False or Misleading? Preemption, FIFRA, and California’s Common Law “Duty to Warn” in Hardeman v. Monsanto Co., 997 F.3d 941 (9th Cir. 2021)

Nathan Wise
University of Wyoming College of Law
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Abstract

Agricultural producers across the United States rely on products containing glyphosate, such as Roundup, to ensure steady and reliable crop yields each season. In order for glyphosate products to maintain their current affordability and availability, consistent messaging regarding product safety must be a priority. The United States Environmental Protection Agency (EPA) oversees the safety labeling of products containing glyphosate to ensure the public is informed of any associated risks. After an international report found possible carcinogenic effects associated with glyphosate, thousands of individuals brought suits under state law against companies that produce glyphosate products. Litigants demanded that glyphosate manufacturers include carcinogenicity warnings on labels of their products. The United States Court of Appeals for the Ninth Circuit addressed whether federal law preempted these state law claims in Hardeman v. Monsanto Co., concluding that state law claims that directly conflict with the EPA’s labeling scheme are not necessarily preempted. This Case Note challenges the court’s holding with respect to its legal analysis on preemption, and it explores how the decision might negatively impact agricultural producers in the United States. Further, it advocates for the United States Supreme Court to seize the next available opportunity to correct Hardeman’s error, and in doing so, reverse a decision that places an unfair burden on agricultural producers.

I. Introduction

Under the Federal Fungicide, Insecticide, and Rodenticide Act (FIFRA), a “State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this [statute].”¹ This statement prohibits states from imposing their own labeling and packaging requirements on pesticides, either through “positive law” (statutes, executive orders, actions by administrative agencies, etc.) or “common law” (law derived from judicial precedent).² This seemingly simple statement has been the subject of extensive litigation over the years.³

Hardeman is the latest chapter in FIFRA’s litigious history.⁴ In 2016, Edwin Hardeman joined the thousands of individuals suing glyphosate manufacturers—particularly Monsanto, maker of the popular product, Roundup—for failure to provide carcinogenicity warnings on their products, use of which allegedly caused the litigants to contract cancer.⁵ Hardeman brought his claims under California state law.⁶ After Hardeman won a substantial verdict at trial, the United States

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¹ 7 U.S.C. § 136w(b).
² See id.
⁴ 997 F.3d 941.
⁵ Id. at 952.
⁶ Id. at 950
Court of Appeals for the Ninth Circuit became the latest court to address whether FIFRA preempts state law claims. The court concluded that FIFRA did not preempt Hardeman’s claims, expressly or impliedly.

This Case Note will discuss the issues with the Ninth Circuit’s decision in Hardeman. First and foremost, the Ninth Circuit applied preemption incorrectly on the issue of whether California’s common law “duty to warn” was preempted by FIFRA and the EPA’s regulatory scheme pursuant thereto. Second, the United States Supreme Court exacerbated the problem when it declined to review the case and allowed a decision made on erroneous legal grounds to remain in place. As a result, many negative policy implications now loom, particularly for agricultural producers.

Part II of this Case Note overviews the provisions of FIFRA essential to the Hardeman case, as well as the EPA’s historical study and regulation of glyphosate. Part III summarizes the relevant portion of the Hardeman opinion. Part IV critiques the Hardeman opinion and the United States Supreme Court’s decision to deny certiorari. Part V considers the policy implications of this decision and what it could mean for agricultural producers. Part VI concludes by calling for the United States Supreme Court to seize the next available opportunity to correct the errors made by the Hardeman court and clarify the scope of preemption under FIFRA.

II. Background

Glyphosate has been regulated under FIFRA since 1974. However, the extent to which FIFRA preempts state regulation of glyphosate and other pesticides remains in dispute to this day. This Part first gives a general overview of the law of preemption. Second, it outlines the relevant provisions of FIFRA. It then

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7 Id.
8 Id. at 954–60.
9 See infra Parts IV.A–IV.B.
10 See infra Part IV.C.
11 See infra Part V.
12 See infra Part II.
13 See infra Part III. Preemption was not the only issue presented to the court in this case. See Hardeman v. Monsanto Co., 997 F.3d 941, 950 (9th Cir. 2021) (listing the issues on appeal), cert. denied, 142 S. Ct. 2834 (2022). The other issues related to evidentiary disputes, jury instructions, and the amount awarded by the jury in punitive damages. Id. As the scope of FIFRA’s preemption is the only issue relevant to this Case Note, discussion is limited to that issue.
14 See infra Part IV.
15 See infra Part V.
16 See infra Part VI.
17 Hardeman, 997 F.3d at 952.
18 See, e.g., id.
19 See infra Part II.A.
20 See infra Part II. B
discusses how pesticides are registered by the EPA under FIFRA, and ends with a historical summary of how FIFRA and the EPA’s regulatory scheme have been applied to glyphosate.

A. Preemption Generally

The theory behind federal preemption is that the federal government has the power to override state authority with respect to an area of the law that otherwise may be properly governed by both. Preemption is highly prevalent in the field of constitutional law. The Supremacy Clause of the United States Constitution holds that the Constitution and laws made pursuant thereto “shall be the supreme Law of the Land.” Consequently, any federal law that does not violate the Constitution potentially preempts state law. While this proposition remains universally unchallenged, preemption issues often become contentious regarding whether Congress actually intended to preempt state law. Despite the doctrine’s importance to principles of federalism, courts generally begin with a presumption that state law is not preempted.

As the doctrine of preemption has developed, two distinct types of preemption have emerged: express preemption and implied preemption. The former exists where Congress expressly states its intent to preempt state authority. The latter variety, implied preemption, occurs in two situations. Implied preemption may exist where federal law occupies a field so completely that it leaves no room for state law to supplement that field. “Implied field preemption,” as it is called, has become somewhat disfavored over time. Still, there is nothing to suggest the doctrine is not valid in instances where federal legislation is truly comprehensive enough to dominate an entire field. Implied preemption may also exist where Congress has not entirely occupied a field, but where state law conflicts with federal

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21 See infra Part II.C.
22 See infra Part II.D.
23 See generally 16A AM. JUR. 2d Constitutional Law § 229 (2023). Although not relevant to this Case Note, preemption can exist between other governmental authorities, such as when state law preempts municipal law. See 6 EUGENE McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 23:7 (3d. ed. 1949).
25 U.S. CONST. art. VI, cl. 2.
26 See id.
27 Gardbaum, supra note 24, at 767.
30 Id. at 203.
31 See id. at 204.
32 Id.
33 Nelson, supra note 28, at 227.
34 See id.
law such that compliance with both laws would be impossible. Unlike the trend against implied field preemption, there is little question that a court will hold state law to be impliedly preempted when it actually contradicts federal law.

B. An Overview of FIFRA

FIFRA was first enacted in 1947. At that time, FIFRA was a drastically different law than it is today. FIFRA's most significant amendment would not occur until 1972, when FIFRA was overhauled as part of the Federal Environmental Pesticide Control Act of 1972. The amendment transformed FIFRA from a mere labeling law to a comprehensive regulatory scheme for pesticides, with an added focus on the environmental impacts of pesticide use. After several more revisions, FIFRA reached its current form.

FIFRA requires, with limited exceptions, that any pesticide sold in the United States be registered. The terms “pest” and “pesticide” are defined broadly under FIFRA, so many chemicals that might often be thought of as “herbicides” are considered “pesticides.” Within this classification, each pesticide is registered for either “general use” or “restricted use.” A pesticide is registered for general use if—when applied according to its instructions—it “will not generally cause unreasonable adverse effects on the environment.” On the other hand, if a pesticide is properly applied according to its instructions and still may cause such adverse effects without additional restrictions, the pesticide is registered for restricted use. A pesticide registered for restricted use must only be applied by a certified applicator or under a certified applicator’s supervision. A pesticide may be registered for general use

38 See 9A Phillip Weinberg et al., Environmental Law and Regulation in New York § 10:3 (2d ed. 2009) (explaining that FIFRA only addressed labeling and was administered by the United States Department of Agriculture when first enacted).
40 See id.; Weinberg et al., supra note 38, § 10:3.
42 § 136a(a)–(b).
43 See § 136(t)–(u) (defining “Pest” to include fungi and weeds and defining “Pesticide” to include all substances intended to destroy or control pests); Hardeman v. Monsanto Co., 997 F.3d 941, 951 n.1 (9th Cir. 2021), cert. denied, 142 S. Ct. 2834 (2022).
44 § 136a(d)(1)(A).
45 § 136a(d)(1)(B).
46 § 136a(d)(1)(C) (“[U]nreasonable adverse effects on the environment, includ[es] injury to the applicator . . . .”).
47 See id.
for some purposes but restricted use for others, provided that instructions clearly indicate this distinction.\footnote{See id.}

FIFRA also prohibits the sale of a “misbranded” pesticide,\footnote{$\S$ 136j(a)(1)(E).} explaining:

A pesticide is misbranded if—

its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular; [or]

\ldots

the label does not contain a warning or caution statement which may be necessary and if complied with \ldots is adequate to protect health and the environment . . . .\footnote{$\S$ 136(q)(1)(A), (G). A pesticide may also be misbranded for a variety of other reasons. See $\S$ 136(q)(1)(B)–(F), (H), (2).}

EPA regulations under FIFRA provide a considerable but non-exhaustive list of examples of false or misleading statements that would render a pesticide misbranded.\footnote{See 40 C.F.R. $\S$ 156.10(a)(5) (2023).}

FIFRA also expressly addresses the extent to which it preempts state law.\footnote{7 U.S.C. $\S$ 136v(a)–(b).} States may regulate the sale or use of pesticides so long as their regulations do not permit what is otherwise prohibited under FIFRA.\footnote{$\S$ 136v(a).} However, states are more restricted in their regulation of labeling: a state is prohibited from “impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].”\footnote{$\S$ 136v(b).} The plain language appears to clearly prohibit an express requirement that does not align with FIFRA and the EPA’s accompanying regulations.\footnote{See id.}

Courts have historically taken competing positions on the issue of whether FIFRA preempts state tort claims when they are applied to the labeling of pesticides.\footnote{See Sam Brar, The Federal Insecticide, Fungicide, and Rodenticide Act: A New Look at Preemption After Bates, 20 SAN JOAQUIN AGRIC. L. REV. 79, 85–88 (2011) (detailing divergent court holdings on whether FIFRA preempts state tort claims regarding labeling requirements).} The view that tort duties do not impose labeling “requirements” is a technical argument based on the fact that tort liability does not affirmatively prevent the use of labels that violate state tort duties, but instead imposes after-the-fact liability; nothing prevents a manufacturer from placing an EPA-approved label on its
product that nonetheless falls short of the state’s common law duty to warn.\textsuperscript{57} Those in favor of this view reason that a state can decide that “the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label than that approved by the EPA.”\textsuperscript{58} The opposing view is more practical, characterizing common law duties as “requirements” under FIFRA because they force a manufacturer to either seek the EPA’s permission to amend a product’s label or maintain a label that will be the source of future liability.\textsuperscript{59} Because pesticide manufacturers are unlikely to willingly subject themselves to liability based on a label they know falls short of a legal duty, this view reasons such a tort duty is essentially a “requirement” to change the label.\textsuperscript{60}

The United States Supreme Court appeared to provide some clarification on the question of state tort law preemption in \textit{Cipollone v. Liggett Group, Inc}.\textsuperscript{61} In \textit{Cipollone}, the Court held that the Public Health Cigarette Smoking Act of 1969 preempted state common law claims based on cigarette package labeling.\textsuperscript{62} The Court quickly concluded that the federal act preempted state “positive law,” such as statutes and regulations.\textsuperscript{63} The less straightforward issue in the case was whether the federal act preempted state tort duties with respect to package labels.\textsuperscript{64} Thus, the issue was almost identical to that of pesticide labeling under FIFRA.\textsuperscript{65} The Court followed the reasoning of the “practical” view described above,\textsuperscript{66} noting that a tort judgment may have the same effect as an express requirement by forcing a manufacturer to change its label or continue to pay damages caused by the label’s alleged defects.\textsuperscript{67} Although \textit{Cipollone} did not involve FIFRA, its reasoning prompted many courts to hold that state tort claims based on pesticide labeling were preempted by FIFRA.\textsuperscript{68}

The Supreme Court sought to clarify \textit{Cipollone} and its effect on FIFRA in \textit{Bates v. Dow Agrosciences LLC}.\textsuperscript{69} The Court rejected the idea that any tort judgment “that might ‘induce’ a pesticide manufacturer to change its label” is barred by FIFRA.\textsuperscript{70}

\begin{itemize}
  \item \textsuperscript{57} See, e.g., Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541 (D.C. Cir. 1984).
  \item \textsuperscript{58} Id.
  \item \textsuperscript{60} See id.
  \item \textsuperscript{61} 505 U.S. 504, 521 (1992).
  \item \textsuperscript{62} See id.
  \item \textsuperscript{63} See id. at 520–24 (determining whether the preemption provision of the federal act reached common law claims in addition to its clear preemption of positive enactments).
  \item \textsuperscript{65} See \textit{Cipollone}, 505 U.S. at 520–24; \textit{supra} notes 56–60 and accompanying text.
  \item \textsuperscript{66} See \textit{supra} notes 59–60 and accompanying text.
  \item \textsuperscript{67} \textit{Cipollone}, 505 U.S. at 521.
  \item \textsuperscript{68} See, e.g., Arkansas-Platte & Gulf P’ship v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1179 (10th Cir. 1993); Levesque v. Miles Inc., 816 F. Supp 61, 69 (D.N.H. 1993).
  \item \textsuperscript{69} Bates v. Dow Agrosciences, 544 U.S. 431 (2005).
  \item \textsuperscript{70} Id. at 443.
\end{itemize}
Still, the Court agreed that FIFRA’s preemption provision would certainly reach many common law claims as supported by *Cipollone*. The Court then introduced a two-part test to address the scope of FIFRA’s preemption of state common law claims: “For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement ‘for labeling or packaging’ . . . . Second, it must impose a labeling or packaging requirement that is ‘in addition to or different from those required under [FIFRA].’” The Court provided the example that “[a] state regulation requiring the word ‘poison’ to appear in red letters, for instance, would not be pre-empted if an EPA regulation imposed the same requirement.” Thus, under this test, whether a state tort law claim based on labeling is preempted is decided on a case-by-case basis that hinges on comparing the relevant FIFRA provisions and the state requirement in question.

C. Registration Procedures Under FIFRA

Having discussed the general concept of preemption and FIFRA’s important provisions and history, this section will outline how pesticides like glyphosate are registered under FIFRA. Each applicant seeking to register a pesticide under FIFRA must file a statement with the administrator of the EPA. Included in this statement is “a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use.” The EPA is to register a pesticide if the claims on its label are accurate based on its composition, its labeling complies with FIFRA requirements, it can be used as intended without unreasonable adverse effects on the environment, and it will not cause unreasonable adverse effects on the environment when common practices are followed. Applicants whose applications are denied are entitled to a factual explanation from the EPA as to the reasons for denial. Approved pesticide registrations must be reviewed every 15 years.

FIFRA imposes an ongoing duty to amend labels in order to adhere to labeling requirements. Registrants may modify labels for reasons relating to a product’s composition, its container’s composition or design, or other characteristics unrelated “to any pesticidal claim or pesticidal activity.” Proposed labeling modifications must not be false or misleading. Registrants making such a modification must

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71 Id.
72 Id. at 444 (quoting 7 U.S.C. § 136v(b) (2005)).
73 Id.
74 See id.
75 See infra Part II.C.
76 7 U.S.C. § 136a(c)(1).
77 § 136a(c)(1)(C).
78 § 136a(c)(5).
79 § 136a(c)(6).
80 § 136a(g)(1)(A)(iii)–(iv).
82 § 136a(c)(9)(A).
83 § 136a(c)(9)(B).
notify the EPA, which may disapprove the modification within 30 days if it notifies the registrant in writing, explaining the reasons for disapproval. The effect of such a disapproval is to bar the sale of a pesticide bearing a label with the disapproved modification. The EPA also allows certain “minor” label modifications to be made without any notification. More significant proposals for amended registration generally follow the same application process as an initial application for a label’s approval.

D. EPA Review of Glyphosate over the Years

Glyphosate has been registered with the EPA since 1974. Aside from an isolated finding in 1985 that glyphosate caused rare tumors in mice—which led to glyphosate being classified as a possible human carcinogen—the EPA has repeatedly approved glyphosate’s use, and concluded that it is not likely to be carcinogenic to humans.

In 1993, the EPA concluded that products containing glyphosate were eligible for reregistration. In doing so, it classified glyphosate as a “Group E carcinogen,” signifying evidence of non-carcinogenicity in humans. In 2009, the EPA once again initiated review procedures for glyphosate. A Final Work Plan pursuant to these procedures set a timeline for glyphosate’s review, which was to conclude with a “Final Registration and Review Decision & Begin with Post-Decision Follow-up” in 2015. At this point, glyphosate appeared to be headed for a routine reregistration.

Unexpectedly, the Final Work Plan’s schedule was derailed in 2015 after the World Health Organization’s International Agency for Research on Cancer (IARC) published a report classifying glyphosate as being “probably carcinogenic
to humans.”\textsuperscript{95} With the EPA’s review of glyphosate still ongoing, IARC concluded that there was “sufficient evidence” of glyphosate’s carcinogenicity in animals, but only found “limited evidence” of the same in humans.\textsuperscript{96}

In 2017, the EPA reaffirmed its position that glyphosate was “not likely to be carcinogenic to humans.”\textsuperscript{97} The EPA based its findings on “an independent evaluation of the available data since the IARC classification to reexamine the carcinogenic potential of glyphosate.”\textsuperscript{98} The EPA was not the only body to study glyphosate recently and reach these conclusions.\textsuperscript{99} For instance, since the IARC report was released, Japan’s Food Safety Commission concluded, following a study, that “[g]lyphosate has no neurotoxicity, carcinogenicity, reproductive toxicity, teratogenicity, and genotoxicity.”\textsuperscript{100}

At the same time the EPA was reaffirming its stance on glyphosate, the State of California listed glyphosate as a chemical known to cause cancer (Proposition 65 Determination).\textsuperscript{101} Under California law, such a listing creates an automatic requirement to “give[ing] clear and reasonable warning” of such listing, which is usually understood to require a warning in writing.\textsuperscript{102} Such a requirement, however, is subject to certain exceptions.\textsuperscript{103} One exception to the warning requirement is when “federal law governs warning in a manner that preempts state authority.”\textsuperscript{104} Between the IARC report and California’s Proposition 65 Determination, it was

\textsuperscript{95} See 112 INT’L AGENCY FOR RESEARCH ON CANCER, SOME ORGANOPHOSPHATE INSECTICIDES AND HERBICIDES: IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS 321, 398 (2017) (publishing the findings of the 2015 working group).

\textsuperscript{96} See id.; Hardeman v. Monsanto Co., 997 F.3d 941, 951 (9th Cir. 2021), cert. denied, 142 S. Ct. 2834 (2022).


\textsuperscript{99} See 2017 Study, supra note 97, at 13 (stating that Australia, Canada, Japan, and New Zealand all maintain that glyphosate is unlikely to have carcinogenic effects in humans). But see id. (stating that other countries have considered glyphosate bans in the wake of the IARC report).


\textsuperscript{102} CAL. HEALTH & SAFETY CODE § 25249.6 (2023); see Hardeman v. Monsanto Co., 977 F.3d 941, 952 (9th Cir. 2021) (“That classification triggered a state law requirement to attach a warning label to glyphosate products.”), cert. denied, 142 S. Ct. 2834 (2022).

\textsuperscript{103} See CAL. HEALTH & SAFETY CODE § 25249.10.

\textsuperscript{104} See id. § 25249.10(a).
only a matter of time before a court was going to decide whether FIFRA preempted California’s warning requirement.

III. Principal Case

Now that FIFRA’s general history relating to glyphosate has been addressed, this Part will summarize the Ninth Circuit’s opinion in *Hardeman*.105 First, it outlines the facts and procedural history of the case.106 Second, it covers the Ninth Circuit’s treatment of the issue of express preemption.107 And, third, it discusses how the court addressed the issue of implied preemption.108

A. Factual and Procedural History

Edwin Hardeman sued Monsanto in 2016, alleging that Roundup, a product he had used for several decades beginning in the 1980s, caused him to develop non-Hodgkin’s lymphoma.109 Hardeman was not the only litigant to sue Monsanto in the wake of the IARC report and California’s Proposition 65 Determination: his case was one of roughly 5,000 in various federal courts alleging that Monsanto failed to warn consumers of Roundup’s carcinogenicity.110 The Judicial Panel on Multidistrict Litigation consolidated the cases for pretrial proceedings in the Northern District of California.111 Of these cases, Hardeman’s was the first to go to trial.112

Hardeman’s claims were based on California common law, which “requires a manufacturer to warn either of any health risk that is ‘known or knowable’ (in strict liability) or those risks ‘a reasonably prudent manufacturer would have known and warned about’ (in negligence).”113 Because these claims were based on state law, Monsanto moved to dismiss on the ground that FIFRA preempted the claims.114

105 *See infra* Part III.
106 *See infra* Part III.A.
107 *See infra* Part III.B.
108 *See infra* Part III.C.
109 *Hardeman*, 997 F.3d at 952.
111 *Hardeman*, 997 F.3d at 952.
112 *Id.*
113 *Id.* at 955 (footnote omitted) (quoting Conte v. Wyeth, Inc., 85 Cal. Rptr. 3d 299, 310 (Ct. App. 2008)).
114 *Id.* at 952.
The district court denied the motion to dismiss.\(^\text{115}\) Monsanto later moved for summary judgment on preemption grounds, which was also denied.\(^\text{116}\)

In a bifurcated trial, the jury first found for Hardeman on the issue of causation.\(^\text{117}\) In the damages phase, “[t]he jury awarded Hardeman $5,267,634.10 in compensatory damages and $75 million in punitive damages.”\(^\text{118}\) The district court denied Monsanto’s post-verdict motion for judgment as a matter of law but did reduce the punitive damages award to $20 million.\(^\text{119}\) Monsanto appealed, arguing that FIFRA preempted Hardeman’s claims.\(^\text{120}\) Hardeman cross-appealed, arguing for the reinstatement of the punitive damages award.\(^\text{121}\)

Shortly after the verdict, the EPA sent a letter to all registrants of products containing glyphosate.\(^\text{122}\) The letter did not expressly address the case, but it did address the IARC report and California’s Proposition 65 Determination.\(^\text{123}\) The letter stated that the EPA disagreed with the IARC report, and that having conducted research more extensive than that of the report, it concluded that glyphosate was not carcinogenic to humans.\(^\text{124}\) The EPA further stated in the letter that the agency considers a state requirement imposing a warning of carcinogenicity to be a false and misleading statement under FIFRA.\(^\text{125}\) The letter made it clear the EPA would not approve a label containing a cancer warning and directed registrants of any products actively bearing such warnings to amend their labels through FIFRA’s appropriate procedures.\(^\text{126}\)

B.  Express Preemption

In Hardeman, the Ninth Circuit first discussed whether FIFRA expressly preempted Hardeman’s claims, which were based on California’s common law duty to warn.\(^\text{127}\) The court employed the test described in Bates to determine whether FIFRA expressly preempted the claims.\(^\text{128}\) The court held that part one of this test,
requiring the state law to be for labeling or packaging, was satisfied without much
discussion.\footnote{See Hardeman, 997 F.3d at 955.}

The court then turned to the second part of the *Bates* test, which establishes
that a state labeling requirement is preempted only if the requirement is “in addition
to or different from” FIFRA’s requirements.\footnote{See id. at 955–58.} The court noted that under *Bates*,
FIFRA does not preempt a state labeling requirement if it is equivalent to FIFRA’s
misbranding provisions and fully consistent with them.\footnote{Id. at 955; see supra
notes 49–50 and accompanying text (describing the misbranding provisions).}

\footnote{Hardeman, 997 F.3d at 955.} Such is the case where a
state law and FIFRA impose requirements that are “parallel,” meaning a violation
of the state law would also be prohibited under FIFRA.\footnote{Id. (alteration in original) (quoting 7.

The court then pointed out that FIFRA requires a pesticide label to “contain
a warning or caution statement which may be necessary and if complied with . . . is adequate to protect health and the environment.”\footnote{Id. (quoting Conte v. Wyeth, Inc., 85 Cal. Rptr. 3d 299, 310 (Ct. App. 2008)).}
The court compared this against California’s common law requirement to warn against risks that are
known or knowable, or against risks that a reasonably prudent manufacturer would
have known to exist.\footnote{Hardeman, 997 F.3d at 955. The court acknowledged in a footnote that a negligence
claim requires the additional element that the defendant’s actions are the result of negligent conduct.
Id. n.5. In the court’s view, however, this made the state requirement narrower than the federal
requirement. Id. Therefore, preempting the state law because of this difference would be too literal
a reading of the *Bates* test and FIFRA. Id.}

\footnote{Id. at 955.} Recall that the “known or knowable” standard sounds
in strict liability, while the reasonably prudent manufacturer standard sounds in
negligence.\footnote{See id. at 955.} In the court’s view, FIFRA’s requirement that a label contain a warning
necessary “to protect health and the environment” was broader than California’s
common law duty to warn against risks that a reasonably prudent manufacturer
would have known.\footnote{Id. (quoting Conte v. Wyeth, Inc., 85 Cal. Rptr. 3d 299, 310 (Ct. App. 2008)).}
Further, the court held that the same requirement of FIFRA
was “at minimum, consistent with California’s requirement” to warn against known
or knowable risks.\footnote{Id.}

Monsanto made compelling arguments in favor of preemption, despite
the court’s broad—and arguably strained—reading of FIFRA used to reach its
holding.\footnote{See id. at 956–57.} Monsanto first noted that the EPA’s continued registration of Roundup
without any warning of carcinogenicity on the label created an irreconcilable
conflict; specifically, that a finding of liability for failure to provide such a warning
would impose a requirement “in addition to or different” from FIFRA.\footnote{Id. at 956.} The
court rejected this argument, pointing out that the EPA’s approval of a label is
not the final word on FIFRA compliance.\textsuperscript{140} The court reasoned that because a label can violate FIFRA despite being approved by the EPA, the approval does not conclusively speak for FIFRA within a preemption analysis.\textsuperscript{141} In other words, although the EPA is only permitted to register a product after determining that its label complies with FIFRA,\textsuperscript{142} the EPA may interpret FIFRA incorrectly.\textsuperscript{143} Thus, a state common law duty can be “parallel” to FIFRA under Bates, where a judge or jury reaches a different conclusion from the EPA regarding the label’s adequacy under FIFRA.\textsuperscript{144}

Monsanto also called attention to the EPA’s 2019 letter to glyphosate registrants, arguing that this letter was further evidence of the impossibility of obeying both FIFRA and California common law.\textsuperscript{145} But the court quickly shot this down, citing a portion of Bates explaining that in order for a government action to preempt state law, it “must have the force of law,” or else it would not be a “requirement” within the meaning of Bates and FIFRA’s express preemption provision.\textsuperscript{146} Because the 2019 letter did not follow a formal agency procedure, the court reasoned, it did not have the force of law.\textsuperscript{147} The court thus rejected the argument that the 2019 letter preempted the state law claims under the doctrine of express preemption.\textsuperscript{148}

C. Implied Preemption

The court next addressed implied preemption.\textsuperscript{149} It did not discuss whether Congress legislated the field of pesticides so completely as to leave no room for state legislation.\textsuperscript{150} The only question the court considered was whether the common law duty and FIFRA conflicted such that compliance with both laws was impossible.\textsuperscript{151} Monsanto argued it lacked the ability to unilaterally change its label without the EPA’s consent, and given that the EPA had disavowed the Proposition 65 Determination in its 2019 letter, Monsanto would not be able to obtain the requisite permission to comply with a duty to warn.\textsuperscript{152}

\textsuperscript{140} Id. (quoting 7 U.S.C. 136a(f)(2) (2021) (“In no event shall registration of an article be construed as a defense for the commission of any offense under this subchapter. As long as no cancellation proceedings are in effect registration of a pesticide shall be \textit{prima facie evidence} that the pesticide, its labeling and packaging comply with the registration provisions of the subchapter.”)).

\textsuperscript{141} See id.

\textsuperscript{142} See 7 U.S.C. § 136a(c)(5)(B).

\textsuperscript{143} See Hardeman, 997 F.3d at 956.

\textsuperscript{144} See id.

\textsuperscript{145} See id. at 957.

\textsuperscript{146} Id. at 956–57 (citing Bates v. Dow Agrosciences LLC, 544 U.S. 431, 444 (2005)).

\textsuperscript{147} Id.

\textsuperscript{148} See id.

\textsuperscript{149} See id. at 958–60.

\textsuperscript{150} See id.

\textsuperscript{151} See id.

\textsuperscript{152} See id. at 958.
The court turned to the United States Supreme Court case *Merck Sharp & Dohme Corp. v. Albrecht*, which lays out a three-part test for determining whether an agency action is inconsistent enough with state law for the latter to be preempted:

To demonstrate an “irreconcilable conflict,” Monsanto must present “clear evidence” that (1) the agency was “fully informed” of “the justifications for the warning” the plaintiff demands, (2) the agency has “informed the . . . manufacturer that [it] would not approve changing the . . . label to include that warning,” and (3) the agency’s action “carries the force of law.”

Emphasizing the third prong of this test, the court reminded Monsanto that it had already determined the 2019 letter did not have the force of law, and thus the letter did not imply preempt the state law claim.

The court still addressed Monsanto’s arguments, despite its quick conclusion in Hardeman’s favor. Starting with Monsanto’s argument that it could not unilaterally change its label without the EPA’s consent, the court pointed out that under FIFRA, manufacturers must draft their own product labels. The court also noted a manufacturer’s “continuing obligation to adhere to FIFRA’s labeling requirements.”

The court downplayed the role of EPA approval by pointing to FIFRA’s requirement that the EPA approve any changes so long as the changes do not violate the statute. The court also found it significant that Monsanto could, per EPA regulations, make certain “minor modifications” simply upon notification to the EPA. The court referenced several instances in which the EPA had allowed manufacturers to add cancer-related warnings to their labels using the notification process provided in the regulations. In doing so, it essentially ignored Monsanto’s argument that the EPA had never done so in an instance where it had specifically found a chemical not to be carcinogenic and that adding the warning would be false and misleading. Because the EPA’s 2017 finding that glyphosate was not likely to be carcinogenic and the 2019 letter did not have the force of law, the court held that they were irrelevant to the implied preemption analysis.

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153 Id. (alteration in original) (quoting Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1678–79 (2019)).
154 See id. at 959–60.
155 See id. at 958–60.
156 Id. at 959 (citing 7 U.S.C. § 136a(c)(1)(C) (2021)).
157 Id. (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 438 (2005)).
158 See id.
159 Id. (citing 40 C.F.R. § 152.46(a) (2021)).
160 Id.; see also id. n.10 (listing examples of such instances).
161 See id. at 959–60.
162 See id. at 960.
IV. Analysis

The Ninth Circuit’s analysis on express and implied preemption issues is fundamentally flawed in Hardeman.163 First, the court’s interpretation of FIFRA was exceedingly broad and strained in reaching its holding on the issue of express preemption.164 Second, the court characterized the EPA’s 2017 finding that glyphosate was “not likely to be carcinogenic to humans,” and the EPA’s 2019 letter to glyphosate manufacturers, as lacking the force of law to dismiss the possibility of implied preemption.165 While this characterization of the letter is technically correct, the United States Supreme Court has insinuated that it would reach a holding of implied preemption where an agency has made it abundantly clear it would deny a requested labeling change.166

A. A Limited Analysis of FIFRA

The court’s analysis of FIFRA and California’s common law duties was not detailed enough to answer the question posed by Bates.167 Monsanto, in its Petition for a Writ of Certiorari, framed its issue with the Ninth Circuit’s analysis of express preemption and the Bates test quite well: “The Ninth Circuit held [that FIFRA did not preempt Hardeman’s claims] because [the court] improperly assessed FIFRA’s requirements at too high a level of generality—an error that, if uncorrected, could render FIFRA’s preemption provision nearly meaningless, and undermine the uniformity in pesticide labeling Congress sought to ensure.”168

The court used the Bates test in determining that FIFRA does not expressly preempt California’s warning duties under the strict liability and negligence standards.169 Bates requires that in order to avoid preemption, a state law requirement must be “equivalent to, and fully consistent with, FIFRA’s misbranding provisions.”170 The Ninth Circuit recognized the implication that flows from this: a state law will only survive preemption if “a violation of the state law is also a violation of FIFRA.”171 Yet the court limited its analysis of this somewhat complex issue to a single paragraph.172 The court determined that FIFRA’s requirement that a pesticide label “contain a warning or caution statement which may be necessary and if complied with . . . is adequate to protect health and the environment” is

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163 See infra Part IV.
165 Hardeman, 997 F.3d at 956–58, 960.
167 Compare Bates v. Dow Agrosciences LLC, 544 U.S. 431, 453 (2005) (describing the detailed analysis a court must undertake to determine whether a state law is fully consistent with FIFRA), with Hardeman, 997 F.3d at 955 (reciting the state and federal laws and then, in two conclusory statements, determining that the laws are “parallel”).
168 Petition for a Writ of Certiorari at 15, Hardeman, 142 S. Ct. 2834 (No. 21-241).
169 See Hardeman, 997 F.3d at 955.
170 Bates, 544 U.S. at 447.
171 Hardeman, 997 F.3d at 955.
172 See id. at 955–56.
more broad than California’s negligence standard and at least as broad as the strict liability standard.  

The lack of substance in analyzing and comparing these laws is where the court’s analysis falls short. FIFRA’s misbranding provision is in some ways ambiguous, making its meaning difficult to determine on its face. The misbranding provision is introduced with the vague requirement that a pesticide contain a warning that “is adequate to protect health and the environment.” This requirement is 1 of 12 a pesticide’s label must comply with in order to avoid being “misbranded.” Compliance with each of these 12 requirements is determined primarily by the EPA. Although the EPA plays a central role in the registration process, the court emphasized a provision of FIFRA stating that registration of a pesticide by the EPA is not definitive evidence of a label’s compliance with FIFRA. Despite this emphasis, the cited provision only allows two things: (1) for a pesticide manufacturer to report additional information regarding its effects to the EPA after registration; and (2) for courts to address the issue of whether a registered pesticide’s label is indeed compliant with FIFRA, as might be the case with any administrative decision. The court made the obvious point when it stated:

So even though EPA approved Roundup’s label, a judge or jury could disagree and find that same label violates FIFRA. And because EPA’s labeling determinations are not dispositive of FIFRA compliance, they similarly are not conclusive as to which common law requirements are “in addition to or different from” the requirements imposed by FIFRA.

The court correctly interpreted this provision as stating that EPA registration is not conclusive of FIFRA compliance. However, this provision alone does not allow a state law claim to survive without a deeper analysis by the court. As the

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173 See id. (alteration in original) (first quoting § 136(q)(1)(G) (2021); and then citing Conte v. Wyeth, Inc., 85 Cal. Rptr. 3d 299, 310 (Ct. App. 2008)).
174 Cf. Bates, 544 U.S. at 453 (stating that the Court did not have enough briefing to determine whether the Texas common law provision in question was “equivalent” to FIFRA’s misbranding provision, and thereby indicating that the analysis could not be adequately performed by simply comparing the words of the two laws).
175 See 7 U.S.C. § 136(q) (2021) (listing all the labeling qualities that would make a pesticide “misbranded”).
177 See § 136(q).
178 See id. (stating when a pesticide is misbranded); 7 U.S.C. § 136(a)(1)(E) (stating that it is unlawful under FIFRA to sell a misbranded pesticide); § 136a(c)(5)(B) (providing that the EPA is to register a pesticide if its labeling and associated materials comply with FIFRA).
179 See Hardeman, 997 F.3d at 956 (quoting § 136a(f)(2) (2021)).
180 See § 136a(f)(2); § 136d(a)(2) (requiring the registrant of a pesticide to come forward with “additional factual information regarding unreasonable adverse effects on the environment on the pesticide”); 5 U.S.C. § 706(2) (describing when a court may set aside an agency’s decision).
181 Hardeman, 997 F.3d at 956.
183 See § 136a(f)(2); see also supra note 167 and accompanying text.
court appeared to understand, a judge or jury would have to determine that the label violates FIFRA if a common law duty imposed on the same label were not to be preempted.\textsuperscript{184} In the absence of such a determination, any state law liability for a properly registered label would indeed impose a requirement “in addition to or different from those required under [FIFRA].”\textsuperscript{185}

While the EPA's decision to register a pesticide is not conclusive with respect to the pesticide's compliance with FIFRA, it does not change the level of deference a court must give to the EPA's assessment of FIFRA compliance.\textsuperscript{186} “The scope of review under the ‘arbitrary and capricious’ standard [for reviewing agency decisions] is narrow and a court is not to substitute its judgment for that of the agency.”\textsuperscript{187} Additionally, “a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute.”\textsuperscript{188} The Ninth Circuit did not engage in this sort of analysis.\textsuperscript{189} Rather, it apparently understood the possibility that the EPA's decision may be incorrect, along with the requirement that manufacturers have an ongoing duty to request permission to make necessary updates to their labels, as sufficient to conclude that FIFRA is parallel to California's common law requirements.\textsuperscript{190}

A label's compliance with FIFRA is determined on a case-by-case basis through a number of factors, including extensive scientific data.\textsuperscript{191} Based on such data, a pesticide may be misbranded under any one of 12 different reasons, including when “its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.”\textsuperscript{192} The court did not address the potential applicability of this and other provisions of the misbranding definition.\textsuperscript{193} Instead, it focused solely on the requirement that pesticide labels contain warnings necessary to protect health and the environment.\textsuperscript{194} In order to properly compare this sweeping requirement against a state law requirement expressed in equally malleable terms, Bates requires a more critical look into how each requirement has been interpreted by courts.\textsuperscript{195} The FIFRA provision in

\textsuperscript{184} See Hardeman, 997 F.3d at 956.

\textsuperscript{185} See § 136v(b); § 136a(f)(2). Because EPA registration of a pesticide is “prima facie evidence” of a label's compliance, the burden is on a party seeking to prove a breach of a common law duty to prove that the label also does not comply with FIFRA. See § 136a(f)(2); see also \textit{Prima Facie}, \textit{Black’s Law Dictionary} (11th ed. 2019).

\textsuperscript{186} See § 136a(f)(2); 5 U.S.C. § 706(2).


\textsuperscript{188} Id. at 42 (agreeing with this formulation of the standard advanced by the U.S. Department of Transportation).

\textsuperscript{189} See Hardeman, 997 F.3d at 955–58.

\textsuperscript{190} See id. at 955–56.

\textsuperscript{191} See, e.g., 7 U.S.C. § 136a(c); 40 C.F.R. §§ 156.10, 158.1 (2023).

\textsuperscript{192} 7 U.S.C. § 136(q)(1)(A).

\textsuperscript{193} See Hardeman, 997 F.3d at 955–56.

\textsuperscript{194} See id.

\textsuperscript{195} See Bates v. Dow Agrosciences LLC, 544 U.S. 431, 453 (2005) (describing the detailed
question and the California common law duties are simply too ambiguous in their plain language to conduct a proper Bates analysis based on their language alone.\textsuperscript{196} California's failure to warn analysis might implicate some of the same necessary data that is required to determine a label's compliance with FIFRA.\textsuperscript{197} However, the analysis asks an entirely different question than the FIFRA analysis and thus cannot so easily be characterized as "parallel" to FIFRA.\textsuperscript{198} Although Bates does not require the description of a common law duty to "be phrased in the identical language as its corresponding FIFRA requirement," it does require that "a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption."\textsuperscript{199} The Ninth Circuit's single paragraph of analysis here is insufficient to determine that this requirement is met.\textsuperscript{200}

B. Setting Glyphosate Manufacturers up for Failure

The Ninth Circuit's decision sets glyphosate manufacturers up for failure by allowing them to be held liable for label defects that cannot be changed.\textsuperscript{201} By characterizing the EPA's 2017 study and its 2019 letter as being without the force of law, the court rejected both Monsanto's express and implied preemption arguments.\textsuperscript{202} By ignoring the practical meaning of the EPA's actions, the court left glyphosate manufacturers with no option but to make a request that had already effectively been denied.\textsuperscript{203}

The court did not address the likelihood that the EPA would reject any proposed glyphosate label containing a cancer warning.\textsuperscript{204} Although the 2017 study and 2019 letter may not have carried the force of law, they demonstrated that the EPA did not consider glyphosate to be carcinogenic and that the EPA was determined to reject any glyphosate label indicating otherwise.\textsuperscript{205} The United States Supreme Court has


\textsuperscript{197} See Conte, 85 Cal. Rptr. 3d at 310.

\textsuperscript{198} Compare 7 U.S.C. § 136(q), 40 C.F.R. § 156.10 (2022), and 7 U.S.C. § 136a(c), with Conte, 85 Cal. Rptr. 3d at 310.

\textsuperscript{199} Bates, 544 U.S. at 453–54.

\textsuperscript{200} Cf. id. at 453 (stating that the Court did not have enough briefing to determine whether the Texas common law provision in question was "equivalent" to FIFRA's misbranding provision, and thereby indicating that the analysis could not be adequately performed by comparing the words of the two laws). The Supreme Court recognized, unlike the Ninth Circuit here, that a more extensive analysis was needed to assess the purported equivalence of FIFRA and a state tort duty. See id.

\textsuperscript{201} See Hardeman v. Monsanto Co., 997 F.3d 941, 956, 958 (9th Cir. 2021) (stating that the EPA's 2017 study and 2019 letter do not have the force of law), cert. denied, 142 S. Ct. 2834 (2022); 2019 Letter, supra note 98 (explaining the EPA would reject any proposed labeling amendment that would add a cancer label to glyphosate products).

\textsuperscript{202} See Hardeman, 997 F.3d. at 956–58, 960.

\textsuperscript{203} See id.; 2019 Letter, supra note 98.

\textsuperscript{204} See Hardeman, 997 F.3d. at 956–58, 960; 2019 Letter, supra note 98.

\textsuperscript{205} See 2017 Study, supra note 97 at 143; 2019 Letter, supra note 98.
insinuated that if there is “clear evidence” that an agency will reject a requested change to a label over which the agency has authority, a court will conclude that compliance with the federal and state requirements is impossible. Though this was in the context of the FDA and drug labeling laws, the applicability of this rule in other contexts is clear. It would make little sense for a court to conclude that preemption does not exist simply because a manufacturer could seek an agency’s approval to change its label, when the agency that must approve the change has made it clear it would not do so. To hold that no preemption exists in such a case essentially requires a manufacturer to seek a labeling change that would surely be rejected. Because the EPA’s actual rejection of a requested labeling change would almost certainly have the force of law, it makes practical sense to treat an obvious indication that such a rejection will occur as having the same force.

The court downplayed EPA oversight in the registration process by pointing out that Monsanto could make certain changes to its label upon a notification to the EPA. In doing so, the court disregarded the EPA’s power to easily nullify such a change. The court noted that the EPA frequently allowed cancer warnings to be added by notification, but as Monsanto aptly pointed out, in none of these cases had the EPA expressly rejected the propriety of such a warning in advance. The Ninth Circuit seemed to implicitly recognize the extreme technicality upon which its holding was based when it emphasized that “it is not impossible for Monsanto to add a cancer warning to Roundup’s label.” Therefore, the Ninth Circuit set Monsanto (and other glyphosate manufacturers) on a path toward requesting a labeling change from the EPA that will not be granted.

C. The Supreme Court’s Unfortunate Denial of Certiorari

A year after the Ninth Circuit’s decision, the United States Supreme Court declined to review Hardeman. Failing to correct this issue at the national level could have serious consequences for FIFRA’s efficacy, which is in large part ensured

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207 See id.
208 See id.
209 See id.
210 See id.; United States v. Mead Corp., 533 U.S. 218, 230 (2001) (“Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure . . . .”).
211 See Wyeth, 555 U.S. at 571.
213 See id.; 40 C.F.R. § 152.46(a)(2) (2021) (allowing the EPA to require, after a change is made upon notification, for a manufacturer to submit an application for amended registration); 7 U.S.C. § 136a(c)(6) (2021) (explaining the circumstances under which an application for registration is denied).
214 See Hardeman, 997 F.3d at 959–60.
215 See id. at 960.
216 See id. at 958–60; 2017 Study, supra note 97 at 143; 2019 Letter, supra note 98.
by the preemption of state authority to enact their own labeling requirements.\textsuperscript{218} While \textit{Bates} made it clear that state law claims enforcing labeling requirements parallel to FIFRA are not preempted, it did not change the fact that states cannot create alternative requirements that are stricter or different from those under FIFRA.\textsuperscript{219} The Ninth Circuit’s decision effectively allows this, and the results could affect pesticide and crop sales at the national level.\textsuperscript{220}

Using the broad lens through which the Ninth Circuit viewed the preemption issue, state courts across the country could create their own labeling requirements.\textsuperscript{221} Through duty-to-warn litigation, these courts may establish labeling requirements that would comply with FIFRA and avoid preemption so long as a warning is abstractly declared necessary to “protect health and the environment.”\textsuperscript{222} Because the Ninth Circuit did not defer to the EPA in determining what that phrase means, state courts have more freedom in allowing tort judgments against EPA-approved labels.\textsuperscript{223} Essentially, any finding of a label’s inadequacy could be justified on the ground that the common law standard under which the finding was made was “parallel” to FIFRA.\textsuperscript{224}

The problem with petitioning the Court for a writ of certiorari is that the Court’s decision is entirely discretionary.\textsuperscript{225} A very small fraction of the cases in which such a petition is filed each year are granted.\textsuperscript{226} However, although the Court does not give an explanation of its reasons for denying review, it often reviews cases that are of national significance.\textsuperscript{227} The case at hand is certainly of national significance, as it puts the EPA’s position with FIFRA at odds with state law and creates substantial confusion as to how these two bodies of law will interact in the future.\textsuperscript{228} Furthermore, \textit{Hardeman} sets the stage for an explosion of litigation that will overrun both federal and state courts with labeling cases in which a court can

\begin{itemize}
\item \textsuperscript{218} See 7 U.S.C. § 136v(a)–(b).
\item \textsuperscript{219} See \textit{Bates} v. Dow Agrosciences LLC, 544 U.S. 431, 443–44 (2005); see also § 136v(b) (“State[s] shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].”).
\item \textsuperscript{221} See \textit{Hardeman}, 997 F.3d at 955; Letter from Agricultural Groups to President Biden, \textit{supra} note 220.
\item \textsuperscript{222} See \textit{Hardeman}, 997 F.3d at 955; Letter from Agricultural Groups to President Biden, \textit{supra} note 220.
\item \textsuperscript{223} See Letter from Agricultural Groups to President Biden, \textit{supra} note 220; Petition for a Writ of Certiorari at 24–25, Monsanto Co. v. Hardeman, 142 S. Ct. 2834 (No. 21–241).
\item \textsuperscript{224} See Letter from Agricultural Groups to President Biden, \textit{supra} note 220; Petition for a Writ of Certiorari at 24–25, \textit{Hardeman}, 142 S. Ct. 2834 (No. 21-241).
\item \textsuperscript{225} See U.S. Sup. Ct. R. 16.
\item \textsuperscript{226} See Supreme Court Procedures, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/QB5U-RQY6] (last visited Nov. 6, 2022) (“In fact, the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year.”).
\item \textsuperscript{227} See \textit{id}.
\item \textsuperscript{228} See Petition for a Writ of Certiorari at 24–25, \textit{Hardeman}, 142 S. Ct. 2834 (No. 21-241).
\end{itemize}
limitlessly construe FIFRA’s meaning in comparing it to state laws. In denying review, the United States Supreme Court passed on an important opportunity to clarify the law, and in doing so injected great uncertainty into the agricultural industry.

V. Hardeman v. Monsanto: Negative Consequences for Agricultural Producers

Aside from its questionable legal analysis, the Ninth Circuit’s decision in Hardeman is problematic for policy reasons. The widespread disagreement in labeling requirements that might emerge among the states has the potential to lead to endless litigation, resulting in a patchwork of state labeling requirements that could threaten agricultural producers’ access to these important pesticides. Inconsistent labeling requirements will also cause confusion to consumers.

A. Agricultural Dependency on Glyphosate

Pesticides are essential to the agricultural industry, and access to them is vital for the short- and long-term operations of agricultural producers. Pesticide use is crucial for the world’s food supply, improving both the quality of crops and total yield. The consequences of not using pesticides would be great for both farmers and consumers alike. For farmers, increases in time and money spent in response to decreasing crop yield would be devastating, especially for an agricultural industry that is already struggling to meet the world’s food supply demands.

Glyphosate is particularly essential. In the United States, it is the most commonly used herbicide due to its effectiveness, affordability, and ease of use. “There are approximately 280 million pounds of glyphosate applied to 298 million acres annually in agricultural settings.” Without glyphosate, farmers would have

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229 See id.; Hardeman v. Monsanto Co., 997 F.3d 941, 959 (9th Cir. 2021), cert. denied, 142 S. Ct. 2834 (2022); Letter from Agricultural Groups to President Biden, supra note 220.
231 See id.; Letter from Agricultural Groups to President Biden, supra note 220.
232 Letter from Agricultural Groups to President Biden, supra note 220.
233 See Petition for a Writ of Certiorari at 26, Hardeman, 142 S. Ct. 2834 (No. 21-241); Letter from Agricultural Groups to President Biden, supra note 220.
234 See Letter from Agricultural Groups to President Biden, supra note 220.
237 See id.
238 M. Danne et al., Analysing the Importance of Glyphosate as Part of Agricultural Strategies: A Discrete Choice Experiment, 86 LAND USE POL’Y 189, 189 (2019).
240 Id. at 13.
to use alternative pesticides with more restrictions on use, which would likely be more expensive. To summarize: “[N]o other weed control method offers the same level of effectiveness, both practically and economically.”

B. Opening the Door to Non-Uniform Labeling Requirements

The costs of non-uniform labeling requirements would be obvious. Constant changing of labeling requirements could cause disruptions in supply of pesticides. If supply chain disruption were somehow avoided, it is almost certain that prices would be raised. Additionally, the ongoing cost of litigation would drive up costs of these products even further—Edwin Hardeman’s case was only one of around 5,000 cases in federal court at the time it was litigated. These costs would likely be shouldered by agricultural producers, who would either suffer in their businesses or pass the costs onto consumers. Given glyphosate’s essential role in agriculture, leaving farmers without this essential commodity could prove detrimental to farm operations and the world’s food supply. As Monsanto pointed out, non-uniform labeling requirements breed confusion. By allowing states to draw conclusions contrary to those of the EPA that would vary from state to state, inconsistent messaging regarding products would arise: “a Nevadan who visits California may be misled to believe that a pesticide sold in California is more dangerous than the formulation sold in Nevada (or vice versa).” Thus, what is said to be done in the name of consumer protection would simply mislead and confuse consumers.
VI. Conclusion

Glyphosate is an essential commodity to the agricultural world, and without it, agricultural producers would face lower crop yields and higher losses.\textsuperscript{251} It is imperative that the information portrayed to the public concerning this important chemical is consistent, truthful, and understandable.\textsuperscript{252} Of the information available to the public, nothing is more important than a product’s label.\textsuperscript{253} Because of the importance of labeling, the United States Congress has enacted and revised FIFRA, a “comprehensive regulatory statute” that encompasses, \textit{inter alia}, the labeling of pesticides.\textsuperscript{254} One of the most important commands to the states in relation to FIFRA is simple: states “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].”\textsuperscript{255}

While the United States Supreme Court determined that a state common law requirement for labeling is permissible despite the preemption provision if it is equivalent to FIFRA, states are not allowed to create an entirely different set of requirements for pesticide manufacturers to follow.\textsuperscript{256} Yet the Ninth Circuit has allowed just that with its decision in \textit{Hardeman}.\textsuperscript{257} Combining a strained reading of FIFRA with an improper preemption analysis, the \textit{Hardeman} court arrived at a problematic conclusion that could lead to widespread harms.\textsuperscript{258} The United States Supreme Court’s decision to deny review amplifies these consequences and leaves the law in a troubled state.\textsuperscript{259} As these cases continue to be litigated, the Court would be wise to seize the next opportunity that comes its way to clarify the law for good.

\textsuperscript{251} See supra Part V.A.
\textsuperscript{252} See supra Part V.B.
\textsuperscript{255} 7 U.S.C. § 136v(b).
\textsuperscript{256} See Bates v. Dow Agrosciences, 544 U.S. 431, 453 (2005); see also § 136v(b).
\textsuperscript{257} See supra Parts III–IV.B.
\textsuperscript{258} See supra Parts IV–V.
\textsuperscript{259} See supra Part IV.C.