

Congress of the United States
Washington, DC 20515

June 3, 2022

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear President Biden:

We write to request your Administration immediately withdraw Solicitor General Elizabeth Prelogar’s amicus curiae brief (“brief”) filed with the Supreme Court (“Court”) on May 10, 2022 in *Edwin Hardeman v. Monsanto*, 997 F.3d 941 (9th Cir. 2021), *cert. filed*, (U.S. Aug. 16, 2021) (No. 21-241) (hereafter *Hardeman*). As the Republican Leaders on both the House and Senate Committees with jurisdiction over the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), we agree with legal reasoning in Solicitor General’s Francisco’s brief filed in *Hardeman v. Monsanto Company*, Nos. 19-16636, 19-16708 (9th Cir.) (opinion and judgment issued May 14, 2021) and strongly recommend your Department of Justice (DOJ) take a consistent position with the Solicitor General’s brief filed in the Ninth Circuit.

We further request DOJ provide our offices with a full review and accounting of the Solicitor General’s consultations with the U.S. Department of Agriculture (USDA) and the U.S. Environmental Protection Agency (EPA) in analyzing and developing the Solicitor General’s brief filed with the Court on May 10, 2022.

The issue before the Court involves the manufacturer (Monsanto, now Bayer AG) of the herbicide Roundup. For decades, EPA has exercised its delegated authority under FIFRA in finding Roundup and its active ingredient, glyphosate, do not cause cancer in humans. EPA has authorized Roundup for sale, repeatedly approved Roundup’s labeling without a cancer warning, and recently informed pesticide registrants that including a cancer warning on the labeling of a glyphosate-based pesticide would render it “misbranded” in violation of federal law. More importantly, Congress explicitly prohibits States from “impos[ing] . . . any requirements for labeling . . . in addition to or different from those required under [FIFRA].” 7 U.S.C. §§136v(a)-(b).

In a recent Ninth Circuit brief, EPA reiterated that it stands by its “conclu[sion] that glyphosate is not likely to be a human carcinogen and that it does not pose human-health risks of concern.” EPA Br. 17, *NRDC v. EPA*, Nos. 20-70787, 20-70801 (9th Cir. May 18, 2021); see also, e.g., *id.* at 30. The Ninth Circuit ultimately concluded that respondent’s claims were not preempted by FIFRA and upheld the admission of expert testimony on causation leading to a finding of liability and significant damages against Monsanto.

On May 26, 2022, in testimony before the United States Senate Committee on Agriculture, Nutrition, and Forestry Secretary Vilsack testified that USDA was not consulted about the Solicitor General's brief. On its face, this lack of consultation with relevant federal agency subject matter experts should warrant immediate withdrawal of the Solicitor General's brief and initiate DOJ's review of the Solicitor General's actions in this case.

Unfortunately, the Solicitor General's lack of consultation with the appropriate federal subject matter experts on this matter is only one matter of concern. What is more concerning is the fact that the Solicitor General's, brief surprisingly reversed its previous long-held position that FIFRA does in fact preempt such label claims. During the previous Administration, DOJ filed an amicus brief before the Ninth Circuit supporting Monsanto in this proceeding, arguing that FIFRA¹ preempted Respondent's claims and all health-related state pesticide labeling requirements that differ from EPA-approved labels. DOJ justified its about-face by stating "[i]n light of the court of appeals' decision and the change of Administration, the United States has reexamined the arguments it has made below." DOJ Amicus Brief at p. 6. Such a reversal coupled with the lack of consultation with subject matter experts is incredibly concerning. Simply citing a "change in Administration" as a cause and justification for completely undermining an agency's federal preemption authority, clearly established by Congress, is egregious. The Solicitor General's actions not only insert significant ambiguity into FIFRA, but also upends a host of statutory preemption authorities and the general use of crop protection tools, and further threatens global food security.

The significance of the Ninth Circuit's decision in this case cannot be overstated. The matter pending before the Court is not solely about an individual chemistry or a single crop protection tool. It is much more significant. Ultimately, the Court will either reaffirm, or potentially, contradict, EPA's federal preemption authority on all crop protection tools (and other pesticides used for non-agricultural purposes, such as those used to protect human health). EPA's rigorous science-based standard of registration and review avoids a patchwork of fifty different state regulatory regimes, allowing crop protection tools to be manufactured and used under a uniform regime. It is incomprehensible that the Solicitor General would contradict its own legal analysis and then trivialize such a complex issue by citing "a change in Administration" as justification for doing so.

On May 23, 2022, fifty-four agricultural groups sent a letter² expressing their "grave concern" with the Solicitor General's brief that would result in "...a change in long-standing policy regarding the regulation and labeling of pesticide products relied upon by farmers and other users. At a crucial time when American farmers are striving to feed a world threatened by food shortages and insecurity, the likes of which we have not seen in decades, this reversal of policy greatly risks undermining the ability of U.S. agricultural producers to help meet global food needs." On May 25, 2022, the National Farmers Union sent a letter calling on your

¹ FIFRA prohibits the sale of "any pesticide that is not registered." 7 U.S.C. § 136a(a). FIFRA and its implementing regulations require registrants to provide substantial scientific data to support a pesticide's safety and health effects, including studies relating to the likelihood that a particular pesticide could cause cancer. 7 U.S.C. §§ 136a(c)(1)(F) & (c)(2)(A); 40 C.F.R. § 158.500(d); see generally 40 C.F.R. pt. 158.

² <https://soygrowers.com/wp-content/uploads/2022/05/5-23-22-Glyphosate-Solicitor-General-Letter-1.pdf>

Administration to “withdraw the Solicitor General’s brief and consult with USDA on the implications of this decision.”³

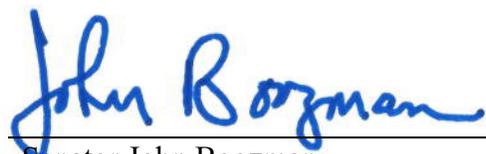
We associate ourselves with these organizations’ concerns, and again, we request your Administration to immediately withdraw the Solicitor General’s current brief before the Court in an effort to fully and appropriately represent the federal government’s rights, responsibilities, and authorities under FIFRA, which includes EPA’s clearly defined federal preemption of crop protection tools.

If the Ninth Circuit’s decision is left in place, not only will growers lose a critical tool from their toolbox, but EPA’s registration process will eventually evolve into a state-by-state patchwork that will thwart the science-based and risk-based process Congress has specifically directed EPA to carry out. Importantly, any marketplace confusion will take place during an emerging global food crisis and growing food insecurity.

We request your Administration take action on this request on or before 6:00 PM on June 8, 2022 and provide our respective Committees a written explanation for the Solicitor General’s lack of consultation.

Thank you for your immediate attention to this important matter.

Sincerely,



Senator John Boozman
Ranking Member
Senate Committee on Agriculture, Nutrition,
and Forestry



Representative Glenn “GT” Thompson
Ranking Member
House Committee on Agriculture

Cc: Attorney General Merrick Garland, Department of Justice
Secretary Tom Vilsack, U.S. Department of Agriculture
Administrator Michael Regan, U.S. Environmental Protection Agency

³ <https://nfu.org/wp-content/uploads/2022/05/05-25-22-Glyphosate-Solicitor-General.pdf>