No. 02-367

In the Supreme Court of the United States

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

TERRY GEYE AND BRANDON GEYE,

Respondents.

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

MOTION OF CROPLIFE AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, CropLife America moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has withheld consent.

CropLife America is a national, not-for-profit trade association that promotes the environmentally sound use of crop protection products (including herbicides, insecticides, fungicides, and other types of pesticides) for the economical production of safe, high quality, and abundant food, fiber, and other crops. Established in 1933, CropLife America (formerly known as the American Crop Protection Association and, before that, as the National Agricultural Chemicals Association) represents the developers, manufacturers, formulators, and distributors of plant science solutions for agricultural and pest management in the United States. The association's members produce, sell, and distribute virtually all of the crop protection and biotechnology products used by American farmers.

CropLife America often participates as *amicus curiae* in cases that raise issues of vital concern to its membership. This is such a case. CropLife America's members have a substantial interest in ensuring that questions concerning the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y, are properly resolved. For that reason, CropLife America filed an *amicus* brief in this case when it was before the Texas Supreme Court, and has filed *amicus* briefs in other FIFRA preemption cases as well. See, *e.g.*, *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991); *Hart* v. *Bayer*, 199 F.3d 239 (5th Cir. 2000); *Etcheverry* v. *Tri-Ag Servs., Inc.*, 993 P.2d 366 (Cal. 2000). CropLife America has also submitted *amicus* briefs in cases in this Court that raised other issues of importance to its members. See, *e.g.*, *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred International, Inc.*,

534 U.S. 124 (2001); *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

CropLife America's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR CROPLIFE AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

ARGUMENT

In enacting the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y, Congress vested the United States Environmental Protection Agency ("EPA") with broad and exclusive authority to regulate the labeling and packaging of pesticides sold in this country. See *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 615 (1991) (explaining that labeling "fall[s] within an area that FIFRA's 'program' pre-empts"). Toward that end, Congress included in FIFRA a broad preemption clause – aptly titled "uniformity" – that expressly bars the States from imposing on federally registered pesticides "*any* requirements for labeling or packaging" that are either "in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (emphasis added). Congress intended Section 136v(b) "to *completely preempt* state authority in regard to labeling and packaging." H.R. Rep. No. 92-511, at 16 (1971) (emphasis added).

In the decision below, the Texas Supreme Court has parted ways with the Supreme Court of California and several federal circuits in resolving an issue of surpassing importance to the manufacturers and distributors of pesticides, to farmers, and ultimately to the consumers of agricultural products: Does FIFRA preempt labeling-related damages claims for crop injury

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[1] Pursuant to Rule 37.6 of the Rules of this Court, CropLife America states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

that are brought under state law? In holding categorically that such claims are *not* preempted, the Texas Supreme Court has created a serious conflict over the meaning of an important federal statute and impaired the national uniformity of pesticide labeling mandated by Congress. That alone merits this Court's review.

But there is more. In reaching this anomalous result, the Texas Supreme Court purported to find an "exception" (Pet. App. 1a) to FIFRA's clear preemptive command, relying on the ground that the expert federal agency charged with regulating pesticide labeling – the EPA – supposedly had chosen not to regulate a particular aspect of the product labeling challenged by respondents' claims. As we explain below, Congress did not create any such "exception" to FIFRA's preemption provision; nor did it authorize the EPA to grant "exemptions" from preemption. Unlike other preemption schemes that have those features, FIFRA is unqualified in its preemption of state-imposed "requirements" for the labeling or packaging of federally registered pesticides. By concluding otherwise based on an inquiry into whether the EPA, at the time of initial product approval, examined data relating to specific product risks, the Texas Supreme Court's decision threatens to interject uncertainty into this important area of federal law as well as invite further, wholly unnecessary litigation. For that reason as well, this Court should grant the petition in this case.

Before examining these reasons in greater detail, however, we first explain why this Court has jurisdiction even though the Texas Supreme Court's decision remanded the case for further proceedings in the state courts.

I. THIS COURT HAS JURISDICTION TO REVIEW THE TEXAS SUPREME COURT'S DECISION

This Court's certiorari jurisdiction over decisions of the state courts is conferred by 28 U.S.C. § 1257, which authorizes review of any "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had." The

Court has long eschewed a "mechanical" interpretation of the requirement of "finality." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). Instead, the Court has applied an "intensely practical approach" to determining "finality." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976); see also *Cox Broadcasting*, 420 U.S. at 478 & n.7 ("[T]he requirement of finality is to be given a practical rather than a technical construction.") (internal quotations omitted). See generally R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 145, 152-154 (8th ed. 2002) ("STERN & GRESSMAN").

In *Cox Broadcasting*, this Court took note of "at least four categories of * * * cases" in which, for practical reasons, it has elected to treat decisions of the state courts as "final" even though "there [we]re further proceedings in the lower state courts to come." 420 U.S. at 477. As petitioner correctly points out (Pet. 1-3), this case falls squarely within the fourth category recognized in *Cox Broadcasting*. That category consists of cases in which (1) "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"; (2) "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"; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-483.

Each of those conditions is satisfied here. *First*, the FIFRA preemption issue was fully considered – and squarely resolved – in the decision below by the highest court of Texas. And, if review is denied, it is at least possible that petitioner eventually will prevail on the merits at trial on nonfederal grounds.

Second, if this Court were to grant review and reverse the Texas Supreme Court by holding that FIFRA preempts respondent's labeling-related claims under state law for

agricultural crop injury, that action would bring this litigation to an end. As American Cyanamid correctly points out (see Pet. 3, 6, 8), both the trial and the intermediate appellate court in Texas ruled that *all* of respondents' claims are labeling-related and the Texas Supreme Court in no way disturbed or questioned that finding. See also Pet. App. 16a, 24a, 28a.[2]

Third, the federal policy underlying FIFRA and its preemption clause would be seriously undermined if this Court declines to exercise immediate review. As its title suggests, FIFRA's express preemption clause is aimed at ensuring nationwide "uniformity" in the labeling and packaging requirements applicable to federally registered pesticides. See 7 U.S.C. § 136v(b). The decision below destroys that uniformity by allowing state juries in Texas – one of the leading agricultural States in the nation – to impose additional or different labeling requirements on manufacturers in private lawsuits.

In similar circumstances, this Court has repeatedly applied *Cox Broadcasting* to grant immediate review. For example, in *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), the Court considered whether a decision of the Federal Energy Regulatory Commission allocating the cost of constructing a nuclear plant among four utility companies preempted a state regulator from examining the prudence of constructing the plant. *Id.* at 356. The state supreme court had ruled that a pru-

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[2] This feature of the litigation below distinguishes it from other FIFRA preemption decisions rendered by state courts that this Court, in its discretion, has elected not to review. For example, in *Sleath* v. *West Mont Home Health Services*, 16 P.3d 1042 (Mont. 2000), cert. denied, 122 S. Ct. 40 (2001), the respondent maintained that a reversal on the preemption issue would not terminate the entire lawsuit. See No. 00-1674 Br. in Opp. 6-7. *Sleath* is also distinguishable, of course, because it did not raise the same issues presented here. Compare No. 00-1674 Pet. i with No. 02-367 Pet. i, 13 & n.3.

dence inquiry by state regulators was not preempted and had remanded the case to state regulators to conduct such an inquiry. See *id.* at 368. Despite the pendency of those state proceedings, this Court held that the state supreme court's decision was "final" under *Cox Broadcasting*: "The critical federal question – whether federal law pre-empts such [state regulatory] proceedings while the FERC order remains in effect – has * * * already been answered by the State Supreme Court and its judgment is therefore ripe for review." *Id.* at 370 n.11.

Similarly, in *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), the Court granted certiorari to decide whether the State of Ohio had violated the Supremacy Clause by subjecting a private contractor operating a federally owned nuclear production facility to a state workers' compensation law giving employees higher awards for injuries resulting from a violation of state safety standards. *Id.* at 176. The Ohio Supreme Court had held that federal law did not preempt Ohio from applying state safety requirements unrelated to radiation hazards to nuclear facilities; accordingly, the state industrial commission was ordered, on remand, to consider the merits of the employee's claim. See *id.* at 177-178. Despite the pendency of these state proceedings, immediate review was granted because the case fell within the "fourth category" recognized in *Cox Broadcasting*. *Id*. at 179. As the Court emphasized, leaving the Ohio Supreme Court's decision unreviewed would have threatened to undermine vital federal policies. *Ibid.* The state court decision "sanction[ed] direct state regulation" of the nuclear facility involved in the case and had "important implications for the regulation of federally owned nuclear production facilities in other States." *Id.* at 179-180.[3]

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[3] The Court's statements about the importance of the federal interest implicated appear in the same opinion in which the Court rejected the argument for preemption and affirmed the state supreme court's judgment. By simultaneously recognizing for jurisdictional purposes the importance of the federal interests involved, and deciding that those federal interests would *not* prevail in the preemption analysis on

Mississippi Power & Light and *Goodyear Atomic* are just two examples of a long line of cases granting immediate review of state court preemption decisions despite pending state proceedings. In *Southland Corp*. v. *Keating*, 465 U.S. 1 (1984), this Court applied *Cox Broadcasting* to review a state-court decision that the Federal Arbitration Act did not preempt state law claims under the California Franchise Investment Law; although such claims had not yet been tried on the merits, the Court recognized the state court's decision as "final." *Id*. at 6-7. In *Belknap* v. *Hale*, 463 U.S. 491, 497 n.5 (1983), and *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U.S. 542, 548-551 (1963), this Court reviewed state-court decisions regarding the preemptive scope of the National Labor Relations Act even though both state-court decisions contemplated further proceedings below.

In several cases, this Court has also exercised jurisdiction over state-court decisions that rejected preemption arguments under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a). See, *e.g.*, *Ingersoll-Rand Co.* v. *McLendon*, 498 U.S. 133 (1990) (reviewing decision of Texas Supreme Court that had held that ERISA does not preempt state wrongful-discharge claims and had remanded for trial); *United States Healthcare Systems of Pa.* v. *Pennsylvania Hosp. Ins. Co.*, 530 U.S. 1241 (2000) (order) (granting, vacating, and remanding state court decision in similar posture). In *United States Healthcare*, this Court invited the Solicitor General to file an *amicus* brief at the petition stage. See 528 U.S. 804 (1999). In his brief, the Solicitor General agreed with petitioner that this Court had jurisdiction under 28 U.S.C. § 1257 to review the Pennsylvania Supreme Court's decision rejecting ERISA preemption even though there were further proceedings to come in the state courts. See No. 98-1836 U.S. Br. 7 n.4 (arguing that

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the merits, the Court in *Goodyear Atomic* demonstrated that the *Cox Broadcasting* inquiry does not require an evaluation of the merits. It is enough that important federal interests are *implicated*.

"this case meets the * * * requirements for immediate review under *Cox Broadcasting*") <available at http://www.usdoj.gov/osg/briefs/1999/2pet/6invit/98-1836.pet.ami.inv.html>.

As with each of these preemption cases, the decision below fits comfortably within the fourth *Cox Broadcasting* category. The Texas Supreme Court's decision is certainly no less damaging or destructive to federal policy than were the other state preemption decisions this Court has treated as final and reviewed under *Cox Broadcasting*. As the Solicitor General told this Court in *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991),

> [A]n exclusive federal approach is *necessary* in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in States and localities across the country, Congress *clearly preempted all but federal regulation of labels.*

No. 89-1905 U.S. Br. 22 (emphasis added). Accord H.R. Rep. No. 92-511, at 16 (1971) (Congress "intended to completely preempt state authority in regard to labeling and packaging").

Finally, under the Court's "intensely practical approach" to finality issues (*Mathews*, 424 U.S. at 331 n.11), the decision below is in every practical sense the final word of Texas's highest court. This is not a case in which the highest court of a State has declined to entertain a discretionary interlocutory appeal, leaving in place the decision of an intermediate state appellate court that might be subject to review, and correction, by the state supreme court in some future appeal. Compare *California* v. *Rooney*, 483 U.S. 307, 314 (1987) (per curiam). In the decision below, the Texas Supreme Court considered, and squarely resolved, the preemption issues raised in American Cyanamid's petition for certiorari. Any revisitation of those issues in some distant return trip of this case to the Texas Supreme Court would have to await the resolution of the merits of this case (perhaps following a full trial) as well as overcome

the high hurdle presented by the law-of-the-case doctrine. See *LeBlanc* v. *State*, 826 S.W.2d 640, 644 (Tex. App. – Houston [14th Dist.] 1992) (law-of-the-case doctrine bars relitigation in all but "exceptional or urgent situations").

In the meantime, other manufacturers, formulators, and distributors of herbicides, insecticides, fungicides, and other types of pesticides in Texas will remain subject to the erroneous rule of law adopted in the decision below. Nor is there any realistic possibility that the Texas Supreme Court will reverse its decision in this case, which was unanimous. In these circumstances, it would "serve[] the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine" the preemption question "now * * * rather than to subject [petitioner] * * * to long and complex litigation which may all be for naught if consideration of the preliminary question * * * is postponed until the conclusion of the proceedings." *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).[4]

II. THE CONFLICT IN THE LOWER COURTS IS SERIOUS AND WARRANTS THIS COURT'S ATTENTION

As the petition for certiorari demonstrates (at 8-14), the Texas Supreme Court's decision in this case squarely conflicts with the California Supreme Court's decision in *Etcheverry* v. *Tri-Ag Servs., Inc.*, 993 P.2d 366 (Cal. 2000), a case the lower court accurately described as "factually similar." Pet. App. 12a. In fact, the Texas Supreme Court candidly "acknowledge[d] that *many* jurisdictions" – not just California – "have reached the opposite result" on the question whether FIFRA preempts

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[4] This Court has often relied on such pragmatic considerations in assessing "finality" under 28 U.S.C. § 1257. For example, in *Langdeau* this Court exercised review over a decision of the Texas Supreme Court upholding a trial court's rejection of a threshold objection to venue. Thus, there is ample precedent – in both preemption and non-preemption cases – for this Court's exercise of jurisdiction in this case.

labeling-related claims for crop injury predicated on state law. Pet. App. 12a & n.45 (emphasis added) (citing as examples the Fifth Circuit's opinion in *Andrus* v. *AgrEvo USA Co.*, 178 F.3d 395 (1999), as well as decisions of the Fourth, Seventh, Eighth, and Ninth Circuits). Not only did the Texas Supreme Court flatly disagree with the holdings of *Etcheverry*, the other federal cases cited in the opinion below, and scores of other state and federal authorities that have upheld preemption in this setting (see Pet. 12), but also it squarely rejected the rationale underlying the California Supreme Court's decision. See Pet. App. 12a (criticizing *Etcheverry* for failing to "draw the essential distinction between phytotoxicity and target area phytotoxicity").

The conflict in the lower courts is thus clear (and was expressly acknowledged by the Texas Supreme Court in this case). This Court has often granted review to resolve conflicting results reached by the highest courts of two or more States over the meaning of a federal statute. See STERN & GRESSMAN, *supra*, at 240, 272 (citing numerous cases). At least three features of the conflict created by the decision below, moreover, make it especially deserving of this Court's attention at this time.

First, as American Cyanamid correctly notes (Pet. 8-9 & n.1), Texas and California are the two largest States in terms of agricultural production. At the time of the last full agricultural survey conducted in 1997, they together accounted for almost a fifth of the entire agricultural output of the United States. See 2 U.S. DEPT OF AGRICULTURE, 1997 CENSUS OF AGRICULTURE 27 (table 23) (Texas and California combined had production of $36.8 billion out of the nation's $196.9 billion) ("1997 CENSUS"). Not surprisingly, California and Texas rank first and second, respectively, in net farm income. See ECONOMIC RESEARCH SERVICE, U.S. DEPT. OF AGRICULTURE, AGRICULTURAL INCOME AND FINANCE OUTLOOK 36-37 (tables 1-2) (Sept. 25, 2001). As of 1997, there were approximately 270,000 farms in Texas and California; and more than 25% of all irrigated farmland in the United States was located in those two States.

See 1997 CENSUS 4 (table 1). In 1995 alone, Texas farmers and ranchers spent $376 million on pesticides. See Texas Environmental Profile <available at http://www.texasep.org/html/pes/pes_2tex.html >.

The importance of the preemption issue presented in this case is thus not limited to the many developers, manufacturers, formulators, and distributors of herbicides and other pesticides who make up CropLife America's membership. The issue presented also is vitally important to farmers who depend on these products and to the national agricultural economy. The Texas Farm Bureau, on behalf of its "308,526 members" in Texas, filed an *amicus* brief in this case in the Texas Supreme Court urging that crop injury claims be spared from preemption under FIFRA. See *Amicus Curiae* Brief (Corrected) of Texas Farm Bureau in Support of Plaintiffs/Appellees, *American Cyanamid Co.* v. *Geye*, No. 01-1008 (Tex.), at iv. (The California Farm Bureau Federation counts "95,000 * * * families" among its members. See <http://www.cfbf.com/about/default.htm>.) Other groups have also participated in cases raising the FIFRA preemption issue involved here. See *Amicus* Brief of California Rural Legal Assistance, Inc., *Etcheverry* v. *Tri-Ag Service, Inc.*, No. S072524 (Cal.), at 1 (expressing concern about impact of FIFRA preemption issue on farm workers).

There is simply no good reason why federal law should be understood to preempt labeling-related crop injury claims brought in the California courts but leave untouched similar claims brought in the Texas courts. Federal statutes should have the same meaning everywhere in the country, and should not vary depending on geographical happenstance. And it is difficult to believe that the same Congress that placed such a premium on national uniformity in pesticide labeling and packaging would view as tolerable the nonuniform scheme that now exists, under which the duties of pesticide manufacturers and the rights of pesticide users hinge on random geographical variables. To resolve the clear disagreement between the highest courts of the two largest agricultural States over this

important question of federal law, review by this Court is needed.

Second, the decision below also squarely conflicts with the Fifth Circuit's decision in *Andrus.* When a decision of the highest court of a State conflicts with a decision of the federal circuit in which that State is located, this Court has often granted review. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994) (conflict between Utah Supreme Court and Tenth Circuit); *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992) (conflict between Ninth Circuit and California state courts); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (describing conflict between Alabama Supreme Court and Eleventh Circuit as "significant").[5] Because conflicts of this kind give rise to a serious risk of forum-shopping, they are especially deserving of this Court's attention. *Yee*, 503 U.S. at 538. The risk of forum-shopping in crop-damages cases is very real, since plaintiffs usually can defeat removal based on diversity through the simple expedient of naming an in-state distributor or retailer as a co-defendant. And, of course, the potential for forum-shopping is greatly accentuated where a state justice system has a reputation for producing windfall verdicts against out–of-state corporate defendants.

Third, Texas and the Fifth Circuit unfortunately are not the only pairing of state and federal courts within the same jurisdiction that treat crop injury claims differently under FIFRA's preemption clause. The same can be said for the state and federal courts in another important farm State: Wisconsin. Compare *Gorton* v. *American Cyanamid Co.*, 533 N.W.2d 746, 753-56 (Wis. 1995) (holding that negligent misrepresentation claim under Wisconsin law in crop injury case was not preempted by

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[5] Currently on the Court's docket are *Ewing* v. *California*, No. 01-6978, and *Lockyer* v. *Andrade*, No. 01-1127, both scheduled for argument November 5, 2002, in which the Court will review conflicting decisions of the Ninth Circuit and the California Court of Appeal, Second District.

FIFRA), cert. denied, 516 U.S. 1067 (1996) with *Kuiper* v. *American Cyanamid Co.*, 131 F.3d 656, 661 (7th Cir. 1997) (declining to apply rule of *Gorton* in part because that case "conflicts with other FIFRA preemption cases" and holding that FIFRA preempts misrepresentation claims based on off-label communications), cert. denied, 523 U.S. 1137 (1998).

Moreover, at least two state appellate courts have concluded – contrary to a vast body of federal and state case law reaching the opposite conclusion – that FIFRA does not preempt *any* common law claims. See *Sleath* v. *West Mont Home Health Services*, 16 P.3d 1042 (Mont. 2000), cert. denied, 122 S. Ct. 40 (2001); *Brown* v. *Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), rev. denied, 6 P.3d 1098 (Or. 2000). These decisions are patently incorrect, rest on a fundamental misreading of this Court's decision in *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), and have been harshly criticized. See, *e.g.*, *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 753-754 (Neb. 2002); *Netland* v. *Hess & Clark*, 284 F.3d 895, 899 & n.4 (8th Cir. 2002), pet. for cert. filed, 71 U.S.L.W. 3138 (Aug. 9, 2002) (No. 02-219).[6] Nevertheless, they do have the practical effect of ensuring that labeling-related claims for crop injuries are *not* preempted in cases filed in the Montana and Oregon state courts. In sharp contrast, such claims *are* preempted by FIFRA in the federal courts in those two States. See *Taylor AG Industries* v. *Pure-Gro*, 54 F.3d 555 (9th Cir. 1995).

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[6] For several reasons, this case is a better vehicle for clarifying the scope of FIFRA preemption than is *Netland*. To begin with, as American Cyanamid points out (Pet. 13 n.3), the petition in *Netland* raises a different issue on which there is virtual unanimity in the lower courts. In addition, if this Court were to grant review in *Netland* and affirm (a result consistent with the great weight of authority in the lower courts), that would leave unresolved the serious conflict in the lower courts over the treatment of crop-injury claims that is raised in this case. Finally, *Netland* presents an unusual fact pattern (because it involves clear misuse of the product).

In light of these serious discrepancies in the treatment of crop injury litigation, review by this Court is needed to bring uniformity to the important questions of federal law presented in American Cyanamid's petition. If left uncorrected, the Texas Supreme Court's decision will subvert Congress's judgment – expressed in FIFRA's preemption clause – that labeling for crop protection pesticides should be nationally uniform. Such uniformity ensures that farmers in every State receive the same information, based on labeling that has been approved by an expert federal regulator (rather than by judges or lay juries in the States). It also allows manufacturers to distribute a single product in the national market for a particular crop rather than incurring the unwarranted expense (which would be passed on at least in part to pesticide users in the form of higher prices) of designing different labels for each of the 50 States. And, of course, the protection provided to manufacturers by FIFRA's preemption clause serves the longstanding federal policy of ensuring that pesticides remain available to farmers and other consumers even for smaller-volume crops (including in States marred by a proven track record of runaway jury verdicts).[7]

III. THE DECISION BELOW IS WRONG AND, IF LEFT UNCORRECTED, COULD SPAWN ADDITIONAL UNCERTAINTY AND WASTEFUL LITIGATION OVER THE SCOPE OF FIFRA PREEMPTION

In holding that respondents' claims are not preempted by FIFRA, the Texas Supreme Court purported to rely on a "congressionally created *exception* to [FIFRA's] express preemption" of state labeling and packaging requirements. Pet. App. 1a (emphasis added); see also *id*. at 14a. According to the lower court, Congress "authorized the EPA in 1978 to choose

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[7] See, *e.g.*, U.S. DEPT. OF AGRICULTURE, ANNUAL REPORT 2001: INTERREGIONAL RESEARCH PROJECT NO. 4, A NATIONAL AGRICULTURAL PROGRAM TO CLEAR CROP PROTECTION CHEMICALS AND BIOLOGICAL PEST CONTROL AGENTS FOR MINOR USE, at i (discussing federal policy) .

not to require the submission of data" relating to pesticide "efficacy" (*id*. at 5a (citing 7 U.S.C. § 136a(c)(5)); the agency, "acting under this authorization, has chosen not to collect efficacy data" for most products (including Pursuit and Prowl, the two pesticides at issue in this case) (*ibid*.); and EPA has further "chosen to include 'target area phytotoxicity' within the concept of efficacy" (*id*. at 5a-6a). Thus, the lower court reasoned, EPA has "exercised no regulatory authority over" the portion of American Cyanamid's label "that specifically allowed the tank mixing of Pursuit and Prowl." *Id.* at 8a. Because FIFRA expressly preempts state labeling requirements only "to the extent that the content of the product label is regulated" by EPA, the court held, there was no preemption of respondents' claims. *Id*. at 1a; see also *id*. at 12a-13a, 14a.

That analysis is flawed at every turn. To begin with, FIFRA's express preemption provision, 7 U.S.C. § 136v(b), contains no exceptions. On the contrary, the preemption clause provides broadly and without qualification that the States "shall not impose or continue in effect *any* requirements for labeling or packaging" that are either "in addition to or different from those required under this subchapter." *Ibid*. (emphasis added). Contrary to the Texas Supreme Court's suggestion, Congress's decision to amend FIFRA in 1978 (six years after the preemption provision was enacted) by adding language in Section 136a(c)(5) authorizing the EPA to "waive data requirements pertaining to efficacy" does not create an exception to express preemption under Section 136v(b). See *Etcheverry* v. *Tri-Ag Servs., Inc.*, 993 P.2d 366, 375-376 (Cal. 2000). In fact, Section 136a(c)(5) says nothing at all about preemption; it concerns instead which pesticides may be "register[ed]" by EPA. Nor is there evidence that Congress intended, in amending FIFRA by adding the pertinent language of Section 136a(c)(5), to create an exception to express preemption. In short, there is no basis in the text or legislative history

of the statute for the novel exception created by the Texas Supreme Court.[8]

Moreover, Congress knows full well how to carve out exceptions to express preemption commands and has done so in many other statutes. For example, the express preemption provision of the Federal Boat Safety Act generally bars States from "establish[ing], continu[ing] in effect, or enforc[ing]" any "law or regulation" that either "establish[es] a recreational vessel or associated equipment performance or other safety standard" or "impos[es] a requirement for associated equipment," but it contains an "except[ion]" allowing States to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State" in the absence of "disapproval" by the federal government. 46 U.S.C. § 4306. Similarly, Congress included in the express preemption provision of the Flammable Fabrics Act, 15 U.S.C. § 1203(b), an exception for state flammability standards that "afford a higher degree of protection" than do the federal standards. Such exceptions are quite common. *E.g.*, 15 U.S.C. § 1476(b); *id.* § 6715; 49 U.S.C. § 20106. See also *City of Columbus* v. *Ours Garage and Wrecker Service, Inc.*, 122 S. Ct. 2226, 2230 (2002) (interpreting "exception" to preemption set forth in 49 U.S.C. § 14501(c)(2)(A)).

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[8] Section 136v(a) of FIFRA, which immediately precedes the express preemption clause, does not create an exception to Section 136v(b)'s preemption of labeling-related state requirements. See 7 U.S.C. § 136v(a) ("A State may regulate the *sale or use* of any federally registered pesticide * * * in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.") (emphasis added). In fact, Congress regarded Section 136v(a) as a "partial[] preempt[ion]" provision in its own right. H.R. Rep. No. 92-511, at 2 (1971); accord *id.* at 16 (referring to the "preemption provision*s*" of the bill) (emphasis added). Nor did the Texas Supreme Court rely on Section 136v(a) in its analysis.

Equally unfounded was the Texas Supreme Court's suggestion that the EPA, by "choos[ing] NOT to regulate product labeling with respect to how well a product works" – and, in particular, the labeling's statements concerning the product's "target area phytotoxicity" – had effectively *exempted* state labeling requirements dealing with that subject from FIFRA's express preemption clause. Pet. App. 1a-2a (emphasis in original). Here again, Congress did not grant the EPA any authority to exempt state requirements from preemption.[9] Notably, Congress *has* granted other agencies exemption authority under other preemption schemes. See, *e.g.*, 15 U.S.C. § 1203(c) (granting Consumer Product Safety Commission ("CPSC") authority under certain circumstances to exempt state requirements from preemption under the Flammable Fabrics Act); *id*. § 1476(c) (same for CPSC under the Consumer Product Safety Act); 21 U.S.C. § 360k(b) (same for Food and Drug Administration under the Medical Device Amendments); 46 U.S.C. §§ 4305, 4306 (same for Coast Guard under the Boat Safety Act). See also 15 U.S.C. § 2617(b).[10]

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[9] In fact, Congress took pains to point out that the subsection immediately following Section 136v(b) – which authorizes States, in the absence of EPA disapproval, to register pesticides for "additional uses" in order "to meet special local needs" (15 U.S.C. § 136v(c)(1)) – was not "intended to derogate" the preemption clause or to grant EPA the power "to delegate to the States authority to set aside the preemption provisions of [subsection (a)]." H.R. Rep. No. 92-511, at 16 (1971). Thus, Congress made clear its intent to protect and preserve the preemptive force of FIFRA even against attempted encroachments by EPA.

[10] Notably, Congress in enacting FIFRA also elected not to include any provision that might have been interpreted as a "savings" clause sparing certain state requirements from preemption. Compare, *e.g.*, 49 U.S.C. § 30103(b), (e) (National Traffic and Motor Vehicle Safety Act) (discussed in *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000)).

Nor does other language in FIFRA's express preemption clause lend support to the notion that "without EPA regulation" on the same subject matter targeted by a state-law claim "there can be no preemption." Pet. App. 13a. Section 136v(b) preempts "*any* requirements for labeling or packaging" imposed by the States that are either "different from" or *"in addition to* * * * those required under this subchapter." 7 U.S.C. § 136v(b) (emphasis added). When EPA leaves some aspect or subject matter of a registered pesticide's labeling unregulated, state labeling requirements that target the aspect or subject matter plainly are "in addition to" the federal labeling requirements that *do* apply to the pesticide. See, *e.g.*, 40 C.F.R. § 156.10 (2001). See generally *Worm* v. *American Cyanamid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1991) ("We * * * construe the prohibition against state labeling requirements 'in addition to' those in FIFRA to preempt the imposition of categories of labeling restrictions not provided by the federal law.").

Moreover, Congress knows full well how to specify that a federal requirement on the same subject matter must be in existence before state law is expressly preempted, and has done so in other preemption provisions (but not in FIFRA). For example, in the preemption provision of the National Traffic and Motor Vehicle Safety Act, Congress provided:

> *When a motor vehicle safety standard is in effect* under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard *applicable to the same aspect of performance* of a motor vehicle or motor vehicle equipment only if the standard is identical to *the standard prescribed under this chapter*.

49 U.S.C. § 30103(b) (emphasis added); see also 15 U.S.C. § 1203(a) (preempting state law "whenever a [federal] standard or other regulation * * * is in effect"); *id.* § 1476(a) (same). Or Congress can accomplish the same result by having no express preemption provision at all or repealing a preexisting preemption provision. See *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988)

("repeal of [Emergency Petroleum Allocation Act] regulation did not leave behind a pre-emptive grin without a statutory cat"). But FIFRA's preemption clause does *not* require that a federal requirement be in effect, and the clause has *not* been repealed. In fact, Congress has repeatedly amended FIFRA but has left unchanged the language of Section 136v(b), even after that provision was widely interpreted as preempting state requirements imposed through the common law (including in crop injury cases such as this).

The Texas Supreme Court had no authority – in conflict with the Fourth Circuit's decision in *Worm* – to rewrite FIFRA's broad preemption provision to have the same effect as a clause with radically different wording or a repealed clause.[11] For all of these reasons (as well as others discussed by American Cyanamid, see Pet. 16-21), the Texas Supreme Court was wrong to conclude that a state labeling requirement is not subject to preemption under Section 136v(b) unless and until the EPA has "regulate[d the] * * * product's labeling *on that subject*." Pet. App. 14a (emphasis added). The Texas Supreme Court's faulty reasoning makes this case particularly worthy of this Court's review.

In addition, if left uncorrected, the lower court's analysis could generate substantial litigation in Texas if not in other States. The reason is straightforward: whether a federal require-

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[11] Even if Section 136v(b) could be read as requiring that some federal labeling requirement be in existence before preemption is triggered, it would not support the Texas Supreme Court's apparent view that *the EPA* must regulate the labeling before preemption is triggered. Pet. App. 13a. By its plain terms, Section 136v(b) refers to any federal requirements that might be "required *under this subchapter*." 7 U.S.C. § 136v(b) (emphasis added). That, of course, includes requirements imposed directly on the labeling by FIFRA itself (without any regulatory action by the EPA). See, *e.g.*, *id.* §§ 136(q)(1)(F)-(G), 136j(a)(1)(E) (regulating pesticide labeling by requiring that pesticides not be misbranded).

ment regulates the same "subject matter" in pesticide labeling is obviously open to debate. Thus, it is foreseeable that litigants in Texas will attempt further to erode FIFRA's preemption clause by arguing – even in failure-to-warn cases involving personal injury rather than agricultural crop-damage claims – that there is no federal labeling requirement that in fact covers the same "subject matter." The Court should act now to prevent further evisceration of Congress's directive that pesticide labeling should be nationally uniform.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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