No. 21-10994

In the United States Court of Appeals for the Eleventh Circuit

JOHN D. CARSON, *Plaintiff-Appellant*

v.

MONSANTO COMPANY, *Defendant-Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
NO. 4:17-CV-00237-RSB-CLR, HON. R. STAN BAKER

EN BANC BRIEF OF RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

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Carson v. Monsanto Co., No. 21-10994

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 29-2, 26.1-1, 26.1-2, 26.1-3, and 35-8, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case, and were omitted from the Certificates of Interested Persons in briefs that were previously filed per Eleventh Circuit Rule 26.1-2(b):

1. Craddock, Joshua J., Attorney for Amicus Curiae
2. Retail Litigation Center, Inc., Amicus Curiae
3. Wilson Sonsini Goodrich & Rosati, P.C., Attorneys for Amicus Curiae
4. Yohalem, Mark R., Attorney for Amicus Curiae

The Retail Litigation Center, Inc. is a non-profit corporation that has no parent corporations, and no publicly held corporation owns 10 percent or more of its stock.

Dated: March 15, 2023

By: */s/ Joshua J. Craddock*

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Amicus is the Retail Litigation Center, Inc., a trade association representing national and regional retailers across the full spectrum of retail verticals that seeks to provide courts with retail-industry perspectives on important legal issues affecting its members. Additional information can be found in the accompanying motion seeking leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Congress vested the Environmental Protection Agency (EPA) with the authority and responsibility to determine the appropriate warnings about potential human health effects for each individual pesticide registered for sale and sold in the United States. The now-vacated panel opinion would have stripped that authority from federal regulators and their staff of scientists, as provided by statute, and handed it to a lay jury—even when a jury would impose labeling requirements on a particular pesticide "in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b). But this Court has long recognized that "it is for the EPA Administrator,

[1] Per Federal Rule of Appellate Procedure 29(a)(4)(E), the RLC states that no party's counsel authored its brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the RLC, its members, or its counsel contributed money to fund the preparation or submission of this brief.

not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made." *Papas v. Upjohn Co.* (*Papas II*), 985 F.2d 516, 519 (11th Cir. 1993) (holding failure-to-warn claims necessarily challenged the adequacy of a product's EPA-approved labeling and were preempted), *cert. denied*, 510 U.S. 913 (1993). Nothing in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), undermines that conclusion, so long as EPA has actually reviewed and rendered a determination that a product's labeling complies with FIFRA, *see id.* at 440, 450. The panel decision here was thus wrong as a matter of preemption law and would have inflicted serious harm on manufacturers, retailers, and their customers alike. The en banc Court must avoid repeating the panel's mistake.

Gutting FIFRA preemption would particularly harm retailers. The plaintiffs' bar has pursued not only major manufacturers based on the labeling of their signature products, but also retailers whose shelves hold *thousands* of products subject to federal labeling requirements. Those requirements govern not only the language on the product labeling itself, but any ancillary statements provided in proximity to the products. Plaintiffs' lawyers are quite literally suing the neighborhood hardware store on small-town Main Street. *See, e.g.*, G. Edwards, *Belleville Hardware Store Faces Roundup Lawsuit*, St. Louis Bus. J. (Nov. 14, 2019), https://www.bizjournals.com/stlouis/news/2019/11/14/belleville-hardware-store-

faces-roundup-lawsuit.html ("The Ace Hardware store on West Main Street in Belleville is being sued for selling Monsanto's Roundup . . . ."). One theory of these suits against retailers is that if a manufacturer's federally approved label lacks a warning that a lay jury deems appropriate, the retailer is liable for not having placed some kind of signage next to the product to supersede the package's labeling. This is so, plaintiffs argue, even though such point-of-sale warnings flatly contradict EPA's labeling determinations for Roundup.

Denying preemptive effect to EPA's authoritative labeling determinations would ratchet up the pressure on retailers, particularly smaller retailers with limited resources. After all, FIFRA covers everything from everything from UV devices[2] to pool disinfectants,[3] and from flea-prevention kits[4] to children's toys.[5]. To avoid liability under state-law claims, retailers would be forced to second-guess decisions made by federal agencies about how manufacturers should label their products.

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[2] EPA, *EPA Regulations About UV Lights that Claim to Kill or Be Effective Against Viruses and Bacteria*, No. 305F20004 (2020), https://www.epa.gov/sites/default/files/2020-10/documents/uvlight-complianceadvisory.pdf.

[3] EPA, *Rhode Island Pool Supply Company Fined for Violating Pesticide Laws* (Jan. 9, 2008), 2008 WL 83445.

[4] *In re No More Fleas Please, Inc.*, No. FIFRA-04-2010-3033(b), 2010 WL 2150369 (EPA May 4, 2010).

[5] EPA, *EPA Acts to Prevent Playskool Toy Manufacturer Hasbro, Inc., from False Claims About Protecting Children from Microbial Infections* (Apr. 18, 1997), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/586a95ebf41f94788525647d006cfd6b.html.

Retailers who trust EPA and other federal agencies face lawsuits from plaintiffs who insist that their views should supersede those of neutral government scientists. But even retailers who give in to the labeling demands of the plaintiffs' bar would hardly be better off—they in turn could face misbranding claims for not obeying federal regulators and would alienate manufacturers whose products were wrongly labeled as harmful. The squeeze will be most painful on smaller retailers, who lack both the resources to second-guess federal scientists and the purchasing volume to offset the risk of antagonizing major manufacturers.

Retailers do have defenses beyond preemption, but preemption is supposed to prevent this evil. "When federal law forbids an action that state law requires, the state law is 'without effect.'" *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486 (2013) (citation omitted). Through FIFRA, Congress meant to prevent "50 different labeling regimes prescribing the color, font size, and wording of warnings." *Bates*, 544 U.S. at 452. It did so through an express preemption provision entitled "Uniformity," which prohibits states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b). But the "[dis]uniformity" that would result from a decision denying FIFRA's preemptive effect is worse than "50 different labeling regimes"; there will be as many different labeling regimes as there are

lawsuits and juries to hear them. State liability ought not attach for *following federal law*.

This case is thus not a first, small step onto a slippery slope; it is a headlong tumble. EPA studied glyphosate for decades and determined that a standard cancer warning on Roundup products would be "false or misleading" misbranding under FIFRA. I-App.-119. That considered judgment is shared by regulators around the world, including those from Australia, Canada, the European Union, Germany, Japan, and New Zealand. Indeed, "[e]very regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does." *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1259 (E.D. Cal. 2020). If *that* is not enough for retailers to rely on, then a federal regulator's word is meaningless, and the ultimate arbiter of product labeling is whichever plaintiffs' lawyer best charms or terrifies the jury in a given case.

Because a decision casting aside EPA's labeling determinations as lacking preemptive effect would nullify FIFRA and menace the hundreds of thousands of retailers operating within the circuit's vast territory, the Retail Litigation Center respectfully requests that the en banc Court affirm the judgment below.

STATEMENT OF THE ISSUE

Whether a state-law claim for lack of a cancer warning on Roundup would impose additional or different labeling requirements than those EPA has imposed on Roundup under FIFRA, when EPA has repeatedly determined that a cancer warning is unnecessary and would in fact render a glyphosate product misbranded.

ARGUMENT

I. FIFRA expressly preempts Carson's failure-to-warn claim.

When amending FIFRA in 1972, Congress created "a comprehensive regulatory statute" governing pesticides. *Bates*, 544 U.S. at 437 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)). Among Congress's goals was to ensure uniformity in pesticide labeling. *See id.* at 452. Congress delegated the task of evaluating product labels—including the adequacy of safety warnings—to EPA. *See* 7 U.S.C. § 136a(c)(1)(C), (F). Nothing in *Bates* casts doubt on this Court's recognition that "FIFRA is sufficiently broad so as to preempt state common law tort claims that question the sufficiency of EPA-approved warning labels." *Lowe's Home Ctrs., Inc. v. Olin Corp.*, 313 F.3d 1307, 1310 (11th Cir. 2002). So long as EPA has actually reviewed the labeling claims in the registration process and rendered a pesticide-specific "determin[ation]" that the label "compl[ies] with the requirements" of FIFRA, then it has imposed labeling "requirements" that preempt different or additional state-law requirements. *See* 7 U.S.C. § 136a(c)(5)(B),

136a(c)(6); *cf. Bates*, 544 U.S. at 440, 450 (EPA had waived review of efficacy claims on labeling, so state-law claims may not have been preempted).

Unlike the efficacy claims in *Bates*, EPA has imposed labeling requirements under FIFRA concerning glyphosate safety. Over decades of scientific study spanning at least six presidential administrations from both major parties, EPA has consistently and repeatedly determined that glyphosate is *not* likely to be carcinogenic to humans. Since 1991, glyphosate has been classified in EPA's lowest risk category as showing "evidence of non-carcinogenicity for humans." I-Supp.App.-165. In 1993, EPA took "regulatory action" after notice-and-comment processes, 7 U.S.C. § 136a-1(b)(5), to determine that "glyphosate . . . will not pose unreasonable risks or adverse effects to humans" and credited "chronic toxicity/carcinogenicity studies . . . finding[] that glyphosate was not carcinogenic," EPA, *R.E.D. Facts, Glyphosate* 2, 6, No. EPA-738-F-93-011 (Sept. 1993), https://archive.epa.gov/pesticides/reregistration/web/pdf/0178fact.pdf; *see also* I-Supp.App.-127. In 1997, the Agency again concluded in a glyphosate-tolerance rulemaking that "[d]ata indicate that glyphosate is a group E carcinogen (evidence of noncarcinogenicity for studies in humans . . .)." 62 Fed. Reg. 17,723, 17,728 (Apr. 11, 1997).

EPA reached similar results in a series of rulemakings spanning from 2002 to 2013, and in additional glyphosate reviews in 2017 and 2020. *See* 67 Fed. Reg. 60,934, 60,935-43 (Sept. 27, 2002) (finding "[n]o evidence of carcinogenicity");

73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008) ("There is [an] extensive database available on glyphosate, which indicate[s] that glyphosate is not mutagenic, not a carcinogen, and not a developmental or reproductive toxicant."); 78 Fed. Reg. 25,396, 25,398 (May 1, 2013); II-Supp.App.-166, 216; III-Supp.App.-384, 390, 394.[6] In this unbroken chain of regulatory actions, EPA has repeatedly "determin[ed]" that Roundup labels "comply with [FIFRA] requirements" and already include whatever "warning or caution statement[s]" are "necessary" to "protect health." 7 U.S.C. § 136a(c)(5)(B), (c)(6); *id.* § 136(q)(1)(G). Indeed, in April 2022, EPA reiterated that "EPA's scientific conclusions regarding glyphosate cancer classification have not changed," and apparently agreed that "standard warning language" stating that glyphosate causes cancer remains "false or misleading and therefore, any glyphosate products bearing the statement would be considered misbranded." II-App.-119.

FIFRA's express preemption clause precludes state-law claims premised on the notion that Roundup should have been labeled in a manner the federal government has deemed "false or misleading." That is because such claims purport to

[6] Although the Ninth Circuit vacated the 2020 Interim Decision for "further analysis and explanation," that vacatur maintained "the status quo" allowing glyphosate products to be sold without a cancer warning. *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 52 (9th Cir. 2022). EPA has since reaffirmed that its "underlying scientific findings regarding glyphosate, including its finding that glyphosate is not likely to be carcinogenic to humans, remain the same." EPA, *Withdrawal of the Glyphosate Interim Registration Review Decision*, No. EPA-HQ-OPP-2009-0361-14447 (Sept. 22, 2022), https://www.epa.gov/pesticides/epa-withdraws-glyphosate-interim-decision.

impose a labeling requirement for Roundup "in addition to or different from" those required by EPA pursuant to FIFRA. 7 U.S.C. § 136v(b); *Bates*, 544 U.S. at 443. Holding otherwise would destroy the interstate uniformity for pesticide labeling contemplated by FIFRA by creating contradictory demands from competing sovereigns within the same state.

Under Carson's theory of express preemption, a state-law failure-to-warn claim is "equivalent to, and fully consistent with, FIFRA's misbranding provisions," *Bates*, 544 U.S. at 447, so long as the claim "parallels" FIFRA's misbranding prohibition at a high level of generality, *see* Carson En Banc Br. (Dkt. 124) at 31–33; *see also Carson v. Monsanto Co.*, 51 F.4th 1358, 1363 (11th Cir. 2022) (comparing the text of 7 U.S.C. § 136(q)(1)(G) with Georgia's failure-to-warn elements), *reh'g en banc granted, opinion vacated*, No. 21-10994, 2022 WL 17813843 (11th Cir. Dec. 19, 2022). That interpretation is inconsistent with *Bates* and would render Section 136v(b) practically meaningless. Preemption turns on whether state law requires *specific* warnings that EPA, in administering FIFRA's misbranding provision with respect to a particular pesticide, does not. *See Bates*, 544 U.S. at 453. The essential issue is thus not whether state and federal law have *generally* similar labeling standards but whether the labeling requirements that a state applies to a particular pesticide (like "DANGER") are different from what EPA determines is required under FIFRA for that pesticide (like "CAUTION"). *Id.* at 452. State labeling

requirements do not "parallel" federal requirements simply because they bear resemblance in the abstract. Instead, they are preempted unless they are "genuinely equivalent" *in practice* to EPA's labeling requirements. *Id.* at 454. Because the common-law duty to warn will always roughly approximate FIFRA's misbranding prohibition, Carson's (and the panel's) reasoning would lead to nominally "parallel" requirements that, as a practical matter, impose common-law warning requirements that are dramatically different from those required by federal agencies—destroying the uniformity in labeling that Congress sought to accomplish.

Nothing in Section 136a(f)(2) alters this analysis. Carson relies heavily on that "Miscellaneous" provision of FIFRA to avoid the force of *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), which interpreted a materially identical preemption provision in the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act. *See* Carson En Banc Br. at 5, 43–46. *Riegel* held that FDA's premarket approval of a medical device "imposes 'requirements' under the MDA" that preempt additional or different state requirements. 552 U.S. at 323. That holding confirms that in this analogous context it is EPA's pesticide-specific determinations that "give content to" federal requirements. *Bates*, 544 U.S. at 453.

Resisting that conclusion, Carson insists that Section 136a(f)(2) is FIFRA's statutory distinction that makes the difference. *See* Carson En Banc Br. at 46–48; *see also Carson*, 51 F.4th at 1362, 1364. Not so. Pesticide registration may not be

"a defense for the commission of any offense under [FIFRA]," 7 U.S.C. § 136a(f)(2), but that has "no bearing on" preemption because a "claim grounded in state common law is not an offense under FIFRA." *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 n.4 (5th Cir. 1994).[7] Monsanto has not been charged with an "offense" under FIFRA at all. *See, e.g.*, 7 U.S.C. § 136*l* (describing penalties "for each offense"); *id.* § 136i-1 (describing "first" and "subsequent offenses"). Moreover, Carson's claims arise not "under FIFRA," but under Georgia tort law. And Monsanto does not rely on the mere fact of "registration . . . as a defense," but rather EPA's repeated and consistent determinations made through the registration process that FIFRA does not require glyphosate product labels to contain a cancer warning. *See supra* pp. 7–8.

Asking whether such agency determinations possess the "force of law" is misguided in the context of express preemption. That is because FIFRA's misbranding and express preemption provisions themselves carry the force of law. Just as *Riegel* held under the MDA statutory scheme, EPA determinations—made through the registration process established by FIFRA—define the scope of preemption and the application of misbranding standards to particular pesticides. This Court has applied

[7] Carson says that *Bates* abrogated the Fifth Circuit's interpretation of Section 136a(f)(2). *See* Carson En Banc Br. at 45–46. But *Bates* did not interpret that "Miscellaneous" provision at all. That is unsurprising since Section 136a(f)(2) has nothing to do with preemption.

the same principle in other statutory contexts with nearly identical express preemption provisions. *See Kuenzig v. Hormel Foods Corp.*, 505 F. App'x 937, 939 (11th Cir. 2013) (applying the express preemption provisions of the Poultry Products Inspection Act and Federal Meat Inspection Act). In *Kuenzig*, this Court found that food producers' "labels complied with federal nutrition labeling regulations and passed the FSIS preapproval process," so the labels could not be "false or misleading" and plaintiffs' deceptive advertising claims were "preempted by federal law." *Id.* In other words, the Food Safety and Inspection Service's determination of labeling requirements applicable to the specific food products at issue had preemptive force, and this Court did not need to inquire further whether FSIS's preapproval determination had sufficiently formal characteristics to carry the "force of law." *See infra* pp. 20–21.

Carson's attempt to borrow the "force of law" inquiry from implied preemption caselaw is thus inapposite. *See* Carson En Banc Br. at 35–36 (citing implied preemption cases *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019), and *Wyeth v. Levine*, 555 U.S. 555, 586 (2009) (Thomas, J., concurring in the judgment)); *see also Hardeman v. Monsanto Co.*, 997 F.3d 941, 957 (9th Cir. 2021) (citing *Albrecht* and *Wyeth* to support its conclusion that EPA determinations lack the "force of law"). But even if this Court were inclined to undertake that inquiry, EPA's repeated and consistent labeling determinations for Roundup—often made through

notice-and-comment rulemaking—carry the force of law. *See supra* pp. 7–8. After all, manufacturers, retailers, and applicators may face civil and criminal consequences for failing to follow the requirements imposed by EPA's labeling determinations. *See, e.g.*, 7 U.S.C. §§ 136k, 136*l*. As EPA has long said, "the label is the law." EPA, *Label Review Manual* 1–2 (Dec. 2016), https://www.epa.gov/sites/default/files/2021-02/documents/full-lrm_2-22-21.pdf.

II. Denying FIFRA its preemptive effect would have serious consequences for retailers who rely on uniform labeling laws.

Retailers depend on the uniformity of labeling laws when stocking their shelves with the products that Congress has determined must undergo federal agency scrutiny. The Supreme Court has recognized that eliminating such uniformity would "create significant inefficiencies for manufacturers." *See Bates*, 544 U.S. at 452. These "inefficiencies"—to put it mildly—are all the worse for retailers.[8]

[8] Generally, courts rightly recognize that retailers have no common-law duty to police the labeling on their shelves. *See, e.g.*, *Williams v. Pac. Cycle, Inc.*, No. 1:13-CV-875-ODE, 2015 WL 11215854, at *7–8 (N.D. Ga. Oct. 19, 2015) ("A product seller may rely on the manufacturer to have properly created the product," and does not have "a duty to warn" when a product's "warning labels" are "in compliance with [federal agency] regulations."), *aff'd*, 661 F. App'x 716 (11th Cir. 2016). Retailers may have additional defenses in failure-to-warn cases as well. *See, e.g.*, *Love v. Weecoo (TM)*, 774 F. App'x 519, 521 (11th Cir. 2019) (Georgia law requires retailers to have "actual or constructive knowledge" of the danger to the consumer); *Hanna v. Walmart Inc.*, No. 5:20-cv-01075-MCS-SHK, 2020 WL 7345680, at *6 (C.D. Cal. Nov. 4, 2020) (granting motion to dismiss when retailer "did not personally participate in or exercise unbridled control over the labeling and advertising of Roundup"). But, as the churn of cases against retailers underscores, the plaintiffs' bar is constantly pushing for an expansion of such liability—not always without

Unlike a manufacturer, which is intimately familiar with its own flagship products, a retailer generally does not manufacture or develop the labels for the products it sells and does not shepherd products through the exhaustive regulatory processes necessary to get them to market.[9] Moreover, retailers sell orders of magnitude more products of any type and types of any products than any one manufacturer typically makes. A wide variety of such products is subject to federal regulatory oversight. *See supra* p. 3 & nn. 2–5. Products potentially subject to FIFRA include household cleaning products like disinfecting sprays and bathroom cleaning sprays;[10] outdoor gear that purports to repel mosquitoes, ticks, and other pests; activewear and athletic socks marketed with antimicrobial claims; and products like squirrel-deterrent birdseed (as it mitigates a pest). Retailers cannot hope to double-check and second-guess EPA's labeling determinations on this broad range of products. And placing conflicting shelf warnings next to products—as some plaintiffs claim retailers are required to do, in an end-run around FIFRA's labeling uniformity

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success—and many retailers facing potentially bankrupting liability will settle even meritless claims to ensure they can stay in business.

[9] Even so-called "private label" products that are sold under the retailer's "house brand" are usually outsourced to individual manufacturers who bear the responsibility under contract to ensure that the products developed for the retailer will meet all legal and regulatory standards.

[10] *See* EPA, *Determining If a Cleaning Product Is a Pesticide Under FIFRA* (updated Aug. 18, 2022), https://www.epa.gov/pesticide-registration/determining-if-cleaning-product-pesticide-under-fifra.

requirement—would confuse consumers and place store staff in the impossible position of answering customer questions about why the warnings are contradictory.

Nevertheless, retailers get sued for following federal requirements—bearing the high cost of litigation and discovery even in cases that ought to be barred by preemption. Numerous plaintiffs have sued retailers ranging from the corner hardware store to The Home Depot, charging them with failure to provide supplementary shelf warnings for Roundup *despite* (and indeed in contravention of) EPA's approval of Roundup's labeling.[11] Some of these cases have been dismissed, some have settled, and others remain pending. Some have been removed to federal courts within

[11] *See, e.g.*, *Weeks v. Home Depot U.S.A., Inc.*, No. 19-cv-06780 (C.D. Cal. filed Aug. 5, 2019); *Williams v. Lowe's Home Ctrs., LLC*, No. 20-cv-01356 (C.D. Cal. filed July 6, 2020); *Hanna v. Walmart Inc.*, No. 20-cv-01075 (C.D. Cal. filed May 22, 2020); *Taylor v. Costco Wholesale Corp.*, No. 20-cv-00655 (E.D. Cal. filed Mar. 27, 2020); *Biddle v. Lowe's Home Ctrs. LLC*, No. 50-2019-CC-011405 (Fla. 15th Cir. filed Aug. 27, 2019); *Boyette v. Lowe's Home Ctrs., LLC*, No. 19-cv-04119 (W.D. Ark. filed Sept. 13, 2019); *Membrano v. Ace Hardware of Kendall, Inc.*, No. 2021-003575-CA-01 (Fla. 11th Cir. filed Feb. 12, 2021); *Jewell v. Walmart, Inc.*, No. 19-cv-4088 (W.D. Ark. filed Aug. 12, 2019); *Pilliod v. Monsanto Co.*, No. RG17862702 (Cal. Super. Ct. filed June 2, 2017); *Lamerson v. Walmart Stores Inc.*, No. 50-2019-CC-009139 (Fla. 15th Cir. filed July 15, 2019); *Shelly v. Target Corp.*, No. 50-2019-CC-010718 (Fla. 15th Cir. filed Aug. 14, 2019); *Morley v. Ace Hardware Corp.*, No. CONO-19-010648 (Fla. 17th Cir. filed Sept. 6, 2019); *Fagundes v. The Home Depot*, No. CACE-20-005126 (Fla. 17th Cir. filed Mar. 21, 2020); *Behar v. Monsanto Co.*, No. 2020-008726-CA-01 (Fla. 11th Cir. filed Apr. 20, 2020); *Salas v. Monsanto Co.*, No. 2021-00615-CA-01 (Fla. 11th Cir. filed Jan. 11, 2021); *Gregorio v. Home Depot U.S.A., Inc.*, No. CACE-21-002428 (Fla. 17th Cir. filed Feb. 4, 2021); *Wyzik v. Monsanto Co.*, No. CACE-21-002871 (Fla. 17th Cir. filed Feb. 10, 2021); *Ferraro v. Monsanto Co.*, No. 2020-L-002845 (Ill. Cir. filed Mar. 9, 2020); *Mesecher v. Lowes Cos.*, No. 17-cv-00299 (E.D. Wash. filed Aug. 25, 2017).

this Circuit. The common theme of these cases is the claim that retailers ought to have figured out for themselves that, contrary to the determinations made by EPA and countless other regulators, Roundup posed a cancer risk for which a warning was required. As this Court has long recognized,

> [a]ny claims that point-of-sale signs, consumer notices, or other information materials failed adequately to warn the plaintiff *necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging*. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends.

Lowe's, 313 F.3d at 1312 (emphasis in original) (quoting *Papas II*, 985 F.2d at 519). A retrenchment by this Court would undermine the sufficiency of EPA-approved labeling—at least where EPA has made a product-specific statutory determination of compliance with FIFRA—and would return retailers to an uncertain world in which plaintiffs will demand such warnings.

Failing to give effect to FIFRA's express preemption clause would also shift product safety assessments from neutral federal scientists to plaintiffs' lawyers and paid courtroom experts. And even if retailers could keep abreast of the borderline science reflected in any one plaintiff's labeling demands, capitulation would not solve the problem created by incomplete and uncertain preemption. As one federal court determined, based on the studies relied on by EPA, placing a cancer warning on glyphosate products would be "at a minimum misleading." *Wheat Growers*, 468

F. Supp. 3d at 1261. In other words, the very warning that retailers might put alongside a product to satisfy one group of plaintiffs could furnish the next group of plaintiffs with a basis for their own suit, or provoke manufacturers to bring trade libel claims.

Indeed, the federal government itself might bring an action, given that a product can be deemed "misbranded" if warnings placed at a product's point-of-sale (which warnings could also be considered "labeling" under FIFRA) "negate or detract from labeling statements required under [FIFRA]." *See* 40 C.F.R. § 156.10. EPA has pursued retailers for contravening FIFRA labeling, even when the retailers did not manufacture the non-compliant product. EPA enforcement actions have included Stop Sale Use or Removal Orders,[12] advisory letters,[13] and civil penalty proceedings.[14] Because EPA considers "each occasion" a product is sold to be a

[12] *See, e.g.*, EPA, *EPA Issues Order to eBay to Stop Selling 170 Unregistered, Misbranded Pesticides* (June 17, 2021), 2021 WL 2474197; EPA, *Stop Sale, Use, or Removal Orders Issued to Amazon.com Services LLC* (June 10, 2020), https://www.epa.gov/enforcement/stop-sale-use-or-removal-orders-issued-amazoncom-services-llc.

[13] *See, e.g.*, EPA, *U.S. EPA Calls on Bay Area-Based Tech Giants to Address Fraudulent COVID-19 Disinfectants* (Apr. 23, 2020), https://www.epa.gov/news-releases/us-epa-calls-bay-area-based-tech-giants-address-fraudulent-covid-19-disinfectants (EPA issued advisory letters to platforms being used by third parties to sell "illegal disinfectant products").

[14] *See, e.g.*, *In re Target Corp. Minneapolis, Minn.*, No. FIFRA-05-2007-0040, 2007 WL 9798059 (EPA Sept. 20, 2007) (civil penalty proceeding resulting in consent decree with retailer for distributing unregistered pesticides); EPA, *Hy-Vee Inc. to Pay Penalty for Violating EPA Pesticide Order* (Feb. 28, 2023),

separate violation of FIFRA, the potential monetary penalties for retailers can be significant.[15] Retailers can even face criminal penalties for certain violations of FIFRA, leading to even higher penalties.[16]

Even aside from this legal exposure, retailers would face serious practical impediments to carrying out point-of-sale warnings that override a product's EPA-mandated packaging: manufacturers would be extremely reluctant to permit the retailers to stock the product at all. A manufacturer complying with EPA-mandated labeling, and litigating against plaintiffs challenging that labeling as misleading, would not consent to a retailer putting up a point-of-sale warning indicating that the packaging is false.

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https://www.epa.gov/newsreleases/hy-vee-inc-pay-penalty-violating-epa-pesticide-order (EPA enforcement against grocery chain for sale of unregistered disinfectant).

[15] *See In re Amazon Servs. LLC, Seattle, Wash.*, No. FIFRA-10-2018-0202, 2018 WL 9960477 (EPA Feb. 14, 2018) (consent decree resulting in $1.216 million penalty in which EPA interpreted "each occasion" that the retailer "distributed, held for distribution, held for shipment, or shipped" a pesticide a separate violation of FIFRA).

[16] *See* 7 U.S.C. § 136*l*(b)(1)(B) (knowing violations of FIFRA subject to $25,000 fine and 1 year imprisonment); DOJ, *Wal-Mart Pleads Guilty to Federal Environmental Crimes, Admits Civil Violations and Will Pay more than $81 Million* (May 28, 2013), https://www.justice.gov/opa/pr/wal-mart-pleads-guilty-federal-environmental-crimes-admits-civil-violations-and-will-pay-more (retailer pleaded guilty to FIFRA violations resulting in an $11 million criminal fine, a $3 million payment to fund pesticide inspections and education, and $7.628 million in civil fines).

None of this helps consumers. Requiring manufacturers and retailers to imagine and warn of every possible risk, no matter how speculative, conjectural, or tentative—"with massive liability looming for failure" to recite them all—"would impose a difficult and costly burden . . . , while simultaneously overwarning users" and diluting the force of any specific warning given. *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 994 (2019). "[O]verwarning can deter potentially beneficial uses of the [product] by making it seem riskier than warranted and can dilute the effectiveness of valid warnings." *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 392 (7th Cir. 2010). At a minimum, consumers would likely be confused if retailers are forced to present conflicting information for products sold in the store, and store clerks could not possibly be trained to explain the bases of the carcinogenicity dispute between neutral government scientists and plaintiffs' lawyers.

The challenges and confusion for consumers and retailers alike will multiply given a lack of nationwide labeling uniformity—in some states, EPA's approved labeling will be left intact; in others, point-of-sale warnings might merely raise questions about the accuracy of EPA's assessment; and in yet others, point-of-sale warnings might flatly contradict EPA's assessment. In sum, the uncertainty arising from disuniform labeling requirements will put retailers in an untenable position as to products governed by FIFRA when there is a dispute between the federal scientists and the plaintiffs' bar as to what warnings the product should have.

What is more, FIFRA is only one of many federal laws that prescribe labeling for products that retailers sell. A wide range of statutes—including those regulating medical devices, meat, and motor-vehicle equipment—all mirror FIFRA's preemption language. *See*, *e.g.*, 21 U.S.C. § 467e (Poultry and Poultry Products Inspection Act) ("Marking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia . . . ."); 21 U.S.C. § 678 (Federal Meat Inspection Act) ("Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia."); 49 U.S.C. § 30103(b) (National Traffic and Motor Vehicle Safety Act) (States may prescribe "a standard applicable to the same aspect of performance of . . . motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.").

Carson rebuffs the comparison to these similarly worded preemption provisions by observing that, for example, the Federal Meat Inspection Act is subject to "extensive regulations" that have preemptive effect, while EPA has promulgated "relatively few" regulations under FIFRA. Carson En Banc Br. at 52. This misses the point. The Food Safety and Inspection Service's regulations do not *themselves* assign nutritional or other labeling language to any particular food product; FSIS makes that product-specific labeling determination in the preapproval process. *See*,

e.g., 9 C.F.R. §§ 412.1(a), 381.132(a), 317.4(a), 607(d). And this Court has found FSIS's determinations to preempt different or additional state-law labeling requirements. *See Kuenzig*, 505 F. App'x at 938–39; *accord Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1023 (10th Cir.) (citing *Kuenzig*) ("The FSIS has already approved defendants' labels, concluding that they are not deceptive or misleading under the FMIA," thus FSIS's approval "plainly preempts plaintiffs' labeling claims."), *cert. denied*, 143 S. Ct. 118 (2022). In the same way, EPA's regulations do not assign toxicity or warning levels to specific pesticides; rather, EPA makes those determinations through the statutorily required pre-sale registration process. *See supra* pp. 7–8. In both cases, the agency action with preemptive effect is the application of the regulation to a particular product and the resulting labeling requirements, not promulgation of the regulation in the abstract.

Because numerous federal statutes use express preemption language that is nearly identical to FIFRA's, and because many federal agencies use similar processes to impose statutory requirements and determine the scope of preemption, the fallout from a decision denying preemptive effect here could be devastating. Even if retailers could figure out for themselves how to label all pesticides, that would not be enough. Undermining FIFRA's express preemption language will undoubtedly expose retailers to extortionate litigation claiming that products ranging from meat

to motorcycle helmets that are labeled in accordance with federal law are misbranded as well.

None of this benefits anyone other than lawyers, and it harms manufacturers, retailers, and consumers alike. Some products really do pose serious threats, as federal regulators carefully determine. But when retailers are forced to put signage next to every product warning that there is a "scientific dispute" about its "potential carcinogenicity,"[17] no one will take any of those warnings seriously. As Aesop teaches, even the cry of "wolf" will stop raising an alarm among shepherds if it is made too often; that lesson is true for any form of "overwarning." *See DeVries*, 139 S. Ct. at 994; *Mason*, 596 F.3d at 392. Further, the monetary cost of such worse-than-useless defensive warnings will, at least in part, be passed on to consumers—as will the cost of litigating the adequacy of whatever federally-approved labeling the plaintiffs' bar trains its sights on next.

Preemption is not the only fix for this problem, but it is a good one and it is what Congress settled upon. Manufacturers, retailers, and customers within the Eleventh Circuit deserve better than the Plaintiff's flawed approach.

CONCLUSION

The en banc Court should affirm the judgment of the district court.

[17] *See, e.g.*, Second Am. Compl., *Weeks*, No. 19-cv-06780 (C.D. Cal. Oct. 2, 2020), ECF No. 67; *Hanna*, 2020 WL 7345680, at *1 (similar).

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Fed. R. App. P. 29(a)(5) and 32(a)(7). The brief is 5,390 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on March 15, 2023.

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