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## MONSANTO V. HARDEMAN: SOLICITOR GENERAL'S BRIEF UNWITTINGLY MAKES STRONG CASE FOR SCOTUS REVIEW

by Glenn G. Lammi

As it occasionally does when a petition for *certiorari* implicates a significant federal interest, the U.S. Supreme Court invited the Solicitor General of the United States to express the government's views on Monsanto's appeal of a product-liability verdict. The Solicitor General's brief in *Monsanto v. Hardeman* counseled against review, but in doing so the government unwittingly gave the Court a multitude of reasons to hear the appeal.

### Background

*Hardeman* is one of thousands of lawsuits individuals have filed against Monsanto alleging that the company violated California law by failing to warn that the active ingredient in its Roundup® pesticide, glyphosate, can cause cancer. In its motions to dismiss and for summary judgment, Monsanto argued that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted Hardeman's state-law claims. The district court rejected those arguments, and, based on scientific evidence of the cancer-causing nature of glyphosate the court itself labeled "borderline" at best, the jury found Monsanto liable for over \$80 million in damages.

Monsanto appealed the district court's evidentiary and FIFRA preemption rulings. The U.S. Court of Appeals for the Ninth Circuit [affirmed](#) the district court's holdings.

On August 16, 2021, Monsanto filed its [certiorari petition](#), which drew the support of seven *amicus* briefs (including [Washington Legal Foundation's](#)). On December 13, 2021, the Court invited the Solicitor General to express the U.S. government's views. The Solicitor General filed her [brief](#) on May 10, 2022. The Court will consider Monsanto's petition during its Thursday, June 9 conference.

### A "change in Administration"

Under a subsection entitled "Uniformity," FIFRA dictates that States may not impose "any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." If the *Hardeman* jury verdict stands, Monsanto would need to add a cancer warning to the Roundup® label. That's something the Environmental Protection Agency (EPA) has never required for a glyphosate-based pesticide's label since the agency approved glyphosate in 1972.

The U.S. government filed an [amicus brief](#) with the Ninth Circuit supporting Monsanto's appeal of *Hardeman* in December 2019, arguing that FIFRA preempted all failure-to-warn legal claims. The government pointedly stated that "[t]he label is the law." The brief cited to the Supreme Court's [Bates v. Dow AgroSciences LLC](#) decision, which explained that Congress included the preemption provision in FIFRA so that manufacturers wouldn't have to comply with "50 different labeling regimes."

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In her May 10 brief recommending the Court deny the *Hardeman* appeal, the Solicitor General reversed the U.S. government's long-held approach to FIFRA preemption.

What happened between December 2019 and May 2022 that caused the government's reversal? Congress did not change FIFRA nor did the Supreme Court overrule *Bates*. And EPA's scientific conclusion about glyphosate stood firm. Even the Solicitor General's *Hardeman* brief itself notes that EPA "repeatedly articulated" the view that glyphosate is not likely to be carcinogenic "in registration decisions spanning decades."

The government made a dramatic shift on FIFRA preemption, as the Solicitor General's *Hardeman* brief explains, not because of a change in law or science, but "[i]n light of ... the change in Administration."

### **A Legally Indefensible Position on Preemption**

In refusing to apply FIFRA's uniformity language as written, the Solicitor General's brief replaces neutral federal statutory law with results-oriented politics tailor-made to help the plaintiffs' bar win product-liability lawsuits.

The brief's argument that FIFRA does not expressly preempt state-law liability claims is a straight rehash of the Ninth Circuit's flawed, facile reasoning in *Hardeman*. There, the appeals court concluded that FIFRA and California common law are parallel because both require warnings for health risks like cancer. The general availability of warnings, however, is not enough for a plaintiff to overcome express preemption. State law must "in fact be equivalent to a requirement under FIFRA," the Supreme Court wrote in *Bates*. Or, as Justice Breyer stated in his *Bates* concurrence, state warning requirements must be "measured against" the way EPA "gives[s] content" to the federal law's demand for uniformity.

EPA gives content to FIFRA's requirements by carefully studying the risks and benefits of a pesticide and deciding whether to approve the product with a health warning. The agency's registration of Roundup® sans cancer warning is, as the government itself said in its 2019 *Hardeman* brief, "the law" for purposes of preemption. And that law is, and must be, to maintain uniformity, superior to any state common-law legal standard.

### **Sudden Policy Change with Sweeping Impact**

Through an *amicus* brief filed in a specific case, the federal government dramatically modified its broader policy toward pesticide labeling. The administration has walked away from a predictable, science-based review of pesticides—a process on which not only pesticide manufacturers, but also thousands of farmers and millions of consumers, rely.

If uniform labeling ceases to be federal policy, preemption will no longer protect pesticide manufacturers from frivolous failure-to-warn claims based on junk science. Faced with the costs of distributing pesticides with potentially fifty different labels, not to mention exposure to billions of dollars in damage awards and legal fees, companies may decide the risks outweigh the rewards. A reduction in pesticide production and innovation will mean fewer effective pesticides. And fewer pesticides mean less, and more expensive, food.

The Solicitor General's brief has so alarmed farmers and others that rely on pesticides that 54 trade associations and other interested groups [wrote](#) to President Biden on May 23 urging him to order the document withdrawn. In May 25 [floor remarks](#), U.S. Senator Chuck Grassley echoed the agriculture groups' demand, lamenting that the "astounding change" wasn't based on "the law and the science because it was based on politics." The following day, Senator Grassley [pressed](#)

Agriculture Secretary Tom Vilsack about the brief at a Senate hearing. Secretary Vilsack explained that the Solicitor General did not consult with USDA. The Secretary added that the agency “follows the science” on glyphosate, a substance that Vilsack agreed is vital to environmentally sustainable techniques such as no-till farming.

Secretary Vilsack echoes this administration’s pledge to “follow the science” when setting policy. EPA has done that for nearly 50 years on glyphosate across both Democratic and Republican administrations. By allowing states to require a cancer warning on Roundup® that EPA has rejected as recently as 2020, the federal government signals a tolerance for outlier science such as the conclusions of WHO’s International Agency for Research on Cancer that California embraces. Ironically, at the same time the Supreme Court is contemplating the Solicitor General’s arguments, the European Chemicals Agency [announced](#) that “[b]ased on a wide-ranging review of scientific evidence, the committee again concludes that classifying glyphosate as a carcinogen is not justified.”

### **Supreme Court, Review**

The Solicitor General’s *Hardeman* brief sends U.S. policy on both pesticides and preemption in a direction that neither the law as written by Congress or interpreted by the Supreme Court permits. For that reason, and because of that policy’s threat to food security and science-based policy making, the justices should accept *certiorari* in *Monsanto v. Hardeman* and ultimately reverse the Ninth Circuit’s decision.