No. _____

IN THE

Supreme Court of the United States

HAROLD D. EYL, an individual,
Petitioner,

v.

CIBA-GEIGY CORPORATION, a New York Corporation, NORTHEAST COOPERATIVE, a Cooperative Association, and CITY OF WISNER, a political subdivision,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal, Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v, preempt state-law personal-injury claims premised on the defendants' failure to warn a bystander of a herbicide's hazards and how to avoid those hazards?

PARTIES

All parties are listed in the caption. Petitioner Harold D. Eyl was the plaintiff below. Respondents Ciba-Geigy Corporation and Northeast Cooperative were defendants below. The City of Wisner is also named as a respondent pursuant to this Court's Rule 12.6. The City was originally named as a defendant in the trial court, but it realigned itself as a plaintiff and supported the positions taken by petitioner Eyl, including those presented in this petition.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Harold D. Eyl respectfully petitions this Court for a writ of certiorari to review the decision of the Supreme Court of Nebraska.

OPINIONS BELOW

The Supreme Court of Nebraska's opinion is reported at 650 N.W.2d 744 (Neb. 2002), and is reproduced in the appendix at Pet. App. 1a. The Supreme Court of Nebraska's unreported order denying petitioner's motion for rehearing is reproduced at Pet. App. 39a. The trial court's unreported order denying respondents' first motion for summary judgment is reproduced at Pet. App. 30a. The trial court's unreported order denying respondents' second motion for summary judgment is reproduced at Pet. App. 36a.[1]

JURISDICTION

The judgment of the Supreme Court of Nebraska, reversing the jury verdict in petitioner's favor and ordering that the case be dismissed, was entered on September 6, 2002. Pet. App. 1a. The order denying petitioner's motion for rehearing was entered on November 14, 2002. Pet. App. 39a. On January 30, 2003, Justice Thomas granted petitioner's application for an extension of time to file this petition for a writ of certiorari to and including April 13, 2003. This Court has jurisdiction under 28 U.S.C. § 1257.

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[1]Unless otherwise stated, references to "respondents" are to Ciba-Geigy Corporation and Northeast Cooperative only. In the courts below, respondent City of Wisner agreed with petitioner Eyl on the issues presented in this petition. *See supra* at ii.

STATUTE INVOLVED

The section of the Federal Insecticide, Fungicide, and Rodenticide Act directly at issue in this case, 7 U.S.C. § 136v, provides:

Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(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.

STATEMENT OF THE CASE

A Nebraska jury awarded petitioner Harold Eyl approximately $2.1 million dollars as a result of the disabling injuries he suffered from his exposure to Pramitol 5PS ("Pramitol"), commonly-referred to as "Total Kill," an herbicide manufactured by respondent Ciba-Geigy Corporation and distributed by respondent Northeast Cooperative. Pet. App. 1a; Trial Transcript ("Tr.") 55. The Nebraska Supreme Court held that, as a matter of federal law, Mr. Eyl is barred from pursuing his Nebraska state-law product-liability claims. Specifically, that court ruled that Mr. Eyl's damages claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), a statute enacted to protect people and the environment from hazards posed by pesticides,

herbicides, and similar products.[2]

As explained in more detail below, this Court should grant review because there is a direct and protracted series of conflicts among the federal and state courts on the question presented and because the Supreme Court of Nebraska's decision is at odds with FIFRA's text and purpose.

A. The Structure Of FIFRA

The Supreme Court of Nebraska's ruling is based on 7 U.S.C. § 136v(b), which overrides certain state pesticide "labeling or packaging" "requirements" that conflict with requirements imposed under FIFRA. The proper construction of that provision must be determined in light of FIFRA's substantive requirements.

FIFRA is the federal component of a tripartite scheme in which pesticides are regulated at the federal, state, and local levels. *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597 (1990). FIFRA requires that the federal Environmental Protection Agency ("EPA") make certain regulatory decisions regarding pesticides, but the Act rarely forbids a state or local government from supplementing EPA decisions. For example, a pesticide generally may not be sold or used in the United States without an EPA registration. 7 U.S.C. § 136a(a). Although state and local governments generally may not permit the sale or use of any pesticide not registered with EPA, they may regulate or ban outright the sale and use of a federally registered pesticide. 7 U.S.C. § 136v(a). For instance,

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[2]The product involved in this case is an herbicide, one of the types of products regulated under FIFRA. For ease of reference, this petition uses the term "pesticide" to refer generally to all such products.

Nebraska may restrict the use of sodium chlorate, the active ingredient in Pramitol, or ban its use entirely. In this way, federal pesticide regulation establishes a floor that may be exceeded by additional state regulations. Moreover, FIFRA gives states the lead role in enforcing pesticide use restrictions. 7 U.S.C. § 136w-1.

Unlike federal statutes governing cigarette and smokeless tobacco labels, FIFRA does not mandate precise wording for pesticide labels. *Cf.* 15 U.S.C. §§ 1333, 4402(a)(1). Nor do EPA's regulations dictate any specific language to be used for the majority of pesticide labels.[3] *Compare* 21 C.F.R. §§ 801.420 & 801.430 (FDA regulations demanding specific label warnings for particular medical devices). Rather, as part of an application for a pesticide registration, the manufacturer submits not only health and environmental data, but also a draft label. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). EPA has made clear that "[t]he registrant must take responsibility for quality control of the product's composition and for adequate labeling describing the product, its hazards and uses." 53 Fed. Reg. 15,952, 15,956 (May 4, 1988).

EPA will register a pesticide if the manufacturer meets FIFRA's requirements. 40 C.F.R. § 152.112. The statute requires that the pesticide's composition warrants the claims made for it, that its labeling and other materials comply with FIFRA's requirements, and that it will not generally cause unreasonable adverse effects on the environment when used in

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[3]EPA requires signal words and precise precautionary statements for pesticides in three of four toxicity categories. 40 C.F.R. §§ 156.60-.78. Prior to 2001, signal words were required for all four toxicity categories. *See* 40 C.F.R. § 156.10(h) (2000).

accordance with widespread and commonly recognized practice. 7 U.S.C. §§ 136a(c)(5)(A)-(D).

As to the product label, FIFRA and EPA establish certain minimum requirements: Pesticide labels must contain an EPA registration number, the registrant's name and address, the pesticide's name, brand, or trademark, the net weight or other measure of content, the use classification of the pesticide, an ingredient statement, directions for use, a warning or cautionary statement that is adequate to protect health and the environment, and, for pesticides that are highly toxic to humans, specific signal words and a description of appropriate first-aid treatment. 7 U.S.C. § 136(q)(1)(D),(G) & (2)(A)-(D); 40 C.F.R. § 156.10(a)(1); *see supra* note 3. Any information required under FIFRA to be on a pesticide's label must be prominently and conspicuously placed in comparison to other labeling information that is not federally mandated. 7 U.S.C. § 136(q)(1)(E); 40 C.F.R. § 156.10(a)(2).

A registrant's use of the label submitted with its registration application does not necessarily satisfy the registrant's FIFRA (or other) obligations. To the contrary, a pesticide is misbranded if, notwithstanding EPA's registration of the pesticide and acceptance of the label, it fails to contain whatever additional warnings are necessary to protect against unreasonable adverse health and environmental effects. 7 U.S.C. § 136(q)(1)(F) & (G). Indeed, EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Neither FIFRA nor EPA regulations prohibit the inclusion of additional label information or warnings, provided that the information does not violate any specific statutory or regulatory requirement. *Id*.

Because EPA depends so heavily on manufacturer

submissions, FIFRA imposes continuing obligations on registrants to submit complete, up-to-date information to EPA. Registrants have ongoing obligations to provide to EPA all factual information that they have regarding unreasonable adverse environmental effects, 7 U.S.C. § 136d(a)(2), and ongoing obligations to ensure that their labeling complies with FIFRA's requirements. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E). Thus, FIFRA anticipates that a manufacturer may have to make labeling changes after registration of its product. FIFRA provides that "[i]f the labeling or formulation for a pesticide is changed, the registration shall be amended to reflect such change if the Administrator determines that the change will not violate any provision of this [Act]." 7 U.S.C. § 136a(f)(1). In other words, the onus for deciding whether a label change is necessary falls on the registrant, which must draft the revised label and submit it to EPA for review. 40 C.F.R. § 152.44.

Although the provision at issue here — 7 U.S.C. § 136v(b) — preempts state "labeling or packaging" requirements "in addition to or different from" FIFRA requirements, FIFRA limits "labeling" to "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers," or other detached written matter accompanying the pesticide, such as an instructional booklet, that serves the same purpose as a label. 7 U.S.C. § 136(p)(1) & (2)(A).[4] The Act expressly leaves manufacturers

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[4]7 U.S.C. § 136(p), provides in relevant part:

Label and labeling.—

(1) Label.—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling.—The term "labeling" means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(continued...)

of registered pesticides many other unrestricted means of conveying information to purchasers and users. For example, EPA's regulations identify the following means of conveying information: "[b]rochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail; [n]ewspapers, magazines, newsletters and other material in circulation or available to the public; [b]roadcast media such as radio and television; [t]elephone advertising; and [b]illboards and posters." 40 C.F.R. § 152.168(b). Unlike labeling, manufacturers do not submit such materials to EPA for review and approval as part of the registration process.

If a pesticide label contains false or misleading statements or lacks directions for use and warnings that are adequate to protect health and the environment, the pesticide is misbranded. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E), 136j(a)(2)(C) & (M). In an administrative action to cancel a pesticide's registration or to seize or bar use or sale, EPA registration is not a defense. 7 U.S.C. § 136a(f)(2). Violations warranting EPA action include labeling that lacks required information and products that cause unreasonable environmental effects even when used as directed on the label. 7 U.S.C. §§ 136j & 136k(b)(3).

FIFRA does not provide a remedy for individuals who sustain injuries from pesticide use or exposure, and thus state-law damages actions provide the only means of compensation for such injuries.

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[4](...continued)

(B) to which reference is made on the label or in literature accompanying the pesticide or device ....

B. Factual Background And Proceedings Below

1. Purchase of Pramitol. In the spring of 1993, while petitioner Harold Eyl was employed by the City of Wisner as a maintenance worker, respondent Northeast Cooperative recommended that the City purchase Pramitol, which, as noted above, is an herbicide manufactured by respondent Ciba-Geigy. Following that recommendation, the City purchased a 20-pound bag of the product on April 2, 1993. Tr. 489. Mr. Eyl did not participate in the purchase. Tr. 498.

2. Harold Eyl's Injuries. On April 9, 1993, Mr. Eyl was assigned to lay pea rock around playground equipment at River Park in Wisner. Mr. Eyl and other employees spent the day hauling pea rock to the playground area in a wheelbarrow, encircling the playground equipment with poles, and filling in the enclosed areas with pea rock. Pet. App. 2a.

That same morning, Donald Bode, the city employee who had purchased the Pramitol, applied Pramitol throughout the playground area to prevent weeds from growing. Pet. App. 2a. Mr. Eyl did not assist in the application of the Pramitol; in fact, he never applied chemicals or herbicides for the City of Wisner. Tr. 959.

It was foggy and damp on the morning of April 9, and Mr. Eyl wore steel-toed leather boots with rubber soles. Pet. App. 4a. While spreading the pea rock, Mr. Eyl walked through wet grass and puddles of water that contained Pramitol. When he returned home that night, his boots, socks, and pant legs were wet. Pet. App. 4a. He wore the same boots to work the next day, but never wore them again. Shortly thereafter, the boots turned white and became stiff, so Mr. Eyl threw them away to prevent his grandchildren from playing with them. Pet. App. 4a; Tr. 1002.

Within two days, Mr. Eyl's legs itched, turned red, and began to swell. Pet. App. 4a. He immediately contacted his doctor, Thomas Tibbels, who, two days later, diagnosed Mr. Eyl with peripheral dermatitis — a skin reaction to a chemical agent characterized by swelling, redness, heat, soreness, and irritation. His legs did not respond to the treatment prescribed by Dr. Tibbels, who therefore referred Mr. Eyl to Midwest Dermatology. Tr. 116, 118.

At Midwest Dermatology, doctors agreed that Mr. Eyl had contact dermatitis, and one doctor believed that the contact dermatitis had developed into a vasculitis, an inflamation of the blood vessels characterized by scarring, weakening, and narrowing of blood vessel walls and blood clots. He was then referred to the Mayo Clinic, where a vasculitis diagnosis was confirmed. Tr. 411. As a result of his exposure to Pramitol, Mr. Eyl is permanently disabled and unable to work. Pet. App. 4a.

3. Pramitol And Its Dangers. Pramitol is registered with the EPA, and its label was approved by the EPA. Its active ingredient is sodium chlorate, a chemical so reactive that it must be combined with an equal amount of another chemical to prevent the sodium chlorate from spontaneously bursting into flame. *See* Tr. 873. Pramitol can be absorbed into the human body through the skin. Tr. 872.

Various studies and scientific articles discuss the harmful effects of sodium chlorate. *E.g.*, Tr. 877-78. Sodium chlorate can damage red blood cells and cause chemical burns, skin irritation, scabs, and blisters. Tr. 875-78, 891-92. Four physicians testified at trial that, in their expert opinion, Mr. Eyl's disabling condition was caused by exposure to Pramitol. Tr. 148-149; 367-68; 568-69; 761-62.

4. Trial Court Proceedings. On April 4, 1997, Mr. Eyl filed suit in the District Court of Cuming County, Nebraska, alleging that respondents were negligent in their failure to warn him and other non-users, bystanders, and purchasers of Pramitol's inherent dangerousness. Mr. Eyl specifically pled that respondents failed to warn of the dangers of Pramitol, not through the product label, but through brochures, safety warnings, other literature, classes, and seminars. Fifth Amended Petition, ¶¶ 9 A, 9B, 10A, 10C. Mr. Eyl also alleged that both respondents failed to provide the City of Wisner brochures and other safety materials concerning the proper methods for applying Pramitol and for warning persons, including non-users and bystanders, of Pramitol's dangers. *Id.* ¶¶ 9D, 9J, 10J. In addition, Mr. Eyl alleged that respondents failed to give proper warnings to end-users, such as Donald Bode, who applied the Pramitol that caused Mr. Eyl's injuries. *Id.* ¶¶ 9K, 10K. Finally, Mr. Eyl alleged that respondents failed to warn bystanders and members of the public, such as Mr. Eyl or children playing at the River Park playground, who would not see the product label, but could nonetheless come into contact with Pramitol and needed to know of its dangers and how to avoid them. *Id*. ¶¶ 9E, 9G. Mr. Eyl's claims were premised both on negligence and strict liability theories.

In September 1998, respondents moved for summary judgment, asserting that FIFRA preempts all of Mr. Eyl's failure-to-warn and labeling-based claims and that Mr. Eyl did not state facts sufficient to support a cause of action relating to any other claims. In an order dated October 21, 1998, the court denied the motion. Pet. App. 30a. In its discussion of strict liability claims, the court observed that while "at first blush" it might appear that Mr. Eyl's claims are preempted under FIFRA, his complaint contained a design-defect claim, and the allegations of a design defect "go to disputed facts which are not labeling-based and cannot be determined as a matter of law

on a motion for summary judgment." Pet. App. 33a-34a.[5]

Respondents moved again for summary judgment in October 1999. The court granted the motion as to Mr. Eyl's strict liability claim against Northeast Cooperative alone, but otherwise allowed Mr. Eyl's claims to go forward against both respondents. Pet. App. 36a.

The case went to trial in November 1999. Considerable testimony was presented concerning methods of warning the public of pesticide hazards other than through the product label. A Ciba-Geigy witness, Dr. John Akins, acknowledged that, for some of its agricultural products, the company issues warning flags to be placed on areas where a pesticide is applied, and that it sends out pamphlets, brochures, leaflets, and newspaper articles to both suppliers and the general public that do not duplicate information on product labels. Tr. 1362, 1369-71. Ciba-Geigy also sends out flags and warnings systems for posting in pesticide application areas, but it admitted that no such information or notices were used for Pramitol. Tr. 1371, 56-57, 297-98, 336.

Similarly, Northeast Cooperative conceded that it was in a position to advise its customers of known pesticide dangers when, as in this case, it makes a purchasing recommendation to its customer. Tr. 489-90. The company's general manager, Richard Brahmer, explained that he attended chemical application courses and chemical conventions, had access to trade magazines and publications, received chemical

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[5]Despite this statement, the Nebraska Supreme Court noted that the trial court ultimately refused a jury instruction based on design defect and held that the case had presented only a series of failure-to-warn claims. Pet. App. 5a. Mr. Eyl does not challenge that ruling here.

manufacturers' advertisements, and reviewed chemical guides and "label" books. He acknowledged that these sources of information provided him safety information not on the product label, and that Northeast would often share its non-label knowledge with its customers. Tr. 829-30, 839; Pet. App. 3a. Mr. Brahmer further testified that Northeast Cooperative provides flags, posters, and other warnings to customers of certain products and that, for some products, it makes its own warnings, flags, and "post-its" regardless of what similar kinds of information it receives from the manufacturer. Tr. 844-49. However, Northeast Cooperative did not provide any such warnings for Pramitol. Tr. 844-45. Finally, Mr. Brahmer agreed that, without such non-label warnings, members of the public, including workers like Mr. Eyl, would have no knowledge of Pramitol's dangers although they could be expected to come into contact with Pramitol. Tr. 847-48; Pet. App. 3a.

After hearing all the evidence, the jury returned a verdict against Ciba-Geigy on both negligence and strict liability grounds, and against respondent Northeast Cooperative on negligence grounds alone, in the amount of $2,146,000.

5. Decision of the Supreme Court of Nebraska. The Supreme Court of Nebraska reversed the jury's verdict. Before that court, Mr. Eyl acknowledged the court's prior decision in *Ackles v. Luttrell*, 561 N.W.2d 573 (Neb. 1997), holding that FIFRA preempts failure-to-warn claims that are "label-based," but he asked the court to affirm the jury's verdict on the ground that his claims did not fit that description. Specifically, Mr. Eyl argued that, under *Ackles*, his claims did not run afoul of 7 U.S.C. § 136v(b)'s preemption of state "labeling or packaging" requirements because they did not constitute an attack on Pramitol's label, but rather are premised on forms of warning by means other than the EPA-approved label — such as through point-of-sale signs, warning flags, and consumer

notices. In this regard, Mr. Eyl also noted that, because he was a bystander, not a pesticide applicator to whom FIFRA labeling is directed, his claims were outside of FIFRA's preemptive scope. In addition, Mr. Eyl noted the Montana Supreme Court decision in *Sleath v. West Mont. Home Health Services*, 16 P.3d 1042 (2000), and the EPA's views of the topic (discussed *infra* at 15-17), both of which hold that FIFRA does not preempt *any* state-law damages actions premised on a failure to warn.

The Nebraska Supreme Court rejected all of these arguments. First, it refused to reexamine *Ackles*, and, in doing so, rejected recent authority, such as *Sleath*, in which courts ruled that section 136v(b) does not reach state-law damages actions. Pet. App. 17a. It then rejected Mr. Eyl's argument that, even if FIFRA preempts some state-law damages claims, his claims are not label-based and, thus, not preempted by FIFRA. Pet. App. 28a. On November 14, 2002, the Nebraska Supreme Court denied Mr. Eyl's timely motion for rehearing.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, this Court should resolve the conflicts in appellate authority regarding the question whether FIFRA preempts all state-law damages claims premised on a defendant's failure to warn of a pesticide's hazards. Second, the majority of decisions on the question presented, including the decision below, have seriously erred in interpreting FIFRA and its preemption provision, have rejected EPA's contrary views, and have thereby eliminated injured persons' rights to compensation under state law contrary to Congressional intent.

A. This Court Should Resolve The Conflicts In Appellate Authority On The Question Presented.

1. Petitioner Eyl acknowledges that a large majority of FIFRA preemption decisions, including decisions of most of the federal circuit courts, hold that state damages actions are "requirements" within the preemptive reach of 7 U.S.C. § 136v(b). *See, e.g., Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 123 S. Ct. 415 (2002); *Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992). Those decisions also hold that damages actions alleging that the defendant failed to warn of a pesticide's dangers are preempted by 7 U.S.C. § 136v(b), under which states are prohibited from issuing certain "requirements" concerning pesticide "labeling or packaging" that are "in addition to or different from" FIFRA requirements.

Several decisions, however, directly conflict with the majority view and hold that state damages actions are not "requirements" within the meaning of section 136v(b). *See* Pet. App. 16a-17a (acknowledging conflict). Those rulings include the early decision of the District of Columbia Circuit in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), and the relatively recent decisions of the Montana Supreme Court in *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), and the Oregon Court of Appeals in *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000). In addition, the California Court of Appeal held in 1998 that FIFRA does not expressly preempt state-law damages actions. *Etcheverry v. Tri-Ag Services, Inc.*, 76 Cal. Rptr.2d 466 (Cal. App. 3d Dist. 1998). Although the California Supreme Court reversed that decision, it did so by a narrow four-to-three margin, over two forceful dissents. *See Etcheverry v. Tri-Ag*

Services, Inc., 993 P.2d 366 (Cal. 2000). Mr. Eyl believes that the minority position better comports with the text of section 136v, the structure of FIFRA, and Congressional intent. For present purposes, however, the question is not which position is correct, but that there is a division among the courts under which state-law damages claims may (or may not) go forward based solely on geographical and jurisdictional happenstance. This Court should grant certiorari to establish uniformity on the question presented.

This division in appellate authority persists even though EPA's views directly conflict with the majority view. The agency has filed *amicus curiae* briefs in private litigation to express its view that FIFRA does not preempt *any* state-law damages claims and to explain how various courts have misinterpreted federal law and FIFRA's legislative history. The agency's most comprehensive brief — signed by the EPA's general counsel as well as an Assistant United States Attorney General — was filed in the *Etcheverry* litigation in California. *See* Brief *Amicus Curiae* for the United States in Support of Plaintiffs-Appellants in *Etcheverry v. Tri-Ag Service, Inc.*, No. S072524 (Cal. S. Ct. filed March 1999) (hereafter "U.S. *Etcheverry* Br."). For the Court's convenience that brief is available at www.citizen.org/documents/USEtcheverry Brief.pdf.[6]

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[6]The EPA and the Justice Department took the same position in a Fifth Circuit case. *See* Brief *Amicus Curiae* for the United States in Support of Appellants in *Hart v. Bayer Corp.*, No. 98-60496 (5th Cir. filed March 1999) (available at www.citizen.org/documents/ USHartBrief.pdf). The Fifth Circuit did not reach the preemption issue, holding only that FIFRA preemption does not create federal question jurisdiction and remanding the case to the state court from which it was removed. *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000).

The EPA's *Etcheverry* brief explains why the text, structure, and history of FIFRA do not support preemption of state damages claims and why the EPA has an interest in assuring that the courts do not undermine the ability of state tort systems to provide compensation to individuals who have sustained personal injuries from pesticides. U.S. *Etcheverry* Br. at 8-33. The United States summarized its views as follows:

> While the term "requirements" may encompass common law duties in some contexts, the text, legislative history, and purposes of FIFRA demonstrate that Congress had no intent that the use of the term "requirements" in section 136v(b) would extinguish state law damages actions. When section 136v(b) was enacted in 1972, state law actions against pesticide manufacturers for failure to warn were a commonplace and uncontroversial feature of the legal landscape. No evidence from the text or legislative history of FIFRA suggests that Congress had any intent to extinguish those actions or that Congress even considered doing so. Indeed, Congress amended FIFRA in 1972 out of increasing concern for human health and the environmental effects of pesticides such as DDT. Given that FIFRA establishes no private damages remedy for those injured by pesticides, it would be astonishing that, without any discussion, Congress would have intended to deprive injured persons of all means of relief.

Id. at 5-6.

The EPA's position is important because this Court has sometimes given weight to an agency's views of the preemptive scope of the statute that it is charged with implementing, both

as expressed in agency regulations, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496-97 (1996); *id.* at 505-06 (opinion of Breyer, J.); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15 (1985), and in the form of briefs filed in private litigation. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 883 (2000); *American Airlines, Inc. v. Wolens*, 513 U.S. 220*,* 232-34 (1995). The EPA's position is not, of course, dispositive on the merits and should only be accorded the weight that its persuasive power deserves, but it provides a further compelling reason to grant review. The majority view in the lower courts effectively abrogates traditional state damages remedies based on an interpretation of a federal statute that is flatly at odds with the interpretation of the agency authorized by Congress to enforce that statute. That situation should not persist without this Court's blessing.

2. The conflict among the courts regarding whether FIFRA preempts *any* duty-to-warn claims is not the only split in authority presented by this case. Even if section 136v(b) preempts common-law claims challenging the adequacy of a pesticide's label, it does not preempt failure-to-warn claims based on the theory that a defendant should have warned through means other than labeling. This conclusion follows directly from the language of section 136v(b), which only preempts state requirements "for labeling or packaging," and from this Court's ruling in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

As discussed in greater detail in Part B below, one of the statutory provisions at issue in *Cipollone* preempted state-law requirements "with respect to advertising or promotion" of cigarettes. *See* 15 U.S.C. § 1334(b). *Cipollone* held that, although that provision preempts failure-to-warn claims based on advertising or promotion, claims based on the theory that the defendants should have warned through other means are not preempted. 505 U.S. at 524-25 (failure-to-warn claim not

preempted to extent based on "actions unrelated to advertising or promotion").

Under FIFRA, "labeling" does not include oral statements, point-of-sale signs or pamphlets, or advertising and promotional material. *See* 7 U.S.C. § 136(p) (defining "label" and "labeling"); *supra* note 4. As noted above, Mr. Eyl's complaint specifically alleged that respondents are liable to him because of their failure to warn him of Pramitol's dangers through non-label means, for instance, via brochures, flags, and posters that would have warned people to stay away from Pramitol and/or to remove it from their bodies as soon as exposure occurred. Thus, consistent with *Cipollone*, Mr. Eyl's claims are not preempted to the extent that they challenge respondents' failures to advise about the risks of Pramitol through non-label means.

The argument that FIFRA has no preemptive effect on modes of warning other than the product label is particularly persuasive in cases like this one, where the plaintiff was not the pesticide *applicator for whom the pesticide labeling is intended*, but, rather, a bystander, who would have been warned, if at all, *only* by means other than the FIFRA-approved label. The Nebraska Supreme Court's holding that FIFRA preempts claims by bystanders against both pesticide manufacturers and distributors (Pet. App. 17a-29a), would apply to any member of the public, including a two-year-old using the playground equipment at River Park, just as forcefully as it was applied to Mr. Eyl here. Yet, even respondents have never suggested that such bystanders can be warned by the product label. As the Second Circuit has put it, "FIFRA 'labeling' is designed to be read and followed by the end-user." *New York State Pesticide Coalition v. Jorling,* 874 F.2d 115, 119 (2d Cir. 1989) (holding that preemption does not extend to non-label forms of state regulation).

The conclusion that FIFRA does not apply to non-label warnings is confirmed by decisions of the Ninth and Second Circuits holding that even direct state regulation of communications by pesticide manufacturers are not preempted by 7 U.S.C. § 136v(b) where such regulations affirmatively require communications by means other than labeling. *See Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941, 946 (9th Cir.) ("labeling" under FIFRA does not include point-of-sale signs required under California's Proposition 65), *cert. denied,* 506 U.S. 825 (1992); *Jorling,* 874 F.2d at 119 ("labeling" under FIFRA does not include posting of signs to warn of impending use of dangerous chemicals, required by New York law). However, other appellate decisions, most notably *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993), have arrived at exactly the opposite conclusion. Pet. App. 27a-28a (following *Papas,* and explicitly rejecting decision in *Allenby*). If review is granted here, it will resolve this important conflict as well.

3. The appellate courts are also divided on a related FIFRA preemption question: whether FIFRA preempts a pesticide user's state-law failure-to-warn claim that a pesticide was not effective for its intended use, *e.g.,* a farmer's claim that a FIFRA-registered pesticide's ineffectiveness resulted in crop damage. *Compare American Cyanamid Company v. Geye*, 79 S.W.3d 21 (Tex. 2002) (some such claims not preempted), *pet. for cert. pending*, No. 02-367 (filed Sept. 4, 2002); *Kawamata Farms v. United Agri Prods.*, 948 P.2d 1055, 1076-77 (Haw. 1997) (some such claims not preempted), *with Etcheverry*, 993 P.2d 366 (crop-damage claims preempted); *Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (same). A grant of certiorari here would, if ultimately decided in petitioner Eyl's favor, necessarily resolve the conflict in the crop-damage

cases.[7]

B. The Decision Below Incorrectly Construes The Scope Of Preemption Under FIFRA.

1. The decision below, like the decisions of most other courts to have addressed the scope of FIFRA preemption, is flawed because it erroneously holds that FIFRA's express preemption provision applies to state-law damages claims. The courts that have found preemption of damages claims under 7 U.S.C. § 136v(b) have relied almost exclusively on a rote application of this Court's decision in *Cipollone*, 505 U.S. 504 (1992). *Cipollone* held that the word "requirement," as used in the preemption provision of the Public Health Cigarette Smoking Act of 1969, could include common-law claims for damages, including claims for failure to warn. 505 U.S. at 520-24. The courts have erroneously concluded that this holding — concerning the use of a particular word in one statute enacted

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[7]On November 12, 2002, this Court invited the Solicitor General to express the views of the United States in *Geye v. American Cyanamid*, perhaps because the EPA has taken the position that efficacy claims are not preempted by FIFRA. *See* U.S. *Etcheverry* Br. at 33-42 (explaining that product efficacy claims also are not preempted by FIFRA because, among other reasons, EPA does not conduct efficacy review for pesticides) (available at www.citizen.org/documents/USEtcheverryBrief.pdf). We believe that this case presents a better vehicle for addressing FIFRA preemption issues than does *Geye* for two reasons: First, unlike the Nebraska Supreme Court's decision below, the decision in *Geye* is a non-final decision from a state Supreme Court, and jurisdiction in this Court appears to be lacking because there is no final judgment as required by 28 U.S.C. § 1257. Second, this case provides a basis for deciding the broader, more important, question whether FIFRA expressly preempts *any* failure-to-warn claims, not just those based on product efficacy.

by Congress in 1969 — necessarily means that "requirement" as used by Congress in 1972 in FIFRA's preemption provision reaches common-law damages claims. A fair reading of FIFRA's preemption provision, however, reveals that Congress did not intend preemption of damages claims at all. *See* U.S. *Etcheverry* Br. at 9 (acknowledging that in some contexts "'requirements' may encompass obligations imposed through common law damages actions[,]" and explaining that the "text, legislative history, and purposes of FIFRA demonstrate, however, that, as it is used in section 136v(b), the term 'requirements' means direct commands imposed by law regarding the contents of labels [and] does not include state damages actions"); *see also Lee v. Madigan*, 358 U.S. 228, 231 (1959) ("Only mischief can result if those terms [appearing in different statutes] are given one meaning regardless of the statutory context.").

In *Cipollone*, the statute contained the specific warning to be included on each label, that is, *Congress itself drafted the required warning language. See* 15 U.S.C. § 1333 (stating exact warnings to appear on cigarette packages and advertisements). It was Congress' very specific and unusual action — and only that specific action — that the preemption provision sought to protect from conflicting state regulation. Congress had dictated the warnings, and thus the Act preempted challenges to the adequacy of those warnings.

By contrast, with regard to preemption under FIFRA, Mr. Eyl's common-law claims in no way challenge a congressional determination, or even an agency determination, that the label must state certain cautionary language and no other. Quite the contrary, the label is drafted by the *registrant*, *i.e.*, the pesticide manufacturer. Although FIFRA specifies warning "signal words" and precautionary statements for certain toxicity categories, those warnings have nothing to do with the types of warnings that might have prevented Mr. Eyl's

injuries here, such as that bystanders not come in contact with water containing Pramitol or that Pramitol be removed from the body immediately after contact.

Even where specific warnings are required, pesticide manufacturers must include additional warnings or cautionary statements on the labels if they are needed to adequately protect health and the environment. 7 U.S.C. § 136(q)(1)(F) & (G); 40 C.F.R. §§ 156.10(a)(1); 156.10(i)(1)(i). Whether or not one of the specific toxicity warnings is required, the label must state "[a]ny limitations or restrictions on use to prevent unreasonable adverse effects." 40 C.F.R. § 156.10(i)(2)(x). FIFRA places full responsibility on the manufacturer to provide adequate warnings and directions for use on its product's label. 7 U.S.C. § 136a(c)(5). FIFRA prescribes only general requirements for pesticide labels and leaves it to the manufacturer to devise a label that will adequately protect against adverse effects, including damage to people, animals, and crops. *Id*. §§ 136(j), 136a(c)(5); 40 C.F.R. § 156.10(i)(2)(iii),(vi),(vii),(x). If a registrant learns of inadequacies in its label after the EPA has registered the pesticide, the registrant must promptly inform the EPA of the inadequacies and revise its label to provide adequate warnings and directions for use. 7 U.S.C. § 136a(f)(1). Accordingly, respondents were not only free at any time to provide information to purchasers and users that would have enabled Mr. Eyl to avoid injury, they were obligated under FIFRA to do so.

Indeed, one manifestation of FIFRA's registrant-driven scheme of labeling, as EPA has acknowledged, is that, "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). The understanding that the federal regulatory system and state-law tort compensation would co-exist makes sense in the FIFRA context where registrants draft pesticide

labels and are subject to general, continuing duties to provide adequate warnings.

2. The legislative history of the provision at issue in *Cipollone* and the one at issue here also differ dramatically. In *Cipollone*, the Court focused on a comparison of the 1969 preemption provision with its predecessor from the 1965 Cigarette Act. 505 U.S. at 520-23. Whereas the 1965 version preempted only "statements," the 1969 version preempted "requirements or prohibitions." The Court determined that the change in language must have some significance and, on that basis, found that common-law claims came within the scope of the preemption provision of the 1969 Act. 505 U.S. at 522-23. The Court's opinion makes clear that the dispositive factor was the contrast between the 1965 and 1969 provisions, not simply the use of the word "requirement" in the 1969 provision. Indeed, although the 1965 Act preempted all state-imposed "statement[s] relating to smoking and health . . . *required*" in cigarette advertising, the Court held that it did not preempt *any* common-law claims. *Id.* at 518-20.

Here, by contrast, the legislative history of FIFRA provides no evidence that Congress intended to preempt state damages actions. Aside from technical changes, section 136v(b) has not been amended since its enactment in 1972, and nothing analogous to the interpretive guide provided by the amendments to the 1965 Cigarette Act is present in the history of section 136v(b). Furthermore, FIFRA's extensive legislative history does not mention preemption of state damages claims. *See*, *e.g.*, S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993; *see also* U.S. *Etcheverry* Br. at 22-31 (explaining that FIFRA's legislative history involving 25 days of hearings and numerous committee reports does not even hint at intent to preempt any state damages actions). As the United States has noted, the conclusion that Congress did not enact sweeping "tort reform" in 1972 is

underscored by the fact that, in nearly a century of case law prior to FIFRA's passage, the courts uniformly held that pesticide manufacturers had a duty to warn under state law. *Id.* at 19-22.

3. Another fundamental problem with the lower courts' FIFRA preemption analyses premised on *Cipollone* is that they overlook the placement of the preemption provision, subsection 136v(b), in the context of the section as a whole. That section, entitled "Authority of States," begins with an *anti*-preemption clause:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. § 136v(a). The preemption clause, which follows immediately, 7 U.S.C. § 136v(b), begins with the words "Such State," thus tying the preemption provision to the activities of the state discussed in section 136v(a), quoted above. Section 136v(a) addresses states' general authority to "regulate" the sale and use of pesticides, *not* the states' authority to award compensation through damages remedies. As this Court has stated, the use of the word "regulate" refers not to common-law damages remedies, but rather to positive-law enactments of legislative and regulatory bodies. *See Cipollone*, 505 U.S. at 519, 523 (in 1965 Cigarette Act, "'regulation' most naturally refers to positive enactments" of legislatures and agencies, "not to common-law damages actions"). It follows, therefore, from the structure and wording of section 136v, that subsection (b) also does not encompass damages liability because it refers to states only in their regulatory, not adjudicatory, capacity.

This conclusion is consistent with other decisions of this

Court, which have noted that Congress can, and does, rationally distinguish state positive law and common law, preempting the former but not the latter. *See Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 527 (2002) (preemption of state positive law, but not state common law "does not produce anomalous results. It would have been perfectly rational for Congress not to pre-empt common-law claims, which — unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *Cipollone*, 505 U.S. at 518 ("there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common-law damages actions"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation ... are significantly more intrusive than the incidental effects of such an award provision. ...Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *Silkwood*, 464 U.S. at 256 (despite federal preemption of state regulatory authority, state-law punitive damages awards not preempted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards").[8]

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[8]This Court's recent decision in *Sprietsma* also demonstrates that the term "requirement" does not always refer to state damages actions, but that the term, like all statutory language, derives its meaning from context. There, the Court held that the Federal Boat Safety Act's preemption provision, 46 U.S.C. § 4306, which preempts certain state laws, regulations, or standards "imposing *a requirement*," does *not* reach common-law claims. *See Sprietsma*, 123 S. Ct. at 524, 526-27. The Nebraska Supreme Court did not have the benefit of *Sprietsma*, which was handed down 19 days after the Nebraska Supreme Court denied rehearing.

In addition, section 136v(a) only bars states from permitting a pesticide sale or use prohibited by FIFRA, but it does not restrict states' authority to impose restrictions in addition to those imposed by FIFRA. Subsection (a) thus allows a state to require manufacturers to comply with state requirements in addition to the federal requirements before they may market their products in that state. For example, a state may, consistent with both sections 136v(a) and (b), ban a registered pesticide from sale in that state — an act quite drastic in comparison to providing a tort remedy. *See* S. Rep. No. 92-970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4092, 4111-12 ("Local governments could, however, prohibit or restrict the sale or use of pesticides within their jurisdiction."). Indeed, states have done so. *See, e.g.*, Iowa Code Ann. § 206.32 (banning sale, purchase, application, and use of chlordane); Md. Agric. Code § 5-210.5 (restricting use of various pesticides). And Nebraska has the power, under state law, to restrict or ban any pesticide, including Pramitol, that is deemed a hazard to the citizenry. *See* Neb. Stat. Ann. § 2-2626(3)(f). Moreover, a state could also require that pesticide manufacturers submit results of safety and efficacy testing to a state environmental agency, as Nebraska law provides. *Id.* § 2-2629(3). Or a state could require that pesticide manufacturers include warnings about risks to people or the environment in any advertising within that state.

Indeed, a state could require that manufacturers, as a condition to marketing in that state, compensate consumers for damage to people, land, or crops caused by their products. *Cf.* Neb. Rev. Stat. § 2-2645 (administrative procedure for claims for damages from pesticides). The state could do so without imposing any requirement on product labels. Such a requirement would reflect a state's decision that, "if it must abide by EPA's determination that a label is adequate, [the state] will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented ...." *Ferebee*, 736

F.2d at 1541. Or the state might decide, based on the principle of strict liability, that manufacturers should be held liable for damage caused by their products, without regard to fault. Under either rationale, a plaintiff's verdict would not require the manufacturer to change its label. It would only require, consistent with subsection (a)'s grant of authority to states to regulate pesticide "use," that the manufacturer pay damages associated with the use of its product. The federal labeling requirements and the state use requirement would not conflict, and the state requirement would not run afoul of section 136v(b)'s proscription against "any requirements for labeling or packaging in addition to or different from those required" under FIFRA.

Moreover, the anti-preemptive force of section 136v(a) is particularly strong in cases like this one, where, as noted above (at 18), the injured, yet foreseeable, plaintiff, was neither a purchaser nor an end-user and was not in the target audience of the product label. In FIFRA, Congress made no effort to regulate the relationship between pesticide manufacturers and distributors, on the one hand, and bystanders and other non-users, on the other. Thus, it is difficult to conceive how a state-law duty imposing an obligation on that relationship can be preempted by FIFRA. The only way to provide warnings to bystanders like Mr. Eyl is through the kind of non-label "regulation" of pesticide "sale or use" that states are specifically empowered to enforce under section 136v(a). *See Jorling,* 874 F.2d at 117-20; *see also, e.g., Mortier,* 501 U.S. 597.[9]

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[9]In *Mortier*, this Court held that FIFRA did not preempt a municipal ordinance that imposed, among other things, non-label-based warnings advising bystanders that a pesticide application had occurred. The Court held that the 7 U.S.C. § 136v(a)'s extension of (continued...)

That is why states have required that manufacturers, distributors, and others provide non-label warnings to bystanders, *see, e.g., Allenby*, 958 F.2d at 946, and Nebraska law empowers the state Department of Agriculture to require notice of pesticide use to the public. Neb. St. Ann. § 2-2626(3)(f); Pet. App. 3a (respondent Northeast Cooperative was aware that state law required it to post warnings). Yet, rulings such as the Eleventh Circuit's decision in *Papas* and the decision below override Congressional intent as expressed in section 136v(a) and thereby negate the power of the states to provide such warnings.

4. Even if it could be said that the state-law "requirements" referred to in section 136v(b) encompass duties that give rise to liability for damages, section 136v(b) would not preempt Mr. Eyl's claims because those claims would not be based on duties "in addition to or different from" the duties imposed by FIFRA. As discussed above, FIFRA requires pesticide registrants to ensure that their labels and directions for use are adequate to protect against unreasonable adverse effects to health and the environment. 7 U.S.C. § 136a(c)(5). Pesticides that lack adequate warning labels are misbranded, even if EPA has approved the label. *Id*. §§ 136(q)(1)(G), 136a(f)(2).

Mr. Eyl maintains that respondents failed to warn him of the dangers associated with Pramitol 5PS. *See, e.g.*, Fifth

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[9](...continued)
authority to *states* to "regulate the sale or use of any federally registered pesticide" did not evince an implied preemption of such regulation by political *subdivisions* of states. The Court did not so much as suggest that such warnings are expressly preempted by section 136v(b) and, indeed, *Mortier* presupposes that non-label warnings are a form of state-imposed regulation specifically permitted by section 136v(a).

Amended Petition, ¶¶ 9C, 9E, 10A, 10B, 10D. Nebraska common law requires that sellers provide warnings about the risks and dangers inherent in a product's intended as well as any reasonably foreseeable uses. *See, e.g., Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827, 841 (Neb. 2000). The common-law duties on which Mr. Eyl's allegations are premised thus mimic the manufacturer's duties under FIFRA, which places the burden on the registrant of testing, identifying, and labeling as to risks to people and the environment. To the extent that the claims alleged here are based on duties that parallel requirements imposed under FIFRA, *see Medtronic*, 518 U.S. at 496-97, they are not "in addition to or different from," but rather in harmony with, FIFRA's requirements and, thus, are not preempted.

This conclusion is consistent with the Court's analysis in *Medtronic.* Looking to the general language of the preemption provision of the federal Medical Device Amendments ("MDA"), 21 U.S.C. § 360k(a) — which is similar to the language of 7 U.S.C. § 136v(b) — the Court identified an "overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." *Medtronic*, 518 U.S. at 500. More specifically, in considering negligent manufacturing and failure-to-warn claims, *Medtronic* made "a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations." *Id.* The Court concluded that the *federal* manufacturing and labeling requirements were "important but entirely generic" regulatory concerns, not the type of concerns that section 360k(a) was designed to protect from potentially contradictory state requirements. Similarly, the *state* common-law duties at issue in *Medtronic* were general duties, not developed specifically with respect to devices. Thus, the Court found that those duties were not the kind of requirements that

Congress or the FDA feared might impede the FDA's implementation and enforcement of the MDA. *Id*. at 500-01.

Like the good manufacturing requirements and general labeling requirements at issue in *Medtronic*, FIFRA's labeling requirements are general. (Indeed, the FDA's good manufacturing requirements are more comprehensive than the EPA's labeling regulations, *see* 21 C.F.R. Part 820, yet *Medtronic* found that the MDA did not preempt manufacturing claims.) The registrant, not the EPA, devises a label in accordance with FIFRA's general standards. And, as noted earlier, in contrast to the statutorily prescribed warnings of the 1969 Cigarette Act, *see Cipollone* 505 U.S. at 508, pesticide registrants are obliged under FIFRA to propose their own labels and then update them to protect against adverse health and environmental effects. *See* 7 U.S.C. § 136d(a)(2). For this reason as well, the Nebraska Supreme Court's decision cannot be squared with the text and purpose of FIFRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

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