PUBLIC JUSTICE
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February 20, 2025

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Lee Zeldin, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: Petition Seeking Rulemaking to Modify Labeling Requirements for Pesticides and Devices, Docket ID No. EPA-HQ-OPP-2024-0562

Mr. Zeldin:

Public Justice submits this comment urging the Environmental Protection Agency (EPA) to deny the petition for rulemaking in the above-captioned matter. The EPA should do so because the requested rule conflicts with the text of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), is contrary to Congress's intent for state tort law to work alongside federal regulation to make pesticides safer, and ignores the difference between assessing pesticide ingredients and the product as a whole.

The petition requests a rulemaking that would amend the FIFRA misbranding regulations to provide that pesticide labels containing statements about the product's health impacts that are different from the conclusions found by the EPA in its human health risk assessment of the product's principal active ingredients are misbranded. Pet. 2. The effect of the regulation would be to preempt state-law challenges to pesticide labels based on claims that the labels fail to sufficiently warn of health risks, even if state law imposes the same misbranding standard as FIFRA.

A. Public Justice's Interest and Expertise

Public Justice is a national legal advocacy organization that specializes in impact litigation. As part of its Access to Justice Project, Public Justice has long worked to ensure that federal law does not unduly preempt state law. Alongside federal regulation, state law, including state tort law, plays a vital role in ensuring dangerous products are appropriately restricted and accurately labeled—keeping all of us safer.

In the context of FIFRA specifically, Public Justice represented the plaintiffs in *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2834 (2022). There, we successfully argued that the text of FIFRA prohibits preemption of misbranding challenges to pesticide labels registered with the EPA. Public Justice has also appeared as amicus curiae on similar issues in cases around the country. *See Schaffner v. Monsanto Co.*, No. 22-3075 (3d Cir.); *Carson v. Monsanto Co.*, No. 21-10994 (11th Cir.); *Johnson v. Monsanto Co.*, Nos. A155940, A156706 (Cal. Ct. App.).

B. The Requested Rule Conflicts with the Text of FIFRA.

First, the petition should be denied because the requested rule is contrary to the text of FIFRA. FIFRA envisions that pesticides duly registered with EPA—that is, pesticides, along with their labels, that have been submitted and approved by EPA—may still be misbranded under the statute. The proposed rule would instead make the fact of registration the beginning and end of whether a pesticide is misbranded under FIFRA.

FIFRA requires pesticide manufacturers to register their products with EPA. 7 U.S.C. § 136a(a). But FIFRA also provides that registration of a product with the EPA is not a defense to a misbranding claim. *Id.* § 136a(f)(2). And registration is only "prima facie evidence that the pesticide, its labeling and packaging comply" with FIFRA's requirements, including its misbranding requirements. *Id.*

Indeed, in interpreting the statute, the Supreme Court has explained that EPA can bring various enforcement actions against the manufacturer *of a registered pesticide* if it determines that the product is "misbranded," including seeking civil and criminal penalties—making clear that registration does not mean a product is not misbranded. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 439 & n.11 (2005). A duly-registered pesticide is misbranded if the label "does not contain adequate instructions for use, or if its label omits necessary warnings or cautionary statements." *Id.* at 438 (citing 7 U.S.C. §§ 136(q)(1)(F), (G)).

The Supreme Court had examined the text of the statute in the context of state-law claims that the pesticide label—which had been approved by EPA—should have included additional warnings. The manufacturer had argued the plaintiffs' label-based claims were expressly preempted by § 136v(b) of FIFRA, which "prohibits only state-law labeling and packaging requirements that are 'in addition to or different from' the labeling and packaging requirements under FIFRA," *id.* at 447 (quoting 7 U.S.C. § 136v(b)).

The Supreme Court held that FIFRA does not preempt state-law requirements that parallel FIFRA labeling requirements, even where—as in *Bates*—the state law would require something different from what was included on the EPA-approved label. *Id.* at 452-53. In doing so, the Court hewed closely to FIFRA's text, interpreting its preemption provision to mean what it says: "A State may regulate the sale or use of any federally registered pesticide," 7 U.S.C. § 136v(a), but "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter," *id.* § 136v(b). That is, so long as the state requirements match the federal requirements, state laws regarding pesticide labeling are not preempted.

Bates explained that it was possible for a pesticide's label to have been approved by EPA yet still be misbranded as a matter of *federal* law. *See id.* at 438. That is because, as provided by the text of the statute, EPA registration of a pesticide is only "prima facie evidence that the pesticide, its labeling and packaging comply with [FIFRA's] registration provisions," including the registration provisions' prohibition on misbranding. 7 U.S.C. § 136a(f)(2); *Bates*, 544 U.S. at 438. In other words, the text of FIFRA itself contemplates that label approval does not mean the product is not misbranded. Further, the statute and

its regulations impose on manufacturers "a continuing obligation to adhere to FIFRA's labeling requirements" and require manufacturers "to report incidents involving a pesticide's toxic effects that may not be adequately reflected in its label's warnings." *Id.* at 438-39. Thus, even if a product is not misbranded at the time the label is approved, it may become misbranded if a manufacturer fails to update the label.

Unsurprisingly, nearly every court to examine whether FIFRA preempts state-law claims has interpreted FIFRA in the same way as the Supreme Court: that, under the text of the statute, the approval of a label by the EPA cannot be equated with the label not being misbranded under federal law. *See Carson v. Monsanto Co.*, 92 F.4th 980 (11th Cir. 2024); *Hardeman*, 997 F.3d 941, *Durnell v. Monsanto Co.*, __ S.W.3d __, 2025 WL 451540 (Mo. Ct. App. Feb. 11, 2025); *Johnson v. Monsanto Co.*, 554 P.3d 290 (Ore. Ct. App. 2024); *Pilliod v. Monsanto Co.*, 282 Cal. Rptr. 3d 679 (Cal. Ct. App. 2021), *review denied* (Nov. 17, 2021), *cert. denied*, 142 S. Ct. 2870 (2022). *But see Schaffner v. Monsanto Co.*, 113 F.4th 364 (3d Cir. 2024).

Given the text of the statute, the Supreme Court's decision in *Bates*, and the weight of authority, it is clear that the rule requested by the petition is in conflict with the text of the statute. And even if the statute were ambiguous, in the context of a challenge to the rule, a court need not defer to the interpretation of the agency—and is unlikely to do so given the existing precedent. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392, 403 (2024) (stressing that "courts decide legal questions by applying their own judgment" and overturning deference to agencies in interpreting statutory language).

C. Congress Intended State Tort Law to Complement Federal Regulation Under FIFRA.

In addition to being contrary to the text of the statute, the requested rule would mean that state failure-to-warn challenges to EPA-approved labels would be preempted, a result that is contrary to the intent of Congress to have state tort law operate alongside federal regulation to ensure the continuing safety of pesticides. If, as the petition would have it, a label is misbranded if it includes statements about health effects that are different from EPA's assessment of the pesticide's "principal active ingredients," state claims that a pesticide label fails to include required health warnings would be categorically preempted.

Such preemption would be problematic as a normative matter because it would permit pesticide manufacturers to evade liability for failing to update their labels in light of the latest information about the dangers of their pesticides.

But also, as the Supreme Court explained in *Bates*, Congress intended state law to complement federal regulation. To start, FIFRA "leaves ample room for States and localities to supplement federal efforts"—federal regulation is not exclusive in this space. *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991). Indeed, *Bates* expressly rejected the conclusion that preemption of state-law labeling claims is necessary in the interest of uniformity. *See Bates*, 544 U.S. at 451-52 ("We have been pointed to no evidence that such tort suits led to a 'crazy-quilt' of FIFRA standards or otherwise created any real hardship for manufacturers or for EPA."). *Bates* described the manufacturer's

uniformity arguments as "unpersuasive" and found that it "greatly overstate[d] the degree of uniformity and centralization that characterizes FIFRA." 544 U.S. at 450. FIFRA, the Court pointed out, "authorizes a relatively decentralized scheme that preserves a broad role for state regulation," allowing states to ban or restrict EPA-approved pesticides and register pesticides for purposes beyond those authorized by EPA. *Id.* And, at a minimum, "[m]ost states conduct a review of the pesticide label to ensure that it complies with federal labeling requirements." *Id.* at 442 n.14 (quoting EPA website).

With regard to state tort law in particular, *Bates* made clear that Congress intended state tort suits to continue after the passage of FIFRA. At the time FIFRA was originally enacted in 1947 and at the time it was substantially amended in 1972, state-law tort suits against pesticide manufacturers were common. *Id.* at 440-41. Contemporaneous secondary sources recognized that manufacturers of products regulated by FIFRA had a duty of care that included "a duty to warn of product-connected dangers." *Id.* at 441 n.13 (quoting R.D. Hursh, Annotation, *Liability of Manufacturer or Seller for Injury Caused by Animal Feed or Medicines, Crop Sprays, Fertilizers, Insecticides, Rodenticides, and Similar Products*, 81 A.L.R.2d 138, 144 (1962)). Given this "long history of tort litigation against manufacturers of poisonous substances[,] . . . [i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Id.* at 449. In short, Congress knew that state-law tort claims challenging labels were common and declined to expressly displace them.

That's because the substantial history of these types of state tort suits "emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items." *Id.* at 450. Indeed, one of the purposes of the 1972 amendments to FIFRA was to "ensure that these [labeling] requirements were followed in practice"—not to reduce the enforcement mechanisms available. *Mortier*, 501 U.S. at 613. Given those goals, *Bates* explained, "it seems unlikely that Congress considered a relatively obscure provision like § 136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort liability," particularly given that "under-enforcement [of FIFRA's misbranding prohibition] creates not only financial risks for consumers, but risks that affect their safety and the environment as well." 544 U.S. at 450.

Indeed, "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA." *Id.* at 451. "FIFRA contemplates that pesticide labels will evolve over time, as manufacturers gain more information about their products' performance" and "tort suits can serve as a catalyst in this process." *Id.* Because state tort law "encourage[es] plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides," such suits "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)). In turn, state tort actions could lead manufacturers to petition EPA to change their labels or EPA itself may take notice that a change is required. *Id.* "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.*

(internal quotation marks omitted). Because state tort suits work to further the purpose of FIFRA, not hinder it, "EPA appears to have welcomed these tort suits." *Id.* at 452.

In short, state tort suits—which have long been brought against pesticide manufacturers based on improper labeling—further the objectives of FIFRA to keep pesticide labels accurate, up to date, and sufficiently protective of health. Congress was well aware of the prevalence of state tort suits in this area, and embraced rather than displaced them.

D. The Requested Rule Ignores Dangers Posed by Formulations.

Finally, the petition should also be denied because its rule ignores that the formulation of a pesticide may pose dangers that the active ingredients, standing alone, do not. The requested rule would make a label misbranded if it contains statements about the product's health effects that "are different from EPA's findings and conclusions stated in its human health risk assessment . . . of the product's *principal active ingredients*." Pet. 2 (emphasis added). In other words, even if EPA only made assessments of certain pesticide ingredients standing alone, those assessments would preclude additional warnings about the product as whole, even if the EPA never assessed the health effects of the product as formulated. That discrepancy puts users at risk.

That the individual components of a pesticide may have different health effects than a product's full formulation is not hypothetical. Take Roundup. While EPA's assessment of the health effects of glyphosate, Roundup's principal active ingredient, has been plagued with uncertainty, inaccuracies, and contradictions over the decades, what is clear is that Roundup as a product is more dangerous than glyphosate alone. In particular, glyphosate in combination with surfactants in Roundup increases health risks. *See, e.g.*, *Hardeman*, 997 F.3d at 971 (quoting a Monsanto toxicologist's assessment that "[g]lysophate is OK but the formulated product (and thus the surfactant) does the damage"). Under the requested rule, even though EPA has never assessed the health and safety of *Roundup*, any warning different from its assessment of *glyphosate* would render the product misbranded.

Such a result imperils pesticide safety and is contrary to the objectives of FIFRA to keep pesticide labels accurate, up to date, and sufficiently protective of health.

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For these reasons, Public Justice urges EPA to deny the petition.

Respectfully submitted,

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Public Justice