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Honorable Senator John Boozman
555 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Boozman,

I am writing this letter to strongly urge you to vote “NO” to H.R. 4288, the proposed federal “Agricultural Labeling Uniformity Act” introduced by Rep. Dusty Johnson (R-SD) on June 22, 2023.

Although this Bill is being promoted as protection for America’s farmers and ranchers, it will do exactly the opposite. The result of H.R. 4288 will be immunity for pesticide manufacturers at the expense of American agriculture. This ill-conceived Bill will saddle U.S. farmers and ranchers with devastating uninsured crop losses and property damage from pesticides.

I grew up on an Oklahoma farm and have practiced law in the agricultural sector for over 25 years. I’ve been on both sides of pesticide litigation, and I am intimately familiar with the impact of federal pesticide laws on agricultural producers. I’ve also witnessed first-hand the damage wrought on farms from ineffective pesticides and product labels.

What does the Ag Pesticide Labeling Act do?

The Bill proposes to amend Section 24(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), a key provision that addresses pesticide labeling and packaging. Specifically, the Bill seeks to prohibit any State, *or any court*, from enforcing FIFRA’s labeling requirements, or even reviewing any part of a pesticide label. In short, this Bill will make a pesticide manufacturer’s product label infallible regardless of whether it is true, accurate, or supported by any data. This stands in stark contrast to virtually all other products sold or distributed in the United States for which manufacturers are legally accountable for claims made on product labeling and packaging. This Bill also ignores reality and critical facts regarding the EPA’s registration process for pesticides, especially agricultural pesticides.

The Facts about FIFRA and EPA's pesticide approval process

The basic structure of registering, selling, and using pesticides in the United States has remained largely unchanged for over 50 years. Manufacturers submit a proposed product label and certain self-generated data to EPA to review. The EPA is **required** to register the pesticide unless its review indicates the pesticide will cause unreasonable adverse effects on humans or the environment. More importantly, EPA's review is limited and depends entirely on the integrity of pesticide manufacturers and what they are willing to disclose to EPA.¹

- **EPA does not conduct scientific testing or generate scientific data on pesticides.** “The EPA is a passive agency” which relies entirely on information and data voluntarily provided by pesticide manufacturers.² It goes without saying that manufacturers will always promote beneficial data and downplay undesirable results.
- **EPA does not independently verify the information and data provided by pesticide manufacturers.** Rather, the Agency simply attempts to “determine if the testing methodology reportedly used is ‘acceptable’ in light of generally accepted scientific standards.”³
 - This is important because the EPA depends entirely on the credibility and integrity of pesticide manufacturers to relay “truthful and accurate information” about the pesticides the manufacturer hopes to sell.⁴
- **EPA does not draft pesticide labels.** The task of preparing and drafting labels is left to pesticide manufacturers which submit their drafts to EPA for review. While EPA may require certain label statements or clarifying language, the responsibility for drafting the label always falls on the manufacturer.
 - According to EPA, “the label is the law.”⁵ Thus, pesticide manufacturers literally write the laws that farmers and ranchers are required to understand and follow.
- **EPA does not evaluate product performance or efficacy data for agricultural pesticides.** The EPA stopped reviewing product performance data for agricultural pesticides over 40 years ago.⁶ Thus, in the Agency's own words: “EPA's approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious or will not damage crops or cause other property damage.”⁷

¹ See 44 Fed. Reg. 27932, 27938-27939 (1979).

² *Hughes v. S. States Co-op, Inc.*, 180 F. Supp. 2d 1295, 1300 (M.D. Ala. 2001).

³ *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1135 (E.D.N.Y. 1992).

⁴ *Hughes*, 180 F. Supp. 2d 1295, 1300.

⁵ EPA, Introduction to Pesticide Labels, < [⁶ See 44 Fed. Reg. 27932, 27938-27939 \(1979\).](https://www.epa.gov/pesticide-labels/introduction-pesticide-labels#:~:text=Unlike%20most%20other%20types%20of,the%20label%20is%20the%20law.> .</p></div><div data-bbox=)

⁷ Pesticide Registration Notice 96-4 (June 3, 1996), available at < [> .](https://www.epa.gov/pesticide-registration/prn-96-4-label-statements-involving-product-efficacy-and-potential-harm)

- This means that EPA does not verify a whole host of claims on agricultural pesticide labels, including, among other things, (i) the product's performance on labeled Use Sites, (ii) whether a product is safe for the application equipment mentioned in the label, (iii) whether rotational crop restrictions in a label are adequate to protect rotated crops, and (iv) whether the directions and warnings are adequate to prevent crop and property damage.⁸ These are just a small handful of the sorts of labeling claims that EPA does not review or verify.
- Even the EPA expects agricultural pesticides to be “regulated by the marketplace,” and that pesticide manufacturers should be “subject to damage suits by the user community if their products prove ineffective in actual use.”⁹
- **EPA's registration of a pesticide does not mean that the product's label is accurate, truthful, and non-misleading.** EPA's registration of a pesticide has never been a conclusive determination that the product label is wholly accurate and without flaw. Instead, registration is simply a rebuttable presumption that the product can be used safely and without unreasonable adverse effect on health and the environment.¹⁰
 - One need look no further than the dicamba herbicide debacle for proof that EPA's registration of a pesticide does not result in an accurate product label. In 2016 EPA initially approved and registered proposed dicamba herbicide labeling for over-the-top application to dicamba-tolerant crops. Yet, those dicamba labels have been significantly changed every year since 2016 in an effort to combat widespread damage from use of the herbicide. Notable label modifications include changing the classification from general use to Restricted Use, mandating dicamba-specific extra training for applicators, and requiring the use of “volatility reduction agents” in the tank mix. Obviously, the dicamba labels were flawed from the beginning and remained flawed through several rounds of amendments, despite the EPA's approval.

How does this Bill harm farmers and ranchers?

This Bill will enshrine pesticide labels with unassailable federal protection under FIFRA, thereby completely destroying any means for a farmer or rancher to obtain a remedy for damages caused by pesticides.

⁸ Pesticide Registration Notice 96-4 (June 3, 1996), available at < <https://www.epa.gov/pesticide-registration/prn-96-4-label-statements-involving-product-efficacy-and-potential-harm> >; see also *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 440 (2005).

⁹ See 47 Fed. Reg. 40659, 40661 (Sept. 15, 1982).

¹⁰ 7 U.S.C. § 136a(f) (“In no event shall registration of a [pesticide] be construed as a defense for the commission of any offense . . .”).

- There is no federal remedy for pesticides that cause harm or damage.¹¹ Since FIFRA was overhauled in 1972, the only recourse for harms caused by pesticides has been under State law. This is because federal law fails to provide a remedy to farmers and ranchers that are damaged by pesticides. Thus, the only avenue for a farmer or rancher that is injured by a pesticide lies with States' ability to provide relief.

The Supreme Court's 2015 seminal decision in *Bates v. Dow Agrosciences LLC*¹² provides an excellent example of how pesticide manufacturers will use H.R. 4288 against farmers and ranchers:

In *Bates*, a group of Texas peanut growers sued Dow after their peanut crops were severely damaged by Dow's "Strongarm" herbicide. Although Strongarm's label stated, "Use of Strongarm is recommended in all areas where peanuts are grown," the herbicide stunted peanut plants grown in soils with pH levels over 7.2. After the damage to the Texas peanut crops, Dow obtained EPA's approval for a supplemental label with a new warning solely for New Mexico, Oklahoma, and Texas: "Do not apply Strongarm to soils with a pH of 7.2 or greater." Despite this label change, Dow sought dismissal of the Texas farmers' claims, arguing that FIFRA preempted all of the farmers' claims. In other words, Dow argued that because EPA approved the label, it is beyond fault and cannot be questioned. This argument was successful in the district court and the court of appeals. Fortunately for the farmers, the Supreme Court reversed these lower decisions, holding that FIFRA did not preempt their state law labeling claims, particularly those claims that sought to enforce FIFRA's labeling requirements.

Under Rep. Johnson's Bill, the Texas peanut growers would be kicked out of court and left with devastating uninsured crop losses. In other words, H.R. 4288 provides pesticide manufacturers with complete immunity, even when the manufacturer has failed to comply with the EPA's requirements under FIFRA.

Falsehoods and Scare Tactics Used by Pesticide Manufacturers & Proponents of the Bill

Falsehood – EPA's labeling decision means a label is in compliance "with all applicable laws."

- The EPA has never confirmed that a label is fully compliant with all applicable laws. Congress made this clear over 50 years ago when it passed the modern version of FIFRA.¹³ Not only does EPA's review not cover all applicable laws, for decades the EPA has not even applied mandatory laws in its review. A notable example is EPA's duty to review pesticide registrations for compliance with the Endangered Species Act. In 2022, the Agency admitted that "[f]or most of EPA's history, the Agency has met these duties for

¹¹ *Bates*, 544 U.S. at 448 ("FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements.")

¹² *Id.* at 431.

¹³ 7 U.S.C. § 136a(f).

less than five percent of its FIFRA decisions.”¹⁴ In short, the industry’s claims of full legal compliance is grossly false and misleading.

Scare Tactic – Without H.R. 4288 the United States’ food security will suffer, and more Americans will go hungry.

- The United States annually produces far more food that it can ever consume domestically, and for decades it has consistently been the world’s largest food exporter.¹⁵ The U.S. has such an excess of agricultural output that it must export food to sustain prices and revenues to farmers.¹⁶ Less than half of the two of the largest crops produced in the U.S., yellow dent corn and soybeans, are used for food. The majority of those crops are used for industrial oils, fuels, and animal feed. The ability of the United States to produce ample food for itself and other countries will not suffer in the absence of immunity for pesticide manufacturers.

Scare Tactic – Farmers will lose pesticide tools unless pesticide labels are protected by federal law.

- Agricultural pesticides are rarely, if ever, canceled or taken off the market. And they certainly aren’t removed from the agricultural toolbox due to inaccurate labeling. FIFRA already provides protection to ensure that pesticide labels are uniformly structured to protect human health and the environment.
- The reality is that consolidation in the pesticide industry has allowed manufacturers to become complacent and stop developing newer, safer, more effective pesticide tools. Instead of spending money on research and development, manufacturers are simply selling the same products which are becoming worn out. Indeed, no new modes of action for herbicides have been released in over 30 years.¹⁷

Falsehood – EPA’s labeling decisions are based on the “best available science.”¹⁸

¹⁴ EPA Announces Plan to Protect Endangered Species and Support Sustainable Agriculture, < <https://www.epa.gov/newsreleases/epa-announces-plan-protect-endangered-species-and-support-sustainable-agriculture> >.

¹⁵ World Bank, Food Products Exports by country in US\$ Thousand 2018 < https://wits.worldbank.org/CountryProfile/en/Country/WLD/Year/2018/TradeFlow/Export/Partner/by-country/Product/16-24_FoodProd >.

¹⁶ USDA Economic Research Service, U.S. Agricultural Trade at a Glance, < <https://www.ers.usda.gov/topics/international-markets-u-s-trade/u-s-agricultural-trade/u-s-agricultural-trade-at-a-glance/> >.

¹⁷ Chemical & Engineering News, < <https://cen.acs.org/environment/pesticides/crop-protection-herbicide-mode-action-glyphosate/100/i22> >.

¹⁸ CropLife America, < <https://thehill.com/opinion/technology/4167917-dont-let-california-override-the-epa-and-hijack-national-farm-policy/> >.

- EPA does not conduct scientific testing, but instead, reviews the “science” used by manufacturers. The Agency does not know whether the “science” that is submitted by manufacturers is the “best available,” or is merely “generally acceptable.”¹⁹

Scare Tactic – Politics will trump science in determining which pesticides could be used.

- Actually, it is the pesticide manufacturers that will gain even greater political influence over the EPA through Rep. Johnson’s Bill. By making EPA’s pesticide label approvals conclusive and eliminating farmers’ and ranchers’ ability to question the adequacy of a label, pesticide approvals will become acutely vulnerable to politics. Again, EPA’s handling of dicamba demonstrates the enormous political influence that manufacturers already wield over the pesticide approval process. The Office of Inspector General of the EPA found extensive political meddling and inappropriate actions by senior Agency officials in the 2018 dicamba registrations.²⁰ If H.R. 4288 is passed, pesticide manufacturers will only need to exert their considerable political influence on a mere handful of EPA officials to obtain the approvals they want.

Scare Tactic – An unworkable patchwork of regulatory requirements will emerge without H.R. 4288.

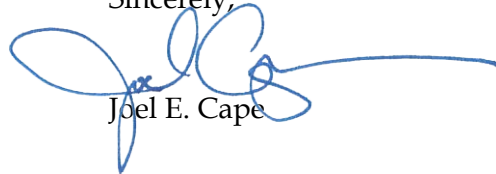
- The reality is that manufacturers themselves regularly create numerous versions of product labels containing different directions, instructions, and warnings for the exact same pesticide. Some of these labels are very specific to certain States, or even counties within a State. One example is sulfosulfuron, a herbicide that was approved with three different labels for three different uses, all containing different directions, instructions, and warnings. Likewise, manufacturers often issue additional “Use Recommendations” under Section 2(ee) of FIFRA which are specialized directions for particular geographies or uses. These so-called “Use Recommendations” are not found in the product label and are never reviewed or approved by the EPA. In short, the need for increased uniformity in pesticide labels is undermined by the manufacturers actual practices and is greatly overblown.
- Agriculture is, by its very nature, local and must adjust to the growing conditions, soils, and climate of the area. There is no one-size-fits-all tool that will meet the requirements of farmers and ranchers in different regions of the country. Thus, a pesticide that works well for one region may be ill-suited for another. This is why Congress saw fit to require a continuing duty for manufacturers to report adverse effects of their product after they were approved for release in the marketplace. However, H.R. 4288 will undermine Congress’ original intent to allow users to inform the marketplace and the EPA of the impact of pesticides in their unique geographies and production environments.

¹⁹ See 40 C.F.R. § 158.70(a); *Burke*, 797 F. Supp. 1128, 1135.

²⁰ EPA Office of Inspector General, EPA Deviated from Typical Procedures in Its 2018 Dicamba Pesticide Registration Decision < <https://www.epaoig.gov/reports/audit/epa-deviated-typical-procedures-its-2018-dicamba-pesticide-registration-decision> >; see also Progressive Farmer, Fed Watchdog Slams EPA on Dicamba, < <https://www.dtnpf.com/agriculture/web/ag/crops/article/2021/05/24/senior-epa-officials-deliberately> >.

The bottom line is that H.R. 4288 is not about protecting the tools of farmers and ranchers - it is solely about giving federal immunity to the pesticide industry. Passage of this Bill will take away a very helpful tool that America's farmers and ranchers currently have in their toolbox - the ability to ensure that agricultural pesticides will actually work on their land. I urge you not to be misled by the industry's misleading scare tactics and political double-talk. Protect American agriculture by voting "**NO**" on H.R. 4288.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joel E. Cape", with a long horizontal flourish extending to the right.

Joel E. Cape