No. 24-1068

IN THE
Supreme Court of the United States

MONSANTO COMPANY,
Petitioner,

v.

JOHN L. DURNELL,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

SUPPLEMENTAL BRIEF FOR RESPONDENT

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The government's brief is incomplete and unpersuasive.

There is no circuit split over whether the Federal Insecticide, Fungicide, and Rodenticide Act forbids Monsanto from warning consumers that exposure to Roundup can cause deadly cancer. The government points to *Schaffner v. Monsanto Corp.*, 113 F.4th 364 (3d Cir. 2024), but that case rested on a materially different record and expressly reserved issues that were litigated here and would have made a difference to the outcome there. The government offers no persuasive response to those points, which undercut its claim of a conflict and would complicate this Court's ability to reach Monsanto's question presented.

Even accepting the government's premise that a conflict exists, this case is a poor candidate for certiorari. The purported split is shallow and undeveloped: no other court of appeals has addressed *Schaffner*'s limited reasoning, and every decision on either side concerns a single product line produced by a single manufacturer. That Roundup liability presents a business problem for Bayer, Monsanto's multibillion-dollar parent, does not warrant this Court's review.

On the merits, the government switches preemption positions based solely on a "change in Administration." CVSG Br. 10. Every argument the government advances today it persuasively rejected just three years ago in *Monsanto Co. v. Hardeman*, No. 21-241, *cert. denied*. And it makes no serious effort to reconcile its current stance with the better-reasoned arguments it made before. When federal preemption doctrine becomes a game of political ping-pong, the Court should view the latest volley with skepticism.

ARGUMENT

I. This Case Implicates No Circuit Conflict

A. The United States previously recommended that the Court deny review of Monsanto's question presented "unless and until a conflict in authority emerges." U.S. Amicus Br. 19, *Monsanto Co. v. Hardeman*, No. 21-241 (U.S. May 10, 2022) ("SG *Hardeman* Br."). None has emerged. The test for an actual conflict is whether the *outcome* would be different in a different court. For three reasons the government either inadequately addresses or ignores outright, the Third Circuit's reasoning in *Schaffner* would not generate a different outcome here.

First, *Schaffner* "explicitly left unresolved how FIFRA would apply following the discovery of information rendering a pesticide's" labeling inadequate "where the use of that label continued without applying for amended registration or otherwise notifying the EPA." 113 F.4th at 397 n.18. The court reserved that question because the plaintiff there had not argued "FIFRA required Monsanto" to seek "EPA approval for a modified Roundup label that included" a cancer warning or warning to wear personal protective equipment. *Id.* at 386 n.13.

This case was argued differently—from complaint to trial and appeal. In the complaint, Durnell "specifically allege[d] 'Monsanto had a duty to properly . . . label' Roundup products." App.6 n.3 (ellipsis in App.). At summary judgment, Durnell explained "it was Monsanto's duty to inform the EPA if it learned of additional factual information relating to unreasonable adverse health effects." Court of Appeals Respondent's Appendix 23, No. ED112410 (Mo. Ct. App. Nov. 7, 2024). At trial, Durnell's counsel closed with a rebuttal of Monsanto's argument "that EPA controlled

the labeling." 5 Tr. 3424:16-17.[1] And on appeal, Durnell argued that "FIFRA requires Monsanto to seek EPA approval for a modified Roundup label that includes a cancer warning." Respondent's Br. 49, *Durnell v. Monsanto Co.*, No. ED112410 (Mo. Ct. App. Nov. 7, 2024); *see* BIO 21.

The government's citation-free response lacks merit. It misstates Missouri law when it claims (at 22) that the jury had "no room to consider" what would have happened if Monsanto had sought a label change. In Missouri, "the feasibility of giving a warning about the danger at issue" is one of the "issues that may be relevant in a failure to warn case." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 760 (Mo. 2011). Adding such a warning was not only feasible but easy—Monsanto just had to ask EPA.

The trial record amply supports that point. Monsanto's witness, James Guard, testified that "Monsanto is the one that initiates changes to its labels." 4 Tr. 2430:1-2. The company has sought Roundup label changes for dozens of business purposes, including to add aerial-application instructions specific to Fresno County, California, App.37a[2], and to warn agricultural users to wear protective coverings, App.30a; *see* 5 Tr. 3423:13-15 (closing argument: "Monsanto gives the most stringent warnings to the most sophisticated users."). And when Monsanto hoped to rid itself of future Roundup liability through a settlement, it offered to seek EPA's permission to add to Roundup's labeling "links to relevant scientific

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[1] "Tr." refers to the Transcript on Appeal in No. ED112410 (Mo. Ct. App. June 13, 2024).

[2] "App.__a" refers to the Appendix accompanying the Brief in Opposition.

evidence and materials related to whether exposure to Roundup Products causes non-Hodgkin lymphoma." BIO 4 (cleaned up). Any one of those warnings would have helped Durnell, who testified that he did not see, but would have heeded, such warnings or instructions to wear PPE. 4 Tr. 2508:16-2509:19. The government ignores this evidence.

Second, the jury's general verdict here was supported by evidence that Monsanto failed to warn consumers of Roundup's risks in its advertising—an issue *Schaffner* never addressed. The government previously acknowledged that "[f]uture cases involving similar state-law claims may contemplate warnings through non-labeling mechanisms that would not require altering EPA-approved labeling." SG *Hardeman* Br. 20. This is such a case.

At trial, Durnell testified that he saw a Monsanto advertisement depicting a man spraying Roundup like a "sharp shooter." 4 Tr. 2515:11-2516:11. The "western theme[d]" ad contained no suggestion that Roundup "might cause cancer," no reference to "non-Hodgkin's lymphoma," and no statement instructing users to wear "any sort of [PPE]." *Id.* Instead, Monsanto showed the product being sprayed by a man in a "[s]hort-sleeve shirt, no gloves, just like you'd hang out." *Id.* Durnell testified that he would not have continued purchasing Roundup had the advertisement "included a cancer warning." 4 Tr. 2517:8-10 ("Q. Would you have kept buying Roundup if it had included a cancer warning? A. No, I wouldn't.").

A rational jury could have returned a plaintiff's verdict based solely on Monsanto's failure to warn in its advertising. Viewed "in the light most favorable to the verdict" for Durnell, *Global-Tech Appliances, Inc.*

v. SEB S.A., 563 U.S. 754, 770 (2011), the evidence showed

> (1) Monsanto sold Roundup in the course of its business;
>
> (2) the product was unreasonably dangerous when sprayed without precautions, as Monsanto's advertising encouraged, 4 Tr. 2515:11-2516:11;
>
> (3) Monsanto failed to warn of these dangers in its advertising, *id.*;
>
> (4) Durnell used the product in a reasonably anticipated way—spraying it without PPE and without washing his clothing afterward, 4 Tr. 2517:11-2520:5; and
>
> (5) he was harmed as a direct result of the lack of warning, 4 Tr. 2517:8-10.

That evidence satisfies each element of Missouri's failure-to-warn cause of action. *See* Cert Reply App. 4 (jury instruction not limited to label-based failures to warn); *Moore*, 332 S.W.3d at 756.

The government's only response (at 22) is that the lower court here focused on labeling rather than advertising. But "in entertaining [Monsanto's] motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). The advertising evidence presented to the jury remains an independent basis for affirmance, no matter how prominently it figured in the opinion below. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.") (quotations omitted).

Third, the jury also could have found for Durnell based solely on Monsanto's failure to warn about the carcinogenic components in *formulated* Roundup—another issue not raised in *Schaffner* and one for which EPA has made no formal findings. BIO 10-11.[3]

> (1&2) The evidence established that Monsanto's formulated product was unreasonably dangerous when sprayed without precautions because it contained carcinogenic ingredients, including ethylene oxide, 1,4-dioxane, and the surfactant POEA, which is banned in Europe, 3 Tr. 1664:3-6, 1665:4-8, 2007:22-2008:2, 2008:12-16;
>
> (3) Monsanto provided no warning about these components;
>
> (4) as a result, Durnell sprayed Roundup, spilled it on himself, and failed to take precautions—such as washing his hands—because he believed it "was a safe product to use"; and
>
> (5) he was directly exposed to those carcinogenic substances in concentrated form, leading to his cancer, 4 Tr. 2484:4-2486:17.

The government offers no response.

Because *Schaffner* neither considered these independent theories nor foreclosed them, its narrow holding does not conflict with the decision below. Those alternative grounds for affirmance would complicate review and prevent the Court from reaching Monsanto's preemption question cleanly, if at all.

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[3] Off. of Pesticide Programs, EPA, *Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential* 144 (Dec. 12, 2017) (acknowledging need for more research "to determine whether formulation components, such as surfactants, influence the toxicity of glyphosate formulations"), https://perma.cc/2WJM-MT7R.

B. Even accepting the government's premise that a conflict exists, this case still would not warrant review. On the government's account, the split consists of a single federal court of appeals on one side and two on the other—supplemented by a few state intermediate-appellate courts. This Court routinely allows such shallow, early-stage disagreements to deepen and mature before granting certiorari.

The need for percolation is acute here. This case presents alternative grounds for affirmance that no appellate court—including *Schaffner*—has addressed. *See supra* pp. 2-6; BIO 17. The government compounds that problem by introducing yet another argument not passed upon below: that a Missouri jury "need not consider the product's economic and social benefits," CVSG Br. 16, while EPA under FIFRA "tak[es] into account the economic, social, and environmental costs and benefits of the use of the pesticide," § 136(bb). That forfeited argument appears nowhere in Monsanto's petition and is contradicted by the government's earlier concession that EPA does not assess chronic health risks. SG *Hardeman* Br. 10-11.

It also is incorrect. Missouri law permits defendants to argue that "the utility of a design outweighs its risks." *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo. 1998) (en banc). Monsanto claimed at trial that Roundup's supposed "benefits . . . to farmers who use it with their crops" should be considered. 3 Tr. 1670:4-6; *see* 3 Tr. 1670:14-1671:2, 1671:10-20. The jury heard both sides of that argument and concluded that Roundup's role in causing Durnell's cancer outweighed its purported benefits as a weedkiller.

The supposed split is also unusually narrow. Every case on either "side" concerns the same product line, from the same manufacturer, under the same federal

statute and implementing regulations. Neither Monsanto nor the United States identifies any broader question affecting other industries, other products, or other corners of state tort law. *See* SG *Hardeman* Br. 17 ("The court's decision therefore is unlikely to have a substantial effect on the development of preemption rules under other federal statutes.").

Nor will Monsanto suffer any cognizable prejudice from further percolation. Other Roundup cases are proceeding through appeal, including one being considered for argument before the Massachusetts Supreme Judicial Court in February[4] and another where Monsanto's petition for review in the California Supreme Court is due in January.[5] If a genuine conflict develops, Monsanto will have ample opportunity to petition again.

II. The Decision Below Is Correct

The government devotes much of its brief to merits arguments that it previously—and persuasively—rejected in *Hardeman*. It does not attempt to grapple with or rebut its prior analysis, but simply ignores it. The government's new arguments cannot withstand scrutiny.

First, the government now argues (at 15) that because EPA has approved Roundup labels without cancer warnings, and because registrants generally must obtain EPA consent before "significantly" amending their labels, FIFRA itself requires that cancer warnings not appear.[6] But it previously explained that

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[4] *Cardillo v. Monsanto Co.*, No. SJC-13741 (Mass.).

[5] *See Dennis v. Monsanto Co.*, --- Cal. Rptr. 3d ---, 2025 WL 3267899 (Cal. Ct. App. Nov. 24, 2025).

[6] The government claims (at 12 n.3) that "[a] registrant could not unilaterally amend its label" to add a cancer warning. But

"[n]either FIFRA nor its implementing regulations . . . specifically address warnings for chronic health risks like carcinogenicity"; "EPA guidance allows a manufacturer to propose state-mandated chronic-risk warnings, such as Proposition 65 warnings, so long as the state-law terminology does not conflict with language in the EPA-approved label"; and "[a]gainst that backdrop, EPA's approval of pesticide labeling without a chronic-risk warning is not naturally characterized as a FIFRA 'requirement' that no such warning appear." SG *Hardeman* Br. 10-11; *see Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005) (a "requirement" is "a rule of law that must be obeyed"). In other words, EPA's silence on cancer warnings neither prohibits them nor creates an affirmative federal command not to provide them.[7]

Second, the government now contends that *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) supports preemption because, "[j]ust as FDA 'premarket approval is specific to individual devices,' EPA determines on an individualized basis what warnings are appropriate for particular pesticides." CVSG Br. 13 (citation omitted). But the government earlier noted—and now simply disregards—the "significant differences between the two statutory regimes." SG *Hardeman* Br. 18. In *Riegel*, which arose under the Medical Device Amendments, "the federal agency had actually

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the regulations permit such amendments, as Bayer—Monsanto's parent company—demonstrated by unilaterally adding a cancer warning to its LARVIN Technical insecticide label. BIO 21-22 n.13. The government ignores this fact.

[7] Of course, "EPA *could*—either through rulemaking or through some other regulatory action carrying the force of law—make a binding determination that the labels of pesticides containing glyphosate should not contain cancer warnings." SG *Hardeman* Br. 13 (emphasis added). But it has not.

and directly addressed the question at issue in the state-law litigation": whether Medtronic's balloon catheter was safe. *Id.* at 18-19; *see* 21 U.S.C. § 360k(a)(2) (preempting additional or different state and local requirements that "relate[] to the safety or effectiveness of the [medical] device"). But under FIFRA, "EPA neither requires nor precludes any specific chronic-risk warnings, through regulation or otherwise." SG *Hardeman* Br. 18-19.

Riegel is also inapposite because "the MDA contains no similar provision" to FIFRA's § 136a(f)(2). *Id.* at 19. Section 136a(f)(2) states that registration "shall . . . [not] be construed as a defense" to misbranding liability. As the government previously explained, that provision "makes clear that a particular pesticide may be found to violate FIFRA's misbranding prohibition even though EPA approved the labeling when registering the pesticide." SG *Hardeman* Br. 8. Rather than confront that statutory text, the government now tries (at 18-19) to confine FIFRA's misbranding prohibition to cases where a manufacturer deviates from an EPA-approved label or withholds information from EPA. But that limitation cannot be squared with *Bates*, which expressly permitted state-law claims alleging the omission of warnings not found on the EPA-approved label. As the government earlier emphasized, "[t]hat disposition would be inexplicable under [Monsanto's]"—and now the government's—"view of the statute." SG *Hardeman* Br. 9-10.

Third, the government tries (at 17-18) to explain away *Bates* by arguing that the Court's analysis was limited to claims about a pesticide's efficacy, which EPA does not review. But "the *Bates* Court did not suggest that the preemption test it articulated was limited in this manner." SG *Hardeman* Br. 10 n.1.

Indeed, the Court considered a hypothetical "failure-to-warn claim alleging that a given pesticide's label should have stated 'DANGER' instead of the more subdued 'CAUTION.'" *Bates*, 544 U.S. at 453. It "found that such a claim 'would be preempted,' not because it concerned safety rather than efficacy warnings, but 'because it is inconsistent with' a specific EPA regulation." SG *Hardeman* Br. 10 n.1.

Fourth, the government attacks a strawman when it asserts (at 19-20) that "neither the Missouri Court of Appeals' opinion nor the jury instructions in this case required a finding" that a manufacturer withheld relevant information from EPA "as a prerequisite to liability." As the government previously explained, EPA's registration decisions are "based in significant part on proposed labeling and scientific studies submitted by the manufacturer." SG *Hardeman* Br. 12 n.3. The government also warned that the contrary view "ignores the possibility that the manufacturer's submissions to EPA may be inaccurate or incomplete, or that evolving science will cast doubt on the adequacy of approved labeling." *Id.*

That possibility is a reality for Monsanto's Roundup representations. Just four days after the government filed its invitation brief, *Regulatory Toxicology and Pharmacology* retracted a 2000 study that served as a centerpiece of EPA's conclusion that glyphosate does not pose a cancer risk. The journal withdrew that article because Monsanto employees' undisclosed involvement in drafting it "raise[d] serious ethical concerns regarding the independence and accountability of the authors of this article and the academic integrity of the carcinogenicity studies presented."[8]

[8] Martin van den Berg, Retraction Notice to "Safety Evaluation and Risk Assessment of the Herbicide Roundup and Its Active

Yet the government would make EPA's scientific assessments dispositive of state tort liability even when those assessments rest on corporate misrepresentations.

Fifth, the government now asserts (at 23) that "the approach that respondent advocates, and that the Ninth and Eleventh Circuits have adopted, allows juries to reach different determinations than EPA itself." But the government previously rejected that concern, explaining that "inconsistency between state and federal risk assessments does not alone preempt enforcement of state tort law" and emphasizing the "long history of tort litigation against manufacturers of poisonous substances." SG *Hardeman* Br. 12.

* * *

The government overlooks significant, unresolved issues that make this case an unsuitable vehicle for deciding any broader preemption question. Its new position—discarding its own recent, well-reasoned analysis solely because of a change in administration—deserves no weight in assessing whether certiorari is warranted.

CONCLUSION

The petition should be denied.

Ingredient, Glyphosate, for Humans" [31 Regul. Toxicol. & Pharm. 117-65 (2000)], published online December 2025, https://bit.ly/4aefz1P.

Respectfully submitted,

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