S264158

IN THE SUPREME COURT OF CALIFORNIA

DEWAYNE JOHNSON,
Plaintiff and Appellant,

v.

MONSANTO COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A155940 & A156706

REPLY TO ANSWER TO PETITION FOR REVIEW

HORVITZ & LEVY LLP
DAVID M. AXELRAD (BAR NO. 75731)
JASON R. LITT (BAR NO. 163743)
DEAN A. BOCHNER (BAR NO. 172133)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
daxelrad@horvitzlevy.com
jlitt@horvitzlevy.com
dbochner@horvitzlevy.com

BRYAN CAVE LEIGHTON PAISNER LLP
K. LEE MARSHALL (BAR NO. 277092)
THREE EMBARCADERO CENTER, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-4070
(415) 675-3400 • FAX: (415) 675-3434
klmarshall@bclplaw.com

ATTORNEYS FOR DEFENDANT AND APPELLANT
MONSANTO COMPANY

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REPLY TO ANSWER TO PETITION FOR REVIEW

INTRODUCTION

The issues in this case will continue to recur in thousands of Roundup cases yet to be adjudicated, and this Court should resolve now whether a company can face liability and be severely punished for conduct that the federal government fully authorizes and that is consonant with a worldwide consensus on the relevant science. The Court of Appeal sidestepped the preemption issue; for the sake of judicial responsibility, this Court should confront it. California law on the consumer expectations test has been applied so inconsistently it has become indecipherable; for the sake of clarity, this Court should fix it. And imposing a duty to warn and punitive damages absent a generally accepted, prevailing view of the science cannot be reconciled with California law; for the sake of fairness, this Court should disapprove it.

LEGAL ARGUMENT

I. The Court should grant review to resolve important issues concerning preemption of California law.

Plaintiff argues that "[i]t is implausible that the EPA would refuse a request by Monsanto to add a cancer warning" to its glyphosate products. (Johnson APFR 13.) But that is exactly what EPA says it would do. Across five presidential administrations, the agency has determined that glyphosate is not likely carcinogenic. (See Monsanto PFR 12-13.) EPA sent glyphosate registrants, including Monsanto, a notice stating that including such a warning would be a *federal crime*. (See

Monsanto PFR 15.) It filed an amicus brief in the Ninth Circuit arguing that a state law claim for failing to include a cancer warning on the Roundup label is preempted. (See Monsanto PFR 13; pp. 12-13, *post*.) And EPA reaffirmed these scientific determinations *after* it *considered and rejected the same expert testimony that Plaintiff uses to support liability*. (See Monsanto PFR 12-15.)

The Court of Appeal effectively closed its eyes to all of this, affirming a severe punishment of Monsanto without attempting to square that result with the regulating agency's longstanding and consistent position that glyphosate poses no cancer risk to humans. That troubling outcome is a problem not only for Monsanto in the innumerable potential Roundup claims to follow, but for farmers across the State of California who depend on glyphosate-based herbicides. (See Amicus Letter of California Farm Bureau Federation (Sept. 21, 2020, S264158).)

A. Review is necessary because the Court of Appeal abdicated its responsibility to decide preemption as a matter of law.

Preemption is a question of law, not fact, that is for courts, not juries, to decide. (See Monsanto PFR 16-17.) Despite United States Supreme Court precedent making this clear, the Court of Appeal deemed "the nature and scope of the agency's determination" to be "factual determinations" that it should not make "on appeal." (Typed opn. 49.)

Plaintiff does not defend this approach, instead proclaiming that the Court of Appeal "did consider" everything. (Johnson

APFR 11.) But if that were accurate, why did the Court of Appeal expressly disclaim evaluating "the nature and scope of the agency's determination"? (Typed opn. 49.) Why did it request supplemental briefing on the preemption issue, but then refuse to consider EPA's actions after trial? (Typed opn. 36, 49 & fn. 4, 50.) And why did it refuse to publish the preemption portion of its opinion because its ruling purportedly "turn[ed] on the lack of a developed factual record"? (Typed opn. 1, fn. *.)

This failure to evaluate the evidence and address preemption on the merits alone warrants review. The courts below decided a critically important question of the relationship between FIFRA and state law, without *ever* explaining how state-law liability can be reconciled with the full history of EPA action under FIFRA.

B. Review is necessary to decide the important issue of express preemption.

Plaintiff baldly asserts that *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431 [125 S.Ct. 1788, 161 L.Ed.2d 687] (*Bates*) " 'resolved' " the express preemption issue here. (Johnson APFR 9.) Yet in *Bates*, EPA had taken no position on whether the specific warning sought by the plaintiffs—which concerned the efficacy, not the safety, of the pesticide—was warranted or would render the label misbranded, and in fact had a policy of never examining efficacy claims. (See *Bates*, at pp. 435-436.) *Bates* explained that, by contrast, if EPA *had* acted to require one warning instead of another (e.g., "CAUTION" instead of "DANGER"), that decision would prohibit states from requiring

the rejected warning. (*Id.* at p. 453; see Monsanto PFR 20-21.) Plaintiff simply ignores this part of *Bates*, but it is by far the most relevant, since here EPA has acted consistently and authoritatively to determine that glyphosate is not a likely carcinogen, and thus no warning is appropriate.

Plaintiff concedes that under *Bates*, a state-law warning requirement is preempted if not " 'equivalent' " to what FIFRA requires, such that the violation of state law "would also violate FIFRA's misbranding provisions." (Johnson APFR 33.) Yet he ignores EPA's *statutory* role in implementing those provisions. (See *Reckitt Benckiser Inc. v. E.P.A.* (D.C. Cir. 2010) 613 F.3d 1131, 1138 (*Reckitt Benckiser*).) Plaintiff argues that "EPA approval of a label is irrelevant" because mere " 'registration' " of a pesticide is not a defense. (Johnson APFR 33-34, citing 7 U.S.C. § 136a(f)(2).) But Monsanto's argument is not that preemption applies because EPA *registered* Roundup. It applies because EPA has consistently concluded through authoritative agency actions that no cancer warning is necessary or appropriate. Such actions "give content to FIFRA's misbranding standards" with respect to the pesticide at issue, and thus carry preemptive effect. (*Bates*, *supra*, 544 U.S. at p. 453.) And these actions were not, as Plaintiff asserts, the views of just some "EPA employees;" they were formal agency actions undertaken pursuant to statutory procedures and having the force of law. (Compare Johnson APFR 10 with pp. 13-14, *post*.)

In order to claim that *Bates* resolves his "safety-related failure-to-warn claims," Plaintiff relies extensively on *Ferebee v.*

Chevron Chemical Co. (D.C. Cir. 1984) 736 F.2d 1529. (Johnson APFR 9-11, 29, 31, 34-35.) Plaintiff, however, ignores this Court's conclusion that "[r]eliance upon *Ferebee* is misplaced because it is no longer good law." (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 327 (*Etcheverry*), overruled on another ground in *Bates*, *supra*, 544 U.S. at pp. 436-437.) Indeed, "*Ferebee*'s fundamental thesis—that liability under state law for failure to warn is not a requirement for labeling or packaging different from that required under FIFRA" (*ibid.*)—was rejected in *Bates* (see *Bates*, at p. 446 ["petitioners' fraud and negligent-failure-to-warn claims are premised on common-law rules that qualify as 'requirements for labeling or packaging' "]). Plaintiff's reliance on a dated, repudiated decision only confirms that the preemption issue here is both open and important.

Finally, Plaintiff suggests that FIFRA's preemption provision can be ignored because his liability theory involves "statements outside of the label." (Johnson APFR 31, boldface omitted.) But Plaintiff's judgment is undisputedly the result of alleged inadequacies of Roundup's label. (See, e.g., 9 RT 1429:19-21 [Plaintiff's counsel: "Cigarettes are still on the market, but people know, because it says right there on the label. And that's all this case is about."].) In any event, FIFRA preemption applies whenever "a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered." (*Etcheverry*, *supra*, 22 Cal.4th at p. 335.) Thus, multiple courts, including the Ninth Circuit, have held that FIFRA preempts state-law failure-to-warn claims regardless of

whether the plaintiff alleges that the desired warning should have been on the label. (See *Taylor AG Indus. v. Pure-Gro* (9th Cir. 1995) 54 F.3d 555, 561, called into doubt on another ground in *Bates*, *supra*, 544 U.S. at p. 446, fn. 21; *Papas v. Upjohn Co.* (11th Cir. 1993) 985 F.2d 516, 519; *Worm v. American Cyanamid Co.* (4th Cir. 1993) 5 F.3d 744, 748.)

C. Review is necessary to decide important questions of impossibility preemption.

Plaintiff does not address the point that, because a warning may not be added without regulatory approval, Monsanto "cannot independently satisfy th[e] state duties for pre-emption purposes." (*PLIVA, Inc. v. Mensing* (2011) 564 U.S. 604, 623-624 [131 S.Ct. 2567, 180 L.Ed.2d 580]; Monsanto PFR 23.) And in defending the Court of Appeal's application of the *Wyeth* "clear evidence" standard, Plaintiff disregards Supreme Court precedent. (See *Wyeth v. Levine* (2009) 555 U.S. 555, 571 [129 S.Ct. 1187, 173 L.Ed.2d 51] (*Wyeth*).)

First, *Wyeth* requires evidence that the agency "would not have approved [the] change" (*Wyeth*, *supra*, 555 U.S. at p. 571), which "implies that the defendant may be able to satisfy the standard without showing that it actually requested a change for the label" (*Dolin v. GlaxoSmithKline LLC* (7th Cir. 2020) 951 F.3d 882, 890). Plaintiff cherry-picks language from *Dolin* suggesting *Merck Sharp & Dohme Corp. v. Albrecht* (2019) 587 U.S. __ [139 S.Ct. 1668, 203 L.Ed.2d 822] (*Merck*) could be read as changing this standard, but ignores that the Seventh Circuit was "not persuaded" by this theory. (*Dolin*, at p. 890; see *Boone*

v. Boehringer Ingelheim Pharmaceuticals, Inc. (Conn. May 4, 2020, SC20200) __ A.3d __ [2020 WL 2121063, at p. *13, fn. 33] [rejecting assertion that *Merck* "stands for the broad proposition that impossibility preemption 'only applies when a defendant can affirmatively show that it attempted to get the FDA to allow the safer alternative proposed by the plaintiff and the FDA affirmatively and officially rejected it' "].) Parties are not required to engage in idle acts. (Civ. Code, § 3532.) It defies logic to suggest that a party regulated by FIFRA must urge EPA to issue a warning *it clearly believes is false*.[1]

Second, Plaintiff contends that an agency's clerical oversight overrides decades of official action. Plaintiff points to a cancer warning provided in marketing materials of a glyphosate product in 2017 (Johnson APFR 37), but ignores *EPA's explanation*—that those labels "did not receive" the appropriate level of review because the registrants failed to present them properly. (Brief for United States as Amicus Curiae in Support of Monsanto, *Hardeman v. Monsanto Co.* (9th Cir., Dec. 20, 2019, No. 19-16636), attached as exh. A to Declaration of David M. Axelrad in Support of 1/15/20 Motion for Judicial Notice, p. 15.)[2] Preemption cannot be defeated by "erroneous" "implementation

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[1] Plaintiff further argues that EPA was not "fully informed" by offering irrelevant and erroneous quibbles with Monsanto's testing. (Johnson APFR 36-37.) There is no dispute that Monsanto conducted all the testing EPA requires and EPA has been presented with *all the evidence* Plaintiff relies on to claim glyphosate causes cancer. (See Monsanto PFR 12-13.)

[2] When citing this amicus brief, we cite the Bates-stamped numbers rather than the page numbers of the amicus brief.

mistakes," based on an alleged cancer risk that EPA has determined "does not exist." (*Id.* at pp. 15, 22.)

Third, even though the crux of Plaintiff's claim is based on an IARC report that postdates his injury, he argues that Monsanto cannot rely on postinjury EPA actions to satisfy the "clear evidence" standard. Yet in *Merck*, it was uncontroversial that agency action occurring after some plaintiffs were injured was relevant to the question whether all plaintiffs' claims were preempted. (See *Merck*, *supra*, 139 S.Ct. at pp. 1673-1676; see also *In re Avandia Marketing, Sales & Products Liability Litigation* (3d Cir. 2019) 945 F.3d 749, 753-756 [examining evidence from 2006 to 2014 in lawsuit filed in 2010].) Moreover, the position EPA expressly stated in its August 2019 letter—that it would reject a cancer warning for glyphosate—flows from its longstanding view that glyphosate is not carcinogenic, reflected in many prior decisions. (See Monsanto PFR 12-13, 15.) These decisions make clear that EPA would have rejected that same warning had it been proposed earlier.[3]

Finally, Plaintiff again distorts Supreme Court precedent in arguing that EPA has not spoken with the " 'force of law.' " (Johnson APFR 38-39.) EPA has issued numerous official

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[3] Plaintiff's claim that "EPA only considers whether glyphosate is carcinogenic, not the full product" (Johnson APFR 38) was never adopted by the Court of Appeal and is untrue. (See, e.g., EPA, *Basic Information About Pesticide Ingredients* <https://bit.ly/2yM1Boy> [as of Sept. 27, 2020] ["All inert ingredients must be approved by EPA before they can be included in a pesticide. We review safety information about each inert ingredient before approval."].)

decisions reiterating its conclusion that glyphosate does not cause cancer—including its registration of Roundup, its approval of Roundup's labeling, and its recent decision to reregister glyphosate after notice-and-comment procedures. (See Monsanto PFR 12-13, 15.) Those decisions were authorized under specific procedures established by Congress to direct authoritative agency action in an individualized manner (see 7 U.S.C. §§ 136a, 136a-1), which fall well within the range of "relatively formal administrative procedure tending to foster the fairness and deliberation" that give agency action the force of law (*United States v. Mead Corp.* (2001) 533 U.S. 218, 230 [121 S.Ct. 2164, 150 L.Ed.2d 292]). Indeed, EPA's procedures are far more formal than the FDA's private, applicant-specific response letters the Supreme Court said had the force of law in *Merck*. Moreover, the 2019 letter was an "authoritative interpretation of [EPA's] FIFRA misbranding authority" with "practical and significant legal effects" (*Reckitt Benckiser*, *supra*, 613 F.3d at p. 1138), and it specifically invoked an earlier determination that glyphosate is not carcinogenic, made as part of the formal and statutorily authorized process discussed above. This robust record of formal agency action cannot be trivialized as " 'musings.' " (Johnson APFR 11.)

State law cannot punish a manufacturer for failing to issue a warning that its federal regulator expressly disagrees with and forbids. The Court of Appeal's decision cannot be reconciled with the rules of preemption laid down by the United States Supreme Court.

D. Plaintiff's design defect theory does not moot the preemption issue.

Plaintiff treats his design claims as immune to preemption. (Johnson APFR 8, fn. 4.) But express preemption under FIFRA applies "when a claim, *however couched*, boils down to an assertion that a pesticide's label failed to warn." (*Etcheverry*, *supra*, 22 Cal.4th at p. 335, emphasis added; see *Mutual Pharmaceutical Co., Inc. v. Bartlett* (2013) 570 U.S. 472, 476 [133 S.Ct. 2466, 186 L.Ed.2d 607] ["design-defect claims that turn on the adequacy of a drug's warnings are pre-empted by federal law"].) The alleged design defect here *was the label* lacking a cancer warning: consumers allegedly had safety expectations about Roundup because "the label specifically says it doesn't have any risk." (29A RT 5119:17-23; see 29A RT 5120:1-11.) In any event, a reversal on preemption limited to the warning claims would leave the verdict supported only by Plaintiff's flawed consumer expectations theory, which independently warrants review.

II. The Court should grant review to address longstanding conflicts in the application of the consumer expectations test.

California courts are split on whether the consumer expectations test applies in cases where a plaintiff alleges that a product is defectively designed because it produces adverse health effects. (See Monsanto PFR 27-36.) Some courts hold that the consumer expectations test does *not* apply in such circumstances (see *Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 116, 156-160 (*Trejo*); *Morson v. Superior*

Court (2001) 90 Cal.App.4th 775, 778-780, 790-795 (*Morson*)), while other courts hold that it does (see *Saller v. Crown Cork & Seal Co.* (2010) 187 Cal.App.4th 1220, 1225-1227, 1231-1237 (*Saller*); *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 465, 468, 472-476 (*Sparks*).) This Court should grant review to resolve this longstanding conflict.

Plaintiff asserts these cases can be reconciled by looking at the nature of the disease and the purported public benefit of the product at issue. Plaintiff observes that some courts have applied the consumer expectations test "in cases involving carcinogens" and cites a few decisions on one side of the conflict that support his position.[4] (Johnson APFR 26.) Plaintiff then suggests that cases on the other side of the conflict are distinguishable because they involve "public health products such as latex gloves [*Morson*] or Tylenol [presumably referring to *Trejo*]." (Johnson APFR 28.) But nothing in *Morson* or *Trejo* turned on the claim that the products at issue were "public health" products. Rather, *Morson* and *Trejo* concluded that the consumer expectations test did not apply because the design defect claims in those cases required expert "testimony regarding the 'medical aspects of an individual's . . . reactions to various substances.' " (*Trejo*, *supra*, 13 Cal.App.5th at p. 159.) The same is true here. (See Monsanto

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[4] In addition to *Sparks* and *Saller*, Plaintiff cites *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 717 and *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1668. (See Johnson APFR 26.) Neither case, however, has any additional analysis of the consumer expectations issue, nor do they in any way diminish the split of authority this Court needs to resolve.

PFR 30-36.) There is no principled way to harmonize the Court of Appeal's decision in this case (which upheld the application of the consumer expectations test) with *Morson*, *Trejo*, or *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 (*Soule*) (which rejected application of the test).

In the Court of Appeal, Plaintiff attempted to distinguish *Morson* and *Trejo* on the ground that both cases "concern injuries involving esoteric circumstances specific to the particular plaintiff." (RB/X-AOB 71.) In this Court, Plaintiff abandons that argument and adopts a "public health" characterization of *Morson* and *Trejo*. (Johnson APFR 28.) Plaintiff suggests that the products at issue in *Morson* and *Trejo* are more important than asbestos-containing products, and thus entitled to greater legal protection than that afforded by a standard-less consumer expectations test. But the suggestion that the consumer expectations test should not apply to products that purportedly provide greater benefits to the public than asbestos-containing products—products this Court recognized were instrumental in fighting a world war (see *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 343-344)—only underscores the fact that the risk-benefit test, not the consumer expectations test, should govern all of these cases.

Plaintiff also accuses Monsanto of "mislead[ing]" the Court about the nature of the expert testimony he introduced in this case. (Johnson APFR 27.) There is no merit to this accusation. Plaintiff's theory of design defect was that Roundup causes cancer in humans and therefore requires a cancer warning. (See,

e.g., 29A RT 5119:20-21 [Plaintiff's closing argument: "Simply put, in using Roundup as it's sold on the market today, would you think that it causes cancer?"].) At trial, Plaintiff presented extensive and complex expert testimony about the chemical composition of Roundup and the effects that Roundup allegedly has on the health of its users. (See, e.g., 16B RT 2645-2646; 21A RT 3610-3612.)

Because Plaintiff's theory of design defect was nothing other than Roundup's alleged ability to cause cancer, there would have been no evidence of any design defect at all absent expert testimony on the purported health effects of Roundup. Expert testimony was essential to Plaintiff's case because no ordinary consumer could possibly have any expectation based on everyday experience concerning the complex chemical and biological processes that cause cancer. Under these circumstances, the consumer expectations test does not apply. (See *Soule*, *supra*, 8 Cal.4th at pp. 560-570; *Trejo*, *supra*, 13 Cal.App.5th at pp. 156-160; *Morson*, *supra*, 90 Cal.App.4th at pp. 792-795; see also *Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480, 1483-1485.) The fact that Plaintiff cites additional cases applying the consumer expectations test to alleged product defects involving complex mechanical or biological processes that cause disease (see *ante*, p. 16 & fn. 4) only underscores the need for this Court to grant review and clarify the law on this issue.

III. The Court should grant review to resolve whether evidence of a prevailing scientific view is required to prove strict liability failure to warn, and if not, whether such evidence is at least required to support an award of punitive damages.

Failure to warn. The standard of proof for a strict liability failure to warn claim is not, as Plaintiff asserts, whether there is a " 'potential' " risk of harm. (Johnson APFR 15-16.) Under the standard adopted by this Court in *Anderson v. Owens-Corning Fiberglas Corp*. (1991) 53 Cal.3d 987, 1002-1003 (*Anderson*), Plaintiff had the burden to prove that at the time Monsanto marketed and distributed its products to Plaintiff, there was a generally accepted, prevailing view in the scientific community that exposure to glyphosate poses a carcinogenic risk to humans. Plaintiff failed to meet that burden. (See Monsanto PFR 37-38.)[5] The Court of Appeal's decision to borrow a different standard from *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483 and allow Monsanto to be held liable based on a potential risk of harm " ' "existing in possibility" ' " or " ' "capable of development into actuality," ' " only serves to heighten, not diminish, the need for this Court to clarify the law. (Typed opn. 16-20; see *Johnson & Johnson Talcum Powder Cases*

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[5] The Court of Appeal's focus on whether Monsanto showed there was a majority view that glyphosate is not carcinogenic or that IARC's position was in fact a minority view (see typed opn. 17-20) effectively reverses the burden of proof: It was Plaintiff's burden to show there was a generally accepted prevailing view that glyphosate was carcinogenic, not Monsanto's burden to show there was a generally accepted prevailing view that it was not. (See *Anderson, supra,* 53 Cal.3d at pp. 1002-1003.)

(2019) 37 Cal.App.5th 292, 314, 321-323 (*Echeverria*) [adopting the same standard from *Valentine*].)

Contrary to Plaintiff's contentions (see Johnson APFR 40-41), the issue presented here is not affected by the quality of trial testimony attacking the scientific studies and regulatory determinations that disagreed with Plaintiff's position. After-the-fact expert criticism does not change the generally accepted prevailing scientific view at the time Monsanto marketed and distributed its products to Plaintiff. Nor is the issue whether there was other, countervailing scientific opinion and evidence at the relevant time. (See Directions for Use to CACI No. 1205 (2020) p. 729 ["A risk may be 'generally recognized' as a view (knowledge) advanced by one body of scientific thought and experiment, but it may not be the 'prevailing' or 'best' scientific view; that is, it may be a minority view"].) Absent evidence that Monsanto deprived regulators of information they needed to study the potential health effects of glyphosate, and there is none (see, e.g., Appellant's Supplemental Brief 21-23), Plaintiff's multifaceted collateral attack on the worldwide regulatory consensus that glyphosate is not carcinogenic is of no relevance to the failure to warn issue presented in this case.

Punitive damages. To justify punitive damages, Plaintiff attempts to distinguish *Echeverria*, *supra*, 37 Cal.App.5th at pages 332-335 on its facts and relies on the Court of Appeal's decision to uphold the jury's finding of liability for punitive damages. (See Johnson APFR 15, 42.)

First, the facts here present a *stronger* case than *Echeverria* for applying the rule that punitive damages are not permitted where the alleged link between a product and cancer is subject to reasonable scientific and regulatory debate. (See *Echeverria*, *supra*, 37 Cal.App.5th at pp. 333-335.) In *Echeverria*, there was an ongoing scientific debate over a causal link between talc and ovarian cancer; but unlike this case, there was no worldwide regulatory consensus in *Echeverria* that talc was not carcinogenic. (See *ibid.*) *Echeverria* nonetheless barred punitive damages because "it is not universally accepted in the scientific or medical community that talc is even a significant risk factor for ovarian cancer," despite evidence that the defendant was aware of a variety of studies showing a purported link between talc and cancer. (*Ibid.*) The Court of Appeal's conclusion here that punitive damages are supported despite the lack of any evidence of a scientific consensus on the carcinogenicity of glyphosate creates an irreconcilable conflict with *Echeverria*.[6]

Second, what is most notable about the Court of Appeal's decision to uphold the jury's finding of liability for punitive damages is that, in doing so, the court found that "the question whether [punitive] damages can be sustained is a close one. One

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[6] Plaintiff makes a host of allegations unrelated to his tort claims that purportedly support an award of punitive damages. (See, e.g., RB/X-AOB 100-101.) There is, however, no independent cause of action for punitive damages. (See *569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 429, fn. 3.) Because Plaintiff failed to establish viable underlying tort claims (see AOB 48-56; ARB/X-RB 27-34), his other allegations are simply irrelevant.

reason it is close is because, notwithstanding the IARC's determination, no evidence was presented of a regulatory body concluding that glyphosate or Roundup products cause cancer." (Typed opn. 79.) That finding by itself should have precluded punitive damages because where the evidence of malice is close, it is by definition not clear and convincing. (See *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 999, fn. 2; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1288, fn. 14, called into doubt on another ground by *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724, fn. 7.)

CONCLUSION

For the reasons stated herein and in our petition, the Court should grant Monsanto's petition for review.

September 28, 2020

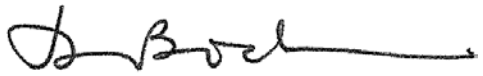
HORVITZ & LEVY LLP
DAVID M. AXELRAD
JASON R. LITT
DEAN A. BOCHNER
BRYAN CAVE LEIGHTON PAISNER LLP
K. LEE MARSHALL

Attorneys for Defendant and Appellant
MONSANTO COMPANY

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 4,186 words as counted by the program used to generate the petition.

Dated: September 28, 2020



Dean A. Bochner

PROOF OF SERVICE

Johnson v. Monsanto Company
Case No. S264158

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On September 28, 2020, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

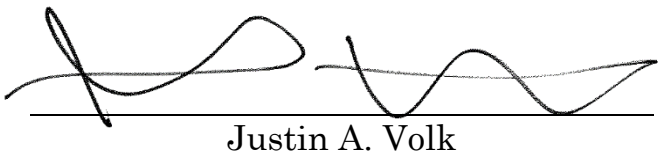
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 28, 2020, at Burbank, California.



Justin A. Volk

SERVICE LIST
Johnson v. Monsanto Company
Case No. S264158

COUNSEL OF RECORD	PARTY REPRESENTED
Curtis G. Hoke Jeffrey A. Travers Michael J. Miller The Miller Firm, LLC 108 Railroad Avenue Orange, VA 22960 jtravers@millerfirmllc.com mmiller@millerfirmllc.com choke@millerfirmllc.com	Attorneys for Plaintiff and Appellant **Dewayne Johnson** *Via TrueFiling*
Robert Brent Wisner Pedram Esfandiary Baum, Hedlund, Aristei & Goldman, PC 12100 Wilshire Blvd, Suite 950 Los Angeles, CA 90025-7107 rbwisner@baumhedlundlaw.com pesfandiary@baumhedlundlaw.com	Attorneys for Plaintiff and Appellant **Dewayne Johnson** *Via TrueFiling*
Mark S. Burton Audet & Partners 711 Van Ness Avenue, Suite 500 San Francisco, CA 94102 markburton@earthlink.net	Attorneys for Plaintiff and Appellant **Dewayne Johnson** *Via TrueFiling*
K. Lee Marshall Bryan Cave Leighton Paisner LLP Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4070 klmarshall@bclplaw.com	Attorneys for Defendant and Appellant **Monsanto Company** *Via TrueFiling*

Sandra A. Edwards Joshua W. Malone Farella, Braun & Martel 235 Montgomery Street, 17th Floor San Francisco, CA 94104 sedwards@fbm.com jmalone@fbm.com	Attorneys for Defendant and Appellant **Monsanto Company** *Via TrueFiling*
California Court of Appeal First Appellate District, Division One 350 McAllister Street San Francisco, CA 94102	**Case No. A155940 & A156706** *Via TrueFiling*
Honorable Suzanne Bolanos San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102	Trial Judge **Case No. CGC16550128** *Via U.S. Mail*