No. 22-3075

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID SCHAFFNER, JR. and THERESA SUE SCHAFFNER,
Plaintiffs-Appellees,

v.

MONSANTO CORPORATION,
Defendant-Appellant.

Appeal from the U.S. District Court for the
Western District of Pennsylvania
No. 2:19-cv-1270
Honorable Cynthia R. Eddy

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

Adina H. Rosenbaum
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Public Citizen

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 & 29(a)(4)(A), amicus curiae Public Citizen, Inc. states that it 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 CURIAE[1]

Public Citizen is a nonprofit consumer-advocacy organization that works for the enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen has a longstanding interest in fighting overly broad claims that federal regulation preempts state laws that protect consumers, and it has appeared as amicus curiae in many cases raising preemption issues, including cases involving preemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq*. Public Citizen submits this amicus curiae brief because the panel's decision, if allowed to stand, will decrease pesticide manufacturers' incentive to disclose safety risks and deprive consumers of redress for injuries caused by exposure to pesticides that lack adequate warnings.

BACKGROUND AND SUMMARY OF ARGUMENT

FIFRA's express preemption provision provides that states may not "impose or continue in effect any requirements for labeling or packaging

[1] Public Citizen has moved for leave to file this brief. No party or party's counsel authored this brief in whole or in part or 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.

in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). The Supreme Court has explained that, because this provision prohibits only state requirements "'*in addition to or different from*' the labeling and packaging requirements under FIFRA," it does not preempt state requirements that are "equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447 (2005).

Plaintiff-appellee David Schaffner, Jr. developed non-Hodgkins lymphoma after years of exposure to defendant-appellant Monsanto's product Roundup. This lawsuit, brought by Mr. Schaffner and his wife, alleges that Monsanto failed to provide adequate warnings of the dangerous risks associated with exposure to Roundup. The lawsuit was earlier sent to the United States District Court for the Northern District of California as part of a multi-district litigation (MDL) proceeding involving thousands of cases. In the MDL, the court determined that the state law underlying the Schaffners' failure-to-warn claim was equivalent to FIFRA's misbranding provisions and, therefore, that FIFRA does not expressly preempt the claim. A panel of this Court reversed, holding the claim preempted based on an EPA regulation, 40

C.F.R. § 152.44, that provides, with only a few exceptions, that changes to pesticide labeling must be preapproved by the agency. Although FIFRA makes clear that the EPA's approval of a label during the registration process does not conclusively establish what is required by FIFRA, *see* 7 U.S.C. § 136a(f)(2), the panel held that, under section 152.44, "the EPA's approval of a proposed label 'give[s] content to FIFRA's misbranding standards,'" Slip Op. 61 (quoting *Bates*, 544 U.S. at 453), and that, unless the relevant warning falls within one of the regulation's minor exceptions, a state-law requirement that a pesticide label contain a warning that is not on the agency-approved label is not equivalent to FIFRA's requirements, *id.* at 53.

The panel's opinion is contrary to the Supreme Court's decision in *Bates*, which sets forth the analysis for determining whether a state requirement is equivalent to FIFRA's requirements—and offers no support for the notion that EPA's approval of a label during registration is relevant to that analysis. The opinion is also contrary to *Indian Brand Farms, Inc. v. Novartis Crop Protection Inc.*, 617 F.3d 207 (3d Cir. 2010), in which this Court held that a state-law failure-to-warn claim was not preempted, although the relevant warning was not on the agency-

approved label. In addition, the opinion departs from every appellate decision to consider whether FIFRA preempts claims against Monsanto for failing to warn about the risks of Roundup, creating a split among the federal courts of appeals on the issue.

Moreover, the opinion's reasoning is flawed. It treats EPA's evaluation of labels in the registration process as determinative of FIFRA's requirements, although FIFRA makes clear that it is not. And the opinion will negatively impact pesticide safety, decreasing manufacturers' incentives to ensure that they know of and properly disclose all the risks posed by their products.

This Court should grant the petition for rehearing en banc and hold that FIFRA does not preempt the Schaffners' claim.

ARGUMENT

I. The panel's decision is contrary to the Supreme Court's decision in *Bates* and this Court's decision in *Indian Brand Farms*.

A. In *Bates*, the Supreme Court held that state requirements for labeling are not preempted if they are equivalent to FIFRA's misbranding standards and any EPA regulations that give content to those standards. 544 U.S. at 454. The Court then remanded the case to the court of appeals

to determine whether FIFRA preempted the plaintiffs' fraud and failure-to-warn claims, stating that it had "not received sufficient briefing on this issue, which involves questions of Texas law." *Id.* at 453. As in this case, the EPA had approved the label of the pesticide at issue in the course of registration, and the defendant had cited 40 C.F.R. § 152.44 in arguing that, once approved, a label "may not be changed, except in the most minor and technical ways, without EPA permission," Br. for Resp. at 7, *Bates*, 544 U.S. 431 (No. 03-388). Nonetheless, the Court did not indicate that either the EPA's approval of the label or section 152.44 would be important to the analysis on remand. Indeed, the Court stated that the defendant had not "identified any EPA regulations that further refine [FIFRA's] general standards in any way that is relevant to petitioners' allegations." *Bates*, 544 U.S. at 453 n.27. And it suggested that regulations would seldom play a role in the FIFRA preemption analysis, noting that, "[a]t present, there appear to be relatively few regulations that refine or elaborate upon FIFRA's broadly phrased misbranding standards," although "[t]o the extent that EPA promulgates such regulations in the future, they will necessarily affect the scope of pre-emption under § 136v(b)." *Id.* at 453 n.28.

Here, the panel's opinion holds that, in light of 40 C.F.R. § 152.44, all state-law requirements that a pesticide label contain a warning that is not on the EPA-label are preempted, unless they involve only minor modifications. That holding is inconsistent with *Bates*'s discussion of the role of regulations in the FIFRA preemption analysis, and incompatible with *Bates*'s characterization of FIFRA preemption as "narrow" in scope. 544 U.S. at 452.

B. The panel's decision is also contrary to this Court's opinion in *Indian Brand Farms*, 617 F.3d 207, which involved a manufacturer's failure to warn that its pesticide would be harmful to crops if mixed with a fungicide. Although the EPA had approved the pesticide's label during the product's registration and the manufacturer would have needed advance approval to add a warning to its label, the Court held, in contrast to the panel here, that the plaintiffs' failure-to-warn claim was not preempted, stating that it had found no EPA regulations that refined FIFRA's misbranding standards "in any way that [was] relevant" to the parties' claims. *Id.* at 223. That is, unlike the panel here, the Court in *Indian Brand Farms* did not consider section 152.44 relevant to the express preemption inquiry.

This Court should grant the rehearing petition to resolve the conflict between the panel's decision and *Indian Brand Farms* and to realign this Court's caselaw with the Supreme Court's decision in *Bates*.

II. The panel's decision misinterprets FIFRA.

Even apart from *Bates* and *Indian Brand Farms*, the panel's decision is wrong. The panel held that, under section 152.44, "the EPA's approval of a proposed label 'give[s] content to FIFRA's misbranding standards.'" Slip Op. 61 (quoting *Bates*, 544 U.S. at 453). But FIFRA makes clear that EPA's approval of a label during the registration process is not determinative of what FIFRA requires with respect to labeling. Rather, FIFRA specifies that, although registration is generally prima facie evidence that the pesticide and its labeling comply 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). Thus, as the United States explained when invited by the Supreme Court to file a brief on the issue, "a particular pesticide may be found to violate FIFRA's misbranding prohibition even though EPA approved the labeling when registering the pesticide." Br. for U.S. as Amicus Curiae at 8, *Monsanto Co. v. Hardeman*, 142 S. Ct. 2834 (2022)

(Mem.) (No. 21-241) (Appx. 1073). Regardless of whether EPA is required to approve amendments to a label, the EPA's approval of a label cannot "give content to FIFRA's misbranding standards" when the statute itself makes clear that a label that received EPA approval can nonetheless violate those standards. *See Hardeman v. Monsanto Co.*, 997 F.3d 941, 955 (9th Cir. 2021) (explaining that "EPA's approval of a label … is not conclusive of FIFRA compliance" and that, "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").

III. The panel's decision conflicts with the decisions of every other appellate court to have considered the issue.

Unsurprisingly, given *Bates* and FIFRA's regulatory scheme, the panel decision is alone among appellate courts in holding that FIFRA preempts state-law claims against Monsanto based on its failure to warn of the risks of Roundup exposure. Both the Ninth and Eleventh Circuits have addressed this exact issue, *see Carson v. Monsanto Co.*, 92 F.4th 980 (11th Cir. 2024); *Hardeman*, 997 F.3d 941, and both have held that FIFRA does not preempt such claims. The panel's decision squarely

conflicts with these Ninth and Eleventh Circuit decisions, creating a split among the federal courts of appeals.

The panel's decision likewise conflicts with the state appellate decisions on the issue. *See Johnson v. Monsanto Co.*, 333 Or. App. 678 (2024); *Pilliod v. Monsanto Co.*, 282 Cal. Rptr. 3d 679 (Cal. Ct. App. 2021). Like *Hardeman* and *Carson* in the federal courts, these state court cases hold that FIFRA does not preempt failure-to-warn claims based on Monsanto's failure to warn of Roundup's dangers. As these decisions show, the panel decision is an outlier among appellate decisions addressing Monsanto's failure to warn of Roundup's risks.

IV. The panel's decision will negatively impact pesticide safety.

The panel's decision will make it less likely that the risks associated with pesticides are discovered and less likely that EPA and the public are adequately informed of such risks. Under the panel's decision, all state-law claims based on a pesticide manufacturer's failure to warn of the health risks posed by its product would be preempted. As the Supreme Cours explained in *Bates*, however, such claims can play an important role in bringing health risks to light and in ensuring that pesticides are not misbranded. "By encouraging plaintiffs to bring suit for injuries not

previously recognized as traceable to pesticides," state-law failure-to-warn claims "may aid in the exposure of new dangers associated with pesticides." *Bates*, 544 U.S. at 451 (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541 (D.C. Cir. 1984)). They "may lead manufacturers to petition EPA to allow more detailed labelling of their products" or cause EPA to "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). "In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement." *Id.* (*quoting Ferebee*, 736 F.2d at 1541–42). Under the panel's decision, all these benefits of state-law actions based on a pesticide manufacturer's failure to provide adequate precautionary statements will be gone, and injured consumers will be left without recompense for the injuries they suffered from a misbranded product. This Court should grant the petition for rehearing en banc and hold that FIFRA does not preempt state-law claims based on the failure to warn of

health risks, so that such claims can continue to "aid … the functioning of FIFRA." *Id*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing en banc.

Dated: September 18, 2024

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Public Citizen

CERTIFICATES OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

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/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that, on September 18, 2024, this brief has been served through the Court's ECF system on counsel for all parties required to be served.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum