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Supreme Court of Texas.
AMERICAN CYANAMID COMPANY, Petitioner,
v.
Terry GEYE and Brandon Geye, Respondents.
No. 01-0008.

November 7, 2001.

Appearances:
Lawrence S. Ebner, McKenna Long & Aldridge, Washington, D.C., for Petitioner.
Kerwin B. Stephens, Stephens & Myers, L L P, Graham, TX, for Respondent.

Before:

Thomas R. Phillips, Chief Justice, Priscilla R. Owen, Harriet O'Neill, Wallace B. Jefferson, Xavier Rodriguez, Nathan L. Hecht, Deborah Hankinson, James A. Baker, Craig Enoch, Justices.

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JUDGE PHILLIPS: The Court is ready to hear argument from the petitioner in American Cyanamid v. Geye.
MARSHAL: May it please the Court. Mr. Lawrence Ebner will present argument for the petitioner. They have reserved five minutes for rebuttal.

ORAL ARGUMENT OF LAWRENCE S. EBNER ON BEHALF OF THE PETITIONER

MR. EBNER: Mr. Chief Justice, members of the Court, the issue in this appeal is whether the Eastland Court of Appeals erred by failing to apply this Court's FIFRA preemption holding in quest to the respondent's labeling-related crop damage claims. Claims involving a tank mix whose use was explicitly authorized by the U.S. EPA-approved labeling. There are four points that I would like to emphasize this morning.
The first point is that to resolve this appeal, the Court simply should reaffirm its holding inquest that Section 136 bb of FIFRA preempts all labeling-related state law claims. The quest is consistent with an overwhelming body of FIFRA preemption case law and nothing in quest suggests that FIFRA preemption is limited to labeling-related claims that alleged personal injury. My second point is that the U.S. Supreme Court's Medronic decision which involved a very different

statutory scheme has no effect on FIFRA preemption. My third point is that EPA's PR Notice 96- 4 guidance document which focuses on the efficacy data waiver is irrelevant to this phytotoxicity or crop poisoning case. And my fourth point is that there is no reason to question the lower court's finding that all of the respondent's claims are labeling related. Section 136 --

JUDGE: I'm sorry -- I'm sorry, what -- what was your last -- your last point?

MR. EBNER: My last point is that there is no reason for this Court to revisit the finding of the lower court's that all of the respondent's claims are related to the EPA-approved labeling. Section 136 bb of FIFRA --

JUDGE: What if I assume here that um -- that the mixture did kill the crop or hurt the crop? Would they have a claim that's -- that's not labeling-related?

MR. EBNER: Well, hypothetically a tank mixture could kill a crop, for example, if there were some sort of manufacturing flaw in the chemical, some contaminant that wasn't supposed to be there. And in that sort of situation, there would be no FIFRA preemption.

JUDGE: Products case. It'll have a products case.

MR. EBNER: It'll be a products case but here --

JUDGE: But here, it was intended to become a [inaudible] instead of bad product.

MR. EBNER: Excuse me.

JUDGE: What if the products simply didn't work? At first it didn't and it killed the crops [inaudible]. What if it's a design defect [inaudible]?

MR. EBNER: Well, it depends on -- no, what the factual situation is. If -- these are products --

JUDGE: That might be -- that might be a design defect.

MR. EBNER: It may be a design defect.

JUDGE: Would that be preempted under a labeling preemption?

MR. EBNER: It depends on whether the design defect claim is really a labeling-related claim in disguise.

JUDGE: A failure to warn sort of thing.

MR. EBNER: Failure to warn. There can be some design defect claims that are unrelated to labeling but in many of the FIFRA preemption cases that have been decided. The Court's have held that although they claim purports to be based on the design defect. It's rarely a labeling, a failure to warn claim in disguise.

JUDGE: If this -- if the Court determines this is really an efficacy issue and the FIFRA legislation says that EPA is not to consider efficacy, then you'll loose?

MR. EBNER: No, your Honor. We do not loose. And the reason goes to --

JUDGE: How can -- how can there be expressed or even implied preemption if the enabling legislation to begin with feels the agency doesn't pay any attention to that?

MR. EBNER: Well, that's not what the enabling legislation says with due respect. What the respondents refer to in their briefs is the so called efficacy data waiver which allows EPA to waive the automatic submission of efficacy or product effectiveness data at the time a pesticide is first registered. It doesn't say anything about whether EPA can regulate labeling to prevent crop damage due to either phytotoxicity or lack of efficacy, two different concepts when and if problems develop after a pesticide or in this case a tank mixture is used.

JUDGE: But -- but what's the reason for waiving in the first instance? The reason for waiving is articulated wasn't it that these disputes can be resolved through state actions.

MR. EBNER: Well, the reason that congress put the efficacy data waiver in FIFRA was to enable EPA to focus on risk issues including crop risk issues. And to let the market place be the judge of whether a product is effective, whether it will kill the weeds, for example, when the product is introduced.

JUDGE: Well, and that's why I don't understand your answer to Justice Enoch's question that if we were to determine the crop damage as an efficacy issue. and I understand your claiming it's phytotoxicity and that's a different issue from efficacy. But if we were to find, as I believe this question was premised that it was efficacy, then with your position then you lose?

MR. EBNER: No. With due respect I don't think we would lose because EPA does in fact regulate labeling when and if efficacy problems develop after a pesticide is registered.

JUDGE: Well let me ask you on that score. Do you agree with what appears to be a common -- a common assumption that an expressed warranty is not preempted under FIFRA? So, if there was an expressed warranty about the product, American Cyanamid would -- could face state claims.

MR. EBNER: Well, not under the circumstances of this case because in this case --

JUDGE: Well, this is a general proposition.

MR. EBNER: Okay. As a general proposition, it depends on the nature of the representation of forming the expressed warranty. The case law has held --

JUDGE: So, if I -- if they warrant that this will increase crop production by 50%, would that be preempted or not?

MR. EBNER: If -- if -- a company warrants that would be increased by 50 percent and the label doesn't say, which are probably wouldn't though to be increased by 50 percent, that claim probably would not be preempted. However, there is much case law holding that expressed warranty claims are preempted by FIFRA. When the expressed warranty, let's say an oral representation by a manufacture's representation were an advertising claim repeats or is consistent with or doesn't substantially differ from what the label says.

JUDGE: I -- I understand. The argument --

MR. EBNER: So, it depends on the -- excuse me -- it depends on the representation which forms the basis of the expressed warranty and whether that representation repeats what's on the labeling.

JUDGE: Well, let me get -- let me get your point. I -- I understand the argument. If the expressed warranty is that you can tank mix this Pursuit with Prowl, that is the same thing that's on the label --

MR. EBNER: Yes.

JUDGE: -- or substantially that would be preemption.

MR. EBNER: Yes, your Honor.

JUDGE: But if the warranty is this increases your production by 50 percent, that's not on the label, there's no word there, that's just in the advertising brochure, that probably wouldn't be preempted because that really isn't phytotoxicity, that really is saying, We've got a good product out here. We're making a guarantee that this -- if you use this product, it improves as a different --

MR. EBNER: That -- that probably would not be preempted on that hypothetical which is not this case. But I think your Honor's question

--

JUDGE: But in this case, there is the argument that there was a warranty that this is a good product.

MR. EBNER: Well -- well, the -- a claim that's being made here is that the tank mix could be used on peanuts. That's what the claim is of the respondents. The advertising said that Pursuit can be tank mixed with Prowl to be used on peanuts. That is exactly the same as what the label said, the federally-approved label. And for that reason, the court of appeals correctly found us that the trial court, that the advertising claims upon which this entire case is based, merely repeat what is on the federally-approved label and therefore all those claims are labeling related. And the case law holds, for example, the Fifth Circuit of crop damage opinion on Andrus and the California Supreme Court opinion on Etcheverry that if a misrepresentation claim or an expressed warranty claim is based on an off-label representation that repeats what's on the label, it is preempted.

And that is exactly the situation here. But your Honor's question, I'd like to add, just underscores an important point which is that FIFRA preemption is a limited defense. It does apply the labeling-related claims but it's limited in the sense that it does not apply the claims which are not labeling related. So it's a limited defense.

JUDGE: Well, that -- that -- that gets to my problem. You know, there are lots of labels that don't say much like engineered like no other car, that may be good, that may be bad, we don't know. This says -- this label says these two chemicals can be mixed.

MR. EBNER: Yes.

JUDGE: And I guess, they won't blow up or make a toxic gas that would kill you as you were doing it or something. But it doesn't say they can be mixed and then used without the untoward effect. What I'm wondering is I -- I can see the basis for the federal preemption but surely, if the -- if you could make -- you went to the dealer and said, "Can I mix these, use these on my crop, it will kill the weeds and it won't kill my crop." And the guy says, "Yes." Would that be related?

MR. EBNER: Yes it would be and the reason is that this statement that the products can be tanked and it appears on EPA-approved label. EPA approves that label pursuant to the statutory standards of FIFRA. The unreasonable adverse effects standard of FIFRA, which requires EPA to determine when they register a product that it's not gonna have unreasonable adverse effects on the environment which is the defined to include crops. So, it is implicit in the tank mix statement on the labeling that it's not going to be phytotoxic to crops and for that reason the claim is -- is preempted.

JUDGE: So, if it were just absolutely determined that it did, that there was a mistake here and this really did killed the crop that we're just -- the federal labeling were just preempted in the --

MR. EBNER: I didn't hear the last part of the question.

JUDGE: The federal labeling would preempt in your view.

MR. EBNER: Well, if the tank mix in fact killed the crops, then it would be a matter of EPA determines whether that tank mix should be prohibited from the label. But there is no such determination that has been made.

JUDGE: The first of these crops had been damaged is a result of just out of luck.

MR. EBNER: Well, I --

JUDGE: There's no -- there's no remedy. There's no place to go. There's none anything to do.

MR. EBNER: Well, it -- this particular plaintiff based on this

particular --
JUDGE: No, based on Justice Hechts' -- Justice Hechts' hypothetical --
MR. EBNER: No.
JUDGE: -- in that particular -- the plaintiff just lost the crops too bad.
MR. EBNER: If the plaintiff lost -- if the plaintiff lost the crops because the plaintiff relied on a representation that the products can be tank mixed, which is what the label says, then FIFRA would preempt that claim which is not to say that FIFRA preempts all crop damage claims?
JUDGE: Because when we answer the questions you asked in that plaintiff has no remedy under either state or federal law.
MR. EBNER: That plaintiff has no remedy if -- if the claim is labeled in the letter, that is correct.
JUDGE PHILLIPS: Any other questions? Thank you Counsel. Oh no, no -- the -- I'm sorry.
JUDGE: Let me ask -- I got a question real quickly.
MR. EBNER: Okay.
JUDGE: Now --
JUDGE PHILLIPS: Sorry.
JUDGE: -- you did talk about host registration investigation.
MR. EBNER: Yes, your Honor.
JUDGE: There is an issue here, seems to me that was raised that um -- the Geyes say they don't -- the EPA has never expressed an interest in crop damage complaints about tank mixing. You had indicated that -- that the issue about the toxicity -- the issue here is a postregistration not a preregistration kind of notion --
MR. EBNER: Correct.
JUDGE: -- that's out there I guess on the --
MR. EBNER: On the phytotoxicity. On the phytotoxicity.
JUDGE: So, is it really -- are you agreeing that the EPA has expressed no interest on the post registration about the phytotox -- about the efficacy of these pesticides?
MR. EBNER: Not at all, your Honor. I'm not agreeing with that because when and if problems develop, the statute requires reporting to EPA and the EPA determines that there is a problem to either phytotoxicity or to lack of efficacy with respect to a single pesticide or with respect to a tank mixture of pesticides. It will regulate the labeling to prevent crop damage. For example --
JUDGE: Does this permit the Geyes to make a report to the EPA that their crops have been adversely affected by this thing?
MR. EBNER: It certainly would allow the farmer to write to EPA and make them aware of that, yes.
JUDGE: But that's the end of it?
MR. EBNER: Not necessarily. It's -- congress gave the EPA the discretion to determine what warnings, what prohibitions if any to make.
JUDGE: After effect.
MR. EBNER: Well --
JUDGE: I mean, if they make a report and say, "Well, we put the mix on our peanuts and it killed them."
MR. EBNER: Well, if we -- if -- if --
JUDGE: So they say, "Well let's make American put some on their label you can mix it but don't put in on peanuts." So, now --
MR. EBNER: If all -- if all EPA has is one unsubstantiated claim that a tank mix caused crop damage. It's not clear to me that EPA would

prohibit that tank mix. On the other hand, if there was a pattern of phytotoxicity reported to EPA as the statute requires the manufacturer to do under certain circumstances when there are series of incidence, then EPA could decide.

JUDGE: So, it's the manufacturer that makes the report?

MR. EBNER: Well, the statute --

JUDGE: Now, the farmer -- the farmer writes to American and says, "The mix did our peanuts and --" and you say, "Okay, I'll report it to the EPA and we -- but we think it's the first claim so that's all we're gonna do."

MR. EBNER: Well, the -- the statute requires the manufacturer to report incidence of phytotoxicity under certain circumstances --

JUDGE: But would you -- do you --

MR. EBNER: -- but the farmers would --

JUDGE: -- the difference between phytotoxicity and efficacy?

MR. EBNER: Excuse me.

JUDGE: Is there a difference between the two?

MR. EBNER: Yes there is and those are terms of art that are explained in the EPA guidelines. Efficacy involves the ability of the herbicide to kill the weed and phytotoxicity is -- is of the property of a pesticide or a tank mixture that kills the crop, which is certainly an unintended thing. And the efficacy data waiver --

JUDGE: So, efficacy is the capacity for producing a desired result which is to kill the weeds.

MR. EBNER: Kill the weeds, kill the insects, whatever the pesticide is intended to do. Whether the --

JUDGE: Right.

MR. EBNER: -- pesticide is effective for its intended purpose.

JUDGE: So long as it does something other than that, then it's phytotoxic and then you can't have a lawsuit for it because it's preempted.

MR. EBNER: Well, you can't have a lawsuit for phytotoxicity if all of the claims in the lawsuit, as this one does, challenge the labeling statement which allows the tank mix and implicitly says that the tank mix will not be phytotoxic. And where -- there is nothing in the record to indicate that the EPA after its review determined that it was phytotoxic or required a label warning or prohibition against use of that tank mix.

JUDGE PHILLIPS: Any other questions? Thank you Counsel.

MR. EBNER: Thank you.

JUDGE PHILLIPS: The Court is ready to hear argument from the respondent.

MARSHAL: May it please the Court. Mr. Kerwin Stephens will present argument for the respondent.

ORAL ARGUMENT OF KERWIN B. STEPHENS ON BEHALF OF THE RESPONDENTS

MR. STEPHENS: May it please the Court. I represent two Eastland County peanut farmers who utilized products by the defendant in this case, Prowl and Pursuit. A lot has been made that our complaint goes around the tank mixing aspects of this case, that's not entirely true. What we have here is -- is a case that's premised on false advertising. For us, this is a false advertising case that is a matter which is traditionally been relegated to the state as a matter of police action

for the protection of its citizens, cases have so held in those areas preemption is disfavored. There is a presumption against preemption.

JUDGE: Is the advertising that you claim was false any different from the labeling?

MR. STEPHENS: I believe so in some aspects, your Honor?

JUDGE: How -- how so?

MR. STEPHENS: Well, inspection of what the representations were that we may complain about, a sound choice for crop safety that didn't cause injury to peanuts, safety use in all peanut varieties, provides superior control without injury to young peanut plants.

JUDGE: That -- that was true to products individually. You don't claim that presumption of products individually just as mixed?

MR. STEPHENS: As mixed, that is our complaint in regard to why this caused the damage to our crop. The mixing is something that is an EPA-approved aspect of label, not mandatory aspect for the label that's in the regulation for that effect. We also disagree in their definition of the term efficacy in this case. We agree with EPA position in this case as the meaning of that term. And the EPA position, and this is set forth in the brief that they filed in the California case, the Etcheverry case just to have the results in Counsel in connection with California. And in regard to these products, these herbicide products at least, efficacy has two components. We will submit whether the pesticide controls the current pest and whether the pesticide does no harm to the crop or part of the crop. So, we are really a product performance and the phytotoxicity aspect that these two components --

JUDGE: And where did you -- from where did you derive that definition?

MR. STEPHENS: EPA. That is their definition, that's how they apply.

JUDGE: Do you have a -- a citation for that?

MR. STEPHENS: Page 35, EPA brief, footnote 69. That brief has been filed with the Court and submitted there. I think it's also self evident --

JUDGE: But does that come from that pesticide review that PR 96-4, that letter -- is that what they're basing it on?

MR. STEPHENS: That I think also that the regs which were formed to be -- I would submit pursuant to authority, one general authority of the administrator to propagate regulations in this area. But also about specific mandate of congress to delegate the -- the right of the EPA administrator to not require that be submitted in regard to not only product performance but also the phytotoxicity aspects which are carried by two of the regs that were cited in the brief.

JUDGE: And the appellant's amicus brief, they cited Section 136AC5C. And they say that before the EPA can register a pesticide, it's got to determine whether the pesticide will perform its intended function without unreasonable adverse effects on the environment. Is that still a requirement?

MR. STEPHENS: I don't see it that way, your Honor. That is correct. 136AC5 is what I would call the labor statute that allows the administrator to waive submission of data in regard to those areas it has done.

JUDGE: But instead -- does the statute still require the appellant to determine if the product will perform its intended purpose?

MR. STEPHENS: No, your Honor. No, not --

JUDGE: It doesn't -- the statute just doesn't say that?

MR. STEPHENS: Well, what it does. It allows the administrator to waive the submission of data in regard to those areas. And EPA has done

some. What we really have is an area of nonregulation as to this crop dispute problem we have before the Court. The EPA is not requiring chemical companies to submit any data concerning crop performance, phytotoxicity, and regarding its actual chemicals.

JUDGE: Well, about phytotoxicity. Doesn't that relate to the EPA's fundamental function as regulating environmental issues and the whole purpose behind far beyond the efficacy exception appeared to be -- to allow the EPA to focus on health and environment? And if you've got crop damage, why does not that relate to environment and come within what the EPA is supposed to be looking at.

MR. STEPHENS: The EPA's explanation on this and again I will abide to their amicus brief filed before the California Court, that's what they're talking about as an actual environment. Here we're talking about crops. Crops that are placed there by planting them, by filtering them, whatever the case may be.

JUDGE: But, I -- I thought the definition of environment included all plants which includes crops.?

MR. STEPHENS: I agree that plants include crops. I don't agree necessarily that the definition of environment means the plant is the sort of EPA's -- I'm sorry.

JUDGE: Well, I guess if -- if environment includes plants, and plants include crops, why doesn't an environment include crops?

MR. STEPHENS: Judge I've had more problems with semantics in this case than probably any I've ever had.

JUDGE: Well, but if that's the case, if environment does include crops, and why wouldn't it come within the EPA's offices to -- to want to retain that piece of it?

MR. STEPHENS: Actually, the question has been they say it doesn't.

JUDGE: Where?

MR. STEPHENS: It's what the EPA takes position regarding the amicus brief that said that. They say they have -- they're not.

JUDGE: But it's not in the regs.

MR. STEPHENS: Not in the regs.

JUDGE: But what congress has said is to experimented it, that congress has told them before you put these products on the market, you've got to ensure that they perform their intended function without unreasonable effects on the environment?

MR. STEPHENS: And Congress has told them that you have the authority to waive these aspects concerning these products --

JUDGE: It says you can waive the data requirement. It doesn't say --

MR. STEPHENS: Right.

JUDGE: That doesn't say that don't pay attention to what we told you what to do. We can -- we're leaving that to you how you did that. And you can waive the data requirement.

MR. STEPHENS: But in application, they're doing none of it.

JUDGE: Would you agree with --

MR. STEPHENS: For 20 years they haven't.

JUDGE: Would you agree with the statement that was made earlier that post incident, the EPA does come back into the picture?

MR. STEPHENS: They have the right to do so. It's in the regs. The problem we have here is it's never happened. In regard to this incident, they determined whether or not they needed to make some sort of a report.

JUDGE: Let me ask you on that -- not necessarily on the report. If this Court determines that your claim is not preempted. You go back to trial, the jury determines that this mixture -- this tank mixture could

not -- not be used on peanuts. They make that determination which I guess is your claim, it falls after it. You said it could be and it couldn't. So the jury says you're right, that was false, they could not. The result will be that your farmer received recovery for the damages to their crops. Is American Cyanamid now permitted to add to its label "Don't use tank mixtures -- don't use this tank mixture which you're gonna put on peanuts?"

MR. STEPHENS: I think they can.

JUDGE: Could they do that without the EPA's authority?

MR. STEPHENS: I think they would have to resubmit the label to the EPA. If approved, the EPA will put it in the marketplace after.

JUDGE: And if the EPA refused to approve that on the label, what happens?

MR. STEPHENS: As I understand, the EPA's position how they handle tank mix and tank situations. It is not an approved tank situation. They don't get into that. It's there. It goes to the process. They don't really get into regulating those very -- those aspects of the label. It is more than application issue that they --

JUDGE: Will Cyanamid will have to put -- put - - at least in Texas the label would have to show that it's not -- could not be used for peanuts based on the jury decision that that was false advertising that it could be used in peanuts.

MR. STEPHENS: They could elect not to sell the product for peanut usage at all if they saw so. I'm not sure I understand your question.

JUDGE: Okay. Well or they can put a warning on the label that this product could be used for other applications but not for peanuts.

MR. STEPHENS: Yeah, they could.

JUDGE: And in Texas, that would be the shape of the label.

MR. STEPHENS: Well, I think in the label --

JUDGE: If they didn't label it -- I mean, if they didn't label it, the next lawsuit would be they already knew it was wrong so this was intentional conduct and this will lead us to find any label that says it [inaudible]. They had to put it on the label.

MR. STEPHENS: We actually have that in this case. Some reports during the prior year that this was causing harm to crops and tank mixture situation and they sold it the following year. That is one of the aspects that we have in this case. Well, the problem I think they really have with their arguments in this case is that EPA doesn't agree with it.

JUDGE: Well, they didn't agree in California either and California rejected that position. So, how do you spur this with Etcheverry?

MR. STEPHENS: Well, I give Mr. Ebner some credit for that. His services are very much in demand in this area. The California Court I think is just plain out wrong. I think they even acknowledged that in the opinion when they acknowledged that the two regs that had been promulgated by the EPA pursuant to congressional mandate that they can waive data submission requirements were both one of which is a phytotoxicity reg the other one is product performance stock reg that they are all -- those promulgated pursuant to an efficacy waiver to take this case to the EPA. So --

JUDGE: Let me ask you about the credibility that in the EPA's view, environmental protection you see is set up for the specific purpose of protecting the environment. Could the agency itself decide that "We're not gonna decide whether or not this chemical will kill the environment?" Could they just -- an agency make a determination that we're not gonna decide if this chemical will kill the environment?

MR. STEPHENS: I think that Geye to carry out the congressional

mandate with function were that their opinion is --

JUDGE: Could they say -- could they define crop damage if the -- if the congress says, "Look, we don't want you to get involved in impeding claims of which is better than which." And could the EPA just, "Okay efficacy is something we're not responsible for we're gonna define efficacy to include damage to environment so we don't have to regulate that." Could they -- could they -- could the agency choose to do that?

MR. STEPHENS: I don't think the agency has the right or the ability to not perform its desired function. But were they good or not -- actually that's not an issue in this case.

JUDGE: But what does a waiver provision? By waiving submission of data, haven't they waived regulation?

MR. STEPHENS: That's our position.

JUDGE: And the statute allows them to do that?

MR. STEPHENS: And they've done that. And so our argument and what we wish to put after this Court is that we have an area that we don't get the protection that EPA -- that suppose to provide or people may think it suppose to provide. If people think that they're actually doing their job in regard to this area. The congress --

JUDGE: But then the question is: is this efficacy? When it kills the weeds, it'll have to just kill everything else. That's your complaint.

MR. STEPHENS: Part of law and I say to that EPA has defined what efficacy is and realized the Etcheverry case went off on the efficacy issue. And that's the basis a lot from your holding is the definition of efficacy that EPA has.

JUDGE: But can -- can the EPA by redefining the efficacy, defining itself as the job that congress has told them to do.

MR. STEPHENS: I think the EPA has done what Congress has allowed them to do by not requiring that it be submitted. So really what EPA is doing in this case is they're following the intent of Congress which is to touch on [inaudible] --

JUDGE: Now but if the congress efficacy not to include just the weed, it doesn't kill the weed, that's what congress had in mind with respect to efficacy. And the EPA comes back as well, we want it to be broad, we want it to include crop damage because we want to get out of the business of examining these pesticides for crop. Does -- can the EPA come back and do that?

MR. STEPHENS: Fairly the EPA thought they had the right to do so and probably in two regs. They have force of law that does that, and has been that way for a substantial period of time.

JUDGE: I thought the regs also allowed the commission to come in and look at crop damage claims or issues and changing labeling if there were in fact crop damage issues.

MR. STEPHENS: Actually in fact there is provision in it. You're correct, your Honor, that when there's a problem, they have the obligation to report them but hasn't happened in this case.

JUDGE: But the label control's up until the time that EPA makes the determination that that label should've been changed.

MR. STEPHENS: The labels are solely a function of EPA approval process, your Honor.

JUDGE: Which can be changed by the EPA --

MR. STEPHENS: If requested.

JUDGE: -- if there's crop damage.

MR. STEPHENS: Or I suppose if there's an issue that they could require and investigate it. But this is all after effect. This is

regulation after there has been no regulation. And so we have, in essence here, a situation where the EPA is not exercising any regulatory aspects --

JUDGE: Up front.

MR. STEPHENS: -- for authority up front.

JUDGE: But they are doing that -- certainly have the authority to do it.

MR. STEPHENS: Have authority, I don't know if they were done. I could find nothing to indicate that they ever done it, in particular with regard to these two chemicals. It's not in the record below that they ever did do it. It's not in the record below that it was ever even reported the problem that we have. So, it hadn't taken place. The regulation, the protection that EPA is charged to provide has not taken place in this situation. And -- and we've simply got an issue to where we don't have the protection.

JUDGE: Suppose under the statute -- suppose that the -- someone wants to market a new herbicide or crop application and submits it --- submits data to the EPA and it determines based on this data, this is what the label should be, this is right, it tracts sort of the requirements of the statute. Then it turns out that there was not an update of -- people were acting in good faith but the particular situation was overlooked and it really is misleading and should be checked. In that case, would the injured farmer have a cause of action?

MR. STEPHENS: I don't think so.

JUDGE: There is -- they were regulating and they did as much as they could and they just messed up.

MR. STEPHENS: There is a problem exception that's recognized that I found and your question did not include the circumstances I understood, but --

JUDGE: But here, you say it's different because there's no regulation at all. They're just saying we passed and the act gives us the right to pass.

MR. STEPHENS: And therefore I'm suggesting there's no preemption because they are not -- occupying this area of the field.

JUDGE: Well, is it really they have the authority to act. Your position is that preemption only applies when they have the authority and they actually have to.

MR. STEPHENS: In this instance, it's a little different. We've got congressional mandate that allows the administrator to waive the submission of this data.

JUDGE: Assuming we disagree with you about what efficacy means. Assuming that we think there's a difference between efficacy and phytotoxicity. They have in -- in any event, they have the authority to take -- to take action either way.

MR. STEPHENS: EPA had the authority or had the right, I guess is one way of saying it, to not relinquish that authority. They exercised the option that congress gave them and promulgated a couple of regs that waive data submission. It's how I best describe it.

JUDGE: Why data submission? They can still require that if they wanted to and they certainly can take actions after the fact that changed [inaudible].

MR. STEPHENS: They left that door open in essence --

JUDGE: And my question to you is it -- doesn't -- you're not looking at preemption in your view doesn't turn on what authority they have. But what authority they actually exercise, and we have to look beyond the statute and beyond the reg to determine whether they're preempted?

REBUTTAL ARGUMENT OF LAWRENCE S. EBNER ON BEHALF OF THE PETITIONER

MR. EBNER: Maybe a matter of semantics but in my viewpoint, they longer have an authority they relinquished it when they promulgated these regs. Now, can they promulgate new regs and we -- we require that authority, I suspect so or without those old regs. We respectfully request that the judgment in the court of appeals be affirmed. We appreciate the Court in allowing us to be [inaudible].

MR. EBNER: There are two points I'd like to make. First, regarding the Etcheverry case in California. The facts here are more compelling than they are in Etcheverry because in Etcheverry there were two labels of pesticides and either label explicitly authorized the tank mix. Yet the Court held that the that FIFRA preempts the crop damage claims. Here we have the label of Pursuit, EPA- approved label that explicitly authorizes tank mix. So, the facts here are even stronger than Etcheverry.

Secondly, this is a phytotoxicity case. We attached our briefs in respondent's court of appeals' brief which says that the peanuts in a tree of field wouldn't grow, their roots were stunted, they didn't develop fully, it's yellow herbicide injury to peanut plants was observed. That's phytotoxicity. That's crop poisoning. I would refer the Court to the EPA regulations 40 C.F.R. Section 158.202 Subsection H which deals with hazards nontarget organisms including plants, that's phytotoxicity and Subsection I, product performance or efficacy. They are different concepts. I would also refer the Court --

JUDGE: And the -- those concepts and I may be mistaken, I'm drawing on the comment in the California case that quoted some of the language and talked about phytotoxicity going to nontarget plants versus --

MR. EBNER: Yes.

JUDGE: -- the crop issue.

MR. EBNER: That's a very astute observation, the nontarget plant is the weed. The weed is a plant and it's the weed that interferes with the growth of the peanut crop.

JUDGE: The nontarget as opposed to efficacy, the target is not the weed, it's the crop.

MR. EBNER: Well --

JUDGE: And the phytotoxicity they're -- ?

MR. EBNER: No. In this case the phytotoxicity complaint refers to the crop itself, to the peanut. But there can be both phytotoxicity to the crop itself and also phytotoxicity to other plants. Let's say for example there's an area of application and there is drift and there's --

JUDGE: Let me -- let me get ahead of you. It seemed to me in those two regulations, they were making it the efficacy argument was saying with respect to the particular crop that's being sprayed, efficacy applies to that. The phytotoxicity testing applies to say the corn crop that was rotated in months later that isn't supposed to be sprayed on but it suffers.

MR. EBNER: Well, it could refer to that but it's not limited to that. It can also refer to the target crop itself, in this case peanuts. And that's made clear in the guidelines the EPA definitional guidelines which we attached to our -- our reply brief that

differential between the two. The Court should not allow the respondents to bootstrap this phytotoxicity case into an efficacy case in order to try to make this efficacy data waiver somehow applicable and besides, I just want to emphasize this point: All EPA has waived is the automatic submission of efficacy data at the time a pesticide is first registered.

JUDGE: Would you agree to have waived that?

MR. EBNER: Well, they have only waived the automatic submission. Regulation says they can -- the manufacturer has to have those data available. They have to submit it timely if they asks for when and if a problem develops after a pesticide has been registered and is actually in use in the marketplace, EPA will hold those data in and they will regulate the labeling to prevent crop damage due to either inefficacy or phytotoxicity, when and if EPA determines that's necessary which they haven't done here.

JUDGE: But at the outset among the other things that the EPA must regulate before it registers a product, efficacy is not one of them?

MR. EBNER: That is correct. However, phytotoxicity is a different story. The unreasonable adverse effect standard does apply. Crops are part of the environment. That's what the Seventh Circuit held in Tybert; that's what Echeverry held. And EPA does regulate labeling to prevent crop damage due to phytotoxicity when and if it determines that's necessary.

JUDGE PHILLIPS: Any other questions? Thank you Counsel.

MR. EBNER: Thank you.

JUDGE PHILLIPS: That completes today's arguments. The Marshal will now adjourn the Court.

MARSHAL: All rise. Oyez, oyez, oyez. The Honorable Supreme Court of Texas now stands adjourned.