No. 04-81

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

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

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., 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, the Product Liability Advisory Council, Inc. ("PLAC") 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.

PLAC is a non-profit corporation with 129 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). In addition, PLAC filed *amicus* briefs in this case in both the Minnesota Supreme Court and the Minnesota Court of Appeals. Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

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

Respectfully submitted.

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SEPTEMBER 2004

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INTEREST OF THE *AMICUS CURIAE*[1]

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

STATEMENT

1. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, vests the Environmental Protection Agency ("EPA") with broad authority to regulate the labeling and packaging of pesticides sold in the United States. EPA has exercised that authority by, among other things, promulgating detailed specifications for pesticide labeling. See, *e.g.*, 40 C.F.R. § 156.10.

In enacting FIFRA, Congress took steps to ensure that EPA's authority over pesticide labeling and packaging was exclusive. Toward that end, Congress included in FIFRA a preemption clause – aptly titled "uniformity" – that expressly bars the States from imposing on federally registered pesticides "*any* requirements for labeling or packaging" that are "in addition to or different from those required under" federal law. 7 U.S.C. § 136v(b) (emphasis added); see also *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 615 (1991) (explaining that labeling "fall[s] within an area that FIFRA's 'program' preempts"). 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).

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[1] Pursuant to Rule 37.6 of the Rules of this Court, PLAC 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.

In contrast to its treatment of labeling, FIFRA expressly preserves a role for the States in regulating the "sale or use" of pesticides (although States may not "permit any sale or use" that is "prohibited by" federal law). 7 U.S.C. § 136v(a). Under FIFRA, a pesticide (including a herbicide) may not be distributed or used in the United States unless it first has been registered by EPA. *Id*. § 136a(a). But the States may (and all do) require separate registration (*i.e.*, approval) of pesticides, and any State may refuse to permit the sale or use of an EPA-registered pesticide within its borders. *Id*. § 136v(a); Pet. 2.

2. In the decision below, the Minnesota Supreme Court upheld a $52 million judgment against petitioner BASF Corporation, a manufacturer of pesticides, in a nationwide class action brought under the New Jersey Consumer Fraud Act ("NJCFA"), N.J. STAT. ANN. §§ 56:8-1 to 56:8-116 (West 2002). Respondents are a class of all persons in the United States who purchased Poast, a herbicide made by BASF, between January 1, 1992, and December 31, 1996, for use on their crops (with the exception of certain North Dakota residents). Pet. ii. During the class period, Poast was more expensive than Poast Plus, another herbicide manufactured by BASF. The price differential between Poast and Poast Plus was the basis for respondents' damages claims.

Over objection, a Minnesota jury was permitted to rely on two of BASF's labeling decisions concerning Poast in concluding that the company had committed an "unconscionable commercial practice" (N.J. STAT. ANN. § 56:8-2 (West 2002)). First, respondents claimed that it was "unconscionable" to put different names and labels on Poast and Poast Plus because the two herbicides have the same active ingredient. See Pet. 13. Yet federal regulations *require* distinct product labeling for pesticides with the same active ingredients if their chemical formulae differ as much as Poast and Poast Plus do. See 40 C.F.R. §§ 152.15, 152.43, 158.175; Pet. 3, 4, 16. Second, respondents claimed it was "unconscionable" to label and market Poast Plus, which was less expensive than Poast, for

only a subset of its EPA-approved uses. See Pet. 12 & nn.3-4. Yet federal regulations *expressly authorize* pesticide manufacturers to engage in this practice (known as "subset labeling"). See 40 C.F.R. § 152.130(b); 53 Fed. Reg. 15952, 15957 (May 7, 1988).

The Minnesota Supreme Court rejected BASF's argument that respondents' NJCFA claims are preempted by federal law. Pet. App. 16a-21a. The court acknowledged that it is "well established that FIFRA preempts state actions relating to labeling and packaging," and that "evidence was presented at trial based on statements derived from the Poast and Poast Plus labels." *Id*. at 18a, 20a. But the court reasoned that "the farmers' claims of unconscionable commercial conduct" were also based on "statements and actions that *went beyond the label*" (including statements made in BASF's advertisements). *Id.* at 20a (emphasis added). It also rejected BASF's implied-preemption argument on the ground that respondents' "consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF * * * making misrepresentations about the products." *Id.* at 17a. Those "misrepresentations," however, included statements – such as that Poast Plus could not be used for minor crops – that were consistent with the Poast Plus labeling. Pet. 12 & n.3.

ARGUMENT

In the decision below, the Minnesota Supreme Court has disregarded Congress's clear command and created a large loophole in the uniform federal regulatory scheme that governs pesticide labeling. The court upheld a $52 million judgment whose "liability-creating premise[]" (*Medtronic* v. *Lohr*, 518 U.S. 470, 508 (1996) (opinion of Breyer, J.)) was that petitioner BASF committed fraud and unconscionable conduct under New Jersey law when it marketed a pesticide with labeling that was in full compliance with requirements imposed under federal law. By so doing, the court has sanctioned exactly what Congress sought to avoid by enacting FIFRA's express preemption clause. It has permitted a State to impose divergent or addition-

al requirements relating to the labeling of an EPA-registered pesticide. The Minnesota Supreme Court's suggestions that the respondents' claims do not really call into question the adequacy of the Poast Plus labeling, and would not spur BASF to change that labeling, are wrong and reflect a stunning disregard for economic and commercial realities. That the Minnesota Supreme Court sanctioned such an incursion on FIFRA's uniform regulatory scheme in a *nationwide class action* applying New Jersey law to farmers across the United States only heightens the need for this Court's review to preserve the integrity and uniformity of the federal regulatory scheme.

The Minnesota Supreme Court's rulings on both express and implied preemption warrant further review. On express preemption, the Minnesota Supreme Court held, in square conflict with the decisions of many lower courts, that FIFRA's express preemption clause can be avoided by any plaintiff who purports to rely on "statements and actions" of a manufacturer that go "beyond the label" (such as product advertisements). Pet. App. 18a, 20a. In addition, as we explain below, the decision raises an issue of broader importance in the law of federal preemption (including under other, similarly worded federal statutes) on which the lower courts have divided sharply.

The Minnesota Supreme Court's *implied*-preemption ruling also warrants this Court's review. According to respondents, BASF violated New Jersey law because it engaged in a "scheme to exploit [ ] farmers" who bought Poast and Poast Plus, two similar but not identical pesticides. Pet. App. 17a. The root of the alleged exploitation was BASF's decision to register Poast Plus as a product distinct from Poast, a step *compelled* by EPA regulations, and to label Poast Plus for use on only a subset of the crops for which EPA had approved it, an option that EPA regulations explicitly guarantee. By imposing massive state-law liability for doing what federal law *requires*, and for exercising an option that federal law expressly authorizes, the Minnesota

courts have reached a result incompatible with this Court's decisions, and thus deserving of review.[2]

I. THE LOWER COURT'S EXPRESS-PREEMPTION HOLDING WARRANTS REVIEW

FIFRA's express preemption clause provides that a 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) (emphasis added). The lower courts have generally rejected plaintiffs' efforts to evade this congressional command through artful pleading. Thus, in response to efforts to repackage failure-to-warn or fraud claims that directly challenge the adequacy of pesticide labeling as warranty or other types of legal claims, most courts have ruled that FIFRA preempts *all* state-law claims that "result[] in the imposition of additional or different labeling requirements * * * *regardless* of the *guise* under which the claim is presented." *Netland* v. *Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.) (emphasis added), cert. denied, 537 U.S. 949 (2002). Equally unavailing, in the vast majority of cases, have been plaintiffs' arguments that failure-to-warn claims escape preemption under 7 U.S.C. § 136v(b) because the manufacturer could have, or should have, provided warnings *outside* of the product "labeling" (as, for example, in advertising).

This body of decisional law makes eminent sense. Warnings, after all, can be communicated on a product's label, in point-of-sale signs, in print or television advertising, in oral representations, and in countless other ways. If federal law requires a warning on the product's labeling, and state law re-

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[2] PLAC agrees with petitioner BASF that the First Amendment issue raised in the petition for certiorari also warrants this Court's review. Especially troubling (and perplexing) is the Minnesota courts' imposition of state-law treble-damages liability on a manufacturer for truthfully reporting to responsible government authorities the illegal actions of third parties in connection with the use of the manufacturer's product. To meet space limitations and avoid redundant briefing, however this brief focuses on the preemption question.

quires a different or additional warning *outside* of the labeling, the necessary premise of the state law is that the federally mandated warnings are inadequate. See, *e.g.*, *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.) ("any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff *necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging*") (emphasis added), cert. denied, 510 U.S. 913 (1993).

Any approach that allows artful pleading, moreover, would allow FIFRA's preemption clause to be easily circumvented. Preemption is an affirmative defense that is ordinarily resolved on purely legal grounds at the threshold of litigation (on a motion for dismissal or for summary judgment). Under the approach adopted by the Minnesota Supreme Court, however, any plaintiff could avoid preemption under FIFRA with the stroke of a pen merely by alleging in the complaint that a manufacturer should have provided warnings outside of the pesticide labeling. That cannot be right. Cf. *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (rejecting argument, equally susceptible to being used to circumvent express preemption, that federal requirements are not preemptive because they were procured by a "fraud" on the agency).

In rejecting BASF's arguments for express preemption, the Minnesota Supreme Court ignored these common-sense teachings of many other courts. It did pay lip service to the "well established" principle that FIFRA preempts not only "state actions relating to labeling and packaging" but also "state law claims *premised* on inadequate labeling or failure to warn, which result[] in the imposition of additional or different labeling requirements." Pet. App. 18a (internal quotation marks omitted). But the Minnesota Supreme Court misunderstood and misapplied that principle when it failed to recognize that a state-law claim can be predicated on the *inadequacy* of FIFRA-compliant labeling without in any way challenging the literal accuracy of statements made in the labeling. Thus, the Minnesota Supreme Court thought it fatal to BASF's preemption

defense that "the farmers here were not asserting that BASF's registration and container labels were false or misleading," but instead were claiming that, "*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops." Pet. App. 19a.

That analysis is wrong at every turn. First, as BASF demonstrates (Pet. 12 & nn.3-4), respondents *did* repeatedly assert that BASF's pesticide labeling was untruthful, inaccurate, and "deceptive." See Pet. 12 & nn. 3-4. Second, and more fundamentally, a plaintiff's state-law claim can challenge the adequacy of product labeling without asserting that any statement in the labeling is literally untrue. For example, a failure-to-warn claim alleging that the manufacturer should have alerted farmers to a hazard that was unmentioned in the labeling would not necessarily challenge the literal accuracy of the warnings that *are* included in the labeling. It plainly would, however, challenge the *adequacy* of those warnings. Third, the Minnesota Supreme Court ignored the fact that BASF's alleged "misrepresentations"– including that Poast Plus could not be used for minor crops – were entirely consistent with the Poast Plus labeling. And respondents' claims would not exist had BASF labeled Poast Plus differently – for use on *all* crops for which EPA had approved it.

The Minnesota Supreme Court also parted ways with the great weight of authority when it rejected BASF's express-preemption argument on the ground that "the farmers' claims of unconscionable commercial conduct" were based on "statements and actions that went beyond the label." Pet. App. 18a, 20a. This aspect of the court's holding warrants review because it conflicts with many other decisions involving FIFRA and also with decisions involving other federal statutes that similarly preempt state "labeling" requirements.

A. The Minnesota Supreme Court's Decision Conflicts With The Decisions Of Other Courts Interpreting FIFRA's Express Preemption Clause

The "overwhelming majority of courts" – both state and federal – have held that state-law claims for failure to warn are expressly preempted by FIFRA, even when such warnings could be communicated through means other than the product labeling. *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 754 (Neb. 2002), cert. denied, 123 S. Ct. 2642 (2003); *id*. at 754-59 (discussing case law); see also, *e.g.*, *King* v. *E.I. Dupont De Nemours & Co.*, 996 F.2d 1346, 1349-50 (1st Cir.), cert. dismissed, 510 U.S. 985 (1993); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993); *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024-25 (5th Cir. 1994); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 369-71 & n.4 (7th Cir. 1993); *Bice* v. *Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), cert. denied, 510 U.S. 813 (1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.), cert. denied, 510 U.S. 913 (1993); *Goodwin* v. *Bacon*, 896 P.2d 673, 681 (Wash. 1995); *Jenkins* v. *Amchem Prods., Inc.*, 886 P.2d 869, 881-82 (Kan. 1994), cert. denied, 516 U.S. 820 (1995).

The Eleventh Circuit's decision in *Papas* is illustrative. There, the court of appeals stated:

> Appellants * * * contend that because the language of 136v refers only to "labeling or packaging," the section does not pre-empt failure to warn claims based on *point-of-sale signs, consumer notices, or other informational materials that are "unrelated" to labeling and packaging*. * * * If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a

> common law action alleging the inadequacy of, for example, point-of-sale signs.

985 F.2d at 519 (emphasis added). Without such a rule, FIFRA preemption could be easily circumvented. Indeed, a failure-to-warn claim would escape preemption if the plaintiff merely alleged that the warning should have been provided through means other than the product's labeling. That allegation could be made in any case. Thus, as the Eleventh Circuit (and many other courts) understood but the Minnesota Supreme Court did not, FIFRA preemption could be defeated by artful pleading on the plaintiff's part.

In holding that there is no preemption under FIFRA because respondents' claims were based in part on "statements and actions that went beyond the label" (Pet. App. 18a, 20a), the Minnesota Supreme Court placed itself in conflict with the foregoing decisions. At the same time, however, its willingness to allow FIFRA's express preemption clause to be circumvented by artful pleading finds support in the decisions of a small minority of courts that have similarly ruled that claims based on statements made outside of the product "labeling" are not preempted by Section 136v(b). See, *e.g.*, *Burke* v. *Dow Chemical Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *D-Con Co.* v. *Allenby*, 728 F. Supp. 605, 607 (N.D. Cal. 1989) ("[m]any warning methods, including the point-of-sale signs * * * may satisfy the requirements of California without infringing on federal supremacy in the area of pesticide labeling"); *Malone* v. *American Cyanamid Co.*, 649 N.E.2d 493, 498-99 (Ill. Ct. App.), appeal denied, 657 N.E.2d 624 (Ill. 1995); *Gorton* v. *American Cyanamid Co.*, 533 N.W.2d 746, 755-56 (Wis. 1995), cert. denied, 516 U.S. 1067 (1996).

The tension between these two lines of cases has been widely acknowledged. See, *e.g.*, *Kuiper* v. *American Cyanamid Co.*, 913 F. Supp. 1236, 1239-45 (E.D. Wis. 1996) (reviewing conflict and expressly disagreeing with *Burke* and *Malone*), aff'd, 131 F.3d 656 (7th Cir. 1997), cert. denied, 523 U.S. 1137 (1998); *Wright* v. *Dow Chemical U.S.A.*, 845 F. Supp. 503, 508

n.2, 510 (M.D. Tenn. 1993) (disagreeing with *Burke*); *DerGazarian* v. *Dow Chemical Co.*, 836 F. Supp. 1429, 1433-47 & nn.1-2 (W.D. Ark. 1993) (extensively reviewing the "split of authority"); *Goodwin*, 896 P.2d at 681 (noting conflict and agreeing with "the majority of courts" that have "refus[ed] to distinguish non-label failure to warn"); *Jenkins*, 886 P.2d at 881-82 (same).

Moreover, the First Circuit has described the issue whether FIFRA preempts state-law claims for failure to warn outside of product labeling as a "potentially vexing problem," explaining:

> [O]ne can imagine claims based on what was said or not said during conversations, in correspondence, or in point of sales signs or the absence of such signs. Whether and to what extent these kinds of claims should be preempted depends on a reading of section 136v and related judgments. The answers are far from clear.

Grenier v. *Vermont Log Buildings, Inc.*, 96 F.3d 559, 564 (1st Cir. 1996).

The disagreement in the lower courts persists and plainly is in need of resolution by this Court. Respondents' consumer fraud claims would be expressly preempted in the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, but not in the Minnesota Supreme Court and in a handful of other jurisdictions. Moreover, the Minnesota Supreme Court's adoption of a rule of law that conflicts with the approach of the Eighth Circuit, see *Bice* v. *Leslie's Poolmart, Inc.*, *supra*, is especially troubling. 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 to address the special problem of forum shopping created by that circumstance. 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) (Ninth Circuit and California state courts); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985). Review of the express-preemption issue in this case is warranted to address this pervasive conflict in the lower courts.

B. The Same Issue Frequently Arises Under Other Preemption Clauses, With Inconsistent Results

Although the Minnesota Supreme Court's evisceration of FIFRA's express preemption clause is reason enough for this Court to grant review, the effects of the decision below are likely to be felt far beyond the context of pesticide labeling. The reason is simple: many other provisions in the United States Code specifically preempt nonidentical state "requirements" that relate to product "labeling." Those include, for example, the Federal Hazardous Substances Act ("FHSA"), which Congress enacted to provide nationally uniform requirements for cautionary labeling of hazardous substances intended for household use. See *Moss* v. *Parks Corp.*, 985 F.2d 736, 739 (4th Cir.), cert. denied, 509 U.S. 906 (1993). The FHSA's express preemption clause declares that "no State * * * may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging * * * unless such cautionary labeling requirement is identical to the [FHSA] labeling requirement." 15 U.S.C. § 1261 note. Some courts have concluded that, because of similarities in the statutory text, the scopes of FHSA and FIFRA preemption are identical. See *Chemical Specialties Mfrs. Ass'n, Inc.* v. *Allenby*, 958 F.2d 941, 945 (9th Cir.) ("The preemption issues arising under FHSA are identical to those arising under FIFRA."), cert. denied, 506 U.S. 825 (1992).

Moreover, when Congress enacted the current version of the FHSA preemption clause in 1976, it did so with the avowed purpose of creating "a uniform Federal preemption clause" for the FHSA and three other federal preemption provisions that include language similar to the FHSA: the Consumer Product Safety Act (15 U.S.C. § 2075(a) (preempting, among other things, nonidentical state standards relating to the "packaging" or "labeling" of consumer products)); the Poison Prevention Packaging Act (*id.* § 1476(a)) (same for state requirements relating to "special packaging" of certain household products); and the Flammable Fabrics Act (*id.* § 1203(a)). See S. Rep. No. 94-251, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N.

993, 996; H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 27-28, *reprinted in* 1977 U.S.C.C.A.N. 1030. In view of Congress's stated objective that these four provisions be co-extensive, any interpretation of the FIFRA (and FHSA) preemption clause is likely to be controlling in cases involving these other statutes as well.

In addition, at least 10 other federal statutes expressly preempt state "requirements" relating to product "labeling." Those include: (1) the Child Safety Protection Act, 15 U.S.C. § 1278 note (preempting state "requirement[s] relating to cautionary labeling" for toys, games, balloons, marbles and other products that present choking hazards to children); (2) the Fair Packaging and Labeling Act, *id*. § 1461 (preempting state laws governing "labeling" of certain consumer products); (3) the Magnuson-Moss Warranty Act, *id.* § 2311(c) (preempting certain state "requirement[s]" that relate to warranties in "labeling"); (4) the National Education and Labeling Act, 21 U.S.C. § 343-1(a) (preempting certain state "requirements" relating to food "labeling"); (5) the Poultry Products Inspection Act, *id*. § 467e (preempting certain state "requirements" relating to poultry "labeling"); (6) the Federal Meat Inspection Act, *id.* § 678 (preempting certain state "requirements" relating to meat "labeling"); (7) the Egg Product Inspection Act, *id*. § 1052 (preempting certain state "requirements" relating to egg product "labeling"); and (8) the Mercury-Containing and Rechargeable Battery Act, *id*. § 14322(e) (preempting certain state "labeling requirement[s]" for rechargeable batteries and rechargeable consumer products).[3]

Each of these provisions potentially gives rise to the same issue that is presented in this case: whether a federal law that preempts state "labeling" requirements permits a State to

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[3] See also 42 U.S.C. § 6297(a) (preempting certain state "labeling requirements" relating to energy consumption or water use with respect to certain products); *id*. § 6363(e)(1) (preempting certain state labeling requirements concerning containers of recycled oil).

impose requirements based on "statements and actions that went beyond the label" (including statements in the manufacturer's advertisements). Pet. App. 18a, 20a. That issue has in fact arisen under a variety of these other statutes, with mixed results.

The cases decided under the FHSA are illustrative. As under FIFRA, the lower courts are divided over whether the FHSA preempts state laws that require statements outside of the product "labeling." The great weight of judicial authority holds that state-law actions are preempted under FHSA if they necessarily imply that the federal labeling requirements are inadequate. See *Comeaux* v. *National Tea Co.*, 81 F.3d 42, 43 (5th Cir. 1996) ("The FHSA preempts any state law warning requirements other than those imposed by the FHSA and its implementing regulations."); *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir. 1993) (same). See also *Lee* v. *Boyle-Midway Household Prods., Inc.*, 792 F. Supp. 1001, 1007-09 (W.D. Pa. 1992); *Salazar* v. *Whink Prods. Co.*, 881 P.2d 431 (Colo. Ct. App. 1994), cert. denied, 514 U.S. 1004 (1995); *Busch* v. *Graphic Color Corp.*, 662 N.E.2d 397, 405-06 (Ill.), cert. denied, 519 U.S. 810 (1996); *State ex rel. Jones Chemicals, Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994); *Canty* v. *Ever-Last Supply Co.*, 685 A.2d 1365, 1374-75 (N.J. Super. Ct. 1996); *Beyrle* v. *Finneron*, 645 N.Y.S.2d 192, 193 (N.Y. App. Div. 1996); *Wallace* v. *Parks Corp.*, 629 N.Y.S.2d 570, 573-74 (N.Y. App. Div. 1995); *Jenkins* v. *James B. Day & Co.*, 634 N.E.2d 998 (Ohio 1994).

The Ninth Circuit has taken a different view, however. In *Chemical Specialties Mfrs. Ass'n, Inc.* v *Allenby*, *supra*, the court of appeals held that FHSA preemption does *not* extend to extra-labeling warning requirements, reasoning that (for example) a state point-of-sale requirement is not a "labeling requirement" because it does not require changing the label itself. 958 F.2d at 945. Other courts have agreed with *Allenby*. See, *e.g.*, *People ex rel. Lundgren* v. *Cotter & Co.*, 53 Cal. App. 4th 1373, 1379-80, 1387-89 (1st Dist.), cert. denied, 522 U.S. 1015 (1997). In these cases, a manufacturer's failure to provide information created liability even though the relevant federal

labeling statute deemed the same information unnecessary.[4] These decisions are consistent with what the Minnesota Supreme Court did in this case.

Finally, the same issue arises even under express preemption clauses that do *not* exclusively target state requirements relating to product "labeling." For example, the preemption clause of the Medical Device Amendments ("MDA") broadly declares: "[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use *any* requirement – (1) which is different from, or in addition to, *any* requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." 21 U.S.C. § 360k(a) (emphasis added). See generally *Medtronic, Inc*. v. *Lohr*, 518 U.S. 470 (1996). But the fact that the MDA's preemption provision is not limited to requirements relating to "labeling" has not prevented plaintiffs from raising this argument. See, *e.g.*, *Baker* v. *Medtronic, Inc.*, 2002 WL 485013, at *8 (S.D. Ohio Mar. 28, 2002); Appellant's Reply Brief, *Horn* v. *Thoratec Corp.*, No. 02-4597, at 11-12 (3d Cir.) (filed June 18, 2003) <available http://www.citizen.org/documents/HornReply3.617.pdf>.

Notably, in several recent *amicus curiae* briefs the United States government has endorsed the common-sense position adopted by the overwhelming majority of courts in response to the efforts of plaintiffs to circumvent express preemption

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[4] Preemption issues arise with frequency under many of the other statutes that nullify state "labeling" requirements. See, *e.g.*, *Moe* v. *MTD Prods., Inc.*, 73 F.3d 179, 182-83 (8th Cir. 1995) (holding state common law failure-to-warn claim based on deficiency in federal labeling preempted under Consumer Product Safety Act, 15 U.S.C. § 2075(a)); *Cortez* v. *MTD Prods., Inc.*, 927 F. Supp. 386, 391 (N.D. Cal. 1996) (same) ("permitting plaintiff to recover on his failure to warn theory would upset the careful balancing of interests that Congress, through the Consumer Product Safety Commission, sought to achieve when it prescribed the warning label regulations" for lawn mowers).

clauses through artful pleading. Thus, in his brief at the petition stage in *Dow Agrosciences LLC* v. *Bates*, No. 03-388, the Solicitor General made clear that in his view FIFRA "broadly preempts state-law causes of action *relating to* product labeling," including any claims that "would, in effect, require [a manufacturer] to add or subtract from the pesticide label in order to avoid liability." No. 03-388 U.S. Br. as *Amicus Curiae*, at 17 & n.6 (emphasis added) <available at http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2003-0388.pet.ami.inv.pdf>; accord *id*. at 11 (FIFRA "generally preempts" state tort actions that are "label-related"). Similarly, in *Horn* v. *Thoratec Corp.*, 376 F.3d 163 (3d Cir. 2004), the United States filed an *amicus* brief successfully urging the court of appeals to affirm the dismissal of all of the plaintiff's state-law tort claims, including those premised on an "outside-the labeling" theory, as expressly preempted by the MDA. See 3d Cir. No. 02-4597 U.S. Br. as *Amicus Curiae*, 2004 WL 1143720, at *5, *30-31 (filed May 14, 2004).

As the foregoing makes clear, this Court's review of the Minnesota Supreme Court's ruling on express preemption would clarify an important issue of preemption law that arises not only under FIFRA but also under a wide array of other statutory preemption provisions. For that reason, this Court should grant review of the preemption issue raised in this case.

II. THE LOWER COURT'S IMPLIED-PREEMPTION HOLDING ALSO WARRANTS REVIEW

Congress's preemptive intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Thus, even if it falls outside of the reach an express preemption clause, a state law may nevertheless be preempted if it conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The Minnesota Supreme Court's

rejection of BASF's *implied* preemption arguments independently deserves this Court's review. As we explain below, the lower court's conclusion that the multi-million-dollar judgment in this case is compatible with federal law is squarely at odds with this Court's teachings.

Respondents' claims are impliedly preempted in at least two ways. *First*, their allegation that BASF engaged in a "scheme to exploit the farmers" directly challenges BASF's federally guaranteed choice to label Poast Plus for only a subset of its registered uses. *Second*, respondents' claim that BASF violated New Jersey law by "advertis[ing] and market[ing] the[] equivalent [Poast and Poast Plus] formulations * * * as two separate products," Tr. 2528, conflicts with federal regulations that *mandated* the separate labeling of the two products.

A. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Exercising A Choice Granted By Federal Law

Respondents' theory of liability was that BASF "unconscionably exploited the regulatory standards and overtly deceived and lied to farmers to conceal the fact that the less expensive Poast Plus was registered with the EPA for the same crops as Poast." Pet. App. 60a. Proving "deceit" was necessary for a recovery, for respondents' theory of damages was that they "lost the opportunity to protest, petition for relief from government agencies, litigate, or simply make an intelligent, informed decision on whether to refuse to buy the more expensive Poast." *Id.* at 43a. At trial, some of respondents were far more blunt, arguing that it was "unfair, unethical, [and] immoral" for BASF not to label Poast Plus for minor crops when "both [Poast and Poast Plus] were registered by EPA." Tr. 1169-1170.

This theory of liability is impliedly preempted by federal law. BASF's decision to label Poast Plus for only a subset of the crops for which it was EPA-approved was an option explicitly authorized by federal regulations. See 40 C.F.R. § 136a(a) ("A registrant may distribute or sell a product

under labeling bearing any subset of the approved directions for use."). As explained by BASF (Pet. 4, 6, 20-21), this subset labeling option serves several salutary purposes. First, even if a pesticide has EPA's approval, its manufacturer may believe it has not been tested sufficiently on a particular crop. If subset labeling is not an option, the manufacturer might simply delay the product's release, a decision that could exacerbate the shortage of pesticides for minor crops. See EPA, *Report on Minor Uses of Pesticides*, at 3 (1996) ("minor uses are not always economically attractive to the pesticide industry"). Second, in the event a manufacturer has trouble obtaining state registration for a particular crop, subset labeling allows it to release that product for use on other, approved crops. Subset labeling also allows manufacturers greater freedom in marketing their products.

In a series of cases, this Court has made clear that a state law is impliedly preempted if it would undermine or prohibit an option granted by Congress or by a pertinent federal agency. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000); *Barnett Bank*, 517 U.S. at 31; *Fidelity Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982). In *de la Cuesta*, this Court held that a federal law authorizing savings and loan associations to use particular "due-on-sale" clauses in loan agreements impliedly preempted a state law prohibiting such federally approved clauses. *Id.* at 156. Similarly, in *Barnett Bank*, this Court held that a federal statute guaranteeing that certain banks could "act as the agent for fire, life, or other insurance company * * * by soliciting and selling insurance" (12 U.S.C. § 92) impliedly preempted the order of a state insurance commissioner, based on a state statute, directing a bank to stop selling insurance. Because the state statute conflicted with the bank's federal authorization to sell insurance, the Court held that it was impliedly preempted.

Most recently, in *Geier*, this Court held that a federal regulation granting auto manufacturers the option of "choos[ing] among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technolo-

gies" (529 U.S. at 878) preempted a state tort action imposing liability for exercising that option in a certain way. The Court recognized that any liability predicated on a duty to install airbags would necessarily imply that choices *other than* airbags were inadequate even though they were federally sanctioned, a conclusion that in turn would "present[] an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. It therefore held that plaintiff's tort claim was impliedly preempted.

This line of cases is dispositive here. Federal regulations allowed BASF to label Poast Plus for use on only a subset of the crops for which EPA approved it. The conclusion that BASF engaged in fraudulent marketing by failing to disclose all permissible uses of Poast Plus conflicts with this regulation because liability stems directly from the decision to use subset labeling, a decision EPA consciously left to the manufacturer. The result is especially perverse in this case because, as the petition notes (at 5), BASF's decision not to seek state registration for Poast Plus for minor crops was based on the insistence of company scientists that additional testing be conducted prior to marketing the product for those uses in order to ensure safety.

In rejecting BASF's implied preemption argument, the Minnesota Supreme Court reasoned that liability was imposed on BASF based not on the company's choice to use subset labeling, but rather on its misleading statements regarding Poast Plus's registration. The lower court pointed out that respondents relied on the fact that BASF advertised Poast as the "only" post-emergent grass herbicide registered for use on minor crops, even though EPA had also approved the cheaper Poast Plus for that use. See Pet. 18 (explaining why BASF's statement was, in fact, truthful in light of lack of state registration). But BASF could not have advertised its product for uses as to which federal, but not state registration, had been obtained without running afoul of the federal prohibition against the promotion of off-label uses. See 7 U.S.C. § 136j(a)(1)(B). It is clear in any event that BASF could have avoided liability under respondents' theory only by relinquishing its federally con-

ferred right to engage in subset labeling and seeking state registration for all uses in every state. If that were required to avoid liability under state law, however, the federal right to engage in subset labeling would be a nullity.

The Minnesota Supreme Court, however, was not content merely to uphold the imposition of multi-million-dollar liability on BASF for exercising an option granted by federal law. The lower court turned the federal authorization on its head, by faulting BASF for electing not "to seek state registration for Poast Plus on all the crops" for which the EPA had granted registration. Pet. App. 21a. Under FIFRA, however, the manufacturer retains the freedom to decide which uses to seek registration for at the federal and state level. See Pet. 20. There is no duty to seek marketing approval for a product. The Minnesota Supreme Court's suggestion that state law imposes such a duty seriously interferes with the delicate balance of objectives that Congress sought to achieve in enacting FIFRA. See *Buckman*, 531 U.S. at 347-53; Pet. 19-22.

B. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Obeying The Requirements Of Federal Law

Respondents' claims under the NJCFA were also predicated on the assertion that BASF committed "unconscionable conduct" when it misrepresented that Poast and Poast Plus were different products. But BASF's decision to give Poast and Poast Plus distinct names and labels was *compelled* by federal law. If federal regulations compel an action that state law punishes, the state law must give way. See *United States* v. *Locke*, 529 U.S. 89, 109 (2000) ("conflict pre-emption * * * occurs when compliance with both state and federal law is impossible") (internal quotation marks omitted).

There can be no serious argument here that federal law did not require BASF to give separate names and labels to the two herbicides. EPA assigned the two products different registration numbers (D Exs. 694, 701), required BASF to submit separate toxicology data for each (see 40 C.F.R. § 158.340), and

mandated that the two products be given different names. See 40 C.F.R. § 152.43. To the extent that the jury based its finding of fraud on BASF's decision to label these "identical" products differently, such liability squarely conflicts with federal law and is impliedly preempted. Indeed, a more direct collision between state and federal law is difficult to imagine.[5]

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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SEPTEMBER 2004

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[5] The Minnesota Supreme Court brushed this argument aside by stating (Pet. App. 17a) that respondents had not, in fact, challenged BASF's decision to label Poast and Poast Plus differently, but instead had used that evidence merely "to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud." That is a distinction without a difference. Whether used as the exclusive basis for state-law liability, or merely as partial evidence of an illegal scheme, BASF's compliance with a federal mandate cannot give rise to state-law liability without violating the principle of federal supremacy embodied in the preemption doctrine and in the Supremacy Clause, U.S. CONST. Art. VI, cl. 2. In any event, as BASF demonstrates, the Minnesota Supreme Court's proffered distinction is refuted by the record. See Pet. 13.

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

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Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown and Williamson Tobacco
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation

DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Delphi Corporation
Diageo North America Inc.
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
GLOCK, Inc.
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
The Procter & Gamble Company
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek

Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
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