October 11, 2021

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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: Pilliod v. Monsanto Company, No. S270957

Dear Chief Justice Cantil-Sakauye
& Associate Justices:

In accordance with California Rule of Court 8.500(g), we are writing on behalf of the Atlantic Legal Foundation to urge the Court to grant the Petition For Review filed by Monsanto Company on September 20, 2021.*

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance civil justice and the rule of law by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and 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 U.S. Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

Monsanto's appeal falls squarely within the Atlantic Legal Foundation's sound-science-in-the-courtroom mission. The reasons why the Court should grant review are compelling.

1. The Petition presents important federal preemption questions concerning pesticide-related, personal injury, failure-to-warn claims. Those claims unavoidably implicate the critical role played by an expert federal regulatory agency—the United States Environmental Protection Agency (EPA)—vested with exclusive authority to regulate, based on extensive review of scientific data, the health and safety warnings on nationally uniform, product-specific, pesticide labeling. The fact that this case arises in California, where a multitude of pesticides are used in residential, agricultural, and other settings every day, and involves Roundup, the nation's most widely used herbicide and the target of thousands of failure-to-warn claims, makes this case even more significant.

This Court has addressed federal preemption of pesticide-related failure to warn claims only once before. (*See Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316.) *Etcheverry* (argued before this Court by one of the counsel signing this letter) was decided without the benefit of the Supreme Court's opinion in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), which addressed the requirements for preemption of pesticide-related failure-to-warn claims under the express preemption provision, 7 U.S.C. § 136v(b), that Congress included in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This Court not only should update its FIFRA preemption jurisprudence in light of *Bates*, but also extend it to the burgeoning personal injury context.

2. It is difficult to imagine a more clear-cut case than this for federal preemption of state-law, pesticide-related, failure to warn claims. FIFRA's express preemption provision, titled "Uniformity," prohibits a State from imposing "any requirements for labeling" that are "in addition to or different from" those imposed under the Act. (7 U.S.C. § 136v(b).) In *Bates* the U.S. Supreme Court held that "negligent-failure-to-warn claims are premised on common-law rules that qualify

as 'requirements for labeling' . . . . These rules set a standard for a [pesticide] product's labeling that the . . . label is alleged to have violated by containing . . . inadequate warnings." (*Id.* at 446.)

The Plaintiffs' failure-to-warn claims are expressly preempted by §136v(b). They are predicated on a state-law standard for Roundup labeling, i.e., they impose state-law requirements for Roundup labeling, that are "in addition to or different from" the requirements for Roundup labeling that EPA has imposed under FIFRA. EPA not only has exhaustively reviewed extensive scientific studies on glyphosate (the active ingredient in Roundup) and concluded that it does not pose a risk of cancer in humans, but also has squarely rejected the addition of a cancer warning on Roundup labeling. (*See* Pet. at 11, 16, 21-22.) EPA even took the extraordinary step of notifying Monsanto and other glyphosate registrants that adding such a warning to Roundup labeling would be false and misleading, and thus, would violate FIFRA's prohibition against distribution of misbranded products. (*Id.* at 11; *see* 7 U.S.C. §§ 136(q) & 136j(a)(1)(F).)

The Court of Appeal nonetheless held that "there is no express preemption here." (Typed opn. at 23.) Misreading *Bates*, the Court of Appeal asserted that § 136v(b) does not apply if "common-law duties pertaining to labeling . . . are equivalent to the FIFRA misbranding provisions." (*Id.*) According to the Court of Appeal, "California common law . . . does not impose any requirements that are different from or in addition to the requirements of FIFRA." (*Id.* at 24.)

This superficial comparison between California's common-law duty to distribute products with adequate warnings and FIFRA's general prohibition against distributing misbranded pesticides is oblivious to the rigorous, case-by-case "equivalency" analysis that *Bates* mandates. (*See* 544 U.S. at 453-54.) *Bates* explains that to avoid § 136v(b)'s preemptive sweep, a state-law labeling requirement must be "*genuinely* equivalent" (544 U.S. at 454 (emphasis is original)) to "the relevant FIFRA misbranding standards, *as well as any regulations that add content to those standards*" (*id.* (emphasis added).) The Supreme Court indicated in *Bates* that "[s]tate-law requirements must . . . be *measured against any relevant EPA regulations* that give content to FIFRA's misbranding standards" and "will necessarily affect the scope of pre-emption under § 136v(b)." (*Id.* at 453 & 453 n.28 (emphasis added).) The Court of Appeal

ignored the admonition in *Bates* "that a state-law labeling requirement must *in fact* be equivalent to a requirement under FIFRA in order to survive pre-emption." (*Id.* at 453 (emphasis added).)

The most relevant EPA labeling regulations for purposes of this litigation pertain to "restricted use pesticides." Under 7 U.S.C. § 136a(d), EPA can classify a product for "restricted use" (i.e., for use only by or under the direct supervision of a state-certified applicator) where it "may cause significant . . . chronic or delayed toxic effects on man as a result of single or multiple exposures to the product ingredients or residues"—for example, where EPA determines that use of a pesticide may cause cancer. (*See* 40 C.F.R. § 152.170(b)(vi).) Where—*unlike in the case of Roundup*— EPA makes such determination, a prominent restricted-use statement must appear at the top of the product's label with warning language specified by EPA. (*See* EPA *Label Review Manual* at 6-3 – 6-4, available at https://www.epa.gov/pesticide-registration/label-review-manual.) Because EPA has determined that glyphosate does *not* pose a risk of cancer in humans, it has not classified Roundup as a restricted use product, and as a result, EPA's restricted-use label warning requirements do not apply. For this reason, the Plaintiffs' state-law claims based on failure to provide a cancer warning on Roundup's labeling necessarily are "in addition to or different from" EPA's regulatory requirements for Roundup labeling, and thus, are expressly preempted by § 136v(b).

3. There also is a strong case for implied preemption of the Plaintiffs' failure-to-warn claims. In view of EPA's scientifically based determination that adding a cancer warning to Roundup's labeling would render the product misbranded under FIFRA, it would be *impossible* for Monsanto to comply with the state-law label warning requirement on which this litigation is predicated without violating federal law. (*See* Pet. at 24.) "Under the Supremacy Clause, state laws that require a private party to violate federal law are pre-empted and, thus, are without effect." *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 475 (2013). Indeed, the Plaintiffs' claims are preempted by direct operation of the Supremacy Clause because they logically contradict, and thus directly conflict with, federal law. *See Merck Sharp & Dohme Corp. v. Albrecht,* 139 S. Ct. 1668, 1681 (2019) (Thomas, J., concurring).

4. The extent to which FIFRA preempts pesticide-related failure-to-warn claims is an exceptionally important and recurring question in California—especially in view of the continuing proliferation of individual, mass-action, and class-action personal injury suits that call upon superior court juries to second-guess EPA's scientifically based determinations regarding what product-specific health and safety warnings should be provided. Too many lower courts have rejected FIFRA preemption based on misinterpretations of *Bates* and subsequent U.S. Supreme Court federal preemption jurisprudence. Monsanto's appeal is an ideal vehicle for this Court to correct lower courts' errors on this crucial subject.

Respectfully submitted,

Hayward D. Fisk

Hayward D. Fisk
Chairman and President
Atlantic Legal Foundation

Lawrence S. Ebner

Lawrence S. Ebner
Executive Vice President
& General Counsel
Atlantic Legal Foundation