No. 02-367

In the Supreme Court of the United States

AMERICAN CYANAMID COMPANY, PETITIONER

v.

TERRY GEYE AND BRANDON GEYE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempts respondents' state-law damages claims alleging that application of petitioner's herbicide products damaged respondents' peanut crop.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondents Terry and Brandon Geye sued petitioner American Cyanamid Company in the District Court of Eastland County, Texas, alleging that their application of petitioner's herbicide products damaged their peanut crop. The district court granted petitioner summary judgment, ruling that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempted respondents' claims for relief. Pet. App. 25a-26a. The Eleventh Court of Appeals of Texas reversed that judgment and remanded the case for trial. *Id.* at 15a-24a. The Texas Supreme Court affirmed the court of appeals' judgment. *Id.* at 1a-14a.

1. *The Federal Insecticide, Fungicide, and Rodenticide Act.* Congress created FIFRA through a series of

enactments to regulate the labeling, sale, and use of pesticides. See *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991). As originally enacted in 1947, see ch. 125, 61 Stat. 163, FIFRA "was primarily a licensing and labeling statute." *Wisconsin*, 501 U.S. at 601 (quoting *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 991 (1984)). In 1972, Congress "significantly strengthened FIFRA's registration and labeling standards" in response to "environmental and safety concerns." *Ibid.* See Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-515, 86 Stat. 973 (1972 Amendments). In addition, Congress "regulated the use, as well as the sale and labeling, of pesticides" and granted the Environmental Protection Agency (EPA), which had previously been charged with federal oversight of pesticide programs, "increased enforcement authority." *Ibid.* The 1972 Amendments effectively "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ibid.* (quoting *Ruckelshaus*, 467 U.S. at 991). Congress has continued to amend FIFRA in response to experience gained in regulating pesticides. See, *e.g.*, Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (1978 Amendments).

a. FIFRA's regulatory framework is centered on the requirement that pesticide producers must obtain an EPA registration for a pesticide before the pesticide may be sold or distributed in the United States. 7 U.S.C. 136a. FIFRA provides that EPA "shall register a pesticide" if the agency determines, in light of any restrictions placed on the pesticide's use:

> (A) its composition is such as to warrant the proposed claims for it;

> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. 136a(c)(5). EPA has promulgated regulations detailing the registration requirements. See 40 C.F.R. 152 *et seq.*

Based on its experience following the 1972 Amendments, EPA reported to Congress that the agency's obligation to evaluate efficacy claims in the registration process was diverting scarce resources needed to evaluate environmental and health effects. Congress responded in the 1978 Amendments, providing:

> In considering an application for the registration of a pesticide, the Administrator [of EPA] may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

7 U.S.C. 136a(c)(5). As a consequence of the 1978 Amendments, EPA's regulations governing registration of pesticides now state:

> The Agency has waived all requirements to submit efficacy data unless the pesticide product bears a claim to control pest microorganisms that pose a threat to human health and whose presence cannot

> readily be observed by the user including, but not limited to, microorganisms infectious to man in any area of the inanimate environment or a claim to control vertebrates (such as rodents, birds, bats, canids, and skunks) that may directly or indirectly transmit diseases to humans. However, each registrant must ensure through testing that his products are efficacious when used in accordance with label directions and commonly accepted pest control practices. The Agency reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration.

40 C.F.R. 158.640(b)(1); see 40 C.F.R. 158.540; 47 Fed. Reg. 53,192 (1982); 44 Fed. Reg. 27,932, 27,938 (1979) (col. 3). Additionally, after a pesticide has been registered, EPA requires the registrant to report certain incidents of known harm to non-target organisms, such as crops. 40 C.F.R. 159.184(a)(1)-(3).

b. FIFRA establishes a program for federal-state cooperation in regulating pesticides. See *Wisconsin*, 501 U.S. at 601-602. Section 136v, captioned "Authority of States," set out key principles of that relationship. See 7 U.S.C. 136v. Section 136v(a) recognizes that, as a general matter, States retain their historic authority to regulate pesticide sale or use, provided that a State does not permit a sale or use that FIFRA, or EPA's implementing regulations, prohibit:

> **(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.

7 U.S.C. 136v(a). Nevertheless, to ensure a uniform nationwide approach to pesticide labeling, Section 136v(b) provides a specific limitation on a State's authority with respect to the content of pesticide labeling:

> **(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). Section 136v(c)(1) further provides that a State shall have the power, subject to various limitations, to allow additional uses of federally registered pesticides within the individual State's borders:

> **(c) Additional uses**
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved or cancelled by the Administrator. * * *

7 U.S.C. 136v(c)(1). Sections 136v(c)(2) through (4) set out additional limitations on state-issued registrations. 7 U.S.C. 136v(c)(2)-(4).

In short, Section 136v provides that a State may prohibit the sale or use of any pesticide within its borders. Under specified conditions, a State may also allow a pesticide to be used within its borders for purposes other than those provided in the federal registration. A State may not, however, "impose * * * any requirements for labeling or packaging in addition to or differ-

ent from those required under this subchapter." 7 U.S.C. 136v(b).

2. *The Facts Of This Case.* Respondents alleged that they purchased two of petitioner's herbicide products, "Pursuit" and Prowl," based on representations contained in brochures and magazine advertisements, to control weeds on their Texas peanut farm. Br. in Opp. App. 2a-3a (Third Amended Petition). Those representations, according to respondents, "substantially differed from, went beyond and were extrinsic of the label on the Prowl® and Pursuit® containers." *Id.* at 3a. Respondents contended that the herbicides, "instead of controlling the weeds in a safe and effective manner as intended and as advertised, caused damage to [respondents'] peanut plants to the extent that the peanuts failed to properly grow and produce." *Ibid.* Respondents furthered alleged that they "would show that the herbicide damage prevented the peanuts from producing harvestable nuts which were to be expected under the circumstances for the crop year in question and which were similar to that produced by the fields which were not treated with a tank mixture combination of Prowl and Pursuit herbicide." Pet. App. 3a-4a.

On the basis of those allegations, respondents sought relief on three causes of action: (a) "strict liability in tort" under Texas common law on the theory that the products were "defective and unsafe for their intended purposes"; (b) breach of express and implied warranties contained in "non-label advertising and promotional material"; and (c) violations of Texas's Deceptive Trade Practices and Consumer Protection Act (DTPA), Tex. Bus. & Com. Code Ann. §§ 17.41 *et seq.* (West 2002), apparently based on alleged misrepresentations by petitioners about the products in their promotional materials. Br. in Opp. App. 1a, 4a-5a. The Texas

district court granted petitioner's motion for summary judgment "on the ground that each and all of [respondents'] claims are preempted by [FIFRA]." Pet. App. 25a. In a letter predating the judgment, the district judge stated that "I have concluded and find that [petitioner is] entitled to summary judgment as a matter of law as to each of [respondents'] claims as those claims are directly or indirectly related to the product's labeling and therefore preempted by FIFRA." *Id.* at 28a.

The Texas court of appeals reversed that judgment. Pet. App. 15a-24a. The court stated at the outset that "[a]ll of [respondents'] state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." *Id.* at 16a. The court apparently reached that conclusion based on its view that "[t]he off-label statements merely repeated information on the labels." *Id.* at 16a n.2. The court also observed that many courts had ruled that FIFRA's "preemption of state authority as to pesticide labels bars damage claims in state court by growers against pesticide manufacturers" because "allowing such a claim by a grower would be, in effect, permitting the state to impose label requirements 'in addition to or different from' the federally-approved label." *Id.* at 20a (quoting 7 U.S.C. 136v(b)). The court further noted, however, that "in actual fact, EPA, with Congress' approval, stopped evaluating pesticide efficacy for routine label approvals almost two decades ago." *Id.* at 21a. The court of appeals concluded that Congress could not have intended to preempt state-law efficacy claims after EPA ceased evaluating pesticide efficacy. *Id.* at 23a. It therefore held that "plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA because such

claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product." *Id.* at 24a.

The Texas Supreme Court, on petition for review, affirmed the court of appeals' judgment. Pet. App. 14a. The supreme court, unlike the lower Texas courts, did not address the question whether or not petitioners' claims were "label-related." Instead, it concluded that the issue of preemption in this case could be resolved on the ground that Congress has authorized EPA "to choose NOT to regulate product labeling with respect to how well a product works." *Id.* at 1a-2a. The court stated:

> Simply put, the EPA does not regulate herbicide labels regarding how well a product works, and this includes if the product actually injures the crops it was intended to assist. Because of the EPA's choice not to regulate, and therefore because there are no labeling or packaging requirements regarding crop damage imposed under FIFRA, we conclude that state common-law claims about target area crop damage are not preempted. Thus, [respondents'] claims are not preempted.

Id. at 2a. The Texas Supreme Court accordingly affirmed the court of appeals' judgment remanding the case for further proceedings. See *id.* at 14a, 24a.

DISCUSSION

The petition for a writ of certiorari raises potentially important questions respecting the preemptive effect of Section 136v(b) of FIFRA. This case does not, however, provide the Court with an appropriate opportunity to address those issues. Most significantly, the Texas Supreme Court's judgment is not "final" for purposes of 28 U.S.C. 1257, and this Court accordingly

lacks jurisdiction to review it. Furthermore (and related to the jurisdictional defect), the Texas Supreme Court—which affirmed the court of appeals' judgment on the ground that Section 136v(b) categorically does not preempt lawsuits predicated on a pesticide's lack of efficacy because EPA does not regulate efficacy—has not resolved whether respondents' causes of action in this case actually entail the imposition of "any requirements for labeling or packaging in addition to or different from those required under [FIFRA]," within the meaning of Section 136v(b). The petition in this case accordingly does not provide a proper vehicle for addressing the scope of FIFRA preemption.

On the merits of the question of FIFRA preemption, the United States has, on two occasions, filed briefs as amicus curiae urging that Section 136v(b) categorically does not preempt state-law actions seeking compensation for injuries from pesticide use, including claims arising from crop damage. The United States has reexamined the position that it urged in those cases and has concluded that its arguments that FIFRA categorically does not preempt common law actions are incorrect. That position no longer represents the view of the United States. Rather, the United States submits that state-law damages claims are within the scope of Section 136v(b) where the state-created legal duty on which the suit is predicated would "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. 136v(b).

1. *This Court Lacks Jurisdiction To Review The Interlocutory Decision Of The Texas Supreme Court.* Congress has granted this Court jurisdiction to review, by writ or certiorari, "[f]inal judgments or decrees rendered by the highest court of a State in which a

decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." 28 U.S.C. 1257(a). "As a general matter, to be reviewed by this Court, a state-court judgment must be final 'as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Pierce County* v. *Guillen*, 123 S. Ct. 720, 728 (2003) (quoting *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997), and *Market Street R.R.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). The Texas Supreme Court's judgment in this case, which affirmed a court of appeals decision reversing a grant of summary judgment and remanding the case for further proceedings, is not final in that sense. See Pet. App. 14a, 24a.

Petitioner nevertheless invokes this Court's jurisdiction on the basis of this Court's decision in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), which recognizes that certain state-court judgments can be treated as final for jurisdictional purposes, even though further proceedings are to take place in the state courts. See *id.* at 477-483 (identifying four exceptions to the finality rule). In particular, petitioner relies (Pet. 1-3) on the "fourth *Cox* exception," which states that a state-court judgment may be treated as final

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or

> determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-483. See, *e.g.*, *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989).

Petitioner can satisfy the first condition because the company could indeed prevail on nonfederal grounds in the future proceedings. But petitioner cannot show that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting*, 420 U.S. at 482-483. Most fundamentally, the Texas Supreme Court did not reach the question whether, even if Section 136v(b) does apply to some efficacy-based claims, the legal duty under state law on which each of respondents' tort claims in this case is predicated would "impose * * * requirements for labeling * * * in addition to or different from those required under [FIFRA]," within the meaning of 7 U.S.C. 136v(b).

For example, to the extent respondents' claims depend on representations by petitioner at all, the complaint alleges that they were not made in product labels, but rather were made in "brochures and magazine advertisements." Br. in Opp. App. 2a-3a. Magazine advertisements, as well as many types of brochures, are not within FIFRA's express definition of "labeling." See 7 U.S.C. 136(p)(2). To the extent that any of the statements identified in respondents' complaint might nevertheless be found to constitute "labeling," then the result could be simply to exclude any such statement as a basis for liability under the

relevant cause of action, and not to require dismissal of the cause of action altogether. The same would be true if Section 136v(b) were held to preempt not only claims that would impose requirements "for" labeling, but also claims that are based on other statements (in advertising or elsewhere) that repeat statements in the label itself, as some courts have held. See, *e.g.*, *Kuiper* v. *American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997), cert. denied, 523 U.S. 1137 (1998).[1]

Thus, the resolution of questions concerning whether particular statements may be admitted into evidence or form the basis for liability under one or another of respondents' causes of action would not "be preclusive of any further litigation on the relevant cause of action," but rather would merely control[] the nature and character of, or determin[e] the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting*, 420 U.S. at 482-483. See *Pierce County*, 123 S. Ct. at 728 n.5 (judgment not final under fourth *Cox* exception because "respondents remain free to try their tort case without the disputed documents").

Furthermore, the Texas Supreme Court has already concluded, in a prior decision, that Section 136v(b) would not preempt a claim for breach of warranty, which is one of respondents claims here, if the claim does not depend on an alleged failure to provide adequate warnings in the labeling. See *Quest Chem. Corp.* v. *Elam*, 898 S.W.2d 819, 821 (1995); cf. *Cipollone* v.

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[1] Although the Texas Supreme Court stated that respondents "claim they relied on various labels and advertisements that specifically stated that Pursuit could be 'tank mixed' with Prowl," Pet. App. 2a, the Texas court of appeals stated that respondents "relied upon *off*-label magazine and brochure advertisements made by [petitioner] regarding Prowl and Pursuit, "*id.* at 16a (emphasis added). Respondents reiterate the latter position in this Court. See Br. in Opp. 1-2.

Liggett Group, Inc., 505 U.S. 504, 525-526 (1992) (plurality opinion) ("'requirement[s]' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed *by the warrantor*"); *American Airlines* v. *Wolens*, 513 U.S. 219, 228-229 (1995); cf. *Grenier* v. *Vermont Log Bldgs., Inc.*, 96 F.3d 559, 564 (1st Cir. 1996) (breach of express warranty claim based on inaccurate statement in labeling preempted); *Welchert* v. *American Cyanamid, Inc.*, 59 F.3d 69, 71-73 (8th Cir. 1995) (breach of express warranty claim preempted where EPA required to include on the label some statement on the subject). And a claim based on strict liability, another of respondents' claims in this case, need not be based on statements in labeling at all.

Finally, even where state law does impose requirements for labeling, that law is preempted under 7 U.S.C. 136v(b) only if the requirements it imposes are "in addition to or different from" any requirements imposed by FIFRA itself. Thus, in *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 486-492 (1996), for example, the Court unanimously held a provision of the Medical Device Amendments of 1976 (MDA), Pub. L. No. 94-295, 90 Stat. 539, which bars any state-law "requirement" that is "different from, or in addition to," one applicable to the device under the MDA, 21 U.S.C. 360k(a)(1), does not bar common law tort claims that are based on a violation of federal regulations—*i.e.*, where federal regulations furnish the standard of care. See *Lohr*, 518 U.S. at 494-497; see also *id.* at 513 (O'Connor, J., concurring in part and dissenting in part) (Section 360k(a) does not preempt claims that seek damages for "alleged violation of federal requirements"). Those issues, too, could arise in the Texas courts in any further proceedings on respondents' claims.

If this Court were to reverse the Texas Supreme Court's ruling that respondents' claims are not preempted because "the scope of FIFRA's preemption is dependent on what the EPA regulates" and "EPA does not regulate a product's labeling claims" respecting whether a product will be toxic to the crop, Pet. App. 14a, the Court's decision would not terminate litigation on respondents' causes of action. Respondents would be entitled to make, on remand, any of the foregoing arguments that have been adequately preserved.

Respondents preserved at least some, if not all, of those arguments in the Texas Supreme Court. They devoted a section of their brief to the contention: "alternatively, the court of appeals improperly held that all of respondents' claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." Respondents' Tex. Sup. Ct. Br. 13-17 (capitalization of argument heading omitted). In that section of their brief, respondents contended that the statements on which they relied were not contained in product labels (see also *id.* at 2), and also relied on cases concluding that claims for breach of express warranty are not preempted.

Petitioner appears to concede that respondents properly preserved this set of arguments. See Pet. Reply Br. 3 n.3 (noting that respondents challenged the court of appeals' characterization of their claims in the Texas Supreme Court). Petitioner contends, however, that the Texas Supreme Court could not—and cannot—reach the issue of whether respondents' claims concern labeling because the Texas Court of Appeals found, as a matter of fact, that "[a]ll of plaintiffs' state law claims relate directly or indirectly to the product label." *Id.* at 2 (emphasis and quotation marks deleted). Accordingly to petitioner:

> Under the Texas Constitution, this factual finding by the state court of appeals "shall be conclusive," and therefore cannot be reviewed by the Texas Supreme Court.

Id. at 3 (quoting Tex. Const. Art. V § 6(a)).

Petitioner is mistaken in its view of Texas law. The questions whether, for purposes of FIFRA, a plaintiff's claims "relate" to a product label (or, more precisely under 7 U.S.C. 136v(b), whether the claims would "impose" any "requirements for labeling" that are in addition to or different from those required under FIFRA) —and what significance that characterization has for purposes of federal preemption—present questions of federal law that have themselves divided the federal courts of appeals. See, *e.g.*, *Kuiper*, 131 F.3d at 662-663; see also *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 754 (Neb. 2002), petition for cert. pending, No. 02-1500 (filed Apr. 10, 2003). The Texas Supreme Court would not be precluded by the Texas Constitution from addressing those legal questions following a remand.[2]

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[2] Indeed, this case does not implicate the restriction contained in the Texas Constitution at all. The Texas Supreme Court reviewed a court of appeals decision that reversed a district court's entry of summary judgment. See Pet. App. 2a-3a. "The very principle upon which summary judgments are founded is that the record presents no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *City of Grand Prairie* v. *City of Irving*, 441 S.W.2d 270, 273 (Tex. Civ. App. 1969) (no writ). A district court's conclusion that no genuine issue of material fact is in dispute is a legal conclusion that is subject to appellate review. The Texas Supreme Court routinely reverses decisions of courts of appeals that a material issue of fact does or does not exist. See, *e.g.*, *Callahan & Assocs.* v. *Orangefield Indep. Sch. Dist.* 92 S.W.3d 841, 842 (Tex. 2002). Respondents were entitled to challenge the district court's judgment on the basis that material facts were in dispute, and they would be entitled, on remand, to renew those or other remaining legal arguments in

Because reversal of the Texas Supreme Court's decision would not be "preclusive of any further litigation on the relevant cause[s] of action," but instead would "merely control[] the nature and character of * * * the state court proceedings still to come," *Cox Broadcasting*, 420 U.S. at 482-483, the decision does not meet the minimum requirements of the fourth *Cox* test.[3]

2. *FIFRA Preempts State-Law Damages Actions That Impose Labeling And Packaging Requirements In Addition To, Or Different From, Those That FIFRA Imposes.* On two occasions in the past, the United States has filed briefs as amicus curiae in the lower courts taking the position that FIFRA does not preempt state-law actions seeking compensation for damages arising from pesticide use and that, in any event, FIFRA does not preempt claims relating to pesticide efficacy. See U.S. Amicus Curiae Br., *Hart* v. *Bayer Corp.* (5th Cir. filed Mar. 1999) (No. 98-60496); U.S. Amicus Curiae Br., *Etcheverry* v. *TRI-AG Serv. Inc.* (Cal. filed Mar. 1999) (No. S072524). Those briefs have been widely circulated and the arguments therein have been noted in other lower courts. See, *e.g.*, Pet. App. 22a.

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defense of the court of appeals' reversal of that judgment. See Resp. Supp. Br. 1-3.

[3] If the Court were to conclude that at least one (but not all) of respondents' causes of action would be preempted if it reversed the decision of the Texas Supreme Court on the particular ground on which that court relied, the question would then arise whether 28 U.S.C. 1257 should be construed (in the manner of Fed. R. Civ. P. 54(b)) to permit a judgment that is not final as to the entire case to be regarded as final with respect to the disposition of particular claims. Cf. *Pierce County*, 123 S. Ct. at 726, 728-729 (treating as final one of two separately filed suits that were consolidated on appeal).

The United States urged in those briefs that, while Congress sought "to prevent state administrative bodies from issuing labeling regulations that conflicted with federal requirements," Congress did not express an intent "to deprive injured persons of state-law damages remedies." U.S. Amicus Curiae Br. at 9, *Etcheverry*, *supra* (No. S072524). The California Supreme Court rejected the United States' submission. *Etcheverry* v. *TRI-AG Serv. Inc.*, 993 P.2d 366 (2000). The United States has reexamined the position that it urged in *Etcheverry* in light of the ruling by the California Supreme Court in that case, as well as the subsequent rulings of other courts, and it has concluded that its position in *Etcheverry* that FIFRA categorically does not preempt common law tort suits or other damages actions is incorrect. In the United States' view, just as Section 136v(b) applies to requirements imposed in a law enacted by a state legislature or regulation promulgated by a state agency, it applies to requirements imposed in the form of a duty or standard of care in a tort action.[4]

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[4] Most federal courts of appeals and state courts of last resort have held that Section 136v(b) preempts state-law failure-to-warn actions, reasoning that such actions are predicated on labeling "requirements" within the meaning of FIFRA. See, *e.g.*, *Netland* v. *Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), cert. denied, 123 S. Ct. 415 (2002); *Etcheverry*, *supra*; see also Pet. 10 n.2 (collecting additional cases); *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 754 (Neb. 2002) (same), petition for cert pending, No. 02-1500 (filed Apr. 10, 2003). But the Montana Supreme Court has held otherwise, concluding that "Congress intended the term 'requirements' in § 136v(b) of FIFRA to mean enactments of positive law by legislative or administrative bodies, not state law damage actions." *Sleath* v. *West Mont. Home Health Servs., Inc.*, 16 P.3d 1042, 1053 (Mont. 2000), cert. denied, 122 S. Ct. 40 (2001); accord *Brown* v. *Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), review denied, 6 P.3d 1098 (Or. 2000).

The California Supreme Court in *Etcheverry* obtained guidance from this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), which held that provisions of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. 1331 *et seq.*, proscribing the imposition of any "requirement or prohibition * * * under State law," encompasses legal duties applied in common-law tort actions as well as affirmative state laws and regulations. See, *e.g.*, *Etcheverry*, 993 P.2d at 370-371 (quoting *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) ("There is no notable difference between the language in the 1969 Cigarette Act [preempting state common-law tort actions based on label claims] and the language in FIFRA.").

The California Supreme Court additionally concluded that this Court's decision in *Medtronic, Inc.* v. *Lohr*, *supra*, supports the conclusion that FIFRA preempts state-law damage claims. *Etcheverry*, 993 P.2d at 373-374. This Court ruled in *Medtronic* that the Food and Drug Administration's (FDA's) approval of a pacemaker under the MDA, did not, under the particular circumstances presented, preempt a state-law action alleging that the pacemaker was improperly designed. Separate opinions in that case recognized, however, that the MDA's provisions prohibiting the States from establishing any inconsistent "requirement" that "relates to the safety or effectiveness of the device," 21 U.S.C. 360k(a)(2), could preempt state-law damage suits. See *Medtronics*, 518 U.S. at 504 (Breyer, J., concurring in part); *id.* at 510-512 (O'Connor, J., concurring in part and dissenting in part); see also *id.* at 502 (opinion of Stevens, J.); cf. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 867 (2000).

The United States agrees and submits that the legal standard applied in a state-law damages action may

"impose" a "requirement[]" for labeling or packaging within the meaning of 7 U.S.C. 136v(b). As the California Supreme Court recognized in *Etcheverry*, however, the scope of FIFRA's preemptive effect in a tort suit depends on the specific nature of the state-law claims at issue. 993 P.2d at 376-378. See, *e.g.*, *Cipollone*, 505 U.S. at 523 ("we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted"). The inquiry specifically depends on an analysis of whether the particular state-law claim would result in "impos[ing] or continu[ing] in effect" any "requirements for labeling or packaging" that are in addition to or different from "requirements" that FIFRA itself imposes. Because the Texas Supreme Court has not conducted such an evaluation in this case, and neither the record nor the precise nature of respondents' claims is yet fully developed, the United States takes no position at this time with respect to whether, or to what extent, respondents' claims are preempted.[5]

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[5] This Court currently has pending before it a petition for a writ of certiorari in *Eyl* v. *Ciba-Geigy Corp.*, No. 02-1500 (filed Apr. 10, 2003), which presents the question whether, and to what extent, FIFRA preempts state-law damage actions. The petition in *Eyl* seeks review of a final judgment of the Nebraska Supreme Court that reversed a personal injury judgment predicated on pesticide exposure. Petitioner Eyl sought damages from a pesticide registrant, Ciba-Geigy Corporation, based on his exposure to the herbicide "Pramitol 5PS" while working as a city maintenance worker. Pet. App. at 1a-2a, *Eyl*, *supra* (No. 02-1500). The registrant argued that "Eyl's claims are labeling based and preempted by [FIFRA]." *Id.* at 2a. The Nebraska Supreme Court ruled that "FIFRA applies to preempt Eyl's failure-to-warn claims," reversing the district court judgment with directions to dismiss. *Ibid.*

CONCLUSION

The petition for a writ of certiorari in this case should be denied.

Respectfully submitted.

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