Case Nos. 10-35458, 10-35592, and 10-35611 (consolidated)

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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TIMM ADAMS, et al.,

Plaintiffs,

and

CLINGER GROWER GROUP; FUNK GROWER GROUP; HANSEN GROWER GROUP; JENTZCH-KEARL GROWER GROUP,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

and

E.I. DU PONT DE NEMOURS AND COMPANY,

Defendant-Appellant.

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On Appeal from the United States District Court, District of Idaho

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# BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN CHEMISTRY COUNCIL, CROPLIFE AMERICA, AND THE NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF DEFENDANT-APPELLANT E. I. DU PONT DE NEMOURS AND COMPANY AND REVERSAL

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## INTEREST OF THE *AMICI CURIAE*

*Amici curiae* the Chamber of Commerce of the United States of America, the American Chemistry Council, CropLife America, and the National Council of Farmer Cooperatives are submitting this brief because they have a substantial interest in (a) the development, interpretation, and application of this Court's jurisprudence on state-law tort claims involving product stewardship initiatives and (b) federal preemption of state-law claims regarding products regulated by expert federal agencies such as the United States Environmental Protection Agency (EPA). *Amici* believe that the product liability doctrines at issue in this case threaten the interests of the businesses that *amici* represent—and society as a whole—with regard to the research, development, production, distribution, sale and/or use of a wide variety of efficacious products.

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses of every size, in every business sector, and from every geographic region of the country.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. A substantial number of ACC's members produce and distribute pesticides, which like all pesticide products are

comprehensively regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), codified at 7 U.S.C. §§ 136-136(y).

CropLife America (CLA) is the national trade association for the plant science industry. Its member companies develop, produce, sell, and distribute virtually all of the agricultural crop protection pesticides and biotechnology products used by American farmers to provide consumers with safe, affordable, and abundant food and fiber.

The National Council of Farmer Cooperatives (NCFC) is a national trade association founded in 1929 to represent America's farmer cooperatives. NCFC's membership includes fifty regional marketing, supply, bargaining, and farm credit bank cooperatives, as well as state councils of cooperatives across the United States. NCFC constituent members represent nearly 3,000 farmer cooperatives across the country. Its members include a majority of America's two million farmers and ranchers. NCFC's mission is to advance the business and policy interests of America's farmer cooperatives and farmer-owned enterprises.

A primary goal of all of the *amici* is to represent the interests of their members by filing *amicus curiae* briefs in cases involving issues of significant importance to the businesses they represent. Unquestionably, this is such a case. *Amici* believe that society benefits substantially from voluntary product stewardship initiatives, and that the imposition of civil liability deriving solely

from the development of these initiatives both violates fundamental principles of tort law and deters forward-thinking, shared efforts on the part of business, government and consumers to enhance product safety. Further, *amici* believe that consumer protection is significantly strengthened by preemption of any type of tort claim that is based on a state-law duty which diverges from, conflicts with, or otherwise undermines federal safety regulation, especially in highly regulated areas such as pesticide product labeling and warnings, where nationally uniform regulation is critical to safe and proper usage.

## SUMMARY OF ARGUMENT

The district court in this case committed two critical errors that transcend the singular interests of Defendant-Appellant E. I. du Pont de Nemours and Company ("DuPont") and impair the broader interests represented by the *amici.* First, the district court erred when it held that DuPont's voluntary product stewardship initiative, without more, was an assumed duty capable of subjecting the company to tort liability. *See Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009). Second, the district court erred when it permitted the jury to consider plaintiffs' attack on the adequacy of the label warnings on DuPont's product, Oust®, as such claims are expressly preempted under FIFRA, particularly in light of EPA's testimony that Oust® was not misbranded. *See Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005).

## ARGUMENT

### I. CONTRARY TO THE DISTRICT COURT'S ANALYSIS IN THIS CASE, PRODUCT STEWARDSHIP INITIATIVES SHOULD NOT BE THE BASIS OF AN ASSUMED DUTY IN TORT

Henry David Thoreau once stated that it is not what you look at that matters, it is what you see. For American businesses, this concept has been captured in the development and production of innovative products that have revolutionized the world as we know it. In recent years, businesses have undertaken to expand their creative efforts beyond the mere delivery of finished goods. Through voluntary product stewardship initiatives, businesses visualize methods for enhancing the product's social and environmental impact long after the product exits the factory doors. Significantly, these initiatives reflect aspirational principles and goals that businesses and others seek to achieve regarding products. Courts should distinguish between the failure to fulfill a societal aspiration and the undertaking of an action that, if negligently performed, can result in civil liability.

The district court's failure to consider this distinction resulted in an improper jury instruction and verdict form on the issue of product stewardship, both of which improperly referenced and confused DuPont's stewardship program and assumed duty principles. *See* Appellant E.I. du Pont de Nemours and Company's First Cross-Appeal Brief ("DuPont Br.") at 31. These erroneous instructions were an outgrowth of the district court's earlier ruling on this issue. Specifically, the

district court held that merely by having a product stewardship initiative, DuPont assumed a duty to act in accordance with that initiative. *Id*. at 29. In the absence of an affirmative action beyond the simple expression of principles, the district court's analysis inappropriately transforms any product stewardship initiative into an inherent legal undertaking subject to tort liability. Such tort liability would unquestionably deter adoption of these types of voluntary initiatives and undermine the interests of business, government, and society in encouraging positive actions.

### A. Product Stewardship Initiatives Are Voluntary, Internal Business Policies Aimed at Increasing Societal Benefits During a Product's Life Cycle

Courts should not construe product stewardship initiatives as assumed legal duties, but rather as the collaborative and well-intentioned business policies that they are. As the Idaho Supreme Court has appropriately noted, to hold otherwise would improperly transform a corporate "'act of humanitarian assistance'" into "'an albatross of mandatory obligation.'" *Udy v. Custer Cnty.*, 34 P.3d 1069, 1073 n.3 (Idaho 2001) (citation omitted).

Product stewardship initiatives are expressions of individual companies' values and goals, and are designed to assist companies in working proactively and collaboratively with the communities that use their products to achieve positive results. Although there is no consensus on the precise definition of product

"stewardship," *amicus curiae* ACC, the leading trade association in the chemical industry, has stated that product stewardship involves "understanding, managing and communicating the impacts to human health and the environment through the life cycle of chemical products."[1] As can be seen, stewardship is premised on corporate citizenship—not legal obligations

Similarly, *amicus curiae* CLA, the leading trade association in the crop protection industry, has stated that "[s]tewardship is a life-cycle approach to product management" and is "the ethical way to manage crop protection products from their discovery and development, to their use and final disposal or phase-out."[2] CLA materials further explain that stewardship involves multiple "interrelated elements" that implicate many parties, including: research and development; manufacture of products; transport, storage, and distribution; integrated pest management; effective and responsible use; container management; and obsolete stock management. *See id*. Again, the purpose of stewardship is to safely manage efficacious products. It is a way of doing business, not a legal undertaking.

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[1] *See* Product Stewardship, *available at* http://www.americanchemistry.com/s_responsiblecare/sec_members.asp?SID=8&VID=201&CID=1320&DID=4863&RTID=0&CIDQS=&Taxonomy=&specialSearch=.

[2] *See* Crop Protection Stewardship, *available at* http://www.croplife.org/public/crop_protection_stewardship.

The ACC's "Responsible Care" program illustrates this point. In 1988, the ACC established a stewardship initiative with its member companies called the "Responsible Care" program.[3] This initiative calls on companies to implement, among other things, management systems and performance goals in order to strive for excellence in their environmental, health, safety, and security practices, and to "extend[] these best practices to business partners through the industry supply chain."[4] Although such lofty goals may be shared collectively by numerous companies, their implementation will, of course, vary from company to company depending on the individualized resources and objectives of each.

The federal government, like industry, agrees that stewardship initiatives satisfy important societal interests. EPA, for example, has instituted a voluntary product stewardship initiative aimed at improving waste management. As stated by EPA, "product stewardship calls on those in the product life cycle—manufacturers, retailers, users, and disposers—to share responsibility for reducing

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[3] *See* Responsible Care, *available at* http://www.americanchemistry.com/s_responsiblecare/sec.asp?CID=1298&DID=4841.

[4] Performance Through Responsible Care, *available at* http://www.americanchemistry.com/s_responsiblecare/doc.asp?CID=1298&DID=5084.

the environmental impacts of products."[5] EPA has further explained that the responsibility for product stewardship is shared not only by manufacturers, retailers, and consumers, but by the local, state, and federal governments as well. *See id*. If such programs were to give rise to liability in tort, the government, too, would be unable to establish such programs without fear of liability.

The United States Department of Agriculture also has several voluntary stewardship programs. One example is the Conservation Stewardship Program established by the National Resource Conservation Service (NRCS). That program "encourages producers to address resource concerns in a comprehensive manner" by improving existing conservation activities as well as "undertaking additional conservation activities."[6] Another example is NRCS's Wetland Reserve Program, which is "a voluntary program offering landowners the opportunity to protect, restore, and enhance wetlands on their property."[7] The goal of this program is "to achieve the greatest wetland functions and values, along with optimum wildlife habitat" by offering landowners "an opportunity to establish long-term

[5] Basic Information, *available at* http://www.epa.gov/wastes/partnerships/stewardship/basic.htm.

[6] *See* http://www.nrcs.usda.gov/PROGRAMS/new_csp/csp.html#describe.

[7] *See* http://www.nrcs.usda.gov/programs/wrp/.

conservation and wildlife practices and protection."[8] Here, too, tort law should not transform laudable programs into enforceable legal obligations.

These stewardship initiatives are embraced not only by industry and government, but also by farmers and producers throughout the country. Examples of producer organizations that have pursued voluntary stewardship initiatives include the following:

- National Grape Cooperative Association, Inc. (www.nationalgrape.com)—National Grape's members have been committed to improving and enhancing the quality of our nation's water resources through a number of voluntary initiatives aimed at conserving natural resources and developing sustainable viticulture.

- Southern States Cooperative, Inc. (www.southernstates.com)—A large number of the co-op's member-producers have been involved in several public and private initiatives designed to improve the water quality of the Chesapeake Bay and the Neuse River in North Carolina.

- Sun-Maid Growers of California (www.sun-maid.com)—Over the years, Sun-Maid has been involved with a number of voluntary projects to improve natural resources, including water quality.

- NORPAC Foods, Inc. (www.norpac.com)—A few years ago, NORPAC undertook a sustainability program, including adoption of specific production guidelines, in order to ensure that their products were being grown in the most sustainable manner available.

- GROWMARK, Inc. (www.growmark.com)—GROWMARK has a long history of continuously educating its farmer members on the concept of nutrient management and promoting the use of Best Agronomic Recommendations in an effort to maximize harvest yield and minimize environmental and sociologic impacts.

[8] *Id*.

These voluntary initiatives are not only prevalent, they promote positive action and fill vital gaps that cannot be reached by government regulation alone.

In summary, far from implicating a clear-cut legal standard, product stewardship programs represent wide-ranging, commendable goals set by businesses to work proactively with supply chain participants, customers, and all levels of government to enhance product safety generally. Courts have recognized as much. *See* DuPont Br. at 27-29. This Court, too, should appropriately recognize that product stewardship simply is not a one-size-fits-all concept that can, or should, be transformed into a cognizable legal duty.

### B. The Court Should Appropriately Recognize That Product Stewardship Initiatives Are Beneficial and Should Be Encouraged, Not Stifled By the Threat of Tort Liability

As demonstrated by their widespread adoption and implementation among business and encouragement by the government, stewardship initiatives are beneficial to society. Indeed, recent data show that companies employing Responsible Care programs have increased worker safety, reduced pollution, decreased reportable distribution and process safety incidents, and reduced greenhouse gas intensity. *See* Performance Through Responsible Care, *supra*; *see also* Crop Protection Stewardship, *supra* (stating that effective stewardship underpins sustainable agriculture and safeguards the environment and public health).

These beneficial initiatives should be encouraged, not stifled by the threat of tort liability. Assigning civil liability to stewardship initiatives constitutes bad policy because it would dramatically chill the continued interest of business and government to work collaboratively with communities on issues involving product safety and environmental responsibility. *See Udy*, 34 P.3d at 1073 n.3 (stating that, if past acts of humanitarian assistance become an obligation in the future, "the natural consequence will be to discourage people from assisting others in the first instance"). Dissuading and penalizing businesses from trying to achieve positive change in the larger community—effectively ensuring that no good deed will go unpunished—simply is not sound public policy. Moreover, the creation of legal duties that serve to discourage voluntary beneficial acts is a matter that should be accomplished by legislative enactment, which contemplates the greater needs of society, rather than by courts, which typically address such issues on a plaintiff-by-plaintiff basis.

In short, *amici* respectfully urge the Court in deciding this appeal to expressly recognize that product stewardship initiatives are beneficial and should be encouraged, not stifled by the threat of tort liability

### C. The Court Should Likewise Recognize That Product Stewardship Initiatives, Without More, Cannot Properly Be Construed as Legal Undertakings Subject to Civil Liability

Product manufacturers are not insurers of their products as against all possible harm, nor are they tasked with being such by federal or state laws. The very concept of product stewardship recognizes that each entity in the life cycle of a product—from government to manufacturer to supplier to consumer—has a role to play in the ultimate impact of any product. Product stewardship programs are not developed to create duties or obligations between parties, but rather are intended to encourage each individual engaged with a product to share responsibility for reducing detrimental impacts of the product, even when there is no pre-existing legal obligation to do so.

This is not to suggest, of course, that injured parties should not have the right to pursue redress when harmed by misuse or other acts of negligence involving a product. Well recognized theories of contract and tort law provide adequate protection in such circumstances. That is similarly true with regard to "assumed duty" claims. For example, it is undisputed that, at common law, if one undertakes to perform an act—referred to as an "undertaking"—one may become liable for negligently performing that act. *See* Restatement (Second) of Torts § 323 (1965). But that body of law is limited to voluntary "undertakings." It would be a perversion of law to suggest—as the district court here held—that mere

statements of high-minded business goals or aspirations, which are the essence of product stewardship programs, can alone constitute the assumption of a legal duty.

The case of *E.S. Robbins Corp. v. Eastman Chemical Co.,* 912 F. Supp. 1476 (N.D. Ala. 1995), illustrates this point. There, plaintiffs argued that the defendant chemical manufacturer assumed a higher duty of care after supplying plaintiffs with certain technical information regarding its product. The court held that, under Alabama law, defendant did not assume a duty of care through "the mere providing of instructions and suggestions," where defendant had neither *active participation* in nor *active control* over the allegedly injury-causing activity. *Id.* at 1492. Further, the court rejected the plaintiffs' arguments that defendant's product stewardship program, which sought to minimize risks associated with the handling of its products, constituted an assumed duty. *Id.* at 1492-93. The court found that, although defendant and other chemical manufacturers exchanged information and guidance materials regarding safe handling of chemical products, such exchanges of information did not constitute an industry standard and, therefore, imposed no duty on defendant. *Id.*

Similarly, this Court recently held that a corporation's statement in its code of conduct that it "will undertake affirmative measures," including various specific actions, "to implement and monitor [its corporate] standards," did *not* create a duty in contract or tort running from the corporation to plaintiffs, the alleged

beneficiaries of the promised actions. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009). Regarding the alleged tort duty, the Court explained that any actions taken by the corporation pursuant to its code of conduct were not obligatory but "gratuitous, and do not independently impose a duty on [the corporation] to protect Plaintiffs." *Id*. at 684. This Court's holding in *Doe*, moreover, is consistent with the decisions of numerous courts across the country that have uniformly held that corporate policies do not give rise to a duty in tort.[9] The same reasoning must apply to product stewardship policies.

Despite this body of law—and despite the sound policy reasons for limiting assumed duty claims to voluntary "undertakings"—the district court in this matter turned DuPont's stewardship program on its head, effectively equating DuPont's development of a product stewardship initiative with the creation of a state tort duty. By referencing both stewardship principles and assumed duty principles in the same jury instruction and portion of the verdict form, the district court erroneously instructed the jury that, in having a product stewardship program, DuPont necessarily had undertaken a legal duty. In so doing, the trial court effectively turned any failure on the part of DuPont to comply with its corporate

[9] *See, e.g., Everitt v. Gen. Elec. Co.*, 979 A.2d 760, 762-763 (N.H. 2009) (collecting cases); *Pomahac v. TrizecHahn 1065 Ave. of the Ams., L.L.C.*, 884 N.Y.S.2d 402, 405 (N.Y. App. Div. 2009); *Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 937 (Fla. 2004); *see also* DuPont Br. at 27 n.3.

stewardship initiative into negligence *per se*—even in the absence of any showing that DuPont actively participated in undertaking specific actions with regard to specific plaintiffs (let alone negligent performance of such an undertaking).

The law of assumed duty demands that some specific undertaking beyond a mere aspirational statement take place, and be performed negligently, before liability will attach. *See, e.g., Udy*, 34 P.3d at 1072-73. Disregarding this rule, the district court permitted the jury to consider not whether the specific stewardship actions performed by DuPont—if any—were negligent, but rather whether DuPont failed to comply with its own voluntary product stewardship initiative itself. As in *Udy*, the district court's analysis turned DuPont's stewardship program into "'an albatross of mandatory obligation.'" *Id*. at 1073 (citation omitted). That ruling is legally incorrect and bad policy.

Moreover, even if DuPont had undertaken specific actions in accordance with its product stewardship policy, common law permits one who undertakes a gratuitous action to stop such action without liability as long as his actions have not put the other in a worse position. *See* Restatement (Second) of Torts § 323 cmt. c ("The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. . . . The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position . . . ."). It is impossible to reconcile the rule that cessation of a

gratuitous act may not give rise to liability with the district court's jury instruction, verdict question, and ruling in this case that the mere presence of a product stewardship initiative alone is sufficient to impose a legal duty demanding either full compliance or automatic attachment of civil liability.

If the district court's stewardship analysis is permitted to stand, then any business with a product stewardship initiative could be viewed as having assumed virtually limitless duties that, in today's global economy, could potentially extend to the entire world. Under such precedent, any failure to act in strict compliance with a stewardship policy (regardless of how broad or amorphous the program might be) could result in civil liability. Such a situation would create a senseless and endless cascade of litigation that would surely clog the courts, threaten corporate livelihood, endanger voluntary interactions between government, product manufacturers, suppliers and consumers and, ultimately, erase stewardship initiatives altogether. That result should be avoided.

## II. FIFRA EXPRESSLY PREEMPTS FAILURE-TO-WARN CLAIMS—LIKE PLAINTIFFS' CLAIMS HERE—THAT ATTACK EPA-APPROVED PRECAUTIONARY LANGUAGE ON PESTICIDE LABELING

The Supreme Court held in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), that unless a pesticide product is "misbranded" under FIFRA, that statute's uniformity-of-labeling provision, 7 U.S.C. § 136v(b), expressly preempts any state-law damages claim that is based on a manufacturer's failure-to-warn about a

pesticide's risks. FIFRA expressly preempts the Plaintiffs' failure-to-warn claims here because EPA—the federal agency which Congress vested with exclusive authority to regulate the content of pesticide labeling—confirmed that DuPont's product, Oust®, was not misbranded. *See* DuPont Br. at 47. The district court erred, therefore, by submitting Plaintiffs' preempted failure-to-warn claims to the jury.

Indeed, the district court's refusal to dismiss those claims—coupled with its pretrial rulings allowing the Plaintiffs to present expert testimony second-guessing the content and wording of EPA-approved labeling that specifically warned about the off-target movement risks at issue here—is an *egregious* example of judicial interference with congressional intent. If unabashed pesticide "mislabeling" claims like those asserted by the Plaintiffs here are not expressly preempted by FIFRA, then both § 136v(b) and the Supreme Court's holding in *Bates*, are devoid of meaning. As *Bates* confirms, the role of a state under FIFRA is *not* to impose its own requirements for the content or wording of pesticide labeling, such as through imposition of state tort liability. Instead, FIFRA delegates to the states the important role of enforcing applicator compliance with the product-specific label warnings, precautionary measures, and directions for use that EPA has approved, and requires to accompany a particular product.

### A. EPA Comprehensively Regulates the Content and Wording of Pesticide Labeling

The importance of pesticide labeling in "describ[ing] how a pesticide may be used safely and effectively" cannot be overstated. 75 Fed. Reg. 51058, 51059 (2010). For example, in a recent discussion paper on a proposal to make pesticide labeling accessible through the Internet, EPA explained labeling's crucial role in the application of pesticides:

> Pesticide labeling is a *critical component* of the regulatory framework for ensuring that a pesticide's use will not cause adverse effects on man or the environment. As part of the process of registering a pesticide product, *EPA must ensure that the product's labeling is sufficient to allow a user to apply the product safely*. Registrants are responsible for ensuring that the labeling on a pesticide product accurately reflects the labeling accepted by EPA in connection with the product's registration. Pesticide users are responsible for applying the product as required by the label.

EPA Pest. Prog. Dialogue Cmte., Web-Distributed Labeling Workgroup Discussion Paper (June 4, 2009) (emphasis added).[10] Pesticide labeling contains "important information about where to use, or not use, the product," including by helping to "inform . . . decisions about whether or how to use particular pesticides to avoid . . . off-site movement." 70 Fed. Reg. 12276, 12281 (2005); *see also Fairhurst v. Hagener*, 422 F.3d 1146, 1151 (9th Cir. 2005) ("FIFRA is a labeling statute that informs the user of a pesticide how to safely use it.").

[10] *Available at* http://www.epa.gov/oppfead1/cb/ppdc/distr-labeling/june09/enforcement-paper.pdf.

Thus, "'FIFRA 'labeling' is designed to be read and followed by the end user.'" *Chem. Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 946 (9th Cir. 1992) (quoting *N.Y. State Pesticide Coal. v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989)). To underscore the importance of pesticide labeling in the proper use of pesticides, FIFRA makes it unlawful "to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G).

Under FIFRA, every pesticide not only must be granted a registration by EPA, but also accompanied by EPA-regulated and approved product labeling. *See* 7 U.S.C. § 136a (Registration of Pesticides); 40 C.F.R. § 152.130(a) (Distribution under approved labeling); *see also Bates*, 544 U.S. at 438-39 (discussing statutory scheme). Before granting a registration, EPA must determine that a pesticide's "labeling . . . compl[ies] with the requirements of [FIFRA]." 7 U.S.C. § 136a(c)(5)(B). This includes the requirement that the product not be "misbranded." *See* 40 C.F.R. § 152.112(f) ("EPA will approve an application under the criteria of FIFRA sec. 3(c)(5) only if . . . [t]he Agency has determined that the product is not misbranded as that term is defined in FIFRA sec. 2(q)"). The § 2(q) definition of "misbranded" includes a pesticide whose labeling "does not contain directions for use [or] a warning or caution statement . . . adequate to protect health and the environment." 7 U.S.C. §§ 136(q)(1)(F) & (G). The term "environment" encompasses "all plants," including agricultural crops. *Id.* § 136(j).

To implement FIFRA, EPA regulates pesticide labeling comprehensively, and on a product-by-product basis. *See* 40 C.F.R. Part 156 (Labeling Requirements for Pesticides); *see also* EPA Label Review Manual (Aug. 2010).[11] This includes requiring product-specific warning and precautionary statements for mitigation of hazards to nontarget organisms, including nontarget plants. *See* 40 C.F.R. § 156.10(i)(2) (Contents of Directions for Use); *id.* § 152.85 (Non-target Organisms); *see also id.* § 158.660 (Nontarget plant protection data requirements); *id.* § 158.130(e) ("A purpose common to all data requirements is to . . . determine the need for (and appropriate wording for) precautionary label statements to minimize the potential adverse effects to nontarget organisms."). As DuPont points out in its brief, the Oust® EPA-approved labeling expressly warned against the precise harm that is the subject matter of this litigation. *See* DuPont Br. at 48-49.

### B. Under *Bates*, § 136v(b) of FIFRA Expressly Preempts Failure-To-Warn Claims Relating To the Content or Wording of EPA-Approved Pesticide Labeling

*Bates*, an agricultural crop damage case, is the only Supreme Court decision directly addressing the preemptive scope of § 136v(b). That section declares that a "State shall not impose . . . any requirements for labeling . . . in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b). This

[11] *Available at* http://www.epa.gov/oppfead1/labeling/lrm.

provision, entitled "Uniformity," was enacted in 1972 when "growing environmental and safety concerns led Congress to undertake a comprehensive revision of FIFRA." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). During its extensive deliberations, Congress carefully considered the allocation of pesticide regulatory authority between the newly created EPA and the states in order to establish "a coordinated Federal-State administrative system to carry out the new program." *Id.* at 615 (quoting H.R. Rep. No. 92-511, at 1). Under that "regulatory partnership," the states share responsibility with EPA for regulating the sale and use of pesticides, but pesticide "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." *Id.*; *see also Bates*, 544 U.S. at 437-39; *N.Y. State Pesticide Coal. v. Jorling*, 874 F.2d at 118 ("The states have joint control with the federal government in regulating the use of pesticides . . . with the exception of the EPA's exclusive supervision of labeling.").

The Court held in *Bates* that under its interpretation,

> § 136v(b) retains a narrow, but still important, role. In the main, it pre-empts *competing state labeling standards* -- imagine 50 different labeling regimes prescribing the color, font size, and *wording of warnings* -- that would create significant inefficiencies for manufacturers. The provision also pre-empts any statutory or common-law rule that would impose a labeling requirement that *diverges from* those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements.

*Bates*, 544 U.S. at 452 (emphasis added). The Court in *Bates* also explained that "the term 'requirements' in § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties" underlying product liability claims. *Id*. at 443.

Based on the plain language of § 136v(b), the Court stated that "[f]or a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement '*for labeling* . . . .'" *Id.* at 444. The Court held that failure-to-warn claims "qualify as 'requirements for labeling' [because they] set a standard for a product's labeling that [a pesticide product's] label is alleged to have violated by containing . . . inadequate warnings." *Id.* at 446. Plaintiffs' failure-to-warn claims, therefore, satisfy this first condition for preemption under FIFRA.

Second, a claim "must impose a labeling . . . requirement that is 'in addition to or different from those required under [FIFRA].'" *Id.* at 444. The Plaintiffs' "mislabeling" (i.e., failure-to-warn) claims satisfy this second condition too. As demonstrated by Plaintiffs' expert testimony on the supposed inadequacies of the precautionary language in the EPA-approved Oust® labeling, their failure-to-warn claims are necessarily based on state tort rules which impose word-level labeling requirements that are "in addition to or different from" those that EPA imposed under FIFRA for the Oust® label. *See* DuPont Br. at 51-52.

*Bates* explains that "a manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined in FIFRA." 544 U.S. at 454. In other words, under the Court's two-prong test for FIFRA preemption, § 136v(b) expressly preempts a plaintiff's failure-to-warn claims provided that the product is not misbranded. This is because if a pesticide product is *not* misbranded under FIFRA—i.e., if the product does *not* contain warnings or directions for use that are inadequate—then a failure-to-warn claim necessarily would be based on state-law rules that impose requirements for labeling that diverge from, in other words, that are in addition to or different from, EPA's labeling requirements for that product.

Here, an EPA official testified that Oust® was not misbranded under FIFRA. *See* DuPont Br. at 48-49. That testimony on behalf of the federal agency that Congress made responsible for regulating pesticide labeling was determinative of the product's compliance with FIFRA's labeling requirements, including the prohibition against misbranding. The district court should not have permitted Plaintiffs' expert witnesses, much less the jury, to second-guess EPA's determination.

Indeed, the Supreme Court emphasized in *Bates* that "[s]tate law requirements must . . . be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards." 544 U.S. at 453; *see also id.* at 455

(Breyer, J., concurring) ("[e]mphasizing the importance of the agency's role in overseeing FIFRA's future implementation."). Due to the tremendous number and diversity of pesticide products, EPA implements FIFRA's broadly worded misbranding standards by regulating pesticide labeling on a product-by-product basis. It is EPA's product-specific labeling requirements—such as the labeling's explicit warning about off-site movement required and approved by EPA for inclusion on the Oust® labeling—that "give content" to FIFRA's misbranding standards, and represent the "requirements for labeling" that statute expressly bars state-law failure-to-warn claims from undermining. *See Bates*, 544 U.S. at 455 (Thomas, J., concurring in the judgment in part and dissenting in part) ("While States are free to impose liability predicated on a violation of the federal standards set forth in FIFRA and in accompanying regulations promulgated by the [EPA], they may not impose liability for labeling requirements predicated on distinct state standards of care."); *id*. (Breyer, J. concurring) ("[T]he federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements.").

### C. The Role of the States Is To Enforce Applicator Compliance With a Pesticide Product's EPA-Approved Labeling, Not Regulate the Content or Wording of the Labeling

Under both FIFRA and *Bates,* a state is limited to a carefully circumscribed role in enforcing FIFRA's labeling requirements. *Bates* indicates that a state can

impose either regulatory or tort liability upon a manufacturer for failure to comply with FIFRA's labeling requirements, for example, if a manufacturer were to fail to distribute a product with the labeling that EPA has reviewed, approved, and requires to accompany a product. *See* 544 U.S. at 442. But nothing in *Bates* authorizes juries to second-guess the content or wording of EPA-approved pesticide labeling in order to determine whether a product is misbranded, especially where, as here, EPA has confirmed that a product's labeling complies with FIFRA's labeling requirements and is not misbranded.

*Bates* makes it clear that under § 136v(b), the most a state can do in terms of pesticide labeling is to "duplicate federal requirements," that is, impose state requirements which are "*genuinely* equivalent" to federal requirements. *Id.* at 442, 454. The Supreme Court recognized in *Bates* that allowing a state, through its tort system, to impose its own additional or different requirements for the content or wording of a pesticide product's labeling would defeat § 136v(b)'s "important role . . . pre-empt[ing] competing state labeling standards," including as to the "wording of warnings." *Id.* at 452. As a result, a state's role in enforcing FIFRA's labeling requirements does not extend to enabling tort litigation that imposes liability for failure to warn claims—such as Plaintiffs' claims here—that challenge the content or wording of label warnings or precautions that EPA has reviewed and approved.

Instead, FIFRA assigns the states the critical responsibility of enforcing user and applicator compliance with a product's EPA-approved labeling. *See* 7 U.S.C. § 136w-1(a) ("a State shall have primary enforcement responsibility for pesticide use violations"); *id*. § 136j(a)(2)(G). This congressionally mandated allocation of responsibility between the U.S. EPA and the states makes eminent good sense:

- EPA has the necessary personnel, expertise, experience, funding, and national perspective, and possesses or has access to the pesticide registration data (e.g., phytotoxicity data; environmental movement data), required to comprehensively and uniformly regulate the warnings, precautionary measures, and directions for use on a nationally distributed pesticide product's labeling.

- Each state, through its own agricultural and pesticide regulatory agencies, has the on-the-ground personnel needed to supplement EPA's efforts in ensuring applicator compliance with the label warnings, precautionary measures, and use directions that EPA has approved and pesticide registrants are required to distribute with their products.

- Pesticide registrants, which invest tens of millions of dollars in regulatory compliance, can devote their resources to cooperating with EPA in developing the best possible product labeling for promoting safe and effective use of their products—without those efforts being undermined by the vagaries of state

tort laws, the skills of trial lawyers, and/or the whims of juries throughout the United States.

Imposing state tort liability upon a highly reputable pesticide manufacturer such as DuPont for "mislabeling" or "failure to warn" is particularly troublesome where, as here, (i) the record establishes that DuPont distributed an effective pesticide product that fully complied with FIFRA's labeling requirements as implemented by EPA, and (ii) the product is purchased by a governmental entity that is designated by federal law to possess special expertise in pesticide use on public land and was specifically required by federal law to study the environmental impacts of any action it takes, including the application of Oust®. Imposition of such state tort liability upon a manufacturer that merely did what federal law required it to do turns the FIFRA statutory scheme on its head. This is further reason why the district court's erroneous refusal to hold that the Plaintiffs' failure-to-warn claims are preempted should be reversed.

## CONCLUSION

Permitting plaintiffs to attach a legal duty solely to the presence of a product stewardship initiative is contrary to the law of assumed duties, discourages voluntary business actions that serve to benefit society, and results in de facto regulation of such worthwhile business efforts by litigation. Further, if pesticide "mislabeling" claims which seek to contradict EPA-approved warnings precisely

targeted to the injury alleged by plaintiffs are not expressly preempted by FIFRA, then both § 136v(b) and the Supreme Court's holding in *Bates*, are meaningless. For these reasons, *amici* respectfully urge this Court to reverse the rulings of the district court on these issues.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing *amici* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Lawrence S. Ebner
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## CERTIFICATE OF SERVICE AND FILING

I certify that on the 4th day of October 2010, I electronically filed the foregoing Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, the American Chemistry Council, CropLife America, and the National Council of Farmer Cooperatives in Support of Defendant-Appellant E.I. du Pont de Nemours and Company and Reversal, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in this case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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