compliance. In *Pliva, Inc. v. Mensing*,[61] federal law required generic drugs to be labeled the same as the brand name counterpart, while state tort law required drug labels to contain adequate warnings to render use of the drug reasonably safe. There had been accumulating evidence that long-term use of the drug metoclopramide carried a significant risk of severe neurological damage, but manufacturers of generic metoclopramide neither amended their warning labels nor sought to have the Food and Drug Administration require the brand name manufacturer to include stronger label warnings, which consequently would have led to stronger labeling of the generic. Five Justices held that state tort law was preempted.[62] It was impossible to comply both with the state law duty to change the label and the federal law duty to keep the label the same.[63] The four dissenting Justices argued that inability to change the labels unilaterally was insufficient, standing alone, to establish a defense based on impossibility.[64] Emphasizing the federal duty to monitor the safety of their drugs, the dissenters would require that the generic manufacturers also show some effort to effectuate a labeling change through the FDA.

In contrast to *Pliva, Inc. v. Mensing*, the Court found no preemption in *Wyeth v. Levine*,[65] a state tort action against a brand-name drug manufacturer based on inadequate labeling. A brand-name drug manufacturer, unlike makers of generic drugs, could unilaterally strengthen labeling under federal regulations, subject to subsequent FDA override, and thereby independently meet state tort law requirements. In another case of alleged impossibility, it was held possible for an employer to comply both with a state law mandating leave and reinstatement to pregnant employees and with a federal law prohibiting employment discrimination on the basis of pregnancy.[66] Similarly, when faced with both federal and state standards on the ripeness of avocados, the Court discerned that the federal

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[61] 564 U.S. ___, No. 09–993, slip op. (2011).

[62] 564 U.S. ___, No. 09–993, slip op. (2011) (Thomas, J.).

[63] Justice Thomas, joined on point by three others, characterized the Supremacy Clause phrase "any [state law] to the Contrary notwithstanding" as a *non obtstante* provision that "suggests that federal law should be understood to impliedly repeal conflicting state law" and indicates limits on the extent to which courts should seek to reconcile federal and state law in preemption cases. 564 U.S. ___, No. 09–993, slip op. at 15–17 (2011) (Thomas, J.).

[64] 564 U.S. ___, No. 09–993, slip op. (2011) (Sotomayor, J., dissenting).

[65] 555 U.S. ___, No. 06–1249, slip op. (2009).

[66] California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). *Compare* Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942) (federal law preempts more exacting state standards, even though both could be complied with and state standards were harmonious with purposes of federal law).