No. 21-1272

IN THE

Supreme Court of the United States

MONSANTO COMPANY,
Petitioner,

v.

ALBERTA PILLIOD AND ALVA PILLIOD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR PETITIONER

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Monsanto's petition and reply explain that the California Court of Appeal's decision here disregarded this Court's preemption and due-process precedents when it failed to heed EPA's consistent refusal to require a cancer warning on Roundup. The Ninth Circuit's recent vacatur of a January 2020 EPA decision concluding that glyphosate is likely not carcinogenic to humans, *see National Resources Defense Council* v. *U.S. Environmental Protection Agency*, -- F.4th --, 2022 WL 2184936, at *5, *13 (9th Cir. June 17, 2022), does nothing to undermine any of Monsanto's arguments for certiorari on either question presented.

I. According to respondents (Supp. Br. 4), *NRDC* undermines Monsanto's petition because Monsanto purportedly "made EPA's 'not likely' conclusion a point

of emphasis." That is an extreme exaggeration. The EPA conduct Monsanto actually emphasized included the agency's "repeated findings" "that glyphosate does not cause cancer in humans," and, relatedly, the agency's repeated "approv[al of] 44 versions of Roundup labeling since 1991—each without a cancer warning." Pet. 2. This decades-long regulatory history (*see* Pet. 7-9) is vital because it makes clear that the court below—contrary to this Court's express-preemption precedent—imposed a "requirement[] for labeling … in addition to or different from those required under" federal law, 7 U.S.C. §136v(b). *See* Pet. 14. EPA's consistent regulatory history also demonstrates that respondents' claims are impliedly preempted because "as of when this suit was filed (June 2017), all available evidence indicated that EPA would not approve a cancer warning on glyphosate." Reply Br. 11. Whether or not EPA would have been correct to withhold such approval (and it surely would have been, as the extensive epidemiological evidence showed) is entirely irrelevant to the preemption issue.

In any event, respondents make no attempt to explain how *NRDC* undermines two further bases for certiorari in this case. Specifically, nothing in the Ninth Circuit's decision can reconcile the demand of the jury verdict in this case that Monsanto unilaterally alter its labeling with FIFRA's prohibition on labeling alterations without EPA sign-off. As this Court held in *PLIVA* v. *Mensing*, 564 U.S. 604, 617-619 (2011), impossibility preemption occurs when an allegedly missing warning could not be added without the agency approving the warning in advance. Because that is the situation here, respondents' claims are preempted. *See* Pet. 21-22 (explaining irreconcilability between *PLIVA* and the decision below). Likewise, nothing in *NRDC* implicates

the division in authority regarding the proper ratio of punitive damages to compensatory damages when the latter are high and a defendant's reprehensibility is not. Pet. 26-31.

II. Beyond invoking *NRDC*, respondents improperly use their supplemental brief to regurgitate arguments from their opposition brief about why certiorari is unwarranted. Monsanto's reply answered these arguments, and respondents simply ignore those answers.

For example, respondents cite (Supp. Br. 3) the position of the United States that certiorari was unwarranted in *Monsanto Co.* v. *Hardeman*, No. 21-241 (*cert. denied* June 21, 2022), because "label-based failure-to-warn claims are 'fully consistent' with FIFRA, so they are not preempted." Monsanto has already explained (Reply 4-5) that this argument views both FIFRA and state tort law at too high a level of generality. Respondents also renew (Supp. Br. 3) a supposed distinction between EPA's actions towards glyphosate and its actions towards Roundup, a distinction Monsanto has likewise already refuted (Reply 6). Finally, respondents again attempt (Supp. Br. 3) to paint this case as a poor vehicle because the judgment below can supposedly be supported on independent grounds. Again, Monsanto has already addressed how those purportedly independent grounds—respondents' "design-defect and off-label failure to warn claims," *id.*—are not in fact a barrier to review. Reply Br. 3-4. Respondents' failure to engage with any of Monsanto's already-presented arguments is a telling indication that they have no answer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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