No. 03-388

In the Supreme Court of the United States

DENNIS BATES, ET AL.,

Petitioners,

v.

DOW AGROSCIENCES LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROBIN S. CONRAD
STEPHANIE A. MARTZ
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ALAN UNTEREINER*
DAMON TAAFFE
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Regulation:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous:

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. Many members of the Chamber depend on the preemption clause of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, as protection against the imposition by state and municipal governments of diverse and burdensome requirements relating to the labeling of pesticides, herbicides, and other agricultural chemicals. For years, these businesses have relied on the lower courts' virtually uniform holdings – supported by a long line of this Court's own preemption decisions – that labeling requirements can be imposed as surely through common-law damages actions as through positive statutory enactments, regulations, and ordinances. Should this Court overturn those holdings as petitioners urge, the result will be the imposition of diverse and perhaps even conflicting obligations with respect to pesticide

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

labeling that will subvert the national uniformity Congress intended FIFRA's preemption clause to preserve.

Moreover, many members of the Chamber that are not in the pesticide industry nevertheless have a substantial interest in the scope of FIFRA preemption because more than a dozen other federal statutes expressly preempt state "requirements" relating to product "labeling." See, *e.g.*, 15 U.S.C. §§ 1203(a), 1278 note, 1461, 1476(a), 2075(a), 2311(c); 21 U.S.C. §§ 343-1(a), 467e, 678, 1052, 14322(e); 42 U.S.C. §§ 6297(a), 6363(e)(1). Each of these provisions potentially gives rise to some of the same issues that are raised in this case. Because courts often interpret preemption clauses by looking to authoritative interpretations of comparably worded clauses in other statutes, the outcome of this case may be felt far beyond the pesticide industry. Thus, the Chamber has a strong interest in the proper resolution of the important issues raised in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

FIFRA is a "comprehensive regulatory statute" that "regulate[s] the use, as well as the sale and labeling, of pesticides; regulate[s] pesticides produced and sold in both intrastate and interstate commerce; [and] provide[s] for review, cancellation, and suspension" by the federal Environmental Protection Agency (EPA) of pesticide registrations. *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 991-92 (1984). An important part of FIFRA's comprehensive regulatory scheme is the creation of a national labeling regime to ensure that pesticide manufacturers may not be required to create separate product labels to comply with idiosyncratic or divergent requirements in every State. Toward that end, Congress included in FIFRA a preemption clause – appropriately titled "uniformity" – that 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). As those words make clear, 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).

I. In the decision below, the Fifth Circuit correctly recognized that States are capable of imposing "requirements" relating to pesticide labeling not only through positive enactments but also through duties imposed by the common law. Pet. App. 10a-11a & n.8. That holding follows ineluctably from this Court's analysis of indistinguishable statutory language in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), as well as from many other decisions of this Court. It is also consistent with the rulings of the overwhelming majority of the lower federal and state courts. And this reading of Section 136v(b) ensures that FIFRA does not create a crazy quilt of preemption under which tort-law duties remain in place in the States that impose those obligations through the common law but are preempted in the many States that have enacted statutes codifying their common law of torts. Petitioners' various arguments for why this Court should radically alter the established landscape of FIFRA preemption law by holding Section 136v(b) excludes common-law "requirements" are all unavailing.

II. The Fifth Circuit was also correct in holding that "FIFRA's text does not define the scope of FIFRA's preemption clause to be a function of existing EPA regulations." Pet. App. 13a. Accordingly, petitioners are wrong in contending that there is no express preemption in this case because of the EPA's decision not to regulate target area phytotoxicity. By its plain terms, Section 136v(b) nullifies "any" requirements imposed by the States on pesticide labeling, whether those requirements are "different from" the federal requirements imposed "under this subchapter" or merely "in addition" to them. 7 U.S.C. § 136v(b). As we explain below, that language is best understood as requiring preemption even when there is no counterpart federal requirement in place. Congress knows full well how to make preemption contingent upon the existence of federal requirements dealing with the same risk or subject matter, has done so in other statutes, but has not done so in

FIFRA. Because the state-law requirements that petitioners seek to impose on Strongarm's labeling plainly are "in addition to or different from" the requirements imposed on that labeling by FIFRA itself, they are expressly preempted.

ARGUMENT

I. FIFRA PREEMPTS "REQUIREMENTS" IMPOSED THROUGH THE COMMON LAW

As this Court has instructed, "analysis of the scope of [a] preemption statue must begin with its text," *Medtronic* v. *Lohr*, 518 U.S. 470, 484 (1996), because "the plain wording of" an express preemption clause "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). FIFRA's preemption clause is contained in Section 136v, which is entitled "Authority of States" and provides in pertinent part:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> **(b) Uniformity**
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v. "This subchapter" refers to Subchapter II, which consists of 7 U.S.C. §§ 136-136y.

Section 136v allows a State to prohibit the "sale or use" of any pesticide, and in certain circumstances allows it to approve a pesticide for use for a purpose other than those provided in the federal registration. See 7 U.S.C. § 136v(c). A State may not, however, "impose * * * any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b).

The clear purpose of Section 136v(b) is to ensure that under no circumstance will a pesticide manufacturer be induced to conform its product's labeling to idiosyncratic or divergent state-law standards. Nothing in the text suggests that preemption is limited to a particular *type* of standard; to the contrary, if uniformity is the goal, the most natural interpretation is that Section 136v(b) preempts any aspect of state law – be it positive enactment or common law – that would require a pesticide manufacturer to change its federally approved label. And that, of course, is what the preemption clause says: it preempts "any" state requirement that adds to or differs from any federal requirements imposed under FIFRA.

Petitioners, however, contend that the word "requirements," understood in context, "encompasses only rules issued pursuant to positive law, such as statutes and regulations." Pet. Br. 14. In an effort to support that position, petitioners advance a variety of arguments based on this Court's decisions involving other preemption clauses, the text and structure of FIFRA, the congressional purposes underlying the statute, and the legislative history. None of these arguments is persuasive.

A. This Court's Decisions Clearly Establish That Common-Law Duties Impose "Requirements"

Twice in recent years litigants have urged this Court to limit the word "requirements" in a preemption clause to positive enactments. See *Cipollone* v. *Liggett Group, Inc*., 505 U.S. 504 (1992); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). Twice this Court has refused. These decisions – and the precedents on which they rely – are controlling here.

1. *Cipollone* involved a suit brought under New Jersey common law against cigarette manufacturers seeking recovery under theories of design defect, failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. The defendants contended that the Federal Cigarette Labeling and Advertising Act of 1965 ("1965 Act"), and its successor, the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), expressly preempted those common-law claims.

As with FIFRA, the purpose of both Acts was to ensure uniformity in labeling. Section 2 of the 1965 Act stated that it was intended to "protect[] the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*." 15 U.S.C. § 1331 (1982 ed.) (emphasis added) (quoted in *Cipollone*, 505 U.S. at 511 n.5). Toward that end, the 1965 Act contained a preemption clause providing that "[n]o *statement* relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity of the provisions of this Act." 15 U.S.C. § 1334(b) (1965) (emphasis added). This Court concluded that the reference to "statement[s] * * * in the advertising," read in light of other provisions of the statute (including the statement of purpose, which as just noted referred to "regulations"), evinced a congressional intent to "supersede[] only positive enactments by legislatures or administrative agencies." 505 U.S. at 518-19.

The 1969 Act, however, substantially broadened the 1965 Act's preemptive scope. Without changing the declared purpose of protecting the economy from the burden of nonuniform "regulations," the 1969 Act replaced the 1965 Act's preemption clause with a new provision stating:

> No *requirement* or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with * * * of this Act.

15 U.S.C. § 1334(b) (emphasis added). The plaintiff in *Cipollone* argued that, like the 1965 Act, the 1969 Act did not preempt common-law actions because they do not impose "requirement[s] or prohibition[s]," and Congress intended only to preempt state positive law. In rejecting that submission, this Court explained that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words *easily encompass* obligations that take the form of common-law rules." *Id.* at 521 (plurality) (emphasis added); *id.*

at 548-49 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) (agreeing with that conclusion). Plaintiff's argument, the Court added, was "at odds both with the plain words" of the statute and "with the general understanding of common-law damages actions." *Id*. at 521; *id*. at 548-49 (per Scalia, J.).

2. A majority of this Court again rejected a claimed exclusion for common-law requirements in *Medtronic*, which involved the preemption clause of the Medical Device Amendments (MDA), 21 U.S.C. § 360k(a). Entitled "State and local requirements respecting devices," the MDA's preemption clause provides in relevant part (*ibid.* (emphasis added)):

> [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.

Writing for four Justices, Justice O'Connor explained that "state common-law damages actions operate to *require* manufacturers to comply with common-law duties." 518 U.S. at 510 (concurrence and dissent) (emphasis added). "If § 360k's language is given its ordinary meaning," she reasoned, "it *clearly* pre-empts any state common-law action that would impose a requirement different from, or in addition to, that applicable under the FDCA – just as it would pre-empt a state statute or regulation that had that effect." *Id.* at 511 (emphasis added). Writing separately, Justice Breyer agreed with Justice O'Connor and three other Justices that "[t]he statute's language, read literally, supports th[e] conclusion" that "the MDA will sometimes pre-empt a state-law tort suit." *Id.* at 504 (concurring in part and concurring in the judgment).

In casting the fifth vote for this reading, Justice Breyer also explained that "a contrary holding would have anomalous

consequences." 518 U.S. at 503. In words that apply with equal force here, Justice Breyer reasoned:

> Imagine that, in respect to a particular hearing aid component, a federal MDA regulation requires a 2-inch wire, but a state agency regulation requires a 1-inch wire. If the federal law, embodied in the "2-inch" MDA regulation, pre-empts the state "1-inch" agency regulation, why would it not similarly pre-empt a state-law tort action that premises liability upon the defendant manufacturer's failure to use a 1-inch wire (say, an award by a jury * * * that use of a more than 1-inch wire is negligent)? *The effects of the state agency regulation and the state tort suit are identical*. To distinguish between them for pre-emption purposes would grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.

Ibid. (emphasis added). That "result," Justice Breyer added, would be "anomalous." *Ibid.*

3. The Court's decisions in *Cipollone* and *Medtronic* build on older decisions that recognize the same principle or acknowledge the clear regulatory effect of common-law judgments. In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the Court observed that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* at 247. Similarly, in *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U.S. 117 (1991), the Court held that the phrase "all other law, including State and municipal law" simply "does not admit of [a] distinction * * * between positive enactments and common-law rules of liability." *Id*. at 128. Indeed, "[a]t least since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), [the Court] ha[s]

recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522.[2]

In *CSX Transp.* v. *Easterwood*, 507 U.S. 658 (1993), this Court examined the preemption clause of the Federal Railroad Safety Act (FRSA), which provides that federal regulations may preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 23 U.S.C. § 434. Citing *Cipollone*'s recognition that the word "requirement" "easily" includes common-law claims, the Court held that "[l]egal duties imposed upon railroads by the common law fall within the scope of [the FRSA's] broad phrases." 507 U.S. at 664. Together with *Cipollone* and *Medtronic*, these decisions defeat petitioners' argument that the word "requirements" in Section 136v(b) describes only positive enactments.

4. In light of the foregoing decisions, it is not surprising that all nine federal circuits that have considered the question have agreed with the Fifth Circuit that FIFRA preempts common-law "requirements." See Br. in Opp. 15-16 & n.13 (collecting cases). Nor is it surprising that 27 out of 29 state appellate courts have reached the same conclusion. *Id*. at 16-17 & nn. 15-16 (same).

5. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), upon which petitioners rely for the proposition that Congress "commonly distinguishes between state positive and common law for preemption purposes" (Pet. Br. 20), does not overrule or undermine the foregoing precedents nor does it support petition-

---

[2] Other decisions of this Court have consistently recognized that the common law imposes standards and requirements. See, *e.g.*, *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-15 (1987) (quoting California Supreme Court's description of product-liability actions as ensuring compliance "with the state's safety standards"); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("imposition of a state standard in a damages action"); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965) ("common law standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("stricter negligence standards of common law").

ers' strained interpretation of FIFRA. In *Sprietsma*, this Court held that the Boat Safety Act (BSA) does not preempt common-law claims. But the BSA and its preemption clause were materially different from FIFRA. The BSA provided that "a State * * * may not establish, continue in effect, or enforce *a law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306 (emphasis added).

Focusing on the highlighted phrase, this Court gave three reasons why common-law claims were not preempted. First, "the article 'a' before 'law or regulation' implies a discreteness – which is embodied in statutes or regulations – that is not present in the common law." 537 U.S. at 63. Second, Congress's use of the terms "law" and "regulation" together "indicate[d] that Congress preempted only positive enactments," because an interpretation of "law" that included "common law" might also include "regulations," which would create a disfavored redundancy. *Ibid.* And third, the BSA includes a "savings" clause that specifically refers to "liability at common law" (46 U.S.C. § 4311(g)). See 537 U.S. at 526-27. The "contrast between [the savings clause's] general reference to 'liability at common law' and the more specific and detailed description of what is preempted" by the preemption clause, the Court explained, further "indicates" that Congress intended the latter to cover only "performance standards and equipment requirements imposed by statute or regulation." *Ibid.*

None of these reasons has any application to this case. FIFRA does not include any "savings" clause, much less one that refers in potentially contrasting fashion to "liability at common law." And FIFRA's preemption clause is worded quite differently from the BSA's. Section 136v(b)'s use of the broad phrase "any requirements" implies no discreteness. Its use of "requirements" without pairing it with other terms avoids the need to interpret multiple terms in light of each other (and avoid redundancy).

Indeed, the operative language of Section 136v(b) far more closely resembles the wording of the provisions at issue in *Medtronic* ("no state * * * may establish * * * any requirement * * * which is different from, or in addition to, any requirement applicable under this chapter"), and in *Cipollone* ("No requirement * * * shall be imposed under State law * * * "), which this Court has ruled clearly encompass requirements imposed under the common law. Moreover, this case is an even stronger one for express preemption of common-law "requirements" than *Cipollone*, because Congress's avowed purpose underlying the 1969 Cigarette Labeling Act's preemption clause was to ensure uniformity of state "regulations," whereas 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). *Cipollone* and *Medtronic* are thus controlling.[3]

B. Nothing In The Text Or Structure Of FIFRA Supports Petitioners' Request For The Exclusion Of Common-Law Requirements

Faced with this Court's case law and the tidal wave of lower-court decisions described above, petitioners fall back on a hodgepodge of arguments based on the language and structure

---

[3] Petitioners' related but inconsistent suggestion (Pet. Br. 14, 16, 17) that "damages actions" are not preempted by Section 136v(b)– including, presumably, damages actions based on state product liability *statutes* – rests on the mistaken assumption that a remedy can be permitted to proceed even though the underlying right, obligation or requirement it seeks to enforce has been nullified by Congress. It also mistakenly assumes that the requirement to pay damages is not a "requirement." See Dinh, *Regulatory Compliance as a Defense to Products Liability: Reassessing the Law of Preemption*, 88 GEO. L. J. 2085, 2114 (2000) ("[T]he effect of tort liability on primary conduct is the same as a statutory prescription or regulatory standard."). In any event, this variation of petitioners' argument was also rejected in *Medtronic*. See 518 U.S. at 510 (O'Connor, J.) ("state common-law *damages actions* operate to *require* manufacturers to comply with common-law duties") (emphasis added); accord *id*. at 504 (Breyer, J.).

of FIFRA for why, in their view, Section 136v(b) must be interpreted as excluding requirements imposed under state common law or tort law. See Pet. Br. 17-20, 22-25. All of these arguments are meritless.

1. Petitioners make much of the fact that the word "requirements" appears "75 times in the remainder of FIFRA, * * * and each time refers only to * * * statutory and regulatory enactments." Pet. Br. 22. They also point out that "Congress used the term 'requirements' in § 136v(b) to refer to both state and FIFRA requirements," and argue that "[i]t would be unnatural to read the word 'requirements' more broadly in reference to a source of state law than for the federal government." Pet. Br. 18. Accordingly, petitioners argue, Section 136v(b)'s reference to state "requirements" should be understood as excluding requirements based in the common law.

This argument fails for at least three reasons. *First*, although petitioners note that a plurality of this Court in *Medtronic* found a similar argument persuasive (Pet. Br. 24-25), they neglect to mention that the majority *implicitly rejected* this argument in holding that the MDA's preemption clause covers common-law requirements. Indeed, precisely the same argument was made in *Medtronic* by the plaintiff based on multiple other uses of the word "requirement" throughout the MDA. See Nos. 95-754, 95-886 Br. for Cross-Pet. Lohrs, at 11-12, 16-19; Nos. 95-754, 95-886 Reply Br. Cross-Pet. Lohrs, at 8-9. Nor are petitioners correct in asserting that the "textual evidence here" is stronger. Scores of other provisions in the MDA refer to "requirements" and, in so doing, describe requirements imposed by statute or by the administering agency (there, the FDA). See, *e.g.*, 21 U.S.C. §§ 360(*l*), 360(m)(1), 360(o)(2), 360c(b)(1)(B), 360c(c)(2)(A), 360c(d)(2)(A), 360d(c)(1)(A), 360e(a), 360h(b)(2)(B), 360h(c), 360i(a)(4), 360j(a).[4]

---

[4] Had the Court in *Medtronic* adopted petitioners' mode of analysis, it might have reached the opposite result on the question whether the plaintiffs' design claim was preempted. As the manufacturer pointed out, other provisions of the MDA refer to "requirements" imposed on so-

Second, the Court in *Medtronic* also rejected petitioners' narrower argument based on the use of the word "requirements" within the *preemption clause itself* to refer to both state and federal obligations. That variant is flawed because it ignores qualifying language in FIFRA's preemption clause: "Such State shall not impose * * * 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). It is the italicized language that creates the limit on the federal "requirements" to which Section 136v(b) refers, not the words "those required" (a synonym for "requirements"). The Solicitor General made the same point in *Medtronic* in successfully urging this Court not to accept a similar reading of the MDA's preemption clause, which refers, on the federal side, to "any requirement *applicable under this chapter* to the device" (21 U.S.C. § 360k(a) (emphasis added)):

> The problem with [the Lohrs'] reasoning is that the limitation on the type of federal provisions that have preemptive effect is not attributable to the term "requirement." It is, instead, attributable to the words that modify "requirement." A state provision may be preempted only by a federal requirement "applicable under this chapter." 21 U.S.C. 360k(a). It is the latter phrase that limits the federal provisions having preemptive force to those imposed by the FDCA and implementing regulations, rather than by common law.

Nos. 95-754, 95-886 U.S. Br. 16-17. The same is true here.

Third, petitioners' argument overlooks the obvious reason why the federal "requirements" FIFRA refers to are traceable to either the statute or to EPA's regulations. It should come as no surprise that a federal statute that imposes requirements on

---

called "510(k)" medical devices (which are cleared for marketing based on "substantial equivalence"). See Nos. 95-754, 95-886 Br. for Pet. Medtronic, at 31-32. Yet this Court held that the 510(k) clearance process imposes no design requirements on a device. 518 U.S. at 492-94.

manufacturers and empowers an administrative agency to regulate in the public interest (by imposing additional requirements) would use the term "requirement" to refer exclusively to statutory and regulatory mandates. Those, after all, are the *only* kinds of "requirements" that such a regime imposes. It does not follow, however, that the broad term "requirements" cannot encompass something more when applied to the obligations that a State may impose through its court system. Any limitation on the federal side of the equation to obligations imposed by the statute or an administrative agency, in other words, is a function of the limitations on the federal scheme and the kinds of requirements it is capable of producing. It is also a function of the very limited role that federal "common law" plays under our system of government. See *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504-05 (1988).[5]

2. Next, petitioners contend that because Section 136v(b) refers to "[s]uch State[s]" that impose "regulation[s]" under Section 136v(a), the state-law "requirements" preempted by Section 136v(b) must be considered a subset of "regulation[s]." Pet. Br. 17; see also *id.* at 25 n.14 (suggesting that the "requirements" mentioned in Section 136v(b) must "stem[] from a 'regulation' otherwise permitted in § 136v(a)"). Because "regulation[s]" are positive enactments, they argue, "requirements" must be as well. This argument has been repeatedly rejected by the lower courts. See, *e.g.*, *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 560-61 (9th Cir. 1995); *King* v. *E.I. Dupont De Nemours & Co.*, 996 F.2d 1346, 1349-50 (1st Cir.), cert. dismissed, 510 U.S. 985 (1993); *Goodwin* v. *Bacon*, 896

---

[5] Petitioners argue that even "FIFRA's references to 'requirements' *of state law* encompass only positive law commands" (Pet. Br. 24), but as their citations make clear, the requirements themselves are imposed upon States *by FIFRA*. See, *e.g.*, 7 U.S.C. §§ 136i(a)(1), 136w-2(a); cf. *id.* § 136w-5 (making reference, in language that is clearly distinguishable, to a State's "requirements *for training*") (emphasis added). Only in Section 136v(b) – FIFRA's preemption clause – did Congress have cause to refer to requirements imposed on pesticides *by States*, and that instance therefore requires an analysis independent of the other provisions.

P.2d 673, 680 (Wash. 1995); *Jenkins* v. *Amchem Prods., Inc.*, 886 P.2d 869, 880 (Kan. 1994), cert. denied, 516 U.S. 820 (1995). It fails for at least three reasons.

First, petitioners' "subset" interpretation would give the words "regulation" and "requirement[]" precisely the same meaning. In substance, States would be free to impose "sale or use" regulations as long as those regulations did not take the form of labeling regulations. That might be a coherent statutory scheme, but it is not the one Congress enacted. Congress chose to use the word "requirements" rather than "regulation[s]" in Section 136v(b), and it is axiomatic that "[t]he use of different words within related statutes generally implies that different meanings were intended." *United States* v. *Bean*, 537 U.S. 71, 76 (2002) (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 194 (6th ed. 2000)). Petitioners' argument ignores this principle.

Second, petitioners' argument overlooks the fact that "regulation[s]" in Section 136v(a) refers only to regulations governing "sale or use." Labeling requirements, however, are entirely distinct from – and are not a subset of – "sale or use" regulations. For example, this Court has stated that FIFRA "regulated the use, as well as the sale and labeling, of pesticides," making clear that the concepts of sale, use, and labeling are analytically distinct. *Wisconsin Publ. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991) (quoting *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986, 991-92 (1984)).

Indeed, petitioners' "subset" interpretation is in severe tension with the reasoning of *Mortier*. There, this Court held that FIFRA does not impose "field" preemption because such an interpretation would render Section 136v(b) superfluous. The Court explained:

> Taking [field] pre-emption as the premise, § 136v(a) would * * * grant States the authority to regulate the "sale or use" of pesticides, while § 136v(b) would superfluously add that states did not have the authority to regulate "labeling or packaging," an addition that would have been

> doubly superfluous given FIFRA's historic focus on labeling to begin with.

501 U.S. at 613. Under this Court's reasoning in *Mortier*, labeling requirements are *not* a subset of "sale or use" regulations. If they were, even under a field preemption theory, labeling requirements would survive preemption as a subset of the "sale or use" regulations carved out by Section 136v(a). In that event, Section 136v(b) would be *necessary* – not superfluous – to ensure that States could not impose divergent labeling requirements. Thus, if this Court was correct in *Mortier* that field preemption would render Section 136v(b) superfluous, it can *only* be because the subset theory is incorrect.

Third, given that labeling is a concept distinct from sale and use, petitioners' "subset" interpretation would yield absurd results. Section 136v(b) would preclude labeling requirements for only "[s]uch State[s]" that impose "sale or use" regulations; States that elect not to issue such regulations would be free to impose labeling requirements – even in the form of statutes and regulations. Congress surely did not intend that result. The better reading of "[s]uch State" in Section 136v(b) treats it as a synonym for "[a] State," the phrase used in Section 136v(a). Congress used "[s]uch State" merely to avoid repetition.

3. Observing that Section 136v(a) empowers States to ban the sale or use of a pesticide entirely, petitioners next contend that "it makes no sense to construe § 136v(b) to foreclose the *lesser* regulatory effects that flow from damages actions that enable the pesticide manufacturer to choose to sell its products while assuming the risk of common-law liability[.]" Pet. Br. 18-19. But that argues far too much, for it applies with equal force to state labeling requirements imposed by statute or regulation that are enforceable through fines or monetary penalties.

C. Petitioners' Arguments Based On The Legislative History Are Unpersuasive

Next, petitioners argue that FIFRA does not preempt "requirements" imposed by the common law because the "legislative history of the 1972 FIFRA amendments" contains

no mention of the possibility that "the proposed legislation would shield pesticide manufacturers from product liability tort suits." Pet. Br. 26. Congress's silence on this score is especially significant, petitioners suggest, because of the historical backdrop of tort litigation involving pesticides. Pet. Br. 4-5, 25-27. Notably, in advancing these arguments petitioners make no effort to explain how their interpretation of FIFRA can be reconciled with the evidence in committee reports making clear that 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); see *Conroy* v. *Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (comparing use of legislative history to "entering a crowded cocktail party and looking over the heads of the guests for one's friends"). But even putting aside petitioners' selective use of the legislative history, their arguments are mistaken.

1. This Court has routinely refused to take the "extraordinary" step of "requir[ing] legislative history to confirm the plain meaning of" a statute. *Bourjaily* v. *United States*, 483 U.S. 171, 178 (1987). See also *Eli Lilly & Co.* v. *Medtronic, Inc.*, 496 U.S. 661, 669 n. 2 (1990) (statute can have effects not explicitly mentioned in its legislative history). Moreover, the Court is loathe to draw inferences from congressional silence or inaction. See also *Garcia* v. *United States*, 469 U.S. 70, 78 (1984) (courts are "not willing to narrow the plain meaning of * * * [a] statute on the basis of a gestalt judgment as to what Congress probably intended"). Where, as here, Congress has enacted a statutory preemption clause that includes broad language that encompasses without qualification all types of state "requirements," and does not exclude common-law duties, there is even less reason to attach any importance to silence in the legislative history concerning common-law duties.

2. As if that were not enough, this Court has twice *rejected* the argument that a preemption clause does not reach state common law because legislative history includes no mention of the preemption of common-law duties. In *Cipollone*, the Court held that common-law "requirements" were preempted by the

1969 Cigarette Act even though portions of the legislative history suggested that "Congress was primarily concerned with positive enactments by States and localities," 505 U.S. at 521 (opinion of Stevens, J.), and there was no explicit reference in the legislative history to common-law damages actions, *id.* at 540 (opinion of Blackmun, J.). Nevertheless, because the Act's language "plainly reache[d] beyond" positive enactments, 505 U.S. at 521 (opinion of Stevens, J.), the Court held that common-law claims were subject to preemption.

Similarly, in *Medtronic*, a majority of the Court rejected the same argument in holding that the MDA's preemption clause covers common-law "requirements." To be sure, as petitioners note in their brief (at 27), four Members of the Court thought it was significant that "nowhere in the materials relating to the Act's history have we discovered a reference to a fear that product liability actions would hamper the development of medical devices." 518 U.S. at 490 (plurality opinion of Stevens, J.). The same four Justices also thought it was "spectacularly odd" that there was no mention in the legislative history "particularly since Members of both Houses were acutely aware of ongoing product liability litigation." *Id.* at 491. Notably, however, a majority of the Court was not persuaded by these points and ruled that common-law requirements *are preempted*. See also *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) (Airline Deregulation Act preempts state advertising standards even though legislative history contained no statements specifically addressing state regulation of advertising).

3. Petitioners fare no better in their invocation of a long history of tort litigation involving pesticides.[6] That argument

---

[6] Petitioners argue that before the 1972 amendments, "it was well-settled that FIFRA's labeling requirements set only minimum standards." Pet. Br. 25-26. Even under petitioners' reading of Section 136v(b), however, it is clear that Congress intended to alter that background principle (by preempting "different" labeling requirements imposed by state statute even if they are less stringent than applicable federal requirements).

overlooks the seismic changes in the American law of product liability that occurred beginning in the 1960s, just before Congress amended FIFRA. As the American Law Institute has correctly observed, it was not until the early 1960s that "American courts began to recognize that a commercial seller of any product having a manufacturing defect should be liable in tort for harm caused by the defect regardless of the plaintiff's ability to maintain a traditional negligence or warranty action." RESTATEMENT OF THE LAW (THIRD): PRODUCTS LIABILITY § 1, cmt. a (1998). Moreover, while "liability for manufacturing defects has a long history in the common law," the "[i]mposition of liability for design defects and for defects based on inadequate instructions was relatively infrequent until the late 1960s and early 1970s." *Ibid.* The widespread acceptance of strict liability, the elimination of the privity requirement (allowing consumers to bring actions directly against product manufacturers who were one or two steps removed in the distribution chain), and the growing use of design defect and failure-to-warn theories, all followed closely upon the ALI's publication in 1965 of the RESTATEMENT (SECOND) OF TORTS, which included the highly influential Section 402A.

To the extent Congress has acted against a backdrop of tort litigation predating these seminal developments, it was tort litigation that looked quite different. By their very nature, manufacturing defect cases tend to focus on the failure of a single product unit (or batch of products) to conform to the manufacturer's own design specifications. In contrast, claims of design defect and inadequate labeling ordinarily target shortcomings of *all* specimens of a product, and they call upon juries (or judges) to determine whether "the manufacturer's design specifications * * * themselves create unreasonable risks" (an inquiry that, in turn, "requires reference to a standard outside the specifications"). RESTATEMENT OF THE LAW (THIRD): PRODUCTS LIABILITY § 2, cmt. d; see also *id.* § 1, cmt. a. To decide such issues, juries (or judges) must engage in risk-utility balancing that is analogous to the inquiry conducted by a regulatory agency (except that it occurs within the narrow

confines of a single tort lawsuit, with its evidentiary limitations and exclusive focus on the plaintiff's specific injury).

It is these fundamental changes in American product liability law, together with the more recent rise of mass tort litigation and large punitive damages awards, that have transformed state tort law into one of the most powerful means of imposing legal requirements on manufacturers and other business defendants. See Hensler, *The New Social Policy Torts: Litigation As A Legislative Strategy, Some Preliminary Thoughts On A New Research Project*, 51 DEPAUL L. REV. 493, 498 (2001) ("What seems to most distinguish the new tort actions from conventional damage class actions is that, in addition to seeking damages and enforcement of current regulations, the plaintiffs seek to change the rules that govern industry-wide business practices."). In recent years, for example, plaintiffs (including state attorneys general) in tort suits brought against the tobacco, gun, and managed care industries have sought changes, respectively, in the defendants' marketing policies, product design, and coverage decision-making processes. *Ibid.* In light of these developments, the pre-1972 decisions cited by petitioners seem almost quaint.[7]

Given the increasingly significant regulatory impact of tort law, petitioners' proposed distinction between positive regulations and common-law requirements is difficult to view as anything other than an elevation of form over substance. The timing of these developments might also help to explain why "no witness or Member of Congress ever suggested that the [1972 FIFRA amendments] would shield pesticide manufacturers from product liability tort suits." Pet. Br. 26.[8]

---

[7] Compare also No. 04-81 Pet. for Certiorari, *BASF* v. *Peterson* (filed July 16, 2004) (seeking review of decision upholding Minnesota jury's $52 million judgment against pesticide manufacturer for alleged labeling-related defects, in nationwide class action based solely on New Jersey law).

[8] Petitioners suggest that upholding the preemption defense in this case

D. Excluding Common-Law Requirements Would Lead To Absurd Results

In light of the powerful regulatory function played by tort litigation today, it would be anomalous to read FIFRA's preemption clause as excluding requirements based in state common law. But there are four other reasons why that result is nonsensical and would lead to absurd results by creating an irrational and judicially unmanageable patchwork of preemption that Congress could not possibly have intended.

First, many States have codified their common-law tort regimes. See, *e.g.*, ARIZ. REV. STAT. ANN. §§ 12-681 to -686 (1992); CONN. GEN. STAT. §§ 52-572m to 52-572q (2004); IND. CODE ANN. § 33-1-1.5-1 to 33-1-1.5-10 (West 1983 & Supp. 1996); LA. REV. STAT. ANN. §§ 9:2800.51 to 9:2800.59 (West 1991); OHIO REV. CODE ANN. §§ 2307.71 to 2307.80 (Baldwin 1996); S.C. CODE ANN. §§ 15-73-10 to 15-73-30 (Law. Co-op. 1993). See generally Hermann & Ritts, *Preemption and Medical Devices: A Response to Adler and Mann*, 51 FOOD & DRUG L.J. 1, 9 n.41 (1996) (collecting other statutes). Under petitioners' view, tort requirements in these jurisdictions would be preempted but identical common-law requirements in neighboring States would not. Why should such an absurd design be attributed to Congress?[9]

---

would be "contrary to Congress's central aim in the 1972 Act to protect the public from dangerous chemicals." Pet. Br. 14. But Congress had multiple aims in enacting and amending FIFRA – including the creation of a uniform national regime of labeling. Moreover, Congress chose *other means* of achieving the goal of protecting the public – such as the conferral of greater regulatory authority on the federal government.

[9] Notably, these codifications are not just a recent phenomenon. South Carolina, for example, adopted a product liability statute in 1962, and Maine followed suit in 1973. See S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1993) (adopted 1962); ME. REV. STAT. ANN. tit. 14, § 221 (West 1980) (adopted 1973). Thus, at the time Congress amended FIFRA in 1972 and 1978, this patchwork was already in existence.

Second, some States that have not enacted comprehensive product liability or tort statutes have nonetheless passed more limited tort reform measures. As a result of such measures, tort claims in these States are based on a hybrid of common law and positive law. Indeed, Texas is a prime example. See TEX. CIV. PRAC. & REM. CODE § 82.001 *et seq.* (Vernon 1997); see generally Comment, *The Products Liability Act of 1993: How It Changes Texas Law*, 45 BAYLOR L. REV. 633, 635 (Summer 1993) ("Though hardly an 'overhaul' of products liability law, the Act must * * * be examined and its effect on the common law determined."). Thus, Texas has prescribed *by statute* the standards that must be satisfied in any product liability action alleging a design defect. TEX. CIV. PRAC. & REM. CODE § 82.005 (Vernon 1997). Given the hybrid nature of tort claims in jurisdictions such as Texas, it would be utterly unmanageable – and require a time-consuming predicate inquiry into state tort law – for preemption to turn on whether a tort-based requirement is rooted in a statute as opposed to the common law.

Third, the common law of many States originated in early *statutes* or *constitutional provisions* adopting the English common law wholesale as the law of the State. For example, "[i]n 1819, the territorial legislature of Florida adopted a statute declaring the common law of England to be of force in Florida. The statute, in modified form but unchanged as to substance, is still in effect * * * ." *Coastal Petroleum Co.* v. *American Cyanamid Co.*, 492 So. 2d 339, 347 (Fla. 1986) (Boyd, J., dissenting) (discussing FLA. STAT. ANN. § 2.01 (1985)), cert. denied, 479 U.S. 1065 (1987). The same is true of many other States – including Texas. *State Farm Fire & Casualty Co.* v. *Gandy*, 925 S.W.2d 696, 706 (Tex. 1996) (explaining that on January 20, 1840, "the Congress of the Republic of Texas adopted the common law") (citing TEX. CIV. PRAC. & REM. CODE § 5.001) (Vernon 2002).[10] Since state common-law

---

[10] See also MD. CONST. art. 5; ALA. CODE § 1-3-1 (1977); CAL. CIVIL CODE § 22.2; COLO. REV. STAT. ANN. § 2-4-211; see generally Bradley & Goldsmith, *Customary International Law As Federal Common Law:*

doctrines evolved from these early English sources, whose legitimacy and force are in turn contingent upon provisions of state positive law, it makes little sense to treat common-law requirements as qualitatively different from statutes.

Fourth, reliance on a distinction between common-law and statutory requirements is especially odd in the area of tort law, where "[c]ompendia such as the torts Restatements help to blur the line between statutes and case law." Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413, 426 (1999). As Professor Bernstein has correctly explained:

> The traditional Restatement mission was to extract a code of blackletter out of case law, relying mostly on judges' *ratios decidendi* but adding a dose of improvement. The apparatus first makes codification out of case holdings and then cycles back to influence the outcome of case holdings with codification. As if this mechanism were not a sufficient muddying of the distinction between statutes and case law, the Third Restatement chose, for the first time, to "restate" statutes as well as case holdings; in Comments to the products liability blackletter, the Third Restatement relies in part on tort reform statutes to support its claim of a trend or direction in the courts.

Ibid. For this reason as well, it makes no sense to read into Section 136v(b) an exception for state requirements that happen to be rooted in the common law.

II. FIFRA PREEMPTS STATE REQUIREMENTS EVEN IN THE ABSENCE OF A COUNTERPART EPA REGULATION

Petitioners also contend that because EPA has declined to regulate product efficacy, FIFRA's preemption clause does not

---

A Critique of the Modern Position, 110 HARV. L. REV. 815, 870 n.345 (1997) ("[M]ost states have receiving statutes that incorporate as rules of decision at least part of the common law of England."); Note, *English Common Law and Indiana Jurisprudence*, 30 IND. L. REV. 409, 409-10 & nn.2-4 (1997) (discussing and citing many such "reception" statutes).

prevent the States from imposing requirements relating to pesticide labeling in that area. Pet. Br. 29-37. The Fifth Circuit rejected that argument as contrary to FIFRA's language, explaining that a decision by EPA not to regulate would not "alter the plain meaning of § 136v(b) nor avoid preemption of a claim that has the effect of imposing labeling requirements." Pet. App. 14a-15. "FIFRA's text," the court of appeals reasoned, simply "does not define the scope of FIFRA's preemption clause to be a function of existing EPA regulations." Pet. App. 13a. Thus, even in the absence of labeling requirements imposed by EPA, state requirements are preempted because they "would clearly be * * * 'in addition to or different from those' required under FIFRA." Pet. App. 15a.

Here again, the Fifth Circuit read the statute correctly: Nothing in the text of Section 136v(b) conditions preemption of state-law requirements on the existence of an EPA regulation on the same subject matter.[11] Petitioners' contrary argument fails for multiple reasons. First, Section 136v(b) preempts *any* requirement for labeling or packaging – no distinction is made between requirements (like efficacy) for which the EPA can waive testing, and requirements for which it cannot. Moreover, Congress knows how to make preemption turn on whether an agency has acted by imposing requirements governing the same subject matter or risk. The lack of any such language in FIFRA speaks volumes. Finally, FIFRA preempts requirements for labeling "in addition to or different from" those imposed under FIFRA. The most natural interpretation of that phrase, we submit, clearly encompasses petitioners' state law claims (even those that allegedly mirror federal requirements). If permitted to proceed, petitioners' claims would impose state "requirements" relating to Strongarm's labeling

[11] As respondent demonstrates (Resp. Br. 8-10), the Fifth Circuit was mistaken to the extent that it assumed (see Pet. App. 14a-15a) that EPA does not regulate the accuracy of labeling statements concerning product efficacy.

that are "in addition to or different from" the requirements imposed by FIFRA itself on the product's labeling.

A. In Contrast To Other Preemption Clauses, Section 136v(b) Does Not Condition Preemption On The Existence Of A Counterpart Federal Regulation

Petitioners point out that, "[i]n 1978, Congress amended FIFRA by conferring on EPA the authority it had requested to waive efficacy requirements" (Pet. Br. 31 (citing 7 U.S.C. § 136a(c)(5)); that the agency has "waived its review of proposed label claims relating to pesticide efficacy" for most products (including Strongarm, the pesticide at issue in this case (*ibid.*)); and that EPA therefore "reviews pesticide labels for the adequacy of claims relating to human health and the natural environment – but *not* for 'target area phytotoxicity'" (*ibid.*). Thus, petitioners reason, "there was no FIFRA or EPA labeling 'requirement' to preempt the farmers' suit." Pet. Br. 33. This argument rests not only on an erroneous factual premise (see note 11, *supra*) but also, as explained below, on a flawed interpretation of Section 136v(b).

Section 136v(b) 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." 7 U.S.C. § 136v(b) (emphasis added). Contrary to petitioners' 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" did not engraft an exception on Section 136v(b). See *Etcheverry* v. *Tri-Ag Servs., Inc.*, 993 P.2d 366, 375-76 (Cal. 2000). In fact, Section 136a(c)(5) says nothing at all about preemption; it concerns instead which pesticides may be "register[ed]" by the 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 theory offered by petitioners.

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 many other preemption clauses. For example, the preemption clause of the National Traffic and Motor Vehicle Safety Act provides:

> *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). Other examples abound. See, *e.g.*, Radiation Control for Health and Safety Act, 21 U.S.C. § 360ss ("*Whenever any [federal] standard* prescribed * * * with respect to an aspect of performance of an electronic product *is in effect*, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, any standard *which is applicable to the same aspect of performance* of such product and which is not identical to the Federal Standard.") (emphasis added); accord Flammable Fabrics Act, 15 U.S.C. § 1203(a); Consumer Product Safety Act, 15 U.S.C. § 2075(a); National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5403(d).[12] Given the frequency with which Congress expressly conditions preemption on the existence of a counterpart federal standard, the absence of similar language in Section 136v(b) goes far toward refuting petitioners' reading.

---

[12] See also 49 U.S.C. § 20106 (state may adopt a regulation "until the Secretary of Transportation prescribes a regulation"); 15 U.S.C. § 2617 ("If the Administrator requires by a rule * * * the testing of a chemical substance or mixture, no State * * * may continue [testing] * * * for purposes similar to those for which testing is required under such rule.").

Notably, Congress also knows how to carve out *exceptions* to express preemption commands, and has done so in many other statutes (but again, not in FIFRA). For example, the preemption clause of the Boat Safety Act 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. FIFRA includes no exception for situations where the EPA has waived requirements or declined to issue a regulation governing the same subject matter.

Nor does FIFRA's preemption clause grant EPA any authority to *exempt* state labeling requirements from preemption. Significantly, 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 authority under certain circumstances to exempt state requirements from preemption under the Flammable Fabrics Act); *id.* § 1476(c) (same under the Consumer Product Safety Act); accord 21 U.S.C. § 360k(b); 46 U.S.C. §§ 4305, 4306; 15 U.S.C. § 2617(b). And, of course, unlike many other preemption clauses, FIFRA includes no "savings" clause. These contrasting statutory provisions confirm the plain meaning of Section 136v(b) as preempting state labeling requirements even when no counterpart federal regulation exists.

B. The State Requirements Underlying Petitioners' Claims Are "In Addition To Or Different From" The Requirements Imposed By FIFRA Itself

Petitioners appear to believe that Section 136v(b)'s reference to "different" or "addition[al]" requirements supports their argument that express preemption depends on the existence of

a counterpart federal requirement. In fact, that phrase refutes petitioners' reading.

Section 136v(b) preempts "any" state requirements relating to labeling or packaging that are "in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). As respondent demonstrates (see Resp. Br. 7-10, 31-32), FIFRA imposes a wide array of requirements on pesticide labeling (as do the EPA's regulations). Moreover, it is undisputed that *FIFRA itself* imposes certain requirements on Strongarm's labeling. See 7 U.S.C. §§ 136j(a)(1), 136(q). At a minimum, the requirements imposed by petitioners' claims are "in addition to or different from" these statutorily imposed requirements. They are also "in addition to or different from" a variety of requirements imposed by EPA's regulations.

Section 136v(b)'s reference to "different" state requirements easily encompasses two situations. First, it encompasses all state requirements as to which federal requirements on the same subject matter exist, but the content of the state and federal duties or obligations differs. To take a concrete example, EPA's imposition of a requirement concerning the wording and coloring of a particular hazard warning would preempt a state labeling requirement that the wording and coloring be different. Second, and fatally for petitioners' "counterpart federal requirement" argument, the word "different" also encompasses all state requirements that relate to *different subject matters* than those covered by existing federal requirements (whether based in FIFRA itself or in the EPA's regulations). Thus, in the example just given of EPA's imposition of a requirement concerning the wording and coloring of a particular hazard warning, Section 136v(b) would preempt a state labeling requirement mandating a particular organization of the labeling. Significantly, the state requirement in this example would be preempted as "different" even in the *absence* of a federal requirement relating to the organization of the product labeling. In both of these situations, the state requirements would be "different" from the federal requirements under the ordinary meaning of that term.

What then does "in addition to" mean? Congress did not say that only state requirements that are "different from" federal requirements are preempted; it said that requirements are preempted if they are either "different from" *or "in addition to"* federal requirements. That language cannot be surplusage. See, *e.g.*, *Doe* v. *Chao*, 124 S. Ct. 1204, 1214 (2004) (quoting *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001)) ("It is a cardinal principle of statutory construction that * * * no clause, sentence, or word shall be superfluous, void, or insignificant.").

The only independent meaning that "in addition to" can have in the example given above is "identical to." It cannot signify a state requirement that deals with the same subject matter as an existing federal labeling requirement but that differs in the content of the obligations it imposes, because that is already captured by "different." A state requirement that warnings be printed in red is "different" from a federal requirement that they be printed in blue. And it cannot signify state requirements that deal with subjects as to which no federal requirements are in place. That, too, is a "different" state requirement. All that remains are situations where the state and federal requirements cover the same subject matter *and* are identical in content.[13]

---

[13] Nothing in *Medtronic* is to the contrary. Although the preemption clause in the MDA contains the phrase "different from or in addition to," 21 U.S.C. § 360k(a), it is triggered only where a federal requirement is "applicable" to the device in question, and (consistent with that language) all parties agreed in *Medtronic* that preemption was triggered under the MDA *only* when a counterpart federal requirement is in place. More importantly, this Court's conclusion in *Medtronic* that "different from or in addition to" did not cover identical state requirements hinged on an FDA interpretation to that effect. See *Medtronic*, 518 U.S. at 495-96; 21 C.F.R. § 808.1(d)(2). Thus, the Court had no occasion in *Medtronic* to conduct an independent analysis of the phrase "different from or in addition to," much less to examine its meaning in the quite different context of a preemption clause such as FIFRA's. See also *United States* v. *Locke*, 529 U.S. 89, 115 (2000) (rejecting argument for exception to preemption on ground that "state rules supplement, or even mirror, federal requirements").

This interpretation is consistent with the ordinary meaning of "in addition to." State law that imposes requirements that parallel federal requirements plainly "add" to the federal obligations. If the EPA forbids misbranding and so does a State, the state requirement is "in addition to" the federal requirement even if it simply imposes another layer of legal obligations.

Finally, this common-sense reading of Section 136v(b)'s language is confirmed by several other express preemption clauses that nullify state requirements that are "different from" or "in addition to" federal requirements – but make an exception for state requirements that are "consistent" with the federal standards. See 21 U.S.C. §§ 678, 1052(a). If "different from or in addition to" already excluded identical requirements, there would have been no need for Congress to include such an exception. Thus, Congress knows how to exclude "identical" state requirements from an express preemption command, and has not done so in Section 136v(b). See also page 26, *supra*. Accordingly, petitioners' labeling-related claims are expressly preempted even if they parallel the federal requirements.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBIN S. CONRAD
STEPHANIE A. MARTZ
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ALAN UNTEREINER*
DAMON TAAFFE
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

NOVEMBER 2004

* *Counsel of Record*