September 10, 2020

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Chief Justice Tani Gorre Cantil-Sakauye
& Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Johnson v. Monsanto Co., No. S264158

Dear Chief Justice Cantil-Sakauye
& Associate Justices:

In accordance with California Rule of Court 8.500(g), I am writing on behalf of the Atlantic Legal Foundation to urge the Court to grant the petition for review filed by Monsanto Company on August 31, 2020 in the above-referenced appeal.*

Founded in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in the courtroom, and school choice. With the benefit of guidance from the legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors or Advisory Council, the Foundation pursues its mission by

* No party or counsel for a party authored or paid for this amicus letter in whole or part.

participating as *amicus curiae* in carefully selected appeals before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

Johnson v. Monsanto Co. is a personal injury case of particular interest to the Atlantic Legal Foundation because federal preemption of state-law failure-to-warn claims involving products that are distributed with nationally uniform labeling containing federally regulated health and safety warnings is a subject that implicates the relationship between federal regulatory agencies and state courts, as well as sound science and free enterprise. The fact that *Johnson* arises in California, which is the nation's most economically important agricultural state, and challenges the adequacy of the federally regulated health and safety warnings on the labeling of Roundup® —the State's and nation's most widely used agricultural and residential herbicide—makes the case even more significant.

1. The extent to which the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, preempts pesticide-related failure-to-warn claims is a question that is as important today as it was when this Court granted review of that issue two decades ago in *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, an agricultural crop damage case. Indeed, the scope of FIFRA tort preemption is an issue that is even more timely now. It requires this Court's immediate further attention because of the continuing proliferation of individual, multi-plaintiff, and class-action personal injury suits premised on allegations that a pesticide's label warnings are inadequate for purposes of state tort law even though FIFRA vests the U.S. Environmental Protection Agency (EPA) with exclusive authority to regulate pesticide label warnings based on its own in-depth review of extensive, product-specific, toxicology and other scientific data.

The onslaught of many thousands of Roundup® cases—fueled by attorney advertising seeking cancer victims—underscores the reason why this Court will not find a better or more timely vehicle than *Johnson* to address, for the first time, FIFRA preemption of failure-to-warn claims in the personal injury context. *Johnson*, like virtually all

other Roundup® cases, alleges that the product's labeling failed to warn that glyphosate, the active ingredient in Roundup®, causes cancer. EPA, however, after years of extensive review, has unequivocally determined that use of glyphosate does not pose a risk of cancer. In fact, EPA not only has continued to approve the use of glyphosate products with labeling that contains no cancer warning, but also has taken the extraordinary step of notifying glyphosate product registrants that any state-imposed requirement for a cancer warning (such as a California Proposition 65 cancer warning) on glyphosate labeling would be false and misleading and render their products misbranded in violation of FIFRA. *See* Monsanto Petition for Review at 19 n.4; 25.

2. The still-unsettled jurisprudence on FIFRA preemption of failure-to-warn claims, and the resultant need for this Court's additional guidance to California state courts and litigants, is an equally important reason why Monsanto's petition for review should be granted.

In *Etcheverry* this Court "concluded that FIFRA preempts state law claims for failure to warn of the risks of using a pesticide." 22 Cal.4th at 334. That holding is based on FIFRA's express preemption provision, 7 U.S.C. § 136v(b), which under the heading "Uniformity," declares that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those imposed under [FIFRA]."

The U.S. Supreme Court subsequently addressed the preemptive scope of § 136v(b) in *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431 (2005), another agricultural crop damage case. The Court explained that § 136v(b) plays the important role of prohibiting "competing state labeling standards — imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings." *Id.* at 452. Tracking the language of § 136v(b), and *consistent* with this Court's overarching conclusion in *Etcheverry*, the Supreme Court held in *Bates* that "fraud and negligent-failure-to-warn claims are premised on common-law rules that qualify as 'requirements for labeling' . . . . These rules set a standard for a product's labeling that the . . . label is alleged to have violated by containing . . . inadequate warnings." *Id.* at 446.

Again tracking § 136v(b)'s language, *Bates* further held that a state-law requirement for labeling (such as a failure-to-warn claim) is expressly preempted if it is "in addition to or different from" EPA's labeling requirements. *Id.* at 447. The Court thus indicated that § 136v(b) would not apply to "a state-law labeling requirement if it is equivalent to, and fully consistent with, FIFRA's misbranding provision," *id.*, which broadly defines a "misbranded" pesticide product to include, *inter alia*, labeling that does not contain adequate health and safety warnings. *See* 7 U.S.C. § 136(q)(1)(g).

Bates makes it clear, contrary to the holdings of the Court of Appeal in *Johnson* and other courts, that this equivalent-state-requirements exclusion does not mean that failure-to-warn claims automatically escape preemption merely because California, like FIFRA, imposes a general duty to distribute products with adequate warnings. Instead, *Bates* holds that to avoid § 136v(b)'s preemptive sweep, a state-law labeling requirement must be "equivalent" or "parallel" to "the relevant FIFRA misbranding standards, *as well as any regulations that add content to those standards*." *Bates*, 544 U.S. at 454 (emphasis added); *see also id.* at 452 ("§136v(b) 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*") (emphasis added); *id.* at 453 ("State-law requirements must also be *measured against any relevant EPA regulations* that give content to FIFRA's misbranding standards.") (emphasis added).

The Court of Appeal's superficial and facile application of *Bate*s allows the equivalency exception to swallow the preemption rule by ignoring the way that EPA *actually* regulates pesticide labeling: Using its labeling regulations as a starting point, *see* 40 C.F.R. Part 156, EPA determines what warnings and other precautionary information should be included on a specific pesticide product's labeling by conducting continual, in-depth, scientific reviews of each pesticide active ingredient's potential human health and environmental risks. As indicated above, EPA has determined based on its own exhaustive scientific analysis that a cancer warning is not warranted, and instead, would be false and misleading, for products containing glyphosate.

3. This Court should grant Monsanto's petition also because neither *Bates* nor *Etcheverry* addressed implied preemption under FIFRA. Subsequent product liability case law, such as *Pliva, Inc. v. Mensing*, 564 U.S. 604 (2011) and *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013), both prescription drug cases, establishes that separately from express preemption, a state-law failure-to-warn claim is impliedly preempted where, as in the case of Roundup®, it would be impossible for a product manufacturer to comply with a state-law duty to add a label warning (here, a cancer warning) without violating federal law.

FIFRA makes it unlawful to alter pesticide product labeling to add a health or safety warning without EPA's prior approval. *See* 7 U.S.C. § 136j(a)(2)(A); *see also* 40 C.F.R. § 152.46(a)(1). Thus, in view of EPA's determination that adding a cancer warning to glyphosate labeling would be false and misleading and in violation of FIFRA's misbranding prohibition, it would be "impossible for [Monsanto] to comply with both [a] state-law duty to change the label and [its] federal law duty to keep the label the same." *Mensing*, 564 U.S. at 618.

Moreover, in *Johnson* the Court of Appeal agreed that under the Supreme Court's reasoning in *Wyeth v. Levine*, 555 U.S. 555 (2009) (also a prescription drug implied preemption case), a pesticide manufacturer defendant "may establish a preemption defense to a state failure-to-warn claim by providing clear evidence that the EPA would not have approved a label change." *Johnson* Opinion at 48 (citing *Wyeth*, 555 U.S. at 571). Further, the Court of Appeal acknowledged that under *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019), "the question of whether a federal agency would not have approved a label change (thus preempting a state-law failure-to-warn claim) is for a judge, not a jury." Opinion at 45-46.

For these reasons, and those presented in Monsanto's petition, the Atlantic Legal Foundation strongly recommends that this Court grant review.

Respectfully submitted,

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Chairman and President
Atlantic Legal Foundation