IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES MILES, III, a Minor, by his Mother and Next Friend, JULIA A. RAGSDELL, and JULIA A. RAGSDELL, Individually,	)	
	)	No. 00 C 3278
Plaintiffs,	)	
	)	Honorable Paul E. Plunkett
	)	
	)	Magistrate Judge Nan R. Nolan
S.C. JOHNSON & SON, INC. ET AL.	)	
	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ALL COUNTS OF THE SECOND AMENDED COMPLAINT

When he was three years old, plaintiff James Miles accessed a container of Drano and swallowed some of its contents, causing him serious injury. Miles and his mother, Julia Ragsdell, have sued defendants S.C. Johnson & Son, Inc., Precise Technology, Inc., and Ball Corporation, the manufacturers of Drano, for failing to design, manufacture, and label the Drano container to prevent Miles from being able to access its contents. Defendants have moved to dismiss, claiming that all of plaintiffs' claims are preempted by the Federal Hazardous Substances Act (FHSA) and the Poison Prevention Packaging Act (PPPA).

Defendants' preemption defense cannot prevail. First, although both Acts contain a provision expressly preempting certain positive state laws, such as statutes and regulations, neither preempts common-law claims. That conclusion is evident from the language and structure of both preemption provisions, and is confirmed by the Consumer Product Safety Commission (Commission), the agency responsible for administering the FHSA and the PPPA, which has concluded that neither Act preempts state-law damages actions. Moreover, even if the two statutes did expressly preempt some damages actions, plaintiffs' claims would not be

preempted because they are based on deficiencies in packaging and labeling that fall outside the scope of both the FHSA and the PPPA. For the same reason, plaintiffs' claims are not impliedly preempted because they do not conflict with the regulations issued by the Commission and do not stand as an obstacle to the accomplishment of Congress' purpose in enacting the FHSA and the PPPA.

BACKGROUND

A. Factual Background

Sometime prior to November 1995, plaintiff Julia Ragsdell purchased a container of Drano, which she stored under the kitchen sink in her home. Deposition of Julia Ragsdell at 57-58. On the evening of November 28, 1995, Ms. Ragsdell used the Drano to unblock a drain. She then closed the Drano bottle and placed it back in the cabinet under the sink. *Id.* The next morning, Ms. Ragsdell was taking a shower when she heard her three-year-old son, plaintiff James Miles, begin to scream. *Id.* at 71. She ran into the kitchen and saw James standing near an open container of Drano, evidently in severe pain. *Id.* He had blue Drano crystals around his mouth and around him on the floor. *Id.* at 71-72. Ms. Ragsdell called 911 and poured milk into James' mouth as the Drano bottle instructed. *Id.* James was taken to the hospital, where he underwent treatment for the injuries to his throat and esophagus.

Defendants S.C. Johnson, Precise Technology, and Ball were involved in the design and manufacture of the Drano container. On June 22, 2002, plaintiffs filed their Second Amended Complaint in this Court alleging that the Drano container was improperly packaged and labeled, permitting Miles to access its contents. Plaintiffs allege that defendants were negligent, engaged in wilful and wanton misconduct, are strictly liable for the defective product, and violated the

implied warranty of merchantability in selling the defective product.[1] On July 30, 2002, defendants filed a joint memorandum in support of their motion to dismiss all claims against them on the ground that plaintiffs' claims are preempted under the FHSA and the PPPA, and by the regulations promulgated by the Consumer Product Safety Commission under those two statutes.

B. Regulatory Background

1. The Federal Hazardous Substance Act

The FHSA was originally enacted as the Federal Hazardous Substances Labeling Act in 1960 to protect the public from the dangers of hazardous substances through a system of cautionary labeling requirements. Pub. L. 86-613, 74 Stat. 372 (1960), 15 U.S.C. § 1261 *et seq.* Under the FHSA, a hazardous substance is any substance that is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustive, or otherwise may cause substantial personal injury or substantial illness because of its customary or reasonably foreseeable use. *Id.* § 1261(f)(1)(A), *see also id.* §§ 1261(f)(1)(C), (D), and (E). The Consumer Product Safety Commission is the federal agency charged with implementing and enforcing the FHSA. *See id.* § 1261(d).

The Act operates primarily through a system of labeling requirements that caution the

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[1] This Court has yet to rule on Plaintiffs' Motion for Leave to File a Third Amended Complaint. Occasionally this opposition brief discusses claims that only appear in the proposed Third Amended Complaint, which we note in our citation of those claims. We have attached a copy of the Motion For Leave to File along with the proposed Third Amended Complaint as Exhibit 2. Defendants informed this Court at the October 2, 2002, hearing that they would not need to amend their Motion to Dismiss to address any of the new claims in the proposed Third Amended Complaint. Thus, we assume that defendants believe that their arguments in their Motion to Dismiss apply to all of plaintiffs' proposed new claims.

public about the hazards of certain substances. The Commission does not have the right to pre-clear a product for safety before it is sold, nor is the manufacturer required to submit the product or its labeling to the Commission before marketing. Except for the requirement that certain words be used (*e.g.* "caution" and "danger"), the FHSA's labeling provisions are very general and do not mandate that the label include specific statements. As is true for the product itself, the Commission also does not approve the label before it is used.

2. The Poison Prevention Packaging Act.

The Poison Prevention Packaging Act of 1970 (PPPA), 15 U.S.C. §§ 1471-1476, authorizes the Consumer Product Safety Commission to issue requirements that hazardous household substances be sold in "special packaging." The PPPA defines special packaging as "packaging that is designed or constructed to be significantly difficult for children under five years of age to open . . . and not difficult for normal adults to use properly." 15 U.S.C. § 1471(4). The Commission has issued regulations stating which household substances are required to have special packaging, 16 CFR § 1700.14, and has set performance standards which the packaging of all such products must meet. 16 C.F.R. §§ 1700.15, 1700.20. The Commission is prohibited under the statute from requiring packaging to include any specific design elements. 15 U.S.C. § 1472(d).

ARGUMENT

PLAINTIFFS' STATE-LAW DAMAGES CLAIMS ARE NOT PREEMPTED BY THE FHSA OR THE PPPA.

Introduction And Background Federalism Principles

The Supreme Court has repeatedly admonished that courts reviewing questions of preemption must "start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Medtronic v. Lohr*, 518 U.S. 470, 475 (1996). This presumption against preemption derives from core principles of federalism that guarantee the states the freedom to regulate as independent sovereigns within their traditional spheres. *Medtronic*, 518 U.S. at 485. Thus, the presumption is even stronger where, as here, federal law threatens to interfere with the regulation of "health and safety" matters because these are issues that are "'primarily, and historically, . . . matter[s] of local concern.'" *Id.* at 475 (quoting *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 719 (1985)). In addition, where a finding of preemption of state common-law claims would leave injured individuals without *any* state *or* federal remedy, as is the case here, courts infer an intent to preempt in only the most compelling circumstances. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *see also English v. General Electric Co.*, 496 U.S. 72, 87-90 (1990).

Defendants assert that "there is no presumption against preemption when the States choose to regulate 'in an area where there has been a history of significant federal presence.'" Defs' Br. at 21 (quoting *Sprietsma v. Mercury Marine*, 757 N.E.2d 75, 118 (Ill. 2001), *cert. granted*, 122 S. Ct. 917 (2002) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)).

Although that general proposition is correct, it has no relevance here. The packaging and labeling of hazardous household substances — that is, substances "customarily" used or stored "in or about the household," 16 C.F.R. § 1700.1(b)(2) — is just the kind of health and safety issue that falls within the state's traditional police powers to protect its citizens. *See Medtronic*, 518 U.S. at 474 (applying the presumption against preemption when interpreting federal laws regulating the marketing of medical devices). The cases quoted by defendants, *Sprietsma* and *Locke*, involve federal maritime law, an area that by its very nature concerns interstate commerce on navigable waters of the U.S. and has been "historically regulated by the federal government," *Sprietsma*, 757 N.E.2d at 119; *see also Locke*, 529 U.S. at 108 — a far cry from the regulation of household products such as Drano.

Defendants also attempt to escape the presumption against preemption by arguing that this Court should focus on "the power and intent of the agency promulgating the regulation" to determine whether regulations have a preemptive effect. Defs' Mot. at 21. Defendants mistakenly assume that the Consumer Product Safety Commission intended for its regulations to preempt state tort liability. However, the Commission has expressly stated that the preemption provisions in the FHSA and the PPPA apply only to positive law, *not* state-law damages actions. *See* Application for Exemption from Preemption, 56 Fed. Reg. 3414, 3415 (1991) (discussed in greater detail below). Thus, not only does the Commission have no intention to preempt claims like those at issue here, it does not even believe it has the authority to do so. In sum, the presumption against preemption is fully applicable to this case.

In light of these principles strongly disfavoring preemption, courts find state law preempted only when such an intention is expressly stated in federal law, or when preemption is

strongly implied. Neither circumstance is present here.

A. The FHSA And The PPPA Do Not Expressly Preempt Damages Actions.

A careful analysis of the relevant language in the FHSA and the PPPA indicates that Congress did not intend to preempt state-law damage claims, like those at issue here, which serve principally to compensate the victims of tortious conduct. First, we address the FHSA's preemption provision, which is substantially similar but not identical to the preemption provision in the PPPA. We will then address the minor differences between the two preemption provisions.

1. The FHSA Does Not Expressly Preempt State-Law Damages Claims.

Preemption of state and local labeling requirements is addressed in section 18(b) of the FHSA, 90 Stat. 510 (15 U.S.C. § 1261 note). Although defendants quote only a brief portion of that provision, Defs' Mot. at 5, we set it out at considerable length, because an accurate preemption analysis can only be conducted by viewing the relevant enactment in context. Section 18(b) provides in relevant part:

> (b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262 (b) of this title] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title].
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> (B) Except as provided in paragraphs (2), (3) and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(q) [subsec. (q) of this section] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury

unless such requirement is identical to the requirement established under such regulations.

(2) The Federal Government and the government of any State or political subdivision of a State may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the Federal, State or political subdivision requirement provides a higher degree of protection from such risk of illness or injury that the requirement described in paragraph (1).

(3)(A) Upon application of a State or political subdivision of a State, the Commission may, by regulation promulgated in accordance with subparagraph (B), exempt from paragraph (1), under such conditions as may be prescribed in such regulation, any requirement of such State or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if—

(i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and

(ii) the State or political subdivision requirement (I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and (II) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision requirement on interstate commerce the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other States or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act [this chapter] for such substance (or its packaging).

The above language makes clear that Congress intended to preempt only *positive* state and local enactments — such as statutes, ordinances, and administrative rules — not state-law damages actions. First, section (b)(1)(A) provides that "no State or political subdivision of a

State may establish or continue in effect" certain cautionary labeling "requirements," which, read most naturally, is a reference to state and local enactments, not damage awards. It strains ordinary English usage far past the breaking point to say that a jury award to a tort plaintiff constitutes a "State or political subdivision of a State establish[ing]" or "continu[ing] in effect" a "requirement." Moreover, Congress has shown its ability to refer explicitly to "common law" when it intends to include it within the scope of a preemption clause. For example, the Copyright Act of 1976, 17 U.S.C. § 301(a), preempts rights "under the common law, rule, or public policy," and the Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-17(d), preempts any "State constitution, statute, court decree, common law, rule or public policy." Congress' past practice provides further evidence, if any is needed, that it did not intend its preemption of state "requirements" to extend to common law damages actions.

The fact that Congress stated an intent to preempt the requirements established by a "political subdivision of a State" as well as by a "State" is additional proof that Congress was referring only to preemption of conflicting statutes, ordinances and rules, and not damages actions under common law. Localities often enact health and safety laws. *See, e.g.,* NYC Code § 16-120.1 (New York City ordinance governing storage and disposal of medical waste)**;** Denver Mun. § 48-43 (Denver ordinance prohibiting improper accumulation and storage of rubbish); 47 Fed. Reg. 50442, 50443 (1982) (describing an ordinance issued by Cook County, Illinois, requiring that over-the-counter drugs be sold in sealed containers). Thus, it made sense for Congress to include localities when discussing preemption to make clear that conflicting positive laws at any level of state government would be preempted. However, localities do not normally

establish courts of general jurisdiction that conduct jury trials in product liability cases; such courts are creatures of the State itself. Moreover, local law is never the source of law for common-law tort remedies. Thus, Congress' reference to preemption of the requirements established by "political subdivision[s]" of states, as well as by states, indicates that Congress intended the term "requirements" to mean *positive* laws enacted by states or localities, not common law claims for money damages.

Congress' intent to preempt only positive law is confirmed by its statement that only "identical" cautionary labeling requirements are not preempted. It would be very odd for Congress to refer to a common-law damages suit as "establish[ing] or continu[ing] in effect a cautionary labeling requirement applicable to [a hazardous] substance" that is "identical" to federal labeling requirements. The common law sets out general duties of care that apply to all cases, not just the labeling of hazardous substances. *See, e.g., Medtronic,* 518 U.S. at 501. The duties relied upon by tort claimants are general duties that have evolved over hundreds of years, and it would thus it is bizarre to refer to damages suits as "establish[ing]" or "continu[ing] in effect" a "cautionary labeling requirement."

Furthermore, defendants wholly ignore subsections (b)(2), (b)(3), and (b)(4) of section 18, each of which provide further confirmation that Congress did not intend to preempt damage actions. Subsection (b)(2) allows the federal and state governments to establish "requirements" "for [their] own use" if those requirements "provide a higher degree of protection" than do the relevant FHSA labeling requirements. Once again, it is clear that the reference to "requirements" here is to the positive enactments of legislative and regulatory bodies, since federal and state governments obviously do not "establish and continue in effect" labeling

requirements "for [their] own use" that consist of damage awards. To read the term "requirement" to cover damage actions in section (b)(1)(A) but only positive law in (b)(2) is inconsistent with the principle of statutory construction that multiple uses of the same word in the same statute -- here the same subsection of the same statute -- ought to be accorded the same meaning. *See Department of Revenue of Ore. v. ACF Industries, Inc.,* 510 U.S. 332, 342 (1994) (" '[I]dentical words used in different parts of the same act are intended to have the same meaning' ") (quoting *Sorenson v. Secretary of Treasury,* 475 U.S. 851, 860 (1986) (some internal quotation marks omitted)).

Subsection (b)(3) further undermines defendants' contention that section 18(b) is applicable to damage claims. Subsection (b)(3) allows states or their political subdivisions to apply to the federal Consumer Product Safety Commission for exemptions from preemption so that they can maintain requirements that are otherwise preempted. Subsection (b)(3)'s language is parallel to that of subsection (b)(1)(A), *i.e.*, it permits exemption of *any* labeling requirement that may be preempted, but only upon applications by "States or political subdivision[s]." The obvious purpose of subsection (b)(3) is to allow state and local governments to seek exemptions for their laws and regulations, and it could not logically include tort actions, which depend on the particular facts of each case. Thus, to interpret subsection (b)(1)(A), upon which defendant relies, to include the preemption of damage claims, when subsection (b)(3) plainly does not, would suggest that Congress intended to inject an awkward and illogical asymmetry into section 18(b) for which there is no support in the statute or its legislative history.

The non-applicability of subsection (b)(3) to damage actions is demonstrated by the types of factors that the Commission must consider in deciding whether to exempt a state or local

enactment. For example, the Commission is required to analyze the state or local requirement and make "findings on the technological and economic feasibility of complying with such requirement" and the "geographic distribution of the substance to which the requirement would apply." *See* subsection 18(b)(3). Because the common law establishes general standards applicable to all products, and not specific design requirements applicable to specific products, the Commission could not possibly make "findings" regarding the cost of compliance or the geographic distribution of the substances to which they apply. Moreover, the legislative history of subsection 18(b) reveals both that exemptions may be sought for anything preempted under subsection (a), and that the preemption provision applies solely to state and local "regulations," "standards" and other enactments. There is no indication whatsoever that common-law remedies are subject to preemption. *See* S. Rep. No. 251, 94th Cong., 2d Sess. 11-13, 17 (1976); *reprinted in* 1976 U.S.C.C.A.N. 993, 1003-1005, 1009; *see also* H.R. Rep. 325, 94th Cong., 1st Sess. 21-23 (1975); H.R. Rep. 2166, 89th Cong., 2d Sess. (1966); 1966 U.S.C.C.A.N. 4095, 4097.

In determining whether state law is preempted, both the U.S. Supreme Court and federal circuit courts have recognized the distinction between general common-law causes of action that do not interfere with federal law and specific, prescriptive enactments of state law that do. For example, in *Silkwood*, the Supreme Court stated that common-law actions for punitive damages can peacefully co-exist with federal regulations safeguarding the use of nuclear power, even though positive enactments of state law are preempted. 464 U.S. at 256. Although the safety of nuclear power plants is the "exclusive concern of the federal law," the Court concluded that "a State may nevertheless award damages based on its own law of liability" because there is no "irreconcilable conflict between the federal and state standards" and because "the imposition of a

state standard in a damages action would [not] frustrate the objectives of the federal law." *Id.* *Silkwood* recognized that even if a defendant were required to pay damages for conduct permissible under federal law, the defendant's liability would not stand as an obstacle to the achievement of a federal purpose.

Similarly, in *Goodyear Atomic v. Miller*, 486 U.S. 174, 185-86 (1988), the Supreme Court stated that "Congress' reluctance to allow direct state regulation of federal projects says little about whether Congress was likewise concerned with the incidental regulatory effects arising from enforcement of workers' compensation laws" because it is possible "to disregard" state safety standards and simply pay additional workers' compensation. 486 U.S. at 185-86 ("The effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of such an award provision, [and] Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.")

Again, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Supreme Court concluded that an express preemption provision preempted positive enactments, but not common law. *Id.* at 518-19.[2] The Court declared "there is no general, inherent conflict between [express]

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[2] However, in *Cipollone*, the Court did find that a later version of the express preemption provision operated to preempt some common-law claims. As the New York Court of Appeals noted in *Drattel v. Toyota Motor Corp.*, the Supreme Court based its conclusion on the unique history of that provision. 92 N.Y.2d 35, 43-44 (N.Y. 1998). The first version, enacted in 1965, provided that "[n]o statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package." As stated above, the Court held that Congress did not intend that provision to preempt common law causes of action, only positive enactments of law. *Cipollone*, 505 U.S. at 518-19. In 1969, Congress amended the provision, this time providing that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The Court reasoned that because Congress must have meant to change the scope of the preemption provision by amending the language, the amended version should be construed as preempting

federal preemption of state warning requirements and the continued vitality of state common-law damages action." *Id.* at 518.

Likewise, in *Medtronic*, the Supreme Court determined that an FDA regulation preempting all state "requirements" "different from, or in addition to federal law" did not preempt plaintiffs' common-law claims because of the general nature of those claims. The Court explained:

> The legal duty that is the predicate for the [plaintiffs'] negligent manufacturing claim is the general duty to use due care to avoid foreseeable dangers in its products. Similarly, the predicate for the failure to warn claim is the general duty to inform users and purchasers of potentially dangerous items of the risk involved in their use. These general obligations are no more a threat to federal requirements than would be a state-law duty to comply with local fire prevention regulations and zoning codes, or to use due care in the training and supervision of a workforce.

518 U.S. at 501-02.

As the above cases demonstrate, Congress' expressed intent to preempt conflicting state and local positive laws should not be extended to claims for damages under general state common-law duties without a clear statement of Congress' intent to do so.

2. The PPPA Does Not Expressly Preempt Common Law Claims.

As with the FHSA, this Court must closely examine the text of the PPPA to determine whether it preempts state-law damages actions. The relevant portions of the PPPA's preemption provision provide:

(a) Exception for identical State standards

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some, but not all, common-law claims. *Id.* at 520-22.

Except as provided in subsections (b) and (c) of this section, whenever a standard established by the Commission under this Act applicable to a household substance is in effect, no State or political subdivision thereof shall have any authority either to establish or continue in effect, with respect to such household substance, any standard for special packaging (and any exemption therefrom and requirement related thereto) which is not identical to the standard established under section 1472 of this title (and any exemption therefrom and requirement related thereto) of this Act.

(b) Federal or State standards which afford a higher degree of protection

The Federal Government and the government of any State or political subdivision of a State may establish and continue in effect, with respect to a household substance for its own use, a standard for special packaging or related requirement which is designed to protect against a risk of illness or injury with respect to which a standard for special packaging or related requirement is in effect under this Act and which is not identical to such standard or requirement if the Federal, State or political subdivision standard or requirement provides a higher degree of protection from such risk of illness or injury than the standard or requirement in effect under this Act.

(c) Exemption for State standards; requirements; determination of burden on interstate commerce; notice and hearing.

(1) Upon application of a State or political subdivision of a State, the Commission may, by regulation promulgated in accordance with paragraph (2), exempt from subsection (a) of this section, under such conditions as may be prescribed in such regulation, any standard for special packaging or related requirement of such State or political subdivisions applicable to a household substance subject to a standard or requirement in effect under this Act if —

> (A) compliance with the State or political subdivision standard or requirement would not cause the household substance to be in violation of the standard or requirement in effect under this Act, and
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> (B) the State or political subdivision standard or requirement (i) provides a significantly higher degree of protection from the risk of illness or injury with respect to which the Federal standard or requirement is in effect, and (ii) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision standard or requirement on interstate commerce the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and

> economic feasibility of complying with such standard or requirement, the cost of complying with such standard or requirement, the geographic distribution of the household substance to which the standard or requirement would apply, the probability of other States or political subdivisions applying for an exemption under this subsection for a similar standard or requirement, and the need for a national, uniform standard or requirement under this Act for such household substance.

15 U.S.C. § 1476

This provision is very similar to the preemption provision in the FHSA. As in the FHSA, the PPPA preempts non-identical standards "establish[ed]" or "continue[d] in effect" by a "State or political subdivision thereof." As discussed in the context of the FHSA's preemption provision, it makes no sense to refer to common-law claims, which arise only in courts of law, as being established or maintained by a political subdivision of a state, or as being identical to a standard set by federal law, and thus the provision can only be read as referring to prescriptive state and local packaging laws. As discussed above, Congress can, and does, reasonably choose to preempt only positive law, which can directly conflict with federal law and regulations, while leaving in place a mechanism by which to compensate injured tort victims.

The PPPA's preemption provision differs from that in the FHSA in only one significant respect: The PPPA refers to "standards" and "requirements" rather than just using the term "requirements" throughout. Congress may have used the word "standards" in the context of the PPPA and not the FHSA because the Commission's task under the PPPA is to set performance standards (*e.g.*, 85% of children tested must not be able to open container within 5 minutes) and not actual design requirements. *See* 16 C.F.R. § 1700.15. Whatever the reason, reviewing these terms in context makes clear that Congress did not intend either term to encompass common-law claims. In subsection (a), Congress stated its intention to preempt all state "standards," "exemptions," and "requirements" for special packaging not identical to the "standards,"

"exemptions," and "requirements" "of this Act." The Act only establishes positive law, not common law, and thus, to be consistent, the state "standard[s]" and "requirement[s]" that it preempts cannot encompass common-law claims either. *See Department of Revenue of Ore.*, 510 U.S. at 342 ("Identical words used in different parts of the same act are intended to have the same meaning."). Furthermore, in subsection (c)(1)(B), the Act compares the "State or political subdivision standard or requirement" to the "Federal standard or requirement." Again, because the term "standard or requirement" is limited to positive law in the federal context, it must be similarly limited when used to describe preempted state law. *Id.* Thus, even though the PPPA, unlike the FHSA, uses the terms standards and requirements, rather than simply requirements, the meaning of those two words is similarly limited to positive enactments of state legislative and administrative bodies.

3. This Court Should Defer To The Commission's Conclusion That Neither The FHSA Nor The PPPA Preempt Common Law Claims.

The Consumer Product Safety Commission, the agency charged by Congress with the task of interpreting and enforcing the FHSA and the PPPA, 15 U.S.C. § 1261(d), has concluded that neither the FHSA nor the PPPA preempts state common law. The Commission reads the PPPA's and FHSA's preemption provisions as follows:

> [The FHSA and the PPPA] provide, generally, that whenever consumer products are subject to certain Commission statutes, standards or regulations, a State or local requirement applicable to the same product is preempted, i.e., superseded and made unenforceable, if both are designed to protect against the same risk of injury or illness . . . .

16 C.F.R. § 1061.3(a).

And the Commission defines "State or local requirement" to mean:

> [A]ny statute, standard, regulation, ordinance, or other requirement that applies to

> a product regulated by the Commission, that is issued by a State or local government, and that is intended to have the force of law when in effect.

16 C.F.R. § 1061.2(f). The Commission defines "state or local requirement" as a series of positive enactments by state legislative and administrative bodies ("statute, standard, regulation, ordinance"), and then adds to that list "other requirement." Under the principle of statutory construction known as *ejusdem generis*, this Court "must read a general statutory term that follows a specific statute term as embracing only those things of the same general class as those enumerated." *American Society of Consultant Pharmacists v. Concannon*, 214 F.Supp.2d 23, 28 (D. Me. 2002) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 114-15 (2001)). Thus, because "other requirement" follows this list of state enactments, the term "other requirement" must be read as referring to positive law as well. Moreover, the regulation refers to requirements that are "issued by a State or local government." Common law standards are not "issued" by a "government"; they evolve over time from judicial decisions. Nor do local governments even have their own judiciary. Finally, it makes no sense to refer to common law standards as being in "effect" the way a positive enactment of state law might be.

Manufacturers recognized that the Commission's regulations did not preempt state law damages actions, and so they submitted comments to the Commission asking it to extend the preemptive scope of its regulations. On January 30, 1991, the Commission published a response in the Federal Register rejecting this request and asserting that neither the FHSA nor the PPPA preempts state law damages actions. The Commission's statement reads, in pertinent part, as follows:

> Four of the acts administered by the Consumer Product Safety Commission contain specific preemption provisions. These are the Consumer Product Safety Act ("CPSA"), 15 U.S.C. 2051 et seq., the Federal Hazardous

> Substances Act ("FHSA"), 15 U.S.C. § 1261 et seq., the Flammable Fabrics Act ("FFA"), 15 U.S.C. § 1191 et seq., and the Poison Prevention Packaging Act ("PPPA"), 15 U.S.C. § 1471 et seq.
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> Although these provisions are not completely identical, each generally provides that when there is a product covered by one of the acts, no State or local government may, except as may apply to such products obtained for the government's own use, enforce a non-identical State or local statute or regulation designed to protect against the same risk or injury as that of a Commission requirement. Thus, in such situations, a federal requirement preempts State or local requirements not identical to a Commission requirement.
>
> * * *
>
> The Commission received four comments to the proposed rule. All of the comments favored the rule, but had some suggestions for minor changes . . .
>
> Spring Industries, Inc. suggested expanding the definition of "State or local requirement" contained in § 1061.2(f) to include standards or local requirements applied as common or statutory law by a State or local court or a federal court exercising diversity jurisdiction . . . .
>
> * * *
>
> The Commission does not believe that "standards" applied by courts should be included in the definition of "State or local requirement." Generally, courts do not establish prospective standards or regulations applicable to a category or persons, but instead deal with the specific parties before them. It is the Commission's view that the statutory preemption provisions were intended to address the legislative type of standard or regulation.

56 Fed. Reg. at 3415 (emphasis added).

The Commission's interpretation of the scope of the FHSA's and the PPPA's preemption provisions is, of course, entitled to substantial deference. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (interpretation of agency charged by Congress with administering law entitled to deference unless clearly impermissible); *Hillsborough County*, 471 U.S. at 714 (applying *Chevron* deference to FDA's narrow construction of preemption provision). Furthermore, the Commission's view that its own regulations do not preempt state law damages actions is due an even a higher level of deference, and can only be rejected by this Court if found to be demonstrably "irrational." *Ford Motor*

Credit Co. v. Milhollin, 444 U.S. 555, 567-68 (1980).

The Supreme Court has given great weight to agency views on preemption. In *Medtronic*, the Court stated that its interpretation of the statute's preemptive scope was "substantially informed" by the Food and Drug Administration's conclusion that its regulations did not preempt plaintiff's common law claims. 518 U.S. at 495. The Court was particularly deferential to the FDA because, as in this case, Congress had given the agency authority to issue regulations with preemptive effect and exempt state regulations in the same area if it chose to do so, making the agency "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 496 (plurality opinion) (internal citations and quotations omitted); *see also* 506 (J. Breyer, concurring). This Court should give no less deference to the Commission's narrow interpretation of its own preemptive power.

In any case, the Commission's reading is reasonable. The FHSA and the PPPA say absolutely nothing about preempting common law remedies, and, in fact, the text and structure of those statutes lead to the inevitable conclusion that the "requirements" and "standards" preempted refer to positive law. *See supra* 7-18. In addition, the strong presumption against preemption counsels that any express preemption provision be read narrowly to permit the states to continue exercising the broadest authority possible in the area of consumer health and safety, which has traditionally been the province of state law. *Medtronic*, 518 U.S. at 475; *Hillsborough*, 471 U.S. at 715-16.

Defendants appear to have overlooked the Commission's conclusion that neither the FHSA nor the PPPA preempts common law claims. Indeed, defendants urge this court to defer

to the Commission's interpretation of the scope of the FHSA and PPPA preemption clauses, claiming that the Commission "support[s]" defendants' view, *see* Defs' Mot. at 12, when, in fact, the Commission has taken the opposite position. Defendants explain that "federal agencies have the power to preempt State law as long as they have the power and intent to do so; statements of their preemptive powers in the Federal Register evidences the agency's intent to preempt state law." Defs' Mot. at 12. Defendants have stated the correct legal principle; their only error is failing to realize that the Commission has formally announced its position that it has neither the authority nor the intention to preempt state law damages actions.

4. The Preemption Provisions In The FHSA And The PPPA Cannot Be Equated With FIFRA.

Defendants devote a considerable portion of their brief to analogizing the preemption provisions in the FHSA and the PPPA to that in FIFRA. Defs' Mot. at 3-614-16. We believe that the decisions holding that FIFRA preempts failure-to-warn claims are incorrect, *see Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom., Dow AgroSciences LLC v. Sleath*, 122 S. Ct. 40 (2001); *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *rev. denied,* 6 P.3d 1098 (Or. 2000); *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). However, even if FIFRA does preempt such claims, its preemption provisions is nothing like those in the statutes at issue here, and thus preemption under the FHSA and the PPPA should not be considered co-extensive in scope with preemption under FIFRA.

In its entirety, FIFRA's preemption provision provides:

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling

or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). The differences between FIFRA and the FHSA and the PPPA are numerous and significant. FIFRA does not refer to "political subdivisions," as do the FHSA and the PPPA, but instead preempts all state action. The title of the preemption provision is "uniformity," which suggests that this was the primary goal of preemption under FIFRA. Most important, in contrast to the FHSA and the PPPA, FIFRA's preemption provision does not use "requirements" to refer only to positive law, and thus it is possible under FIFRA, but not under the FHSA and the PPPA, to construe the term "requirements" to include common law. Presumably, it is these significant differences in the wording and structure of the FHSA and the PPPA that lead the Commission to conclude that the FHSA and the PPPA do not preempt state law damages actions — a position that is due considerable deference by this Court. *See, e.g.,Ford Motor*, 444 U.S. at 567-68.

The Commission's statements on preemption eviscerate defendants' argument that the Commission's regulations implementing the FHSA and the PPPA preempt all the same types of claims preempted by regulations promulgated by the EPA under FIFRA. According to defendants: "If the area of child-resistant packaging is preempted by one federal agency (the EPA), it follows that the same regulations are preempted when promulgated by another federal agency (the CPSC)." Defs' Mot. at 15. Not so. Unlike the EPA, the Commission has formally expressed its intent *not* to preempt state common law, 56 Fed. Reg. At 3415, concluding that it only has authority under the statute to preempt state and local positive law, and thus defendants can draw no analogy to the EPA's preemptive power pursuant to FIFRA. In sum, defendants can rely on neither the text of FIFRA nor any equivalence between the EPA's and the Commission's

regulations to support its claim that the FHSA and the PPPA preempt plaintiffs' common-law claims.[3]

B. Even If The FHSA And The PPPA Preempt Some Common-Law Claims, Plaintiffs' Claims Would Not Be Preempted Because They Fall Outside The Scope Of These Two Statutes.

As explained above, plaintiffs' common-law claims are not expressly preempted because the PPPA and the FHSA do not preempt state law damages actions and, in any case, because the Commission has specifically stated that it does not intend to do so. However, even assuming that the PPPA and the FHSA permitted the preemption of some damages actions, plaintiffs' claims are not preempted because they do not overlap with those areas in which the Commission has been granted authority to regulate packaging and labeling of hazardous substances.

1. Plaintiffs' Claims Fall Outside The Scope Of The PPPA.

Section 1472 of Title 15 grants the Commission authority to "establish in accordance with the provisions of this Act, by regulation, standards for the special packaging of any household substance. . . ." That authority is limited, however, by section 1472(d), which provides, in relevant part:

(d) Limitation

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[3] Defendants cite cases from other jurisdictions in which courts have equated the preemption provision in the FHSA to that in FIFRA's. Defs' Mot. 4-6 (citing *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 340-41 (1996); *Chemical Specialties Mfrs. Assoc., Inc. v. Allenby*, 958 F.2d 941, 945 (9th Cir. 1992); *Pinckney v. Zep Mfg., Co.* No. 94CV-0742, 1997 WL 204903, at *5 (N.D.N.Y. April 15, 1997)). However, none of these courts discussed the numerous differences in language and structure between FIFRA's preemption provision and the provisions in the FHSA, or seemed to even consider whether these differences should counsel against reading the provisions as identical in scope. In addition, these courts did not mention — and, indeed, appeared to be unaware of — the Commission's position that the FHSA does not preempt state-law damages claims, and therefore did not consider the Commission's views or give the Commission's position the considerable deference that it is due.

> Nothing in this Act shall authorize the Commission to prescribe specific packaging designs, product content, package quantity, or, with the exception of authority granted in section 1473(a)(2) of this title labeling.

In other words, the Commission has *no authority* to mandate or prohibit the use of specific design features in the packaging of hazardous substances. For example, the Commission could not promulgate a regulation either requiring or barring defendants from including a pressure release valve in the packaging of Drano, as plaintiffs argue defendants should have done. Second Amended Complaint ¶¶ 19(h), 27(u) (attached as Exhibit 1). Nor could the Commission have required or barred defendants from packaging Drano in individual units, another design feature that plaintiffs contend defendants were negligent in failing to implement. Proposed Third Amended Complaint ¶ 17(u) (attached as Exhibit 2). Because the PPPA does not give the Commission authority to require (or prohibit) such design features, neither the PPPA nor the Commission's regulations preempt states from imposing these types of requirements.

The PPPA does permit the Commission to promulgate regulations concerning testing protocols, which is just what the Commission has done. The Commission's regulations establish "standards for the special packaging of any household substance" required to protect children from serious injury or illness from handling, using, or ingesting the substances. 16 C.F.R. § 1700.3(a)(1). The regulations set out detailed testing requirements: the number, age, and gender of the children tested is specified, and the regulations provide explicit standardized instructions for the setting, dialogue, and other conditions of testing. Most important, the regulations mandate a specific testing result: "not less than 85%" of children tested must be unable to open the container after five minutes of trying. 16 C.F.R. §§ 1700.15, 1700.20.

Therefore, under the PPPA, "standards" for "special packaging" do not refer to design

specifications, but rather to *performance* standards. Thus, the term "standards" in the PPPA's preemption provision is similarly limited. That section provides, in relevant part,

> whenever a standard established by the Commission under this Act applicable to a household substance is in effect, no State or political subdivisions thereof shall have any authority to either establish or continue in effect, with respect to such household substance, any standard for special packaging . . . which is not identical to the standard established under section 1472 of this title. . . of this Act.

15 U.S.C. § 1476(a). A "standard established by the Commission under this Act" simply *cannot* be read so broadly as to include design specifications, because the Commission is expressly prohibited by section 1472(d) from requiring containers for hazardous substances to have a specific design. Section 1476's preemption of state and political subdivisions' "standard[s] for special packaging" must therefore similarly be limited in scope, since it would make no sense for Congress to have preempted state law in an area in which it expressly forbade federal regulators from participating. *See, e.g., Puerto Rican Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988) (refusing to find preemption of Puerto Rico's regulation of the prices of gas and petroleum products in the absence of federal authority to regulate in that area). Thus, the PPPA's preemption provision prohibits states from establishing or continuing in effect non-identical *performance* standards when the Commission has itself established such standards, but says nothing about states' authority to set the specific design standards that they favor.

If the Commission is not authorized to promulgate regulations concerning these types of design specifications, then it has no authority to preempt common-law claims based on the absence of such design defects. *See American Cyanamid Co. v. Geye*, 79 S.W.3d 21, (Tex. 2002) (FIFRA does not preempt crop-damage claims because EPA has not regulated in this area); *Hawkins v. Leslie's Pool Mart*, 184 F.3d 244, 253 (3d Cir. 1999) ("In sum, we hold that

where, as here, a preemption provision is dependent on government regulations, we cannot extend the reach of that provision to areas not actively regulated by the federal government."). As the Third Circuit explained in *Hawkins*, "We read *Medtronic* as instructing that only when the 'Federal Government has weighed the competing interests ... [and] reached an unambiguous conclusion about how those competing considerations should be resolved in a particular cases ... and implemented that conclusion via a specific mandate' are general state common-law claims preempted." *Hawkins*, 184 F.3d at 254 (quoting *Medtronic*, 518 U.S. at 501). Because the Commission never even considered requiring (or prohibiting) the design elements at issue, plaintiffs' claims based on these design flaws cannot be preempted.

Moreover, the Commission's performance standards do not test for the false latching problem identified by plaintiffs in their Second Amended Complaint. Plaintiffs assert that the Drano container was defectively designed so that, even if it appeared to be closed, it was not latched securely and spontaneously opened sometime after use. Second Amended Complaint ¶ 17(j). Although the Commission's regulations require testing of Drano on children of specific ages for prescribed amounts of time, they do not require manufacturers to test for the possibility of false latching resulting in spontaneous opening after use, and therefore, plaintiffs' claims regarding false latching cannot be preempted.

Finally, even if the PPPA did permit the Commission to establish design requirements, and even if the Commission had exercised that authority, the Commission's design requirements would not preempt any of plaintiffs' claims concerning manufacturing defects. Manufacturing defect claims do not relate to the design or the testing of the product, but rather concern errors in the manufacture of a *specific* item. If the Drano container at issue here was negligently

manufactured so that it did not close properly, that error does not concern either the design or the safety of normally manufactured Drano containers, and thus no federal law on these latter topics would preempt such a claim.

2. Likewise, plaintiffs' labeling-related claims are outside the scope of the FHSA and cannot be preempted by that statute. Defendants erroneously assume that any claim related to labeling falls within the scope of the FHSA and is preempted. Defs' Mot. 7-9. However, the FHSA does not preempt all labeling, but only non-identical "cautionary labeling requirement[s]" "designed to protect against the same risk of illness or injury" as the federal requirement. 15 U.S.C. § 1261 note (1988) (Effect Upon Federal and State Law, § (b)(1)(A), Pub.L. 94-284 § 17(a)). Thus, the states remain free to regulate the contents of labels as long their regulations do not fall within this definition.

The federal cautionary labeling requirements are listed in section 1261(p). All hazardous substances must include on their labels: 1) the name and location of the manufacturer and distributer, and the common name of the hazardous substances; 2) signal words such as "warning" or "caution"; 3) a statement of the principal hazards, such as "flammable" or "causes burns"; 4) precautionary measures describing the action to be followed or avoided in using the substance; 5) instruction for first-aid treatment; 6) instructions for handling and storage of packages which require special care in handling and storage; and 7) the statement "Keep out of the reach of children." States are barred from establishing unidentical cautionary labeling requirements addressing the same risk of illness or injury as the federal regulations, but they are free to set other requirements regarding the labels. As the Second Circuit explained in *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir. 1993), the FHSA creates a

system of only "partial preemption, under which, in an area in which the Commission has not acted, state regulations may supplement the regulations adopted by the CPSC." *Id.* at 617-18.

Plaintiffs' labeling claims fall outside the scope of the federal law because they are not "cautionary labeling requirements" that address the same risks as federal law. In their complaint, plaintiffs assert that defendants' labeling should have warned of the potential for the cap not to close properly after it is opened and should have contained instructions on how to ensure that the cap is secure. *See, e.g.,* Second Amended Complaint ¶ 17(c). This information is not a cautionary statement regarding the dangers of ingesting Drano, nor is it an instruction regarding Drano's storage or handling; rather, it is an instruction about proper closure of the container and a warning regarding the container's likelihood of bursting open. Because instructions for opening and closing the Drano bottle are not "cautionary labeling requirements" addressing the same risk as the federal requirements, plaintiffs' labeling claim would not be preempted even if the FHSA applied to common law claims.[4]

C. The FHSA And The PPPA Do Not Impliedly Preempt Damages Actions.

The existence of an express preemption provision in the FHSA and the PPPA undermines

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[4] In their Motion to Dismiss, defendants misrepresent plaintiffs' claims in an effort to convince this Court that their claims are preempted. Defendants state: "Count II, ¶ 27 (k), (l), (m), & (n) and Count III, ¶ 37 (j), (k), (l) & (m) claim that [S.C. Johnson] placed Drano in the stream of commerce with knowledge of a *product* defect." Defs' Mot. at 8 (emphasis added). Defendants then argue that plaintiffs' claims are preempted under the FHSA because they are "disguised failure to warn claims." *Id.* However, those claims in the Second Amended Complaint do not allege that the Drano itself was defective or dangerous, but rather that the container was not properly designed. Warnings and instructions concerning the Drano *container*, rather than Drano itself, cannot be preempted under the FHSA because instructions and warnings regarding the proper closure of containers falls outside the scope of that statute. *Cf. Hawkins,* 184 F.3d at 254 n.7 (rejecting defendant's attempt to characterize plaintiffs' claims as warning claims preempted under FIFRA when, in fact, the claims relate to defective packaging and are not preempted).

any argument that these statutes, or regulations promulgated pursuant to these statutes, impliedly preempt plaintiffs' claims. Congress is presumed to carry out its policies through the text of enacted legislation. Thus, where Congress has expressly addressed preemption in a particular provision of an Act, that provision is assumed to be a "reliable indicium" of congressional intent. *Cipollone*, 505 U.S. at 517. Although this presumption "does not . . . entirely foreclose[] any possibility of implied preemption," *Freightliner Corp.*, 514 U.S. 280, 288 (1995), an "express definition of the pre-emptive reach of a statute 'implies' -- *i.e.*, supports a reasonable inference -- that Congress did not intend to pre-empt other matters." *Id.*

In any case, courts have identified only three narrow circumstances under which preemption is implied: (1) when a direct conflict between state and federal law exists such that "compliance with both federal and state regulation is a physical impossibility," *Florida Lime & Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); (2) "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Silkwood*, 464 U.S. at 248; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); or (3) when federal law is pervasive, indicating a Congressional intent to occupy the field exclusively. *Silkwood*, 464 U.S. at 248. None of these three conditions is present here.

1. For good reason, defendants do not claim that it would be impossible for them both to comply with the federal packaging and labeling regulations and face liability in the lawsuit brought by plaintiffs. Plaintiffs' complaint focuses on the Drano container's defective manufacture and design and defendants' failure to adequately instruct users on how to safely close the container. Plaintiffs contend that either the latch did not properly catch on closure, or else that the build-up of pressure inside the Drano container caused it to burst open after use, and

that defendants should have, *inter alia*: 1) designed the Drano container to prevent such problems; 2) warned consumers about the possibility that the container would not latch properly or might burst open and instructed them on how to avoid this; and/or 3) prevented the manufacturing defect that caused the container to fail to latch properly and/or burst open. If a jury found defendants liable to plaintiffs for such a manufacturing, warning or design problem, that verdict would in no way conflict with federal law: Defendants would be required only to pay plaintiffs compensation for their injuries; they would not be forced by the verdict to change any aspect of the Drano container or its warning label. *See Goodyear Atomic*, 486 U.S. at 185-86.

Moreover, even if defendants did choose to change some aspect of the manufacturing process, design or label of the Drano container in response to a jury verdict, those changes would not be incompatible with federal law or regulations under the FHSA or the PPPA because these laws do not require that labels and packaging for hazardous substances meet some very specific standard identical for all substances. Under the FHSA, products containing hazardous substances must bear labels stating the seller's name, the name of the hazardous substance, and certain signal words (such as "danger," "warning" or "caution," depending on the substance), as well as certain additional warnings. Other than the requirement that certain specific words be used, the FHSA's labeling provisions are very general and do not mandate inclusion of specific statements, or bar a manufacturer from making additional statements.

Likewise, neither the PPPA nor the Commission's implementing regulations sets any specific packaging standards. The Commission has promulgated regulations requiring that containers meet an effectiveness standard. As defendants themselves explain it: "A product

meets the Federal requirement for special packaging under the PPPA when up to eighty-five (85) percent of the children cannot open the package within the first five minutes of testing." Defs' Mot. at 14-15. Thus, even if defendants responded to a jury verdict in plaintiffs' favor by redesigning the Drano container and label to make it safer — something that the verdict would not require them to do — those alterations would not create any conflict with the federal regulations, but rather would be fully consistent with the policies embodied by federal law and regulations promulgated thereunder.

2. Nor do plaintiffs' claims in any way "stand as an obstacle" to Congress' purposes in enacting the FHSA and the PPPA. Defendants assert, without citation, that the "purpose of the FHSA and the PPPA was to create uniform standards so that numerous State actions, each ultimately creating differing standards, would not unduly burden manufacturers." Defs' Mot. at 21. To the contrary, as the Second Circuit concluded, "national uniformity is clearly not intended under the FHSA." *Toy Manufacturers of America,* 986 F.2d at 624.

The legislative history demonstrates that the FHSA and the PPPA were intended, first and foremost, to protect consumers from injury due to inadequate labeling and packaging of hazardous substances, not to create uniform national standards.[5] Although Congress was certainly concerned that manufacturers not be forced to comply with conflicting state standards, it did *not* make uniformity the overriding goal of its legislation. Plaintiffs' claims are entirely

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[5] As the Senate Report accompanying the FHSA explained:

> This preemption scheme is designed to meet the competing interests of those who view Federal requirements as merely minimum standards and those who would opt for uniform national requirements.

S. Rep. No. 94-251, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 993, 1004.

consistent with the FHSA's and the PPPA's objective to protect consumers against hazardous household products. Moreover, the Commission, which has been charged by Congress with determining the preemptive scope of the FHSA and the PPPA, has concluded that common law claims would not create an obstacle to the realization of Congress' purpose. This Court should not second-guess the agency's view. *See, e.g., Medtronic*, 518 U.S. at 506 (noting that agency has "special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives").

3. Field preemption occurs when federal law is so comprehensive, or the federal interest is so dominant, as to imply an intent to control the entire field, barring states from enacting any laws in the same area. *See Hillsborough*, 471 U.S. at 713; *Hines*, 312 U.S. 52. Such is not the case here. Commission regulations are not so pervasive as to "occupy the field" of packaging and labeling of hazardous substances. As explained, *supra*, both the PPPA and the FHSA limit the Commission's regulatory authority to certain specific subject areas: the Commission is not free to set design standards, 15 U.S.C. § 1472(d), and it is given exclusive authority only over *cautionary* labeling, which does not address directions for properly closing containers. 15 U.S.C. § 1261 note. As a result, the Commission's regulations are limited to these narrow topics, and thus cannot be viewed as preempting the entire field of labeling and packaging of hazardous substances. *See, e.g., Hillsborough*, 471 U.S. at 716-19 (concluding that even comprehensive federal regulations concerning collection of blood plasma of do not "occupy the field" because agencies usually enact detailed regulations to deal with problems, without intending to preempt all state law in that area).

The Commission's authority over hazardous substances is far less extensive than the FDA's authority to approve or reject the marketing of medical devices such as pacemakers, yet the Supreme Court has concluded that a plaintiff's state-law tort claims against a medical device manufacturer are not preempted by federal law or regulations. *See Medtronic*, 518 U.S. 470. To give just one example, the FDA is required to pre-approve new medical devices before they enter the market; in contrast, Commission does not review or approve hazardous substances or their packaging or labeling before they go on the market. Likewise, the FDA exercises vigorous control over the collection of blood plasma, yet the Supreme Court has held that federal law does not oust all state law in this area. *Hillsborough*, 47 U.S. at 716-19. If federal law has not entirely displaced state law in the fields of medical devices or collection of blood plasma, then it certainly has not occupied the field in its far less comprehensive regulation of hazardous substances.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

Respectfully submitted,

Amanda Frost (admitted *pro hac vice*)
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20002
(202) 588-1000

Aldo E. Botti
Peter M. Delongis
720 Enterprise Drive
Oak Brook, IL 60521
(630) 573-8585

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