments made in the registration process, also have preemptive effect.

In sum, EPA’s registration of a pesticide without a certain warning on its label, and the determinations that it makes in that process, do not conclusively establish that FIFRA does not require such a warning on the pesticide’s label. They thus do not establish that a state-imposed requirement to include that warning is “in addition to or different from” FIFRA’s requirements. 7 U.S.C. § 136v(b).

III. The August 2019 letter did not set forth a federal rule of law.

Monsanto cites an August 2019 letter that the director of EPA’s pesticide registration division sent to certain pesticide registrants stating that a California Proposition 65 warning about glyphosate would “constitute a false and misleading statement” and render a pesticide “misbranded.” Renewed Reh’g Pet. 6. That letter, however, did not

establish a “rule[] of law that must be obeyed,” *Bates*, 544 U.S. at 445, and thus did not establish any “requirements” under FIFRA. As EPA acknowledged when it sent the letter, the letter was simply “guidance.” EPA, News Release, *EPA Takes Action to Provide Accurate Risk Information to Consumers, Stop False Labeling on Products* (Aug. 8, 2019), <https://www.epa.gov/newsreleases/epa-takes-action-provide-accurate-risk-information-consumers-stop-false-labeling>. EPA “did not follow any ‘formal administrative procedure’ that would give the letter the force of law.” *Hardeman*, 997 F.3d at 957 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

The August 2019 letter is similar to a letter that the Third Circuit held had no preemptive effect in *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237 (3d Cir. 2008). There, the FDA Commissioner sent a letter to the California Attorney General stating that Proposition 65 warnings regarding mercury on tuna labels would be misleading and therefore render tuna products sold with such a warning misbranded. The Third Circuit stated that, if the FDA had “exercised its misbranding authority to establish that a warning ... would be false or misleading under federal law,” a state failure-to-warn claim “would be preempted.” *Id.* at 255.

However, the court explained, the FDA had taken “no regulatory action establishing mercury warnings as misbranding under federal law.” *Id.* “Instead, the FDA merely expressed an informal policy opinion in a letter, and it did so only after [the plaintiff’s] injuries were allegedly suffered.” *Id.* Likewise, here, EPA “merely expressed an informal policy opinion in a letter,” and the informal views expressed in the letter did not establish requirements under FIFRA.

In any event, in a letter sent from EPA’s Assistant Administrator to California regulators in April 2022, EPA stated that it “could approve” specific glyphosate-warning language proposed by California “if pesticide registrants requested it for inclusion on glyphosate product labels.” *See* Letter from Michal Freedhoff, Assistant Adm’r, Office of Chem. Safety & Pollution Prevention, EPA, to Lauren Zeise, Dir., Office of Env’tl. Health Hazard Assessment, Cal. Env’tl. Prot. Agency (Apr. 8, 2022), available at <https://perma.cc/GPS5-72SZ>. Glyphosate products with that warning, the letter stated, “would not be considered false and misleading” or “misbranded.” *Id.* The April 2022 letter further confirms that the August 2019 letter did not establish that Monsanto could not have placed a

cancer warning on Roundup’s label without rendering the pesticide misbranded—and that the letter is irrelevant to the preemption analysis.

IV. The state-law requirements underlying Mr. Carson’s claim are not “in addition to or different from” FIFRA’s requirements.

In determining whether state-law requirements are “in addition to or different from” FIFRA’s requirements, the state-law requirements must be measured against the misbranding standards “set out in FIFRA and its implementing regulations.” *Bates*, 544 U.S. at 452. Conducting that comparison here shows that the state-law requirements underlying Mr. Carson’s claim parallel FIFRA’s requirements. FIFRA requires pesticide labels to 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). Similarly, Georgia law requires a manufacturer to warn whenever it “knows or reasonably should know of the danger arising from the use of its product.” *Chrysler Corp. v. Batten*, 264 Ga. 723, 724, 450 S.E.2d 208, 211 (1994). That duty requires the manufacturer to warn of “nonobvious foreseeable dangers from the normal use of its products.” *Certainteed Corp. v. Fletcher*, 300 Ga. 327, 330, 794 S.E.2d 641, 645 (2016) (citation omitted). Given the duties at

issue, “it’s hard to see how [Mr. Carson’s] failure-to-warn claim[] could be construed more broadly than FIFRA.” *Hardeman v. Monsanto Co.*, 216 F. Supp. 3d 1037, 1038 (N.D. Cal. 2016) (internal quotation marks and citation omitted). As the panel correctly explained, “[i]n practice, the Georgia failure to warn claim simply enforces the FIFRA cause of action.” *Carson*, 51 F.4th at 1363.

Because the state-law duties at issue parallel FIFRA’s requirements, FIFRA does not expressly preempt Mr. Carson’s failure-to-warn claim.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5). Excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4, the brief contains 4,367 words, less than half the number of words permitted by the Court for the parties' principal briefs. The brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief is composed in a 14-point proportional typeface, Century Schoolbook.

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CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on February 13, 2023.

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