

Justices' Monsanto Decision May Fix A Preemption Mistake

By **Lawrence Ebner** (February 11, 2026)

On Jan. 16, the U.S. Supreme Court granted certiorari in *Monsanto Co. v. Durnell* to address the following question: "Whether the Federal Insecticide, Fungicide, and Rodenticide Act preempts a label-based failure-to-warn claim where EPA has not required the warning."^[1]

The answer to this question could result in dismissal of tens of thousands of pending state law personal injury claims alleging that Monsanto, now Bayer AG, failed to include a cancer warning on the U.S. Environmental Protection Agency-regulated labels for its Roundup herbicide products.



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This wave of Roundup failure-to-warn litigation has burdened the civil justice system for years. It not only clashes with FIFRA's express preemption provision,^[2] but also with the EPA's carefully considered, expert determination that a cancer warning for glyphosate — the active ingredient in Roundup — is scientifically unwarranted and would be false and misleading.

I have been a steadfast FIFRA preemption advocate since the 1980s. For the past 20 years I have been urging, and waiting for, the Supreme Court to revisit and clarify its only other FIFRA tort preemption decision, *Bates v. Dow AgroSciences LLC*, handed down in 2005.^[3] The *Durnell* case provides the court with this important and long-overdue opportunity.

From a product liability viewpoint, *Durnell* presents the question of exactly how Congress should word a statute if it wants to completely preempt state law — including state tort law — on a particular subject.

From an even broader civil justice perspective, the Roundup litigation is a cautionary tale: It illustrates how the plaintiffs bar has been able to target a company — and a highly beneficial, widely used product that a federal regulatory agency repeatedly has determined does not cause cancer in humans — by consistently misinterpreting a prior Supreme Court decision in a way that essentially negates a federal statute's express preemption provision.

FIFRA Preemption Background

FIFRA Section 24(b) is a seemingly airtight express preemption provision. Under the heading "Uniformity," Section 24(b) declares that a "State shall not impose ... any requirements for labeling ... in addition to or different from those imposed under [FIFRA]."

Legislative history confirms that Congress intended Section 24(b) "to completely preempt State authority in regard to labeling."^[4]

In *Bates*, the Supreme Court held that Section 24(b) expressly preempts pesticide-related failure-to-warn claims. The court noted that such claims "are premised on common-law rules that qualify as 'requirements for labeling' ... they set a standard for a product's labeling that the ... label is alleged to have violated by containing ... inadequate warnings."^[5]

This should have been the end of the story. However, the Bates opinion, authored by former Justice John Paul Stevens, did not stop there.

According to the opinion, the statutory phrase "in addition to or different from," which appears in identical or similar form in a number of federal regulatory statutes, is not as all-encompassing as one might think.

Instead, the Bates opinion indicates that, as used in FIFRA Section 24(b), "in addition to or different from" includes an implicit exception for state labeling requirements that are "parallel," "genuinely equivalent" to or "fully consistent with" FIFRA's labeling requirements — specifically, FIFRA's general prohibition against distribution of pesticide products that are "misbranded" due to inadequate label warnings.[6]

The court, except perhaps for former Justice Stephen Breyer in his concurring opinion,[7] failed to recognize that FIFRA's misbranding prohibition, and even the EPA's labeling regulations,[8] are merely a regulatory baseline. In reality, the EPA imposes pesticide labeling requirements, including labeling requirements for specific human health and safety warnings, on a product-by-product basis.

The plaintiffs bar, supported by antipesticide groups, immediately seized upon the fuzzy "parallel requirements" part of the Bates opinion. For two decades, they have argued, with considerable success in the lower courts, that FIFRA preemption does not apply to failure-to-warn claims if a state's tort law, like FIFRA's misbranding provision, imposes upon product manufacturers a general duty to warn.

Every state, of course, imposes such a duty. In effect, the plaintiffs bar's simplistic interpretation of the Bates parallel requirements exception negates the Supreme Court's holding that FIFRA expressly preempts state law failure-to-warn claims.

To the contrary, the implied parallel-requirements exception does not allow a state, through tort law or otherwise, to impose its own warning requirements if they diverge in any way from the EPA's warning requirements. It is a narrow exception that should not be interpreted to swallow the express preemption rule from which it is derived.

For example, if the EPA determines that a product label should warn about "X" and the manufacturer fails to include a warning about "X," then under the parallel-requirements exception, a state law damages suit based on the label's failure to warn about "X" would not be preempted.

What state tort law cannot do, however, is impose a requirement for a label warning about "Y" if the EPA does not require a warning about "Y."

As Justice Clarence Thomas explained in his separate opinion in Bates, "[w]hile States are free to impose liability predicated on a violation of the federal standards set forth in FIFRA and in any accompanying regulations promulgated by the Environmental Protection Agency, they may not impose liability for labeling requirements predicated on distinct state standards of care." [9]

The FIFRA Preemption Saga

I was introduced to FIFRA in 1974 as a young associate at a small Washington, D.C., law firm. Throughout the 1970s and 1980s, it was widely assumed — even by the pesticide industry — that the FIFRA Section 24(b) preemption provision applied only to state statutes

and state agency regulations that imposed additional or different requirements for pesticide product labeling.

But beginning in the early 1990s, a few of us began to argue that Section 24(b) also preempts labeling requirements imposed through the state tort duties that underlie failure-to-warn claims.

Our preemption argument was fueled by a 1992 Supreme Court cigarette label warning decision, *Cipollone v. Liggett Group Inc.*[10] The court held in *Cipollone* that a statutory provision that preempts state law requirements includes requirements imposed through state tort law.

From the early 1990s until 2005, we were quite successful establishing that FIFRA preempts failure-to-warn claims against pesticide manufacturers. During this period I orally argued or briefed FIFRA preemption in many federal courts of appeals and district courts, and in some state appellate courts, including the California Supreme Court. Most of these cases were personal injury suits.

Then came *Bates*, which was an agricultural crop damage case. From my point of view, *Bates* was a win. It affirmed, as so many lower courts had held, that FIFRA Section 24(b) expressly preempts label-based failure-to-warn claims.

But the plaintiffs bar responded to *Bates* by focusing on the opinion's discussion of parallel state requirements. They argued that a product manufacturer's general state tort duty to provide adequate warnings is parallel or equivalent to FIFRA's general prohibition against distributing misbranded pesticide products.

This argument, which turned the judicial tide on FIFRA tort preemption, is oblivious to the way that the EPA actually regulates pesticides on a science-based, product-specific basis.

In the case of Roundup, for example, the EPA, based on careful review of numerous scientific studies, repeatedly has determined that glyphosate is not a human carcinogen. The EPA even took the extraordinary step of sending a "Dear Registrant" letter to glyphosate producers in 2019, advising them that it would be false and misleading, and a violation of FIFRA's misbranding prohibition, to distribute their products with labels that contain a cancer warning.

It was particularly frustrating that unlike Monsanto and a few other companies, most pesticide producers and their trade associations quickly gave up on the FIFRA preemption defense in the wake of *Bates* — a decision that, in my opinion, was a victory for the pesticide industry.

I also have been fascinated by the succession of federal government positions on FIFRA tort preemption since the 1980s. By my count, it has shifted at least four times, based primarily on which party controls the executive branch. In *Durnell*, the U.S. solicitor general submitted an amicus brief urging review and supporting preemption.

During the two decades since *Bates*, I have emphasized in amicus briefs and articles that only EPA has the authority to regulate the content of pesticide labels, e.g., to determine what specific warnings should and should not appear on a particular pesticide product's label.

As Justice Thomas indicated in his separate opinion, the parallel-requirements exception

merely provides a state law remedy where a manufacturer fails to comply with a product-specific warning requirement imposed by the EPA.[11]

With the certiorari grant in *Monsanto Co. v. Durnell*, FIFRA preemption has returned to the Supreme Court. I hope that it finally will end there with an unambiguous opinion reaffirming that FIFRA expressly preempts any form of state law that deviates from the EPA's label warning determinations, and that clarifies the narrow scope of the Bates parallel-requirements exception.

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[1] No. 24-1068.

[2] FIFRA § 24(b), 7 U.S.C. § 136v(b).

[3] 544 U.S. 431 (2005).

[4] H.R. Rep. No. 92-511, at 16 (1971).

[5] 544 U.S. at 446.

[6] See *id.* at 447-48, 453-54.

[7] See *id.* at 454 (Breyer, J., concurring)

[8] See 40 C.F.R. Part 156.

[9] See *Bates*, 544 U.S. at 455 (Thomas, J., concurring in the judgment in part and dissenting in part).

[10] 505 U.S. 504 (1992).

[11] *Id.* at 455.