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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**NATIONAL ASSOCIATION OF WHEAT
GROWERS ET AL.,**

Plaintiffs,

v.

**LAUREN ZEISE, IN HER OFFICIAL
CAPACITY AS DIRECTOR OF THE
OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT; AND
XAVIER BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,**

Defendants.

Civil Action No. 2:17-CV-02401-WBS-EFB

**DEFENDANT DR. LAUREN ZEISE'S
NOTICE OF MOTION AND MOTION
FOR JUDGMENT ON THE PLEADINGS
AND TO ALTER OR AMEND THE
COURT'S ORDER GRANTING
PRELIMINARY INJUNCTION**

Date: May 29, 2018
Time: 1:30 p.m.
Courtroom: 5
Judge: Hon. William B. Shubb
Trial Date: None set
Action Filed: 11/15/2017

1 TO THE COURT, THE PARTIES, AND COUNSEL OF RECORD:

2 NOTICE IS HEREBY GIVEN THAT, on Tuesday, May 29, 2018 at 1:30 p.m., or as soon
3 thereafter as the matter may be heard, in Department 5 of this Court, located in the United States
4 Courthouse at 501 I Street, Sacramento, CA 95814, before the Honorable William B. Shubb,
5 Defendant Dr. Lauren Zeise, in her official capacity as the Director of the Office of
6 Environmental Health Hazard Assessment (“Dr. Zeise”) will, and hereby does, move for the
7 following relief:

8 (1) Entry of judgment on the pleadings in favor of Dr. Zeise as to Plaintiff’s Amended
9 Complaint for Declaratory and Injunctive Relief (“Amended Complaint”), pursuant to Federal
10 Rule of Civil Procedure 12(c), on the grounds that Dr. Zeise is entitled to judgment in her favor as
11 a matter of law;

12 (2) Dismissal of Plaintiff’s Amended Complaint as to Dr. Zeise without leave to amend;

13 (3) Denial of any relief requested in Plaintiff’s Amended Complaint as to Dr. Zeise;

14 (4) Entry of judgment in favor of Dr. Zeise as to all relief requested in this matter by
15 Plaintiffs; and

16 (5) Amendment, pursuant to Federal Rule of Civil Procedure 59(e), to the Court’s
17 February 26, 2018 Memorandum and Order re Motion for Preliminary Injunction to exclude Dr.
18 Zeise from the scope of the injunction against enforcement of the warning provision of
19 Proposition 65, on the grounds that the Court committed clear error by enjoining Dr. Zeise from
20 an action she has no power to do, enforce Proposition 65’s warning requirement.

21 This motion will be based on this Notice of Motion and Motion, Dr. Zeise’s supporting
22 Memorandum of Points and Authorities served and filed herewith, and the [Proposed] Order
23 Granting Dr. Zeise’s Motion for Judgment on the Pleadings and to Alter or Amend the Court’s
24 Order Granting Preliminary Injunction.

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Dated: March 26, 2018

Respectfully Submitted,

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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA
 12

13
 14 **NATIONAL ASSOCIATION OF WHEAT
 GROWERS ET AL.,**

Civil Action No. 2:17-CV-02401-WBS-EFB

15
 16 Plaintiffs,

17 v.

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANT DR. LAUREN ZEISE'S
 MOTION FOR JUDGMENT ON THE
 PLEADINGS AND TO ALTER OR
 AMEND THE COURT'S ORDER
 GRANTING PRELIMINARY
 INJUNCTION**

18 **LAUREN ZEISE, IN HER OFFICIAL
 CAPACITY AS DIRECTOR OF THE
 19 OFFICE OF ENVIRONMENTAL
 HEALTH HAZARD ASSESSMENT; AND
 20 XAVIER BECERRA, IN HIS OFFICIAL
 CAPACITY AS ATTORNEY GENERAL
 21 OF THE STATE OF CALIFORNIA,**

Date: May 29, 2018
 Time: 1:30 pm
 Courtroom: 5
 Judge: Hon. William B. Shubb
 Trial Date: None set
 Action Filed: 11/15/2017

22 Defendants.
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INTRODUCTION

1
2 In an effort to avoid having to warn Californians that they are being exposed to glyphosate,
3 Plaintiffs challenge both the placement of glyphosate on the Proposition 65 list of chemicals
4 known to the State to cause cancer and the statute’s warning requirement. They name as
5 Defendants in this case two individuals with very different types of authority under Proposition
6 65. First, Plaintiffs name Xavier Becerra, in his official capacity as Attorney General of the State
7 of California (the “Attorney General”). Under Proposition 65, the Attorney General has primary
8 authority to enforce the warning requirement. Second, Plaintiffs name Lauren Zeise (“Dr.
9 Zeise”), in her official capacity as Director of the Office of Environmental Health Hazard
10 Assessment (“OEHHA”). Under Proposition 65 OEHHA, represented here by Dr. Zeise, has the
11 authority to list chemicals. Neither Dr. Zeise nor OEHHA has authority to enforce the warning
12 requirement of Proposition 65.

13 Dr. Zeise respectfully requests, by this motion, that the Court enter judgment as to Dr. Zeise
14 because she is immune from suit as to the warning requirement since she has no authority to
15 enforce it. To the extent that Plaintiffs’ claims against Dr. Zeise challenge the listing
16 requirement, they all fail on the merits as a matter of law. The glyphosate listing is government
17 speech and thus does not violate the First Amendment to the United States Constitution. The
18 glyphosate listing in no way implicates or infringes upon the federal laws Plaintiffs cite regarding
19 preemption. And finally, the glyphosate listing does not deprive Plaintiffs of life, liberty, or
20 property and therefore does not implicate substantive due process concerns. Even if it did, the
21 glyphosate listing is not arbitrary and capricious and is rationally related to legitimate public
22 health and safety goals and the public’s “right-to-know.” Thus, Plaintiffs’ substantive due
23 process claim must fail. Because Plaintiffs fail to state any plausible claims for relief as to Dr.
24 Zeise with respect to the listing of glyphosate, she requests that the Court enter judgment on the
25 pleadings in her favor. Further, consistent with these arguments, Dr. Zeise requests that the Court
26 modify its February 26, 2018 Memorandum and Order re: Motion for Preliminary Injunction
27 (“Order”) (Docket No. 75) to exclude her from the scope of the injunction against enforcement of
28 the warning provision of Proposition 65.

BACKGROUND

The background to this case is discussed extensively in the Defendants’ Opposition to the Motion for Preliminary Injunction (Docket No. 50), which is incorporated here by reference. It is briefly summarized below.

I. STATUTORY AND REGULATORY BACKGROUND: PROPOSITION 65.

Proposition 65, Cal. Health & Safety Code §§ 25249.5 –25249.14¹, is a right-to-know statute, which requires businesses to warn Californians before exposing them to chemicals listed under the statute as carcinogens and/or reproductive toxicants, § 25249.6, and prohibits businesses from discharging these chemicals into sources of drinking water. § 25249.5.

Proposition 65 has a two-step structure. *Exxon Mobil Corp. v. Office of Env’tl. Health Hazard Assessment*, 169 Cal. App. 4th 1264, 1291 (2009). The first step, referred to here as listing, requires the Governor, through his designated lead agency, in this case OEHHA, Cal. Code Regs. tit. 27 § 25102(o), to publish “a list of those chemicals known to the state to cause cancer or reproductive toxicity....” § 25249.8.

The second step, which places obligations and restrictions on businesses, does not occur until twelve to twenty months *after* the chemical has been listed. §§ 25249.9(a), 25249.10(b). It includes two components: the discharge prohibition and the warning requirement. The discharge prohibition forbids businesses from discharging or releasing listed chemicals into sources of drinking water. § 25249.5. The warning requirement requires businesses to give clear and reasonable warnings before they expose Californians to listed chemicals. § 25249.6.

While OEHHA, represented here by Dr. Zeise, has the sole authority to list chemicals under Proposition 65 section 25249.12, neither it nor she has any authority to enforce Proposition 65. Under the statute, enforcement actions may only be brought by designated persons, including by the Attorney General acting in the name of the People of the State of California, district attorneys, city attorneys of cities of a certain size, or by private citizens acting in the public interest (pursuant to certain restrictions). §§ 25249.7(c), (d).

¹ All statutory references are to the California Health & Safety Code unless otherwise noted.

1 **II. THE STATE AND FEDERAL LITIGATION.**

2 OEHHA listed glyphosate on July 7, 2017.² Prior to the listing of the chemical, Monsanto
3 Company (“Monsanto”) sued OEHHA in state court challenging the listing on multiple
4 constitutional grounds, including the First Amendment, procedural due process, the Guarantee
5 Clause, and the unlawful delegation doctrine. The trial court rejected each of Monsanto’s claims,
6 and the matter is on appeal. Monsanto’s state court appeal was heard on March 7, 2018, and a
7 decision is expected within approximately 90 days.

8 On December 5, 2017, Plaintiffs, including Monsanto, filed their Amended Complaint for
9 Declaratory and Injunctive Relief (“Complaint”) (Docket No. 23) in this Court. The Complaint
10 names Dr. Zeise and Attorney General Xavier Becerra in their official capacities as Defendants,
11 and alleges that both the listing of glyphosate by OEHHA and the warning requirement as applied
12 to glyphosate violate the First Amendment, the Supremacy Clause, and the Due Process Clause of
13 the Fourteenth Amendment of the United States Constitution.

14 On February 26, 2018, this Court granted in part and denied in part Plaintiffs’ motion for a
15 preliminary injunction. The Court denied Plaintiffs’ request that the Court enjoin Defendants
16 from *listing* glyphosate as a chemical known to the State of California to cause cancer. The Court
17 ruled that the listing of glyphosate did not implicate Plaintiffs’ First Amendment rights because
18 the listing “is government speech, not private speech.” Order at 11. However, the Court enjoined
19 all Defendants from enforcing the warning requirement for glyphosate. Order at 20.

20 **LEGAL STANDARD**

21 Federal Rule of Civil Procedure 12(c) provides that “after the pleadings are closed — but
22 early enough not to delay trial — a party may move for judgment on the pleadings.” Judgment on
23 the pleadings is proper “when, taking all the allegations in the pleadings as true, the moving party
24 is entitled to judgment as a matter of law.” *Gregg v. Hawaii Dep’t of Pub. Safety*, 870 F.3d 883,
25 887 (9th Cir. 2017) (internal citations and quotations omitted). A Rule 12(c) motion is

26 _____
27 ² Docket No. 49, Declaration of Laura J. Zuckerman in Support of Defendants’
28 Opposition to Motion for Preliminary Injunction (“Zuckerman Decl.”), Exh. T (OEHHA
Chemicals Known to the State to Cause Cancer or Reproductive Toxicity List (December 29,
2017)).

1 “functionally identical to a Rule 12(b)(6) motion, [and thus] the same standard of review applies
2 to motions brought under either rule.” *Id.* Rule 12(c) may be applied to the entire complaint or to
3 individual causes of action. *Larsen v. Trader Joe’s Co.*, 917 F.Supp.2d 1019, 1022 (N.D. Cal.
4 2013). If a pleading cannot be cured by the allegation of other facts, the court must dismiss the
5 complaint without leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

6 ARGUMENT

7 Plaintiffs’ allegations do not separately address the enforcement authority of the Attorney
8 General on the one hand, and the listing authority of Dr. Zeise on the other. However,
9 enforcement authority under the statute is critical to the Court’s jurisdiction to hear claims against
10 these state defendants. Because Dr. Zeise has no authority to enforce the warning requirement of
11 Proposition 65, she is immune from any lawsuit grounded in a challenge to the warning
12 requirement, and therefore cannot be enjoined, even under *Ex parte Young*, 209 U.S. 123 (1908),
13 from enforcing the warning requirement for glyphosate. To the extent the Complaint names Dr.
14 Zeise to prevent her from enforcing the warning requirement of Proposition 65, the suit is
15 improper and judgment should be granted to Dr. Zeise. Given her immunity, Dr. Zeise also
16 requests that this Court’s Order be amended to clarify that Dr. Zeise is not subject to the
17 preliminary injunction relating to enforcement of Proposition 65’s warning requirement as to
18 glyphosate.

19 Further, while OEHHA, represented here by Dr. Zeise, has the authority to list chemicals
20 under Proposition 65, Plaintiffs’ claims related to the listing of glyphosate fail on the merits. The
21 listing of glyphosate under Proposition 65 does not violate the First Amendment, the Supremacy
22 Clause, or the Due Process Clause of the United States Constitution. Thus, judgment should be
23 granted in favor of Dr. Zeise on the listing challenges as well.

24 I. SOVEREIGN IMMUNITY BARS PLAINTIFFS FROM SUING DEFENDANT DR. ZEISE IN 25 FEDERAL COURT TO PREVENT ENFORCEMENT OF THE WARNING REQUIREMENT.

26 Plaintiffs’ attempt to prevent Dr. Zeise from enforcing the warning requirement, something
27 she has no legal authority to do, is barred by principles of sovereign immunity. Under the
28 Eleventh Amendment to the United States Constitution, “the judicial power of the United States

1 shall not be construed to extend to any suit in law or equity, commenced or prosecuted against
2 one of the United States....” This prohibits a suit against the State or its instrumentalities “in the
3 absence of consent.” *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984).
4 Neither the State nor Dr. Zeise has consented to be sued in federal court. Under the limited
5 exception to state sovereign immunity recognized by the Supreme Court in *Ex parte Young*, 209
6 U.S. 123 (1908), lawsuits may be filed “for prospective declaratory or injunctive relief against
7 state officers in their official capacities for their alleged violations of federal law.” *Coalition to*
8 *Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). However, the officer
9 sued “must have some connection with the enforcement of the act.” *Ibid.* (citing *Ex parte Young*,
10 209 U.S. at 157). “That connection ‘must be fairly direct; a generalized duty to enforce state law
11 or general supervisory power over the persons responsible for enforcing the challenged provision
12 will not subject an official to suit.’” *Ibid.* (citing *Los Angeles County Bar Ass’n v. Eu*, 979 F.2d
13 679, 704 (9th Cir. 1992)).

14 Here, OEHHA and Dr. Zeise have *no* connection, much less a “fairly direct” connection, to
15 the enforcement of Proposition 65’s warning requirement. Enforcement actions may be brought
16 by the Attorney General and a number of other public enforcers or by private citizens acting in
17 the public interest subject to certain restrictions. §§ 25249.7(c), (d). OEHHA is not one of the
18 entities named in the law and therefore cannot bring actions to enforce Proposition 65’s warning
19 requirement. *Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 346 (2004). Without a
20 connection to the enforcement of the warning requirement, the limited exception to sovereign
21 immunity provided by *Ex parte Young* does not apply, and sovereign immunity bars Plaintiffs’
22 claims against Dr. Zeise arising from warning requirements for exposures to glyphosate.

23 **II. THE LISTING OF GLYPHOSATE DOES NOT VIOLATE THE FIRST AMENDMENT OF**
24 **THE UNITED STATES CONSTITUTION.**

25 To the extent that Plaintiffs challenge the constitutionality of the glyphosate listing, those
26 claims fail on the merits. As this Court has already recognized, the glyphosate listing does not
27 violate, or even implicate, the First Amendment of the United States Constitution. In its Order,
28 this Court properly found that the listing of chemicals known to the State to cause cancer is

1 “neither a restriction on private speech nor government-compelled private speech.” Order at 11.
2 OEHHA’s listing of glyphosate, as an action by a California executive branch agency, was
3 government speech. *See, e.g., R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 918 (9th Cir.
4 2005) (the key issue is “the degree of governmental control over the message.”) Government
5 speech is not regulated by the First Amendment. *Pleasant Grove City v. Summum*, 555 U.S. 460,
6 467 (2009) (“[t]he Free Speech Clause restricts government regulation of private speech; it does
7 not regulate government speech.”) Thus, the listing of glyphosate cannot violate the First
8 Amendment.

9 **III. THE LISTING OF GLYPHOSATE IS NOT PREEMPTED BY FEDERAL LAW.**

10 **A. The Court Must Presume that Proposition 65 is Not Preempted.**

11 “Preemption analysis starts with the presumption that the traditional police powers of states
12 are not displaced by federal law unless displacement was the clear and manifest purpose of
13 Congress.” *Chemical Specialties Mfrs. Ass’n, Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir. 1992)
14 (internal citations and quotations omitted). Providing accurate information about food and
15 beverages for purposes of consumer protection is a subject that historically has been regulated by
16 the states. *Hillsborough County, Florida v. Automated Medical Lab., Inc.*, 471 U.S. 707, 719
17 (1985) (“the regulation of health and safety matters is primarily, and historically, a matter of local
18 concern”). Thus, Proposition 65 is subject to the presumption against preemption. *Sciortino v.*
19 *Pepsico, Inc.*, 108 F. Supp. 3d 780, 796 (N.D. Cal. 2015) (“Proposition 65 is a consumer
20 protection law that is within the states’ historic police powers and subject to the presumption
21 against preemption.”)

22 To overcome this strong presumption, Plaintiffs must prove that federal law preempts state
23 law in one of three ways: (1) express preemption, where Congress defines explicitly the extent to
24 which its laws preempt state law; (2) field preemption, where federal law is so pervasive as to
25 leave no room for the states to supplement it; or (3) conflict preemption, where state law “actually
26 conflicts” with federal law. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). An
27 actual conflict sufficient to preempt state law exists in two circumstances: (1) “where it is
28 impossible for a private party to comply with both state and federal requirements,” or (2) “where

1 state law stands as an obstacle to the accomplishment and execution of the full purposes and
2 objectives of Congress.” *Id.* at 79 (internal citations and quotation marks omitted). Plaintiffs
3 must demonstrate that it was the “clear and manifest purpose of Congress” to supersede
4 Proposition 65. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Plaintiffs cannot
5 meet this burden of proof.

6 **B. Neither the FDCA’s Misbranding Provision nor the FDCA’s Pesticide**
7 **Tolerance Regime Preempt the Listing of Glyphosate.**

8 To the extent that Plaintiffs’ claim of preemption is based on a misbranding theory under
9 the Food, Drug, and Cosmetic Act (“FDCA”), *see, e.g.* Complaint ¶¶ 110-113, that claim is based
10 on the content of the warning, and has no relationship to the listing of glyphosate. To the extent
11 that Plaintiffs’ claim of preemption relates to the FDCA’s pesticide tolerance regime, *see*
12 Complaint ¶ 116 (“Proposition 65’s glyphosate listing and any related safe harbor effectively
13 establish or enforce a regulatory limit on a pesticide chemical residue” in contravention of the
14 FDCA section 346a(n)(4)), that claim must fail. Pursuant to section 346a(n)(4) of the FDCA, no
15 State “may establish or enforce any regulatory limit on a qualifying pesticide chemical residue in
16 or on any food....” 21 U.S.C § 346a(n)(4). This section goes on to provide that a State “shall be
17 deemed to establish or enforce a regulatory limit on a pesticide chemical residue in or on a food if
18 it purports to prohibit or penalize the production, processing, shipping, or other handling of a food
19 because it contains a pesticide residue....” *Id.*

20 Section 346a(n)(4) does not preempt the listing of glyphosate, either expressly or by
21 implication, because the listing does not establish or enforce a regulatory limit on glyphosate
22 residues that prohibits or penalizes the production, processing, shipping, or other handling of a
23 food. Section 25249.8 of the California Health and Safety Code, Proposition 65’s listing
24 provision, imposes no duties on Plaintiffs. It simply instructs OEHHA to list chemicals. The
25 only duties or prohibitions imposed by Proposition 65 on Plaintiffs are those that arise pursuant to
26 the two sections of the statute that require businesses that expose Californians to listed chemicals
27 to provide clear and reasonable warnings, § 25249.6, and that prohibit them from discharging
28

1 listed chemicals into sources of drinking water. § 25249.5. Because Dr. Zeise does not enforce
2 those provisions of the statute, Plaintiffs' preemption claims cannot be brought against Dr. Zeise.³

3 **IV. THE LISTING OF GLYPHOSATE DOES NOT VIOLATE PLAINTIFFS' SUBSTANTIVE DUE**
4 **PROCESS RIGHTS.**

5 The Fourteenth Amendment's Due Process Clause confers both substantive and procedural
6 rights." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Since Plaintiffs do not allege they were
7 denied any proper procedure, it appears their claim is a substantive due process claim. Their
8 substantive due process claim fails because they cannot assert that the listing of glyphosate
9 deprived them of life, liberty, or property and even if they could, the listing of glyphosate is not
10 arbitrary and capricious and is rationally related to a legitimate state interest.

11 **A. The Listing of Glyphosate Does Not Deprive Plaintiffs of Life, Liberty, or**
12 **Property.**

13 Substantive due process protects an individual's "fundamental rights to liberty and bodily
14 autonomy." *C.R. v. Eugene School District 4J*, 835 F.3d 1142, 1154 (9th Cir. 2016) (holding that
15 there was no substantive due process interest in maintaining a non-stigmatizing school
16 disciplinary record). "To establish a substantive due process claim, a plaintiff must, as a
17 threshold matter, show a government deprivation of life, liberty, or property." *Nunez v. City of*
18 *Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (citing *Jeffries v. Turkey Run Consolidated*
19 *School District*, 492 F.2d 1, 4 (7th Cir. 1974)). Indeed, "the absence of any claim by the plaintiff
20 that an interest in liberty or property has been impaired is a fatal defect in [plaintiff's] substantive
21 due process argument." *Jeffries*, 492 F.2d at 4. In *Nunez*, the court rejected a police-officer's
22 assertion of a substantive due process right to a promotion. *Id.* at 872. The Ninth Circuit noted
23 that property interests are created by an independent source such as state law, and that there was
24 no law that created a property interest in a promotion. *Ibid.* Further, "reputation alone is not an
25

26 ³ In addition, even Proposition 65's warning requirement is not preempted by § 346a(n)(4)
27 of the FDCA. Section 346a(n)(8) contains a savings clause that provides, "Nothing in this
28 chapter preempts the authority of any State or political subdivision to require that a food
containing a pesticide chemical residue bear or be the subject of a warning or other statement
relating to the presence of the pesticide chemical residue in or on such food."

1 interest protected by the Constitution.” *WMX Technologies Inc. v. Miller*, 197 F.3d 367, 373 (9th
2 Cir. 1999).

3 Plaintiffs fail to allege any way in which the listing of glyphosate impairs their life, liberty,
4 or property interests. In its Order, this Court properly held that the injuries Plaintiffs’ allege stem
5 from the warning requirement, not the listing requirement. Order at 11 (“any harm that plaintiffs
6 might suffer is caused by the warning requirements of Proposition 65, rather than the listing itself.
7 Notably, plaintiffs do not claim that they have already suffered any injury as a result of the listing,
8 but only allege that they will suffer injury as the warning requirement deadline approaches and
9 takes effect.”) And Plaintiffs cannot amend their complaint to allege such a deprivation as the
10 listing of glyphosate does not compel or curtail any action by Plaintiffs and does not deprive them
11 of any property interest created by law. The listing of glyphosate does not deprive Plaintiffs of
12 life, liberty, or property and thus Plaintiffs fail to state a valid substantive due process claim.

13 **B. Even if Plaintiffs Could Allege Deprivation of Life, Liberty, or Property,**
14 **The Listing of Glyphosate is Rationally Related to a Legitimate State**
15 **Interest.**

16 Even if Plaintiffs could amend their complaint to properly allege deprivation of a life,
17 liberty, or property interest sufficient for a substantive due process claim, the listing of glyphosate
18 survives the very easy standard of rational basis review. To withstand a substantive due process
19 claim, a statute “is required to bear only a rational relationship to a legitimate state interest, unless
20 it makes a suspect classification or implicates a fundamental right.” *National Ass’n for*
21 *Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir.
22 2000). Plaintiffs do not allege they are members of a suspect class or that Dr. Zeise is infringing
23 upon one of their fundamental rights.⁴ Instead, Plaintiffs allege in conclusory fashion that

24 ⁴ Notably, “government action that affects only economic interests does not implicate
25 fundamental rights.” *Yagman v. Garcetti*, 852 F.3d 859, 866 (9th Cir. 2017) (citation and internal
26 quotation marks omitted). Further, Plaintiffs cannot assert that free speech is a fundamental right
27 for purposes of their due process claim. “[A]n infringement of the right to free speech cannot
28 provide the basis for a violation of due process.” *Denney v. Drug Enforcement Administration*,
508 F. Supp. 2d 815, 833 (E.D. Cal. 2007). “Where a particular Amendment provides an explicit
textual source of constitutional protection against a particular sort of government behavior, that
Amendment, not the more generalized notion of substantive due process, must be the guide for
analyzing these claims.” *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (citation and
internal quotation marks omitted).

1 “California has no rational basis for listing glyphosate as a chemical known to the State of
2 California to cause cancer....” Complaint, ¶ 123.

3 Plaintiffs bear a heavy burden to show that OEHHA’s listing of glyphosate in July 2017
4 had no rational basis. “Governmental action is rationally related to a legitimate goal unless the
5 action is clearly arbitrary and unreasonable, having no substantial relation to the public health,
6 safety, morals, or general welfare.” *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189,
7 1193 (9th Cir. 2013) (citation and internal quotation marks omitted). Courts “do not require that
8 the government’s action actually advance its stated purposes, but merely look to see whether the
9 government *could* have had a legitimate reason for acting as it did.” *Dittman v. California*, 191
10 F.3d 1020, 1031 (9th Cir. 1999) (citation and internal quotation marks omitted) (emphasis in
11 original). The government need not state a rational basis for its action at the time it acts. Rather,
12 the plaintiff must “establish that the facts on which the legislature may have relied could not
13 reasonably have been conceived as true by the governmental decisionmaker.” *Id.* (citation and
14 internal quotation marks omitted).

15 OEHHA’s use of the listing mechanism at issue in this case to add glyphosate to the
16 Proposition 65 list was an action rationally related to the goals of the voters who enacted
17 Proposition 65. Indeed, the action was expressly required by law. § 25249.8(a). The Preamble
18 to Proposition 65, quoted in the law’s Ballot Pamphlet, states,

19
20 The people of California find that hazardous chemicals pose a serious potential threat to
21 their health and well-being, that state government agencies have failed to provide them with
22 adequate protection, and that these failures have been serious enough to lead to
23 investigations by federal agencies of the administration of California’s toxic protection
24 programs. The people therefore declare their rights: (a) To protect themselves and the
25 water they drink against chemicals that cause cancer, birth defects, or other reproductive
26 harm. (b) To be informed about exposures to chemicals that cause cancer, birth defects, or
27 other reproductive harm....⁵

24 The listing of glyphosate was rationally related to each of these legitimate public health and
25 safety goals.

26 First, the voters’ decision to rely on carcinogenicity findings by the International Agency
27 for Research on Cancer (“IARC”) was rational. IARC, the cancer research arm of the United

28 ⁵ Zuckerman Decl., Exh. A (Ballot Pamphlet for Proposition 65).

1 Nations World Health Organization, is an intergovernmental entity that exists to “promote
 2 international collaboration in cancer research.”⁶ The United States and at least 18 other states
 3 made the very same decision that the voters made here, to rely on IARC’s technical expertise.
 4 For example, the United States Department of Health and Human Services notes that IARC
 5 “Monograph volumes are considered critical references that inform health policy and cancer
 6 research worldwide about carcinogenic risks to reduce cancer burden globally.”⁷ Additionally,
 7 the Federal Occupational Safety and Health Administration relies on IARC as a source for
 8 determining the carcinogenicity of chemicals for purposes of warning employees about exposure,
 9 *see* 29 C.F.R. § 1910.1200, App. F, and requires businesses to disclose to their workers on Safety
 10 Data Sheets “whether the hazardous chemical... has been found to be a potential carcinogen in
 11 the International Agency for Research on Cancer (IARC) Monographs (latest edition)....” 29
 12 C.F.R. §§ 1910.1200, App. D, Heading 11(e), 1910.1200(g)(2)(xi). And export regulations
 13 promulgated under the Toxic Substances Control Act identify a chemical as a known or potential
 14 carcinogen if IARC classifies it as Group 1, 2A, or 2B. 40 C.F.R. § 707.60(c)(2)(ii). IARC has
 15 classified glyphosate as Group 2A.⁸ Finally, Alaska, Connecticut, Illinois, Indiana, Louisiana,
 16 Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island,
 17 Tennessee, Texas, Vermont, Virginia, and Washington rely on IARC to create lists of hazardous
 18 chemicals and identify carcinogens for other public health purposes.⁹

19 Second, the listing decision in this case was rational. OEHHA placed glyphosate on the
 20 Proposition 65 list because IARC followed its established practices, convened a working group of
 21 scientists from the United States Environmental Protection Agency (“EPA”), the California EPA, the
 22 National Institute of Environmental Health Sciences, the National Cancer Institute, two United States
 23 schools of veterinary medicine, and seven other countries.¹⁰ This group reached *consensus* that

24 ⁶ Zuckerman Decl., Exh. G (IARC, Statute Rules and Regulations, Fourteenth Edition
 25 (May 2014)), at 6.

26 ⁷ *See* United States Department of Health and Human Services, Limited Competition:
 27 IARC Monographs Program (UOI), available at <http://grants.nih.gov/grants/guide/rfa-files/RFA-CA-14-503.html> (last visited March 15, 2018).

28 ⁸ Zuckerman Decl., Exh. O (IARC, *Glyphosate*, Monograph 112), at 78.

⁹ Zuckerman Decl., Exh. L (Table of Reliance on IARC by Other States.)

¹⁰ Zuckerman Decl., Exh. N (IARC *List of Participants*, Monograph 112.)

1 glyphosate is “probably carcinogenic to humans” based on sufficient evidence in animals, limited
2 evidence in humans (noting a positive association for non-Hodgkin lymphoma), and strong
3 mechanistic evidence, and published its detailed findings.¹¹

4 Third, the listing was rationally related to the voters’ desire to be informed about exposures
5 to chemicals that outside scientific experts determine to be human or animal carcinogens. The
6 listing was also rationally related to the voters’ desire to protect their drinking water from being
7 contaminated with carcinogens.

8 Given the multiple ways in which the listing of glyphosate was rationally related to public
9 health and safety goals, even if the Plaintiffs could state a valid interest for purposes of substantive
10 due process, the listing of glyphosate did not violate the Due Process Clause of the Fourteenth
11 Amendment of the United States Constitution. Therefore, this claim fails as well.

12 **V. CONSISTENT WITH PRINCIPLES OF SOVEREIGN IMMUNITY, THE COURT’S ORDER**
13 **SHOULD BE AMENDED TO CLARIFY THAT DR. ZEISE IS NOT SUBJECT TO THE**
14 **PRELIMINARY INJUNCTION BARRING ENFORCEMENT OF THE WARNING**
REQUIREMENT FOR GLYPHOSATE.

15 In addition to requesting judgment on the pleadings, Dr. Zeise respectfully moves pursuant
16 to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend this Court’s Order as it
17 applies to her. A motion to reconsider is to be granted sparingly and is only appropriate if the
18 district court is “presented with newly discovered evidence, committed clear error, or if there is
19 an intervening change in the controlling law.” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir.
20 2003).

21 The Court committed clear error by enjoining Dr. Zeise from enforcing Proposition 65’s
22 warning requirement. On page 19, line 28 and page 20, lines 1 through 7 of the Order (emphasis
23 added), the Court states:

24
25 Pending final resolution of this action, *defendants*, their agents and employees, all persons
26 or entities in privity with them, and anyone acting in concert with them are hereby
27 *ENJOINED from enforcing* as against plaintiffs, plaintiffs’ members, and all persons
represented by plaintiffs, California Health & Safety Code § 25249.6’s requirement that any
person in the course of doing business provide a clear and reasonable warning before
exposing any individual to glyphosate.

28 ¹¹ Zuckerman Decl., Exh. O (IARC, *Glyphosate*, Monograph 112), at 78.

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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12
 13 **NATIONAL ASSOCIATION OF WHEAT
 GROWERS ET AL.,**

Civil Action No. 2:17-CV-02401-WBS-EFB

[PROPOSED] ORDER

14 Plaintiffs,

15 v.

16
 17 **LAUREN ZEISE, IN HER OFFICIAL
 CAPACITY AS DIRECTOR OF THE
 18 OFFICE OF ENVIRONMENTAL
 HEALTH HAZARD ASSESSMENT; AND
 19 XAVIER BECERRA, IN HIS OFFICIAL
 CAPACITY AS ATTORNEY GENERAL
 20 OF THE STATE OF CALIFORNIA,**

21 Defendants.

22
 23 This matter came on regularly for hearing before this Court on May 29, 2018, at 1:30 p.m.,
 24 Defendant Dr. Lauren Zeise, in her official capacity as Director of the Office of Environmental
 25 Health Hazard Assessment (“Dr. Zeise”) moved for Judgment on the Pleadings as to Plaintiff’s
 26 Amended Complaint for Declaratory and Injunctive Relief (“Amended Complaint”) and to Alter
 27 or Amend the Court’s Order Granting Preliminary Injunction.
 28

1 After full consideration of the moving papers, oral argument, and the documents on file
2 with the Court, with good cause appearing, IT IS HEREBY ORDERED THAT:

3 (1) Dr. Zeise’s Motion for Judgment on the Pleadings is GRANTED;

4 (2) Plaintiff’s Amended Complaint as to Dr. Zeise is DISMISSED without leave to
5 amend;

6 (3) The relief requested in Plaintiff’s Amended Complaint as to Dr. Zeise is DENIED;

7 (4) This Judgment is final as to the relief requested by Plaintiffs in this action as to Dr.
8 Zeise; and

9 (5) This Court’s February 26, 2018 Memorandum and Order re Motion for Preliminary
10 Injunction (“Order”) is amended or altered to exclude Dr. Zeise from the scope of the injunction
11 against enforcement of the warning provision of Proposition 65. The final three sentences of the
12 Order will be eliminated and replaced with the following:

13
14 Plaintiffs’ request for a preliminary injunction enjoining Dr. Lauren Zeise, in her official
15 capacity as Director of the Office of Environmental Health Hazard Assessment, from listing
16 glyphosate as a chemical known to the State of California to cause cancer under California
17 Health & Safety Code § 25249.8 is DENIED. Plaintiffs’ request for a preliminary
18 injunction as to Defendant Xavier Becerra, in his official capacity as Attorney General of
19 the State of California, enjoining his enforcement of the warning requirement of California
20 Health & Safety Code § 25249.6 as to glyphosate is GRANTED. Pending final resolution
21 of this action, the Attorney General, his agents and employees, all persons or entities in
22 privity with him, and anyone acting in concert with him are hereby ENJOINED from
23 enforcing as against plaintiffs, plaintiffs’ members, and all persons represented by
24 plaintiffs, California Health & Safety Code § 25249.6’s requirement that any person in the
25 course of doing business provide a clear and reasonable warning before exposing any
26 individual to glyphosate.

21 **IT IS SO ORDERED.**

23 Dated: _____

24 William B. Shubb
25 Senior United States District Judge