

No. C3-02-857

**STATE OF MINNESOTA
IN SUPREME COURT**

Ronald Peterson, Barry Thune, Owen Larson, Owen Larson Farms, Inc.,
Duane Evenson, Jeffrey Nesvig, Richard Moen, Christopher Grove,
Christopher Grove Farms, Inc., David Abentroth, Glenn Asbeck, Asbeck, Inc.,
Donald Steinbeisser, Joe G. Steinbeisser & Sons, Inc., Stephen Pust, and
Stephen Pust Farms, Inc., individually and on behalf of all other similarly situated
Plaintiffs/Respondents,

vs.

BASF Corporation, a foreign corporation,
Defendant/Appellant.

APPELLANT BASF CORPORATION'S REPLY BRIEF FOLLOWING REMAND

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ARGUMENT

Plaintiffs' brief kicks up a great deal of dust, but ultimately sidesteps the critical issues presented on remand. The Supreme Court's decision in Bates v. Dow AgroSciences LLC, 125 S. Ct. 1788 (2005), establishes as a matter of law that FIFRA preempts plaintiffs' attacks on BASF's pesticide labels. Rather than deal squarely with Bates, plaintiffs recycle the same pre-Bates arguments they used in opposing BASF's petition for *certiorari*, frequently lifting pages of their Supreme Court submissions virtually verbatim.¹ Indeed, plaintiffs speak as if they had *won* rather than lost in the Supreme Court. See Pl.Br. 8 ("BASF's preemption complaint summarily rejected by the Supreme Court"). As the vacation and remand here demonstrate, however, plaintiffs' arguments did *not* in fact persuade the Supreme Court, and should not persuade this Court either.

I. BATES CONFIRMS THAT FIFRA PREEMPTS PLAINTIFFS' CLAIMS

Remarkably, despite a five-page statement of the case, plaintiffs' brief never actually acknowledges that the U.S. Supreme Court *granted* BASF's petition for *certiorari* in the present case and *vacated* the state court judgment. 125 S.Ct. 1968. On the contrary, plaintiffs' brief relies heavily on the very state court decisions—Peterson I, II, and III—that the Supreme Court vacated. Plaintiffs treat these vacated decisions as if they, and not Bates, represent the current state of the law on FIFRA preemption. See,

¹ Compare Pl.Br. 13-28; 32-34 with Pl.Cert.Opp. 6-19; 21-24 (U.S. Sup.Ct.).

e.g., Pl. Br at 3 (“BASF asks this Court to ignore Peterson III”). In fact, plaintiffs cite the vacated state decisions as controlling authority more than twice as often as they cite Bates itself. It is Bates, however, that governs the issues here, and Bates requires reversal.

A. Bates squarely rejects plaintiffs’ legal theories

In contending that Bates “is a complete victory for farmers and all consumers,” Pl.Br. 4, plaintiffs ignore the portions of Bates that are pertinent here. In Bates, the Supreme Court ruled that FIFRA does not preempt product defect and inadequate testing/warning claims, but held that FIFRA *does* preempt state-law claims (including “fraud” claims) attacking pesticide labeling *unless* the state law is *exactly equivalent* to FIFRA and its implementing regulations. 125 S.Ct. at 1799-1800. Bates thus gives plaintiffs here no victory: their claims that BASF’s labels complied with FIFRA but violated state-law duties of honesty and fairness fall squarely within the express preemption defined in Bates.

Indeed, had Bates actually been a “complete victory” for plaintiffs, the Supreme Court undoubtedly would *not* have disturbed the Peterson III decision, which found no preemption. Instead, the Supreme Court granted BASF’s petition for *certiorari*, vacated the judgment, and remanded the case for reconsideration in light of Bates. Plaintiffs’ view that the vacating of their judgment is a “complete victory” defies logic.

In fact, the Supreme Court clearly had Peterson in mind in its Bates opinion. Bates specifically addresses, and carves out exceptions for, many of the preemption issues that Peterson raises but that Bates itself did not present. The Court stressed the

need to measure state-law requirements against the EPA regulations that give content to FIFRA's misbranding standards, 125 S. Ct. at 1804; the impropriety of state-law fraud claims that create liability where FIFRA would not, id. at 1803; and the necessity of appropriate jury instructions where requested, id. at 1804. The Supreme Court's GVR Order here, citing to Bates, conveys the pointed message that Peterson III is inconsistent with Bates.

B. State law claims addressing pesticide marketing are subject to preemption under Bates

Plaintiffs contend that, under Bates, “state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA.” Pl.Br. 28; id. at 5. But Bates held that *all* state-law causes of action are subject to preemption under FIFRA *if*, as applied, they set standards for pesticide labeling. Such preemption may occur *whatever* the title of the purported state-law duty—be it “honesty to consumers,” “adequate warning,” or “responsible marketing.” See Bates, 125 S. Ct. at 1799-1800 (plaintiff's fraud and negligent-failure-to-warn claims impose labeling requirements because they “set a standard for a product's labeling that the [pesticide's] label is alleged to have violated by containing false statements and inadequate warnings”). Here, plaintiffs contend that BASF engaged in “fraudulent marketing” by affixing dishonest (if “technically accurate” (Pl.Br. 33)) labels to their products. Under Bates, such claims impose labeling *standards*, and thus are subject to express preemption under FIFRA, regardless of the name plaintiffs attach to them.

Plaintiffs also contend that FIFRA does not preempt “[c]onsumer fraud statutes” because such statutes “only impose a duty upon global chemical companies to honestly market their product.” Pl.Br. 7. Bates expressly refutes that argument: addressing the Texas state-law fraud claims before it, Bates held that FIFRA *does* preempt such fraud claims *if* those claims impose duties of honesty in labeling that go beyond FIFRA’s requirements; *i.e.*, duties “in addition to or different from” FIFRA’s requirements. 125 S. Ct. at 1800 (quoting 7 U.S.C. §136v(b)).

Here, plaintiffs contend that BASF lied on its pesticide labels by labeling and marketing one pesticide as two products and by not labeling Poast Plus® for minor crops. Plaintiffs concede, however, that BASF’s pesticide labeling complied with FIFRA. Tr.3544:5-7. Because plaintiffs’ claims thus seek to impose “a broader obligation” than that imposed by FIFRA, FIFRA expressly preempts them. “[A] state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption.” 125 S.Ct. at 1803.

C. Under Bates, the jury verdict here imposes “requirements” for labeling.

Citing Bates, plaintiffs contend that FIFRA preemption does not apply because the jury’s verdict does not impose a labeling “requirement” within the meaning of FIFRA.

See Pl.Br. 28-32. Plaintiffs’ argument misreads Bates badly.

Plaintiffs first argue that “Bates holds that ... [j]ury verdicts do not establish ‘labeling and packaging’ requirements.” Pl.Br. 28. In fact, the Bates Court held that “the term ‘requirements’ in § 136v(b) reaches beyond positive enactments, such as statutes

and regulations, to embrace common-law duties” imposed through jury verdicts. 125 S. Ct. at 1798; see also Cippollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992) (cited in Bates, 125 S.Ct. at 1798) (“[S]tate regulation can be as effectively exerted through an award of damages as through some sort of preventative relief.”). The result in Bates itself reflects that principle: the Court held that plaintiffs’ fraud and failure-to-warn claims were “premised on common-law rules that qualify as ‘requirements for labeling or packaging.’” 125 S. Ct. at 1799. Plaintiffs’ unqualified assertion that jury verdicts do not impose labeling “requirements” simply flouts the Bates decision.

Plaintiffs also contend that their claims are not preempted because the verdict does not “‘require’ a change in the EPA-approved label” of BASF’s product. Pl.Br. 30. According to plaintiffs, “[n]othing about the verdict requires BASF to do anything other than honestly market its product.” Id. Given the nature of plaintiffs’ claims, however, BASF *cannot* “honestly market its product” without radically changing its EPA-approved labels. To address plaintiffs’ complaints that its labels violate state-law standards of honesty to consumers, BASF must label Poast® and Poast Plus® with the same name (in violation of EPA regulations) and add minor crops to the Poast Plus® labeling (surrendering its FIFRA-granted prerogative to employ subset labeling). Having explicitly undertaken to “send a message” to pesticide manufacturers that they “shouldn’t lie on the label,” Tr.1206:11-12, plaintiffs cannot deny that they seek to impose “labeling requirements,” which are preempted under Bates.

II. **BATES ENTITLES BASF TO JUDGMENT ON PLAINTIFFS' CLAIMS**

Turning to plaintiffs' specific claims here, Bates leaves no doubt that FIFRA preempts those claims.

A. **Under Bates, FIFRA Preempts Plaintiffs' Claim that BASF Committed Consumer Fraud in Labeling and Marketing Poast® and Poast Plus® as Different Products**

Plaintiffs' brief confirms that their claims rest on the premise that Poast® and Poast Plus® are the same herbicide. At the same time, plaintiffs do not deny that EPA regulations *required* BASF to register, label, and market Poast® and Poast Plus® as two different herbicides. Plaintiffs never comes to grips with the inherent conflict between their claims and the federal regulatory scheme, and thus cannot escape FIFRA preemption under Bates.

1. **Plaintiffs' claims rest on the assertion that BASF deceived them by labeling Poast® and Poast Plus® as different products.**

In the now-vacated Peterson III, this Court based its ruling on its understanding that

[t]he farmers' consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF violating the NJCFA by making misrepresentations about the products, which included providing as relevant evidence the fact that they contained the same active ingredient and were EPA approved for use on the same crops.

675 N.W.2d at 69. In their briefs to the Supreme Court, however, plaintiffs repeatedly acknowledged that their claims did indeed rest on the premise that Poast® and Poast Plus® are the same product. See Pl.Cert.Opp. at 9-15 (U.S. Sup.Ct.). Plaintiffs' brief on remand again makes crystal clear that their "fraud" claim rests squarely on that premise.

Although plaintiffs take issue with some isolated record citations,² they do not dispute that the supposed identity of Poast® and Poast Plus® was a central premise of their case at trial, they do not deny that they introduced extensive evidence urging that the two products are the same, and they do not withdraw their acknowledgement that, if the products are different, they have “*no complaint*” against BASF. See BASF Br. 14, 28-30 (collecting examples). Plaintiffs did more than offer evidence that Poast® and Poast Plus® “contained the same active ingredient and were EPA approved for use on the same crops” in support of a marketing claim. 675 N.W.2d at 69. They testified, repeatedly and unambiguously, that the supposed identity of Poast® and Poast Plus® was the linchpin of their marketing claim. See Tr.2174:7-13 (“My complaint to BASF is that they lied to us because Poast and Poast Plus is the same product.”). Even in their brief here, plaintiffs argue that the claimed identity of Poast® and Poast Plus® supports the verdict. See Pl.Br. 9, 13, 16-17, 40-41.

Indeed, plaintiffs’ brief explicitly and directly premises plaintiffs’ “marketing” claim on the assertion that Poast® and Poast Plus® are the same herbicide:

² Plaintiffs’ claim that BASF relies on “mis-cited record citations,” Pl.Br. 36-37 n.16, lacks merit. One BASF citation, to Tr.1397:19-1398:14 on page 15, was incomplete and should have included the 13 lines immediately following. The other citations that plaintiffs list fully support the statements for which BASF cites them. For example, plaintiffs take issue with the support BASF cites for its statement that “plaintiffs testified that BASF acted dishonestly.” Pl.Br. 37. But plaintiff Abendroth in fact testified—as quoted in the text on that very page—that “[t]hey [BASF] *were*’t honest in fact to the consumer. They lied to us.” Tr.2174:19-[25](emphasis added).

Trial evidence established that BASF defrauded thousands of farmers *by marketing the same herbicide as different products* —Poast and Poast Plus—at different prices as a “system of deceit” to extract inflated prices for the same herbicide from minor crop farmers.

Pl.Br. 6 (emphasis added). Plaintiffs reiterate this claim throughout their brief:

...BASF engaged in a national “system of deceit”- intentional misrepresentations, unconscionable commercial practices, and omissions — *by marketing the same herbicide as different products* — Poast and Poast Plus — to extract inflated prices from minor crop farmers.

Pl.Br. 11 (emphasis added); see also id. at 40.

Plaintiffs’ brief makes *no effort whatever* to reconcile their position with this Court’s statement in Peterson III that their claim “was not based on Poast and Poast Plus being the same product.” Instead, they cite the passage as support for their argument that Poast® and Poast Plus® were *in fact* the same product. See Pl.Br. 9, 40.

2. Plaintiffs’ claim that BASF committed fraud by labeling Poast® and Poast Plus® as distinct products imposes a “requirement for labeling or packaging” that diverges from FIFRA.

Under Bates, FIFRA preempts any claim based on plaintiffs’ assertion that Poast® and Poast Plus® are the same product. Because of the differences in the Poast® and Poast Plus® formulas, EPA regulations *require* BASF to register, label, advertise, and market the two herbicides as different products under different names. See 40 C.F.R. §§152.15, 152.42-.43, 158.175; BASF Br. 31-32. Plaintiffs do not dispute that EPA regulations impose this requirement; indeed, plaintiffs’ brief does not even mention this crucial fact.

This case thus presents an unavoidable conflict:

- The judgment below held that “BASF defrauded thousands of farmers by marketing the same herbicide as different products — Poast and Poast Plus,” Pl.Br. 6; *yet*
- Federal law *requires* BASF to label and market Poast® and Poast Plus® as different products.

Plaintiffs make no attempt to reconcile this frontal collision between their fraud claims and the federal law governing BASF’s conduct. Instead, they repeatedly argue that Poast® and Poast Plus® have the same active ingredient, are applied at the same net rate, and received EPA registration for the same crops based on the same residue data. See Pl.Br. 13, 16, 20. All of this is true. None of it, however, alters EPA’s requirement that BASF register, label, and market Poast® and Poast Plus® as different herbicides under different names. Accordingly, none of it affects the analysis here.³

The jury’s verdict that (in plaintiffs’ words) “BASF fraudulently marketed Poast® and Poast Plus® as different products, at different prices,” Pl.Br. 40, imposes on BASF a labeling “requirement” that not only differs from but directly contradicts BASF’s labeling obligations under FIFRA. Under Bates, FIFRA “pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA

³ Plaintiffs also try to defend their claims by relying on contact lens cases. See Pl.Br. 35. These are inapposite pre-Bates cases that do not even involve FIFRA or the express preemption provision addressed in Bates.

and its implementing regulations.” 125 S.Ct. at 1803. FIFRA thus expressly preempts plaintiffs’ claims.

Plaintiffs’ claims are also impliedly preempted under FIFRA, an issue that plaintiffs fail to address. Plaintiffs insist BASF committed consumer fraud because it failed to label and market Poast® and Poast Plus® as the same herbicide, Pl.Br. 9, 13, 16, 18, but do not dispute that EPA *mandates* that Poast® and Poast Plus® be separately registered, named and labeled. Plaintiffs’ claims thus rest on labeling and marketing requirements that “make it impossible for a private party to comply with both state and federal law.” Wuebker v. Wilbur-Ellis Co., ___ F.3d ___, 2005 WL 1939408 at *2 (8th Cir. Aug 15, 2005) (citing Geier v. American Honda Motor Co., 529 U.S. 861, 873 (2000)). Because the premise of plaintiffs’ claims so clearly conflicts with EPA regulations, the claims are impliedly preempted. See Bates, 125 S.Ct. at 1807 (Thomas, J., concurring in part and dissenting in part) (implied preemption asks “whether the ordinary meanings of state and federal law conflict”).

B. Under Bates, FIFRA Also Preempts Plaintiffs’ Claim that BASF Committed Consumer Fraud by Using Subset Labeling

As plaintiffs concede, Pl.Br. 32, EPA’s regulations expressly authorize manufacturers to label pesticides for fewer than all their EPA-registered uses. FIFRA preempts plaintiffs’ state claim based on BASF’s employment of that practice. Under Bates, section 136v(b) “pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations.” 125 S. Ct. at 1803. The Court emphasized “that a state-law labeling

requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption.” Id.

Plaintiffs’ assertion that “regulatory compliance has no relation to consumer fraud,” Pl.Br. 32, flatly contradicts these Bates holdings. Plaintiffs contend that the jury could properly hold BASF liable for subset labeling, even though EPA’s regulations authorize the practice, because “the EPA does not address company marketing and pricing schemes.” Pl.Br. 33. Under Bates, however, “a manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.” Id. at 1804. As Justice Thomas stated, a state-law claim is preempted “when it attaches liability to statements on the label that do not produce liability under FIFRA.” Id. at 1805 (Thomas, J., concurring in part and dissenting in part). Thus, under Bates, BASF’s compliance with FIFRA’s labeling regulations *does* insulate it from a consumer fraud claim based on labeling.

Plaintiffs attempt to avoid this conclusion by repeatedly invoking two quotations. First, plaintiffs again and again quote this Court’s statement in Peterson III that “farmers’ ... consumer fraud claim is not based on BASF’s labels but rather on fraudulent marketing techniques.” 675 N.W.2d at 70, quoted at Pl.Br. 1, 10, 12, 32, 46, 47. Although plaintiffs treat this snippet from Peterson III as a sort of mantra, they fail to demonstrate that their “fraudulent marketing” claim was anything other than an attack on subset labeling. Indeed, according to plaintiffs’ own testimony, BASF’s use of subset labeling *was* the “fraudulent marketing technique” underlying their complaint. See, e.g.,

Tr.1398:23-1399:2 (“BASF made the decision to only put the four crops on the Poast Plus label, and I guess I feel that they had been deceptive in saying that ... Poast Plus could be used only on those four crops.”).

Second, plaintiffs’ brief six times quotes a May 6, 1994 letter from EPA’s Frank Sanders to Sarah Vogel, North Dakota Agriculture Commissioner, stating: “Your problem appears to stem from a marketing decision in which EPA had no input.” RFA385, cited at Pl.Br. 1, 6, 9, 12, 19 n.12, 25. Plaintiffs invoke this isolated quotation to argue that EPA had nothing to do with BASF’s subset labeling of Poast Plus®, and that FIFRA therefore does not preempt plaintiffs’ claim attacking that practice. Pl.Br. 9. In fact, this letter merely reiterates the EPA rule explicitly *authorizing* manufacturers to use subset labeling for marketing purposes. See 40 C.F.R. § 152.130(b); 53 Fed. Reg. 15952 at 15957 (May 4, 1988). Far from taking plaintiffs’ suggested “hands off” approach, EPA regulations specifically *grant permission* to manufacturers to do *exactly* what BASF has been found liable for doing here. *Id.* (“A company having a registered product *is permitted* ... to market the product in a variety of ways.” (emphasis added)).

EPA’s public pronouncements confirm that EPA did not view BASF’s subset labeling as an improper “exploitation of federal regulations,” Pl.Br. 11, 33. EPA has consistently stated that farmers may *not* use an EPA-registered pesticide for a registered use if, as here, the manufacturer elects to not place that use on the label. After receiving EPA’s letter, Commissioner Vogel asked EPA to permit North Dakota to treat Poast® and Poast Plus® (along with other pesticides with active ingredients in common) as the

same product so that the state need not enforce BASF's subset label. Tr.1807:16-

1808:21. EPA denied the request, stating:

Upon examination of the approved labels for the products in question, we noted that some of the products do not carry the same precautionary label language. . . Some products also contain different formulations, even though they have the same active ingredient. We have looked at each of your individual requests, and have a major concern...

It is critical for us to keep in mind that, under FIFRA, the label is the law. ... To move away from this basic precept and inform farmers that it is acceptable to substitute different products with different approved labels has serious national implications with regard to the health and safety of farmers and workers. . . .If EPA were to undermine the basic understanding by farmers that they must follow the labeling on a specific product, we would cause confusion in the regulated community, and, in effect, be encouraging pesticide misuse.

AA-554-555 (emphasis added).

EPA required North Dakota to enforce the Poast Plus® subset label, stating that, “[i]f a company chooses to not support the crops on its label, that’s its choice.” AA-516.

EPA also rejected North Dakota’s assertion that purely economic considerations (including differential pricing) could justify a 24(c) registration under FIFRA. See BASF Br. 10-11; AA-523, 534. In sum, EPA authorized and supported BASF’s choice not to label Poast Plus® for minor crops, and, when states tried to interfere with that right, EPA acted to defend that right.

The question of whether EPA approves of BASF’s subset labeling practices or views them as “exploitation” is *not* an issue of fact for the jury. EPA’s authorization of BASF’s actions appears from the agency’s regulations and publications. Should the

Court have any doubt about EPA's rules or the Agency's position, however, BASF again encourages the Court to allow EPA to offer its views on the application of its regulations to BASF's conduct. See Bates, 125 S.Ct. at 1804-05 (Breyer, J. concurring) (noting agency expertise in determining effect of state requirement on federal regulations).

Finally, plaintiffs' brief entirely ignores FIFRA's implied preemption of their claims based on the subset labeling regulations. BASF Br. at 38. As plaintiffs concede, EPA regulations grant BASF the choice to label Poast Plus® for fewer than all its EPA-registered uses. Pl.Br. 32-33. Under implied conflict preemption, state law claims may not hold a defendant liable for exercising a choice granted by federal law. E.g., Geier v. American Honda Motor Co., 529 U.S. 861, 884 (2000); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53, 155 (1982). Here, BASF cannot be held liable under state law for exercising a labeling choice that EPA regulations specifically grant. Cf. Bates, 125 S.Ct. at 1802 ("FIFRA contemplates that pesticide labels will evolve over time, as manufacturers gain more information about their products' performance in diverse settings.").

C. In Conflict with Bates, the Decision Below Permits a State Jury to Override Manufacturers' Safety Concerns

Plaintiffs' brief fails to address or even acknowledge the threshold safety issue presented by Bates: whether a court should *ever* permit a jury to *punish* a manufacturer for deciding *not* to market a potentially dangerous product for a particular purpose.

Instead, plaintiffs' brief merely recites the evidence they believe supports the jury's conclusion that BASF sufficiently tested Poast Plus® for all minor crops.

The judgment here turns Bates on its head. In Bates, the Supreme Court confirmed that a pesticide manufacturer has a state law duty—*beyond* that imposed by EPA regulations—to conduct crop safety tests under specific local conditions where necessary before labeling and selling the pesticide for use under those conditions. 125 S.Ct. at 1793. Public policy demands that manufacturers thus err on the side of safety, and Bates makes clear that both FIFRA and the courts serve that public policy by recognizing legal duties of careful design, targeted pre-market testing, responsible manufacturing, and adequate warnings. See 125 S.Ct. at 1798. The judgment here, imposing on BASF the duty to elevate consumer desires for a product over possible safety testing concerns, directly conflicts with these broad duties and policies recognized in Bates. Plaintiffs' brief fails to address this real-world problem in any way.

Even if the issue of BASF's duty to test were a question of fact for the jury instead of a question of law for the court, the evidence plaintiffs cite does not satisfy the safety concerns expressed in Bates. First, plaintiffs do not dispute the contemporaneous documentary evidence that BASF's scientists believed (before *and* after EPA registration) that more testing was needed before Poast Plus® could be safely labeled for use on minor crops. AA-457-58, 482, 484-89, 491-95, 500-504, 506-508, 611-614.

Second, to satisfy the state-law duties recognized in Bates, a manufacturer must not only *believe* that its product is reasonably safe, it must test the product sufficiently to

ensure that the product actually *is* reasonably safe. E.g., Bilotta v. Kelley Co., 346 N.W.2d 616, 622-24 (Minn. 1984). Although plaintiffs assert that “Poast Plus is not considered risky,” Pl.Br. 42 (quoting 657 N.W.2d at 867), Bates notes that all pesticides are “poisonous substances.” 125 S.Ct. at 1801. The record contains no evidence that Poast Plus® had *actually* been tested *and* proven safe for use on all minor crops for all 50 states under all likely conditions and tank-mix combinations. On the contrary, the undisputed evidence at trial demonstrated that Poast Plus® had been tested for crop safety on minor crops only a few times under a few conditions, and had not been tested for crop safety on some minor crops under any *actual* conditions. Tr.3391:23-3392:4; 2921:2-2923:5;AA-748. Such limited testing did not satisfy BASF’s obligations to test Poast Plus® before marketing it for minor crops, and the trial court erred as a matter of law in permitting the jury to punish BASF for declining to market the pesticide for minor crop use.

Contrary to plaintiffs’ assertion, BASF’s sale of the Poast Plus® formulation under the Vantage® and Torpedo® trade names, Pl.Br. 17, 42-43, does *not* show that Poast Plus® can be used safely *everywhere* on *every* minor crop. On the contrary, these sales demonstrate that, in the words of Bates, BASF used “due care in conducting appropriate testing of their products” and produced “pesticide labels [that] evolve[d] over time, as [BASF] gain[ed] more information about their products’ performance in diverse settings.” 125 S.Ct. at 1798, 1802.

Both the Torpedo® and Vantage® labels contained safety-related, test-based directions and warnings specific to the particular conditions and crops for which the products were actually labeled. See Tr.2919:4-2920:2, RFA1200-1241 (Torpedo® label limited to citrus trees in five states *only*; *prohibits* tank mixing with other pesticides, *requires* application to the ground *between* tree trunks, and *warns* against spraying foliage and fruit); RFA-429, 1236-41, 1200-30, 1249-53Tr.3114:9-3116:23; Tr.3129:6-3131:9 (Vantage® label limited to non-food ornamental and nursery plantings; *warns* users of insufficient crop safety testing on those crops to guarantee safety, and advises testing in small area before broad use—a routine practice for ornamental plants but *not* for other minor crops).

In place of the careful, targeted approach to crop safety contemplated by FIFRA, adopted by BASF, and endorsed by Bates, plaintiffs here would reverse direction and permit a jury to severely punish a manufacturer for failing to market a pesticide for all EPA-registered uses in all states under all conditions, regardless of any crop safety concerns demonstrated by product testing or, indeed, of whether testing under those conditions has occurred at all. Plaintiffs cannot square their position on crop safety with Bates, nor does their brief attempt to do so.

D. Plaintiffs' Claims Flout the States' Important Role in Pesticide Regulation under FIFRA

The verdict here, which assumes that all states would have rubber-stamped any Poast Plus® registration application, directly threatens every state's power to regulate pesticides within its own borders, a power affirmed in FIFRA and recognized in Bates.

BASF Br. 43-46. Plaintiffs duck this legal issue entirely and simply argue that the evidence was sufficient to support the jury's verdict. The issue, however, is not whether the jury could have believed that all states would have approved Poast Plus® for all uses, but whether the jury has the right to intrude on states' powers by making such a decision.

Plaintiffs do not deny that every state both has and uses the power to regulate, and even to ban, any use of any pesticide within its borders, notwithstanding EPA registration. Plaintiffs do not dispute that no state has *actually* registered Poast Plus® for use on all the EPA-registered minor crops, or that (other than the temporary and ill-grounded 24(c) registration) the use of Poast Plus® on minor crops has never been legal anywhere. Plaintiffs do not deny that California actually *rejected* registration for the Poast Plus® formula for safety reasons. Despite these facts, plaintiffs nevertheless assert that BASF committed fraud in saying Poast Plus® was not registered for minor crops.

Plaintiffs ask the Court to sustain a verdict that takes this state regulatory power away from the states and places it the hands of a single jury in a single state, which is permitted to punish a manufacturer for not seeking a state registration that the jury speculates the state might have granted. This result runs directly counter to the terms of FIFRA and the dictates of Bates. 7 U.S.C. § 136v (“*A State* may regulate the sale or use of any federally registered pesticide...*in that State*...” (emphasis added)); 125 S.Ct. at 1802 (noting FIFRA expressly “preserves a broad role for state regulation” of pesticides).

E. Plaintiffs' Reliance on Preempted Theories Entitles BASF to Judgment

While ignoring the consequences of their undisputed attacks on BASF's pesticide labels, plaintiffs contend that their claims arose from "off-label claims of lies, deceit and smoking gun memoranda" and that "[t]he Supreme Court confirmed [in Bates] that off-label claims . . . are off the radar of preemption." Pl.Br. 31. Although plaintiffs introduced a modicum of evidence of conduct other than labeling, plaintiffs' "same product" and subset labeling themes clearly formed the foundation of plaintiffs' claims. As plaintiffs themselves frankly admitted at trial, without them they have no claim. Tr.1225:14-17. Plaintiffs' subsidiary evidence cannot sustain the judgment.

BASF's initial brief addressed plaintiffs' reliance on advertisements and the *Sugarbeet Grower* article, BASF Br. 46-47 & n.10, and, lacking any response by plaintiffs, BASF will not repeat that discussion.

1. Truthful Reports to Authorities

Plaintiffs argue that, in 1992 and 1993, one BASF sales representative accurately informed North Dakota authorities of substantial sales of Poast Plus® to retailers in areas where few major crops are grown. RFA-840-849; Tr.1859:18-1861:4. The state investigated and ultimately charged several dealers and growers with illegal off-label use of Poast Plus®, producing guilty pleas. RFA-840-849; Tr.518:2-520:8, 1861:5-14, 1912:11-1913:14. These were North Dakota's prosecutions; plaintiffs' assertion (without citation) that BASF "threatened" these prosecutions, Pl.Br. at 6, is unsupported in the record.

Plaintiffs' claim that these truthful reports to authorities of illegal activity constituted "unconscionable commercial conduct" is not, as plaintiffs try to characterize it, an "off-label" claim at all. On the contrary; the claim unavoidably seeks to impose liability on BASF for subset labeling. EPA's subset labeling regulation *necessarily* contemplates that the subset labels will be enforced like any other EPA-approved label, and that those farmers who illegally use the product off-label may be prosecuted. See 7 U.S.C. § 136j(a)(2)(G) (prohibiting off-label use); AA-516, 554-559. Under Bates, such a state law predicate for liability is preempted. See 125 S.Ct. at 1803.

2. BASF Meeting with North Dakota Pesticide Control Board

Plaintiffs also point to a North Dakota Pesticide Control Board meeting to which BASF representatives were summoned to appear in March 1994. Pl.Br. 24-26. At that meeting, a BASF representative told the Board that it would cost BASF millions of dollars to complete the crop safety testing needed to safely label Poast Plus® for minor crops, and did not disclose that BASF already had EPA shelf registrations for the use of Poast Plus® on minor crops. RFA-377-378, 587.

Any misapprehension by the Board regarding Poast Plus®'s federal registration status continued at most for *two months*; in May 1994, Commissioner Vogel learned directly from EPA that Poast Plus® had EPA shelf registrations for minor crop use, and that EPA regulations authorized BASF's decision not to label Poast Plus® for minor crops for marketing purposes.

As plaintiffs' brief makes clear, however, plaintiffs' claim rests *not* on this brief period of misunderstanding—or indeed on *any* misunderstanding by plaintiffs—but on BASF's choice to employ subset labeling *at all*. Pl.Br. 6, 13, 18, 32-33. Because plaintiffs cannot show that BASF's conversations with the Board caused them any injury without falling back on their attack on BASF's subset labeling decision, the Board evidence is insufficient to sustain liability.

F. BASF has Not Waived the Issue of Federal Preemption

Finally, plaintiffs try to avoid the issue of federal preemption altogether, retreating *five* steps in the litigation to argue that BASF waived the issue by not specifically mentioning it in the PFR following Peterson I. Pl.Br. 44-45. This argument does not withstand scrutiny.

The U.S. Supreme Court and this Court have placed federal preemption at the center of the present remand. This Court decided the federal preemption issue in Peterson III, 675 N.W.2d at 68-71. The U.S. Supreme Court vacated that judgment and ordered this Court to reconsider its decision in light of Bates, which made new law on FIFRA preemption. 125 S.Ct. 1968. This Court in turn directed the parties to brief “the effect of the Bates decision on the preemption issue presented in this case.” June 14, 2005 Order. Federal preemption is not only a live issue in this appeal, it is the very reason for this proceeding.

In any event, plaintiffs have waived any objection to the consideration of the issue. In the five years since Peterson I, plaintiffs have never before asserted that BASF had

waived the issue of federal preemption. On the contrary, plaintiffs themselves argued against federal preemption in Peterson III without ever suggesting waiver. See Pl.Br.(Peterson III) at 51-54. Plaintiffs cannot belatedly assert waiver now. Tokatly v. Ashcroft, 371 F.3d 613, 618 (9th Cir. 2004) (failure to argue waiver implicitly “waive[s] waiver”).

III. IN THE ALTERNATIVE, BATES REQUIRES A NEW TRIAL

Even if plaintiffs’ claims were not wholly preempted under Bates, BASF is nevertheless entitled at the very least to a reversal of the trial court’s judgment and a remand for a new trial.

A. Under Bates, the Trial Court Erred in Refusing to Exclude Evidence Attacking BASF’s Pesticide Labels

As previously detailed, the case plaintiffs presented to the jury featured numerous direct attacks on BASF’s Poast® and Poast Plus® labels. BASF Br. 14-15, 33-35, 48-50. Plaintiffs do not dispute that the testimony occurred, or that their own attorneys elicited it, or that it formed the central theme of their case. They do not dispute that, under Bates, FIFRA bars such attacks on EPA-approved pesticide labels.

Plaintiffs do not try to rationalize their opposition to BASF’s motion in limine to exclude evidence of pesticide labeling. AA-230-234. They do not try to justify the attacks themselves. They do not deny that their attacks on the labels were inflammatory and highly prejudicial to BASF, and they do not deny that the attacks affected the result of the trial. Plaintiffs simply pretend that the attacks did not occur.

The record, however, establishes that the attacks did occur. Bates unavoidably preempts these attacks, and Minnesota law at the very least mandates a new trial. E.g., W.G.O. v. Crandall, 640 N.W.2d 344, 349-50 (Minn. 2002).

B. The Trial Court Improperly Denied BASF’s Requested Jury Instructions Concerning BASF’s Rights and Duties under EPA Regulations

Finally, BASF is entitled to a new trial because the trial court refused to instruct the jury concerning the EPA regulations governing BASF’s conduct under FIFRA. Bates specifically requires that “[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards.” 125 S.Ct. at 1804. Here, at plaintiffs’ insistence, the trial court refused to give BASF’s requested instructions.

1. The requested instructions bear directly on the central issues in the case.

Plaintiffs argue that BASF’s jury instruction argument is “irrelevant” and “dishonest” because Bates’s jury instruction requirement—which plaintiffs call a “suggestion”—“only relates to state label-based claims...that the pesticide seller’s statements *on the EPA-approved label* were false or inadequate.” Pl.Br. 47 (emphasis in original). Nothing in Bates supports such a limitation. See 125 S.Ct. at 1804. The Bates Court focused on preventing juries—in whatever context—from basing liability decisions on FIFRA-preempted labeling claims, which is exactly what plaintiffs’ “deceptive label” evidence invited here. Id. The trial court erred in refusing to give BASF’s requested instructions.

Moreover, the Supreme Court was well aware of the jury instruction issue in Peterson when it included its jury instruction language in Bates. Bates, after all, involved a summary judgment appeal, where the issue of jury instructions did not arise, 125 S.Ct. at 1793, and the Bates Court had before it multiple submissions in Peterson addressing the issue of jury instructions in the FIFRA context. The Court also vacated and remanded Peterson a mere five days after deciding Bates. The jury instruction issue presented in this case clearly informed the Bates decision's discussion of the issue.

2. The trial court's failure to instruct the jury on FIFRA was not "harmless error."

Plaintiffs next suggest that failure to instruct the jury on the applicable regulations was "harmless error." The Supreme Court clearly did not regard such instructions as optional or unimportant; Bates explicitly requires that "a court *should instruct the jury*" about such regulations. 125 S.Ct. at 1804 (emphasis added).

Plaintiffs argue that expert and other witness testimony, attorneys' arguments, and copies of regulations offered as exhibits somehow substitute for the court *actually* instructing the jury on the relevant law. They do not. As to witnesses, the law is not a proper subject for testimony, expert or otherwise. See State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982) ("opinions involving a legal analysis or mixed questions of law and fact are deemed to be of no use to the jury," citing Advisory Committee Comment to Minn. R. Evid. 704).

Attorneys' statements likewise are not evidence of the law, and the trial judge here, following Minnesota's standard JIGs, told the jury exactly that. See Tr.3833:10-12

(“Nothing the attorneys say during the trial, including opening statement and closing argument, is evidence. ” (quoting CIVJIG 10.25)). Finally, simply giving the jury a copy of a statute or regulation as an exhibit does not and cannot substitute for the court *actually* telling the jury what the law is. Anderson v. Ohm, 258 N.W.2d 114, 117 (Minn. 1977) (“It is the trial court’s duty to instruct the jury on the law and not to submit a regulation to the jury for its own interpretation.”).

All of plaintiffs’ arguments here share a common fatal flaw: they assert that the *jury* should interpret the law. Unquestionably, however, it is the *judge’s* job to interpret and state the law, not the jury’s. The trial judge here correctly instructed the jury to rely on his statement of the law. See Tr.3833:16-18 (“What the attorneys say about the law may be different from what I say. If this happens, you must rely on what I say about the law. ” (quoting CIVJIG 10.25)). Unfortunately, the judge’s instruction on the law said nothing at all about the federal regulations that govern BASF’s conduct.

Moreover, plaintiffs’ own attorney argued in his closing that the trial court’s failure to instruct concerning federal regulations permitted the jury to *ignore* all the evidence and all the argument BASF had presented concerning such regulations. Tr.3748:9-22. The trial court’s failure to instruct about the federal regulations *cannot* be harmless error where plaintiffs’ attorney urged the jury to disregard the regulations exactly *because* the court had not instructed about the regulations.

In sum, under Bates, the instructions here undeniably left the jury with a fatally incomplete view of the law. BASF is entitled to a new trial.

3. BASF has not waived the jury instruction issue.

In a last attempt to avoid the issue, plaintiffs argue for the first time here that BASF has waived the issue of jury instructions about FIFRA because it did not specifically mention jury instructions in its PFR after Peterson II. This argument also fails. First, because plaintiffs did not raise the issue until now, plaintiffs waived any claim of waiver by failing to raise it in its prior brief to this Court. See §II(F) above.

More importantly, the jury instructions are and always have been an integral part of the FIFRA preemption issue, an issue indisputably raised in BASF's PFR. After this Court granted that PFR, both parties briefed the jury instruction issue, and the Court's decision addressed it. 675 N.W.2d at 65 (noting court of appeals' handling of issue). Both parties raised and discussed the issue in their submissions to the U.S. Supreme Court. AA-420-21; AA-435-36. The Supreme Court vacated and remanded Peterson for reconsideration in light of Bates, 125 S.Ct. 1968, a case that sets out *new* standards for jury instructions in cases involving FIFRA-regulated products. See 125 S.Ct. at 1804. Finally, this Court directed the parties to brief "the effects of the Bates decision on the preemption issue in this case." June 14, 2005 Order. The issue of jury instruction has not been waived, and is properly before the Court.

IV. PLAINTIFFS' BRIEF DISREGARDS COURT RULES

Beyond avoiding the real issues here, plaintiffs' brief skirts both the rules and the record. Plaintiffs evade Rule 132's 14,000 word limit by putting an additional 1,031 words of argument into their Addendum in a three-page, single-spaced chart headed

“BASF’s Amicus Arguments in Bates are Uniformly Rejected.” RFADD 1-3. Plaintiffs openly cite to non-record evidence that the trial court excluded as irrelevant and unfairly prejudicial, see Pl.Br. 11 n.7, as well as to non-record exhibits that plaintiffs never even offered at trial. E.g., Pl.Br. 26 (citing PX291); id. 40-41 (citing PX117). Plaintiffs include in their addendum new exhibits that are not part of the record, RFADD 17-18, 20-21, and characterize as “substantive evidence” BASF demonstrative exhibits that never went to the jury. Pl.Br. 49 (citing RFADD55-62); see Tr.3866:23-3867:1. Plaintiffs’ extra-record exhibits and extra-brief arguments violate the court’s rules and are not properly before the Court, e.g., Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988), and BASF objects to their inclusion in plaintiffs’ submissions.

In addition, plaintiffs’ brief engages in wholly inappropriate *ad hominem* attacks on BASF and its attorneys, using words such as “deceit,” “dishonest,” “childish,” “unethical,” and “abusive” that have no place in civil appellate discourse. BASF is confident that the Court will see these gratuitous attacks for what they are, but, in its own defense and for the record, BASF objects to this uncalled-for incivility.

CONCLUSION

BASF urges this Court to reverse the judgment of the district court and direct entry of judgment in BASF's favor on all claims, or in the alternative, grant BASF a new trial as described above.

The Court's June 14, 2005 Order deferred the issue of oral argument. BASF believes that oral argument would assist the Court in resolving the issues presented here, and once again urges the Court to permit it.

Dated: August 19, 2005

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STATE OF MINNESOTA
IN SUPREME COURT

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vs.

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Defendant/Appellant.

CERTIFICATION OF
BRIEF LENGTH

Appellate Court

Case Number: No. C3-02-857

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,999 words. This brief was prepared using Microsoft Word 2003 software.

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