No. 21-241

IN THE
Supreme Court of the United States

MONSANTO COMPANY,

Petitioner,

v.

EDWIN HARDEMAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

REGULATORY CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

PLEADINGS

INTERESTS OF AMICUS CURIAE[1]

The Retail Litigation Center, Inc. ("RLC") represents national and regional retailers across the full spectrum of retail verticals. Its members employ millions of people throughout the United States, serve a customer base of tens of millions more, and account for tens of billions of dollars in annual sales.

The RLC's members sell a vast array of products regulated by the federal government, from pesticides and pool products to pet foods and prescription drugs. Whether retailers large and small can rely upon the federal government's labeling determinations, or whether they must instead second-guess those determinations based on the risk of state-law claims insisting on contradictory labeling, is an issue of significant importance to the RLC and its members.

[1] All parties received timely notice of amicus curiae's intent to file this brief pursuant to Rule 37.2(a), and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than the amicus curiae or its members, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As a consequence of the Ninth Circuit's decision in this case, the question of how to label a product governed by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) has been taken from federal regulators and their staff of scientists, as provided by statute, and handed to a lay jury informed by a plaintiff's expert employing a methodology that was dubious at best. As ably set forth in Monsanto's petition and other *amici*'s briefs, that result is wrong as a matter of preemption law, wrong as a matter of how to apply Federal Rule of Evidence 702 and the *Daubert* standard, and certain to inflict serious harm to manufacturers and their customers alike. As California's own Supreme Court has recognized, "both common sense and experience suggest that if every report of a possible risk, no matter how speculative, conjectural, or tentative, imposed an affirmative duty to give some warning, a manufacturer would be required to inundate [people] indiscriminately with notice of any and every hint of danger, thereby inevitably diluting the force of any specific warning given." *Finn* v. *G.D. Searle & Co.*, 35 Cal. 3d 691, 701 (1984). "[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).

Harm from the Ninth Circuit's decision will also fall on 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 governing not only the language on the product labeling itself but any ancillary statements provided in proximity to the products. In this regard, 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 Business Journal (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—which are now commonplace—is that if a manufacturer's federally-approved label lacks a warning that a plaintiff's expert deems appropriate, the retailer is liable for not having placed some kind of signage next to the product to supersede the package's labeling.

The Ninth Circuit's decision ratchets up the pressure on retailers, particularly smaller retailers with limited resources. In order to avoid liability under state-law claims, retailers are forced to second-guess decisions made by federal agencies about how manufacturers should label their products. Retailers who trust the EPA and other federal agencies face lawsuits from plaintiffs who insist that their paid experts' views should supersede those of neutral government scientists. But even retailers who acquiesce to the plaintiffs' bar's labeling demands 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* v. *Dow Agrosciences LLC*, 544 U.S. 431, 452 (2005). It did so with an express preemption provision entitled "Uniformity." See 7 U.S.C. § 136v(b). But the "[dis]uniformity" that will follow from the Ninth Circuit's decision is worse than "50 different labeling regimes"; there will be as many different labeling regimes as there are lawsuits and juries to hear them. Moreover, as happened here, state liability may be imposed for *following federal law*.

This case is thus not a first, small step onto a slippery slope; it is a headlong tumble. The EPA studied glyphosate for decades and determined that a cancer warning on Roundup products would be "false and misleading" misbranding under FIFRA. Pet. App. 195a-197a. That considered judgment is shared by regulators around the world. 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 (ED Cal. 2020). If *that* is not enough for retailers to rely

upon, then a federal regulator's word is meaningless, and the ultimate arbiter of product labeling is whichever expert witness best charms or terrifies the jury in a given case. And, given the Ninth Circuit's approach to *Daubert* and Rule 702, there is no gatekeeping as to such experts.

Given the serious impact the Ninth Circuit's decision will have on the hundreds of thousands of retailers operating within the circuit's vast territory, the Retail Litigation Center respectfully requests that the Court grant Monsanto's petition.

ARGUMENT

I. CERTIORARI IS WARRANTED ON BOTH ISSUES PRESENTED IN THE PETITION

A. Preemption

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 the EPA. See 7 U.S.C. §§ 136a(c)(1)(C), (F).

Throughout decades of scientific study, the EPA has consistently determined that there "are no risks to human health from the current registered uses of glyphosate." EPA, Glyphosate Interim Registration Review Decision Case No. 0178, at 10 (Jan. 2020),

https://tinyurl.com/5b7c8awa; see also EPA, R.E.D. Facts, Glyphosate 2 (EPA-738-F-93-011, 1993), https://archive.epa.gov/pesticides/reregistration/web/pdf/0178fact.pdf; EPA Office of Pesticide Programs, Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential 139 (Dec. 12, 2017), http://tinyurl.com/eparevdglyphosate. In August 2019, the EPA explained that, given this science, putting a cancer warning on Roundup would "constitute a *false and misleading* statement. As such, pesticide products bearing the … warning statement" would be "misbranded pursuant to section 2(q)(1)(A) of FIFRA." See Pet. App. 195a-197a (emphasis added).

As explained in Monsanto's petition and other *amici*'s briefs, preemption should preclude state-law claims premised on the notion that Roundup should have been labeled in a manner the federal government deemed "false and misleading." Whether this question is analyzed as one of express or implied preemption, the result is the same. Plaintiff's failure-to-warn claims are *expressly* preempted because those claims purport to impose a labelling requirement for Roundup "in addition to or different from" those required by the EPA pursuant to FIFRA. 7 U.S.C. § 136v(b); *Bates*, 544 U.S. at 443. The claims are *impliedly* preempted because compliance with both federal and state law is impossible. See *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668 (2019). The EPA's actions, taken pursuant to its "congressionally delegated authority" to review and approve labelling for Roundup, provide "clear evidence" that the EPA would not permit a change in Roundup's label. *Id.* at 1678-1679.

By holding otherwise, the Ninth Circuit has departed from controlling precedent, not only eliminating the interstate uniformity contemplated by FIFRA but creating contradictory demands by competing sovereigns within the same state. As the petition explains, this Court's review is warranted to address this issue of great importance.

B. Expert Testimony

The application of *Daubert* in this case transformed the district court from a gatekeeper imposing scientific rigor to an usher waving in a "borderline" medical opinion that was *explicitly* "art" rather than "science." Pet. App. 83a-84a (district court); see also Pet. App 23a (panel's approval of district court). That approach is antithetical to the role courts must play in this sort of case and the requirements of Rule 702.

Rule 702 imposes a "special obligation" on a trial judge to ensure that expert testimony is "not only relevant, but reliable," and that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147, 152 (1999). In cases like this one, it is "particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong." *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 148-149 (1997) (Breyer, J., concurring). That is so because "modern life, including good health as well as economic

well-being, depends upon the use of artificial or manufactured substances." *Ibid.*

As the district court lamented below, the Ninth Circuit's approach to expert testimony is an outlier, Pet. App. 9a, 84a, one in which a district court *must* permit a "borderline" opinion that the district court recognized would be excluded "[u]nder a strict interpretation of *Daubert*," Pet. App. 83a. Review is warranted on this issue, too.

II. THE NINTH CIRCUIT'S RULING CARRIES DIRE CONSEQUENCES FOR RETAILERS WHO RELY ON UNIFORM LABELING LAWS

The Ninth Circuit's errors on these issues warrant the Court's review not only for the reasons stated by Monsanto and other *amici* but also because of the impact on retailers.

Retailers depend on the uniformity of labeling laws when stocking their shelves with the products that Congress has determined must undergo federal agency scrutiny. This Court 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.[2]

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[2] Generally, courts rightly recognize that retailers have no common law duty to police the labeling on their shelves. See, *e.g.*, *Emery* v. *Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 960, 964, 966 (2002) (retailers have no "duty to investigate the truth of statements made by others" or to play the "onerous role of the global policeman"). Retailers may have additional defenses in

Unlike a manufacturer, who is intimately familiar with its own flagship products, a retailer (a) generally does not manufacture the products or develop the labels for the products it sells and (b) sells orders of magnitude more types of products than any one manufacturer typically makes. A wide variety of such products is subject to federal regulatory oversight. Per the EPA, FIFRA alone covers everything from UV devices[3] to pool disinfectants,[4] and from flea prevention kits[5] to children's toys.[6] Other types of products potentially subject to

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failure-to-warn cases as well. See, *e.g.*, *Hanna* v. *Walmart Inc.*, 2020 WL 7345680, at *6 (CD Cal. Nov. 4, 2020) (granting motion to dismiss a California Unfair Competition Law claim 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 success—and many retailers facing potentially bankrupting liability will settle even meritless claims to ensure they can stay in business.

[3] EPA, EPA Regulations About UV Lights that Claim to Kill or Be Effective Against Viruses and Bacteria (305F20004, 2020), https://www.epa.gov/sites/default/files/2020-10/documents/uvlight-complianceadvisory.pdf.

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

[5] *In re No More Fleas Please, Inc.*, 2010 WL 2150369 (EPA May 4, 2010).

[6] 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/586a95ebf41f9478852564 7d006cfd6b.html.

FIFRA include: household cleaning products like disinfecting sprays and bathroom cleaning sprays;[7] outdoor gear that purports to repel mosquitoes, ticks, and other pests; activewear and athletic socks marketed with antimicrobial claims; and products like squirrel-deterrent bird seed (as it mitigates a pest). Retailers cannot hope to double-check and second-guess the EPA's labeling determinations on this broad range of products. And placing conflicting shelf warnings next to products 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 guidance—bearing the high cost of litigation and discovery even in cases that ought to be barred by preemption. Even before the Ninth Circuit's decision, retailers faced numerous suits charging them with failure to provide supplementary shelf warnings for Roundup *despite* (and indeed in contravention of) the EPA's approval of Roundup's labeling. See, *e.g.*, *Weeks* v. *Home Depot U.S.A., Inc.*, No. 19-cv-06780 (CD Cal.) (action filed 8/5/2019); *Williams* v. *Lowes Home Ctrs., LLC*, No. 20-cv-01356 (CD Cal.) (action filed 7/6/2020); *Hanna* v. *Walmart Inc.*, No. 20-cv-01075 (CD Cal.) (action filed 5/22/2020); *Taylor* v. *Costco Wholesale Corp.*, No. 20-cv-00655 (ED Cal.) (action filed 3/27/2020); *Biddle* v. *Lowe's Home Ctrs. LLC*, No. 50-2019-CC-011405 (Fla. 15th Cir.) (action filed 8/27/2019); *Boyette* v. *Lowe's Home*

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[7] See EPA, Determining If a Cleaning Product Is a Pesticide Under FIFRA, https://www.epa.gov/pesticide-registration/determining-if-cleaning-product-pesticide-under-fifra.

Ctrs., LLC, No. 19-cv-04119 (WD Ark.) (action filed 9/13/2019); *Membrano* v. *Ace Hardware of Kendall, Inc.*, No. 2021-003575-CA-01 (Fla. 11th Cir.) (action filed 2/12/2021); *Jewell* v. *WalMart, Inc.*, No. 19-cv-4088 (WD Ark.) (action filed 8/12/2019); *Pilliod* v. *Monsanto Co.*, No. RG17862702 (Cal. Super.) (action filed June 2, 2017); *Lamerson* v. *Walmart Stores Inc.*, No. 50-2019-CC-009139 (Fla. 15th Cir.) (action filed 7/15/2019); *Shelly* v. *Target Corp.*, No. 50-2019-CC-010718 (Fla. 15th Cir.) (action filed 8/14/2019); *Morley* v. *Ace Hardware Corp.*, No. CONO-19-010648 (Fla. 17th Cir.) (action filed 9/6/2019); *Fagundes* v. *Home Depot*, No. CACE-20-005126 (Fla. 17th Cir.) (action filed 3/21/2020); *Behar* v. *Monsanto Co.*, No. 2020-008726-CA-01 (Fla. 11th Cir.) (action filed 4/20/2020); *Salas* v. *Monsanto Co.*, No. 2021-00615-CA-01 (Fla. 11th Cir.) (action filed 1/11/2021); *Gregorio* v. *Home Depot U.S.A., Inc.*, No. CACE-21-002428 (Fla. 17th Cir.) (action filed 2/4/2021); *Wyzik* v. *Monsanto Co.*, No. CACE-21-002871 (Fla. 17th Cir.) (action filed 2/10/2021); *Ferraro* v. *Monsanto Co.*, No. 2020-L-002845 (Ill. Cir.) (action filed 3/9/2020); *Mesecher* v. *Lowes Cos.*, No. 17-cv-00299 (ED Wa.) (action filed 8/25/2017). Some of these cases have been dismissed, sometimes pursuant to settlement, while others remain pending. The common theme of these cases is the claim that retailers ought to have figured out for themselves that, contrary to the science set forth by the EPA and countless other regulators, Roundup posed a cancer risk for which a warning was required.

By not applying preemption, the Ninth Circuit shifted product safety assessments from neutral federal

scientists to paid courtroom experts, and by not rigorously applying *Daubert* and Rule 702, the Ninth Circuit permitted opinions that are not meaningfully grounded in science at all. The district court below recognized that, under the Ninth Circuit's approach, an expert's "art" can make up for a lack of "science" supporting his or her approach: "Recognizing that '[m]edicine partakes of art as well as science,' the Ninth Circuit's recent decisions reflect a view that district courts should typically admit specific causation opinions that lean strongly toward the 'art' side of the spectrum." Pet. App. 83a-84a. The Circuit agreed that this was a fair description of its artfulness-over-science approach to expert testimony: "the district court followed this court's precedent and thus cannot be faulted for following binding case law." Pet. App. 23a. "[T]his circuit affords experts 'wide latitude in how they practice their art when offering causation opinions.'" Pet. App. 9a. When even courts are euphemistically admitting that they are precedent-bound to "be more tolerant of *borderline* expert opinions than in other circuits," Pet. App. 84a (emphasis added), a prudent defendant will recognize that, with preemption gone, the only thing standing between junk science and liability is the gut feeling of a lay jury. Betting on the luck of the draw is no way to run a retail business, let alone a regulatory regime.

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 has found, based on the studies relied upon by the 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 its labeling is "false or misleading in any particular." See 40 C.F.R. § 156.10. The 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,[8] advisory letters,[9] and civil penalty proceedings.[10] Because the EPA considers "each occasion" a product is sold to be a separate violation of FIFRA, the potential monetary penalties for

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[8] 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.

[9] 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/newsreleases/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").

[10] See, *e.g.*, *In re Target Corporation Minneapolis, Minnesota, Respondent*, 2007 WL 9798059 (EPA Sept. 20, 2007) (civil penalty proceeding resulting in consent decree with retailer for distributing unregistered pesticides).

retailers can be significant.[11] Retailers can even face criminal penalties for certain violations of FIFRA, resulting in even higher penalties.[12]

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.

Moreover, 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' experts. The challenges and confusion for

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[11] See *In re Amazon Servs. LLC, Seattle, Wash., Respondent*, 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).

[12] 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).

consumers and retailers alike will multiply given a lack of nationwide uniformity—in some states, the EPA's approved labeling will be left intact; in others, point-of-sale warnings might merely raise questions about the accuracy of the EPA's assessment; and in yet others, point-of-sale warnings might flatly contradict the EPA's assessment. In sum, the uncertainty the Ninth Circuit's decision creates 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. Some of those statutes have preemption language directly mirroring the preemption language in FIFRA. 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 …."); see 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."). Thus, 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 labeled in accordance with other federal statutes are misbranded as well.

None of this benefits anyone other than lawyers, and it harms 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",[13] no one will take any of those warnings seriously. As Aesop teaches, even the cry of "wolf" can cease to raise an alarm among shepherds if it is made too often; that lesson is true for any form of "overwarning." See *Finn*, 35 Cal. 3d at 701; *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. By weakening both preemption and the scientific rigor required of experts, the decision below has replaced reasoned, science-based decision-making with courtroom "art." Manufacturers, retailers, and customers within the vast Ninth Circuit deserve better.

CONCLUSION

The Court should grant the petition for writ of certiorari to correct the ruling of the Ninth Circuit on these issues of great importance.

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

Respectfully submitted,

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