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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF WHEAT  
GROWERS; NATIONAL CORN GROWERS  
ASSOCIATION; UNITED STATES  
DURUM GROWERS ASSOCIATION;  
WESTERN PLANT HEALTH  
ASSOCIATION; MISSOURI FARM  
BUREAU; IOWA SOYBEAN  
ASSOCIATION; SOUTH DAKOTA AGRI-  
BUSINESS ASSOCIATION; NORTH  
DAKOTA GRAIN GROWERS  
ASSOCIATION; MISSOURI CHAMBER  
OF COMMERCE AND INDUSTRY;  
MONSANTO COMPANY; ASSOCIATED  
INDUSTRIES OF MISSOURI;  
AGRIBUSINESS ASSOCIATION OF  
IOWA; CROPLIFE AMERICA; AND  
AGRICULTURAL RETAILERS  
ASSOCIATION,

Plaintiffs,

v.

XAVIER BECERRA, IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL OF  
THE STATE OF CALIFORNIA,

Defendant.

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

**PLAINTIFFS' NOTICE OF  
MOTION AND MOTION FOR  
SUMMARY JUDGMENT**

[Declarations of Jefferson  
Jon Doggett, David Heering,  
Blake Hurst, Blake Inman,  
Mark Jackson, Greg Kessel,  
Mark Martinson, Ray  
McCarty, Dan Mehan, Trent  
Norris, Renee Pinel, Gordon  
Stoner, Dan Wogsland, and  
Kathy Zander filed and  
[Proposed] Order lodged  
concurrently herewith]

Hearing: Feb. 10, 2020  
Time: 1:30 p.m.  
Ctrm: 5

The Honorable William B.  
Shubb

Case Filed: Nov. 15, 2017

1           **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2           **PLEASE TAKE NOTICE** that on Monday, February 10, 2020, at  
3 1:30 p.m., or as soon thereafter as counsel may be heard in  
4 Courtroom 5 of the above titled Court, located in the United  
5 States Courthouse at 501 I Street, Sacramento, CA 95814, before  
6 the Honorable William B. Shubb, Plaintiffs will and hereby do  
7 move the Court to enter summary judgment in Plaintiffs' favor; to  
8 declare that the Proposition 65 warning requirement for glyphosate  
9 violates the First Amendment; and to convert the Court's  
10 preliminary injunction to a permanent injunction, enjoining  
11 Defendant and his officers, employees, or agents, and all those  
12 in privity with those entities or individuals, from enforcing or  
13 threatening to enforce the warning requirement in Proposition 65  
14 with regard to glyphosate, including the requirement that any  
15 "person in the course of doing business" provide a "clear and  
16 reasonable warning" before "expos[ing] any individual to"  
17 glyphosate. Cal. Health & Safety Code. § 25249.6.

18           This Motion is made on the grounds stated in the Memorandum  
19 of Points and Authorities filed herewith. Proposition 65's  
20 warning requirement, if allowed to come into effect, would coerce  
21 Plaintiffs to provide a cancer "warning" with which they  
22 vehemently disagree and that is contrary to the nearly unanimous  
23 worldwide scientific consensus that glyphosate does *not* pose a  
24 risk of cancer. As explained in detail in Plaintiffs' Memorandum,  
25 the warning requirement violates the First Amendment to the United  
26 States Constitution's protections against compelled speech.

27           In support of their Motion, Plaintiffs rely on the  
28 accompanying Memorandum of Points and Authorities; the

1 Declarations of Jefferson Jon Doggett, David Heering, Blake Hurst,  
2 Blake Inman, Mark Jackson, Greg Kessel, Mark Martinson, Ray  
3 McCarty, Dan Mehan, Trent Norris, Renee Pinel, Gordon Stoner, Dan  
4 Wogsland, and Kathy Zander, and the Exhibits attached thereto;  
5 such oral argument that may be properly presented at or before  
6 the time of the hearing; and upon any other matter the Court deems  
7 proper.

8 Plaintiffs anticipate that hearing of this Motion will  
9 require 1 hour. Plaintiffs do not anticipate calling live  
10 witnesses.

1 Dated: September 25, 2019

Respectfully submitted,

2 /s/ Philip J. Perry

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AGRICULTURAL RETAILERS  
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Plaintiffs,

XAVIER BECERRA, IN HIS  
OFFICIAL CAPACITY AS ATTORNEY  
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CALIFORNIA,

Defendant.

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

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

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Time: 1:30 p.m.  
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The Honorable William B.  
Shubb

Case Filed: Nov. 15, 2017

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION.....	1
BACKGROUND.....	5
A.    Glyphosate And Its Federal Regulation.....	5
B.    The International Scientific Consensus That Glyphosate Does Not Cause Cancer, And IARC's Contrary Outlier View.....	7
C.    The Proposition 65 Scheme.....	16
D.    OEHHA's Glyphosate Listing And NSRL.....	23
E.    Significant Effects Of Proposition 65's Glyphosate Warning Requirement.....	26
F.    Proceedings Before This Court.....	29
ARGUMENT.....	31
I.    THE COMPELLED GLYPHOSATE WARNING VIOLATES THE FIRST AMENDMENT.....	31
A.    The Compelled Glyphosate Warning Cannot Be Sustained Under <i>Zauderer</i> Because It Is Not "Purely Factual And Uncontroversial".....	34
1.    The Warning Mandated By Proposition 65 Cannot Be Sustained Under <i>Zauderer</i> .....	34
2.    The Alternative Warnings Proposed By The Attorney General Also Cannot Be Upheld Under <i>Zauderer</i> .....	39
B.    The Warning Mandate Fails Intermediate Scrutiny.....	46
1.    The Attorney General Cannot Prove That The Warning Directly And Materially Advances The State's Legitimate Interests.....	47
2.    The Attorney General Cannot Prove That The Warning Requirement Is Narrowly Tailored.....	50

1	C.	The First Amendment and Due Process Clause	
2		Do Not Permit The State To Continually	
3		Invent New Warnings To Save The Warning	
4		Mandate From Invalidity.....	51
5	II.	A PERMANENT INJUNCTION SHOULD ISSUE.....	54
6		CONCLUSION.....	61

**TABLE OF AUTHORITIES**

**Page (s)**

**CASES**

44 <i>Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996) .....	46
<i>Am. Beverage Ass’n v. City of S.F.</i> , 916 F.3d 749 (9th Cir. 2019) (en banc) ....	3, 4, 32, 33, 47, 48
<i>Am. Meat Inst. v. U.S. Dep’t of Agric.</i> , 760 F.3d 18 (D. C. Cir. 2014) (en banc) .....	33, 34, 36
<i>Am. Trucking Ass’ns, Inc. v. City of L.A.</i> , 559 F.3d 1046 (9th Cir. 2009) .....	59
<i>Amidon v. Student Ass’n of S.U.N.Y.</i> , 508 F.3d 94 (2d Cir. 2007) .....	44
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964) .....	52
<i>Baxter Healthcare Corp. v. Denton</i> , 120 Cal. App. 4th 333 (2004) .....	26
<i>Bullfrog Films, Inc. v. Wick</i> , 847 F.2d 502 (9th Cir. 1988) .....	52
<i>Cal. Chamber of Com. v. Brown</i> , 196 Cal. App. 4th 233 (2011) .....	48, 49
<i>Cal-Almond, Inc. v. U.S. Dep’t of Agric.</i> , 14 F.3d 429 (9th Cir. 1993) .....	46, 49
<i>Cent. Hudson Gas &amp; Elec. Co. v. Pub. Serv. Comm’n of N.Y.</i> , 447 U.S. 557 (1980) .....	32
<i>CKE Rests., Inc. v. Moore</i> , 159 Cal. App. 4th 262 (2008) .....	22
<i>Consumer Cause, Inc. v. Mrs. Gooch’s Nat. Food Mkts., Inc.</i> , 127 Cal. App. 4th 387 (2005) .....	20
<i>Consumer Cause, Inc. v. SmileCare</i> , 91 Cal. App. 4th 454 (2001) (Vogel, J., dissenting) .	20, 22, 23



1	<i>Consumer Def. Grp. v. Rental Hous. Indus. Members,</i>	
2	137 Cal. App. 4th 1185 (2006) .....	20, 21
3	<i>Corales v. Bennett,</i>	
4	567 F.3d 554 (9th Cir. 2009) .....	54
5	<i>CTIA - The Wireless Ass'n v. City of Berkeley,</i>	
6	928 F.3d 832 (9th Cir. 2019) .....	3, 4, 32
7	<i>CTIA - Wireless Ass'n v. City of S.F.,</i>	
8	494 F. App'x 752 (9th Cir. 2012) .....	35, 39
9	<i>De Simone v. VSL Pharm., Inc.,</i>	
10	133 F. Supp. 3d 776 (D. Md. 2015) .....	58
11	<i>Design Furnishings, Inc. v. Zen Path LLC,</i>	
12	No. CIV. 2:10-02765 WBS GGH, 2010 WL 4321568 (E.D. Cal. Oct. 21, 2010) .....	58
13	<i>DiPirro v. Bondo Corp.,</i>	
14	153 Cal. App. 4th 150 (2007) .....	21
15	<i>Doe v. Harris,</i>	
16	772 F.3d 563 (9th Cir. 2014) .....	61
17	<i>Dowhal v. SmithKline Beecham Consumer Healthcare,</i>	
18	32 Cal. 4th 910 (2004) .....	3, 17, 34, 40, 50
19	<i>Edenfield v. Fane,</i>	
20	507 U.S. 761 (1993) .....	47
21	<i>Elrod v. Burns,</i>	
22	427 U.S. 347 (1976) .....	56
23	<i>Envtl. Law Found. v. Beech-Nut Nutrition Corp.,</i>	
24	235 Cal. App. 4th 307 (2015) .....	22
25	<i>Envtl. World Watch, Inc. v. Walt Disney Co.,</i>	
26	No. CV 09-04045 DDP, 2009 WL 3365915 (C.D. Cal. Oct. 19, 2009) .....	22
27	<i>Evergreen Ass'n v. N.Y.C.,</i>	
28	740 F.3d 233 (2d Cir. 2014) .....	51
	<i>FCC v. Fox Television Stations, Inc.,</i>	
	567 U.S. 239 (2012) .....	53, 54
	<i>Gaeta v. Perrigo Pharm. Co.,</i>	
	562 F. Supp. 2d 1091 (N.D. Cal. 2008) .....	50

1	<i>Gerling Glob. Reinsurance Corp. of Am. v. Quackenbush</i> ,	
2	No. Civ. S-00-0506WBSJFM et al., 2000 WL 777978	
3	(E.D. Cal. June 9, 2000), <i>aff'd sub nom Gerling</i>	
4	<i>Glob. Reinsurance Corp. of Am. v. Low</i> , 240 F.3d 739	
5	(9th Cir. 2001) .....	57
6	<i>Hernandez v. Sessions</i> ,	
7	872 F.3d 976 (9th Cir. 2017) .....	55
8	<i>Hufford v. McEnaney</i> ,	
9	249 F.3d 1142 (9th Cir. 2001) .....	54
10	<i>Hurley v. Irish-American Gay, Lesbian &amp; Bisexual Grp.</i> ,	
11	515 U.S. 557 (1995) .....	1, 31
12	<i>Idaho v. Couer d'Alene Tribe</i> ,	
13	794 F.3d 1039 (9th Cir. 2015) .....	60
14	<i>Int'l Dairy Foods Ass'n v. Amestoy</i> ,	
15	92 F.3d 67 (2d Cir. 1996) .....	56
16	<i>Int'l Franchise Ass'n v. City of Seattle</i> ,	
17	803 F.3d 389 (9th Cir. 2015) .....	57
18	<i>Italian Colors Rest. v. Becerra</i> ,	
19	878 F.3d 1165 (9th Cir. 2018) .....	31, 47, 48, 49
20	<i>Janus v. Am. Fed'n of State, Cty., &amp; Mun. Emps.</i> ,	
21	<i>Council 31</i> ,	
22	138 S. Ct. 2448 (2018) .....	1, 31
23	<i>Johnson v. Am. Standard, Inc.</i> ,	
24	43 Cal. 4th 56 (2008) .....	50
25	<i>KH Outdoor, LLC v. City of Trussville</i> ,	
26	458 F.3d 1261 (11th Cir. 2006) .....	61
27	<i>Libertarian Party of L.A. Cty. v. Bowen</i> ,	
28	709 F.3d 867 (9th Cir. 2013) .....	29
	<i>Life Alert Emergency Resp., Inc. v. LifeWatch, Inc.</i> ,	
	601 F. App'x 469 (9th Cir. 2015) .....	56
	<i>Linkmark Assocs., Inc. v. Willingboro</i> ,	
	431 U.S. 86 (1977) .....	51
	<i>People ex rel. Lockyer v. Tri-Union Seafoods, LLC</i> ,	
	Nos. CGC-01-402975, CGC-04-432394, 2006 WL 1544384	
	(Cal. Sup. Ct. May 11, 2006) .....	3, 17, 34, 53

1	<i>Illinois ex rel. Madigan v. Telemarketing Assocs.,</i>	
2	<i>Inc.,</i>	
	538 U.S. 600 (2003) .....	52
3	<i>Mason v. SmithKline Beecham Corp.,</i>	
4	596 F.3d 387 (7th Cir. 2010) .....	50
5	<i>Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights</i>	
6	<i>Comm’n,</i>	
	138 S. Ct. 1719 (2018) .....	44
7	<i>Melendres v. Arpaio,</i>	
8	695 F.3d 990 (9th Cir. 2012) .....	55
9	<i>Milavetz, Gallop &amp; Milavetz, P.A. v. United States,</i>	
	559 U.S. 229 (2010) .....	33, 34
10	<i>Monsanto Co. v. Geertson Seed Farms,</i>	
11	561 U.S. 139 (2010) .....	55
12	<i>N.E. Med. Servs., Inc. v. Cal. Dep’t of Health Care</i>	
13	<i>Servs.,</i>	
	712 F.3d 461 (9th Cir. 2013) .....	60
14	<i>Nat’l Ass’n of Mfrs. v. S.E.C.,</i>	
15	800 F.3d 518 (D.C. Cir. 2015) .....	35
16	<i>Nat’l Elec. Mfrs. Ass’n v. Sorrell,</i>	
	272 F.3d 104 (2d Cir. 2001) .....	34
17	<i>Nat’l Inst. of Family &amp; Life Advocates v. Becerra,</i>	
18	138 S. Ct. 2361 (2018) .....	4, 32, 33, 46, 47, 51, 54
19	<i>Nelson v. NASA,</i>	
20	530 F.3d 865 (9th Cir. 2008), <i>rev’d on other</i>	
	<i>grounds,</i> 562 U.S. 134 (2011) .....	60
21	<i>Nicolle-Wagner v. Deukmejian,</i>	
22	230 Cal. App. 3d 652 (1991) .....	49
23	<i>Nken v. Holder,</i>	
	556 U.S. 418 (2009) .....	61
24	<i>Pac. Gas &amp; Elec. Co. v. Pub. Utils. Comm’n of Cal.,</i>	
25	475 U.S. 1 (1986) .....	35
26	<i>Pac. Merch. Shipping Ass’n v. Cackette,</i>	
27	No. CIV. S-06-2791 WBS KJM, 2007 WL 2914961 (E.D.	
	Cal. Oct. 5, 2007) (Shubb, J.) .....	60
28		

1	<i>PDK Labs., Inc. v. DEA,</i>	
2	362 F.3d 786 (D.C. Cir. 2004) .....	54
3	<i>Reckitt Benckiser Inc. v. EPA,</i>	
4	613 F.3d 1131 (D.C. Cir. 2010) .....	14
5	<i>Rent-A-Center, Inc. v. Canyon Television &amp; Appliance</i>	
6	<i>Rental, Inc.,</i>	
7	944 F.2d 597 (9th Cir. 1991) .....	57
8	<i>Riley v. Nat’l Fed’n of Blind of N.C., Inc.,</i>	
9	487 U.S. 781 (1988) .....	53
10	<i>Rodriguez v. Robbins,</i>	
11	715 F.3d 1127 (9th Cir. 2013) .....	61
12	<i>In re Roundup Prods. Liab. Litig.,</i>	
13	385 F. Supp. 3d 1042 (N.D. Cal. 2019) .....	15
14	<i>In re Roundup Prods. Liab. Litig.,</i>	
15	390 F. Supp. 3d 1102 (N.D. Cal. 2018) .....	16
16	<i>In re Roundup Prods. Liab. Litig.,</i>	
17	No. 16-md-02741-VC, 2019 WL 1371806 (N.D. Cal. Feb.	
18	18, 2019) .....	16
19	<i>Rubin v. Coors Brewing Co.,</i>	
20	514 U.S. 476 (1995) .....	47
21	<i>San Miguel Pure Foods Co. v. Ramar Int’l Corp.,</i>	
22	625 F App’x 322 (9th Cir. 2015) .....	58
23	<i>Sciortino v. Pepsico, Inc.,</i>	
24	108 F. Supp. 3d 780 (N.D. Cal. 2015) .....	22
25	<i>Sorrell v. IMS Health, Inc.,</i>	
26	564 U.S. 552 (2011) .....	51
27	<i>Stormans, Inc. v. Selecky,</i>	
28	586 F.3d 1109 (9th Cir. 2009) .....	60
	<i>Thalheimer v. City of San Diego,</i>	
	645 F.3d 1109 (9th Cir. 2011) .....	56
	<i>Thompson v. Cty. of Alameda,</i>	
	27 Cal. 3d 741 (1980) .....	50
	<i>United States v. United Foods, Inc.,</i>	
	533 U.S. 405 (2001) .....	33

1	<i>Valle Del Sol Inc. v. Whiting,</i>	
2	709 F.3d 808 (9th Cir. 2013) .....	50, 55
3	<i>Video Software Dealers Ass’n v. Schwarzenegger,</i>	
4	556 F.3d 950 (9th Cir. 2009), <i>aff’d</i> , 564 U.S. 786	
5	(2011) .....	4, 33, 35, 41, 47
6	<i>Zauderer v. Office of Disciplinary Counsel of Sup. Ct.</i>	
7	<i>of Ohio,</i>	
8	471 U.S. 626 (1985) .....	1, 4, 32, 33, 34, 52, 53
9	<i>Zetwick v. Cty. of Yolo,</i>	
10	850 F.3d 436 (9th Cir. 2017) .....	31
11	<b>STATUTES</b>	
12	7 U.S.C. § 136(a) .....	7
13	7 U.S.C. § 136(bb) .....	7
14	21 U.S.C. § 331(b) .....	7
15	21 U.S.C. § 342(a) .....	7
16	21 U.S.C. § 346a(b) (2) (A) .....	7
17	21 U.S.C. § 346a(b) (2) (A) (ii) .....	7
18	Cal. Code Regs. tit. 11, § 3202(b) .....	42, 43, 53
19	Cal. Code Regs. tit. 11, § 3203(b) .....	19
20	Cal. Code Regs. tit. 11, § 3203(d) .....	19
21	Cal. Code Regs. tit. 27, § 25600 .....	3
22	Cal. Code Regs. tit. 27, § 25601 .....	3, 17, 40
23	Cal. Code Regs. tit. 27, § 25603(a) (operative Aug. 30,	
24	2018) .....	18
25	Cal. Code Regs. tit. 27, § 25603(b) (operative Aug. 30,	
26	2018) .....	18
27	Cal. Code Regs. tit. 27, § 25603(d) (effective Jan. 1,	
28	2019) .....	18
	Cal. Code Regs. tit. 27, § 25603.2 (abrogated Aug. 30,	
	2018) .....	17
	Cal. Code Regs. tit. 27, § 25701 .....	25

1	Cal. Code Regs. tit. 27, § 25703.....	25
2	Cal. Code Regs. tit. 27, § 25703(a)(3).....	25, 26
3	Cal. Code Regs. tit. 27, § 25705(b)(1).....	25
4	Cal. Code Regs. tit. 27, § 25904(c).....	18
5	Cal. Health & Safety Code § 25249.6.....	3, 16, 17, 34
6	Cal. Health & Safety Code § 25249.7(a).....	19
7	Cal. Health & Safety Code § 25249.7(b).....	19
8	Cal. Health & Safety Code § 25249.7(c).....	19
9	Cal. Health & Safety Code § 25249.7(d)(1).....	20
10	Cal. Health & Safety Code § 25249.7(e)(1)(A).....	21
11	Cal. Health & Safety Code § 25249.7(e)(1)(B).....	21
12	Cal. Health & Safety Code § 25249.8(a).....	3, 17, 18
13	Cal. Health & Safety Code § 25249.10(b).....	17
14	Cal. Health & Safety Code § 25249.10(b).....	34
15	Cal. Health & Safety Code § 25249.10(c).....	21, 22, 25, 27
16	Cal. Health & Safety Code § 25249.11(e).....	19
17	Cal. Lab. Code § 6382(b)(1).....	3, 18

**RULES**

20	Fed R. Civ. P. 56(a).....	31
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**REGULATIONS**

22	40 C.F.R. § 180.364.....	7
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## INTRODUCTION

This case presents a simple question: Can a State force private parties to defame their own products by reciting a cancer warning with which they vehemently disagree, in circumstances where the primary federal regulatory authority body—in agreement with a nearly unanimous worldwide scientific consensus—has determined that the state-mandated warning would be “false and misleading”? Under bedrock First Amendment principles, the answer is no.

The First Amendment generally forbids regulations that compel speech to the same extent that it forbids regulations that restrict speech. *See, e.g., Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995). In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), the Supreme Court recognized a narrow exception to this rule permitting the government in certain circumstances to require commercial speakers to disclose “purely factual and uncontroversial” information about their products. *Id.* at 651. Most common health and safety disclosures fit that mold, informing consumers of indisputable facts, such as ingredient lists, calorie counts, country of origin, and universally acknowledged health risks. The compelled speech at issue in this case is nothing like those. Under threat of steep civil penalties and bounty hunter lawsuits, California is requiring that products sold in-state that expose consumers to the herbicide glyphosate be accompanied by a warning communicating to consumers that glyphosate causes cancer—even though the U.S.

1 Environmental Protection Agency (EPA), numerous regulators around  
2 the world, and California's own Office of Environmental Health  
3 Hazard Assessment (OEHHA) have concluded otherwise. This  
4 compelled-speech requirement fails the *Zauderer* test and violates  
5 the First Amendment.

6 Plaintiffs are a nationwide coalition of agricultural  
7 producers and business entities that collectively represent a  
8 substantial segment of U.S. agriculture. Glyphosate is a critical  
9 tool in modern American agriculture, approved by the federal  
10 government for use in more than 250 agricultural crop applications,  
11 and Plaintiffs and their members use, sell, manufacture, grow, and  
12 rely upon products containing glyphosate or to which glyphosate is  
13 applied. Because of its longstanding and widespread use,  
14 glyphosate has been subject to rigorous scientific scrutiny by the  
15 federal government and regulators worldwide for decades. It is  
16 widely regarded as one of the safest herbicides ever developed,  
17 and the overwhelming scientific consensus is that it does *not* pose  
18 any risk of cancer.

19 One entity in Lyon, France, the International Agency for  
20 Research on Cancer (IARC), disagrees. IARC has concluded, based  
21 on admittedly "limited evidence in humans," that glyphosate is  
22 "probably carcinogenic." Decl. of David C. Heering, Monsanto Co.,  
23 Ex. W (112 Int'l Agency for Research on Cancer (IARC), WHO, Some  
24 Organophosphate Insecticides and Herbicides, IARC Monographs 398  
25 (2017) [hereinafter "IARC Monograph 112"]). Under California's  
26 Safe Drinking Water and Toxic Enforcement Act of 1986 (more  
27 commonly known as Proposition 65), IARC's outlier determination  
28 triggered an automatic requirement that OEHHA list glyphosate as



1 a chemical "known to the state to cause cancer." Cal. Health &  
 2 Safety Code § 25249.8(a) & Cal. Lab. Code § 6382(b)(1) (IARC  
 3 triggering mechanism). This listing, in turn, triggers a  
 4 presumptive requirement under Cal. Health & Safety Code § 25249.6  
 5 that any "person" exposing "any individual" to glyphosate must  
 6 provide a "clear and reasonable warning" that their "product  
 7 contains [glyphosate], a chemical known to the state of California  
 8 to cause [cancer], or words to that effect." *Dowhal v. SmithKline*  
 9 *Beecham Consumer Healthcare*, 32 Cal. 4th 910, 918 (2004); see also  
 10 *People ex rel. Lockyer v. Tri-Union Seafoods, LLC*, Nos. CGC-01-  
 11 402975, CGC-04-432394, 2006 WL 1544384, at \*61 (Cal. Sup. Ct. May  
 12 11, 2006) (providing that this is the "core language . . . in any  
 13 warning"); Cal. Code Regs. tit. 27, §§ 25600, 25601, 25602, 25603  
 14 (providing the content of the warning and safe harbor warnings).

15 Plaintiffs brought suit to enjoin that warning requirement,  
 16 and last year this Court entered a preliminary injunction after  
 17 concluding that Plaintiffs are likely to succeed on the merits of  
 18 their First Amendment claim. This Court subsequently denied the  
 19 Attorney General's motion to alter or amend that ruling, then  
 20 stayed further proceedings in the case pending the Ninth Circuit's  
 21 decisions in *American Beverage Ass'n v. City of San Francisco* and  
 22 *CTIA - The Wireless Ass'n v. City of Berkeley*. Those cases have  
 23 now been decided, and nothing in them undermines this Court's  
 24 earlier conclusion that the State cannot compel Plaintiffs to  
 25 spread a controversial and misleading warning message on the  
 26 State's behalf. See *Am. Beverage Ass'n v. City of S.F.*, 916 F.3d  
 27 749, 756 (9th Cir. 2019) (en banc); *CTIA - The Wireless Ass'n v.*  
 28 *City of Berkeley*, 928 F.3d 832, 842 (9th Cir. 2019). Accordingly,

1 Plaintiffs now respectfully ask this Court to declare the  
2 glyphosate warning requirement unconstitutional and permanently  
3 enjoin it.

4       The basis for doing so is straightforward. Under *Zauderer*,  
5 California cannot compel Plaintiffs to broadcast a warning that is  
6 misleading, inaccurate, or controversial. See, e.g., *Nat'l Inst.*  
7 *of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018)  
8 ("*NIFLA*"); *Zauderer*, 471 U.S. at 651; *Am. Beverage Ass'n*, 916 F.3d  
9 at 756; *CTIA*, 928 F.3d at 842; *Video Software Dealers Ass'n v.*  
10 *Schwarzenegger*, 556 F.3d 950, 965-67 (9th Cir. 2009), *aff'd*, 564  
11 U.S. 786 (2011). The Proposition 65 warning, as applied to  
12 glyphosate, is all three. As this Court explained in granting the  
13 preliminary injunction, "[i]t is inherently misleading for a  
14 warning to state that a chemical is known to the state of  
15 California to cause cancer based on the finding of one organization  
16 . . . , when apparently all other regulatory and governmental  
17 bodies have found the opposite," and "given the heavy weight of  
18 evidence in the record that glyphosate is not in fact known to  
19 cause cancer, the required warning is factually inaccurate and  
20 controversial." Mem. & Order re. Mot. for Prelim. Inj. at 16-17,  
21 ECF No. 75 ("*PI Order*"). And intervening developments have  
22 reinforced that finding. Indeed, just last month EPA indicated  
23 that it "considers the Proposition 65 warning language based on  
24 the chemical glyphosate to constitute a false and misleading  
25 statement," and pesticide labels containing such language to be  
26 "misbranded," because the warning inaccurately suggests that  
27 glyphosate is carcinogenic. See Heering Decl. Ex. E (Letter from  
28 Michael L. Goodis, Dir., Reg. Div., Office of Pesticide Programs,

1 to Monsanto (Aug. 7, 2019) [hereinafter "EPA Aug. 2019 Letter"]].  
2 Under any level of First Amendment scrutiny, California's attempts  
3 to compel Plaintiffs to misleadingly and disparagingly describe  
4 their own products cannot be sustained.

5 Because there is no genuine dispute as to any material fact  
6 and Plaintiffs have shown that they prevail on the merits of their  
7 claims, the Court should enter judgment in Plaintiffs' favor;  
8 declare that the Proposition 65 warning requirement for glyphosate  
9 violates the First Amendment, and convert its preliminary  
10 injunction enjoining the application of Proposition 65's warning  
11 requirement as it pertains to glyphosate into a permanent  
12 injunction.

#### 13 **BACKGROUND**

##### 14 **A. Glyphosate And Its Federal Regulation**

15 Glyphosate is an herbicide that is used to control weeds in  
16 agricultural, residential, aquatic, and other settings.  
17 Heering Decl. ¶¶ 6-17; Statement of Undisputed Facts No. 1  
18 [hereinafter "SUF"]. Since its introduction in 1974, glyphosate  
19 has become the world's most widely used herbicide because it is  
20 effective, economical, and "environmentally benign." See Heering  
21 Decl. Ex. A (Jorge Fernandez-Cornejo et al., USDA, EIB No. 124,  
22 Pesticide Use in U.S. Agriculture: 21 Selected Crops, 1960-2008 at  
23 21 (May 2014)); SUF No. 2. It is the active ingredient in many  
24 commercial products that are marketed by multiple businesses under  
25 a number of trade names, including Roundup®, and has been  
26 registered for use in over 160 countries. Heering Decl. ¶¶ 8, 9,  
27 31-33, 67; SUF No. 3.

1 In the United States, glyphosate is approved for use in more  
 2 than 250 agricultural crop applications. Heering Decl. ¶¶ 13, 31;  
 3 SUF No. 4. In California, for instance, it is used, among other  
 4 things, in the cultivation of almond, citrus, and cotton. Heering  
 5 Decl. ¶ 31; SUF No. 5. Elsewhere in the United States, glyphosate  
 6 is used on canola and on a high percentage of critical crops such  
 7 as corn, wheat, cotton, and soybean. Heering Decl. ¶¶ 13, 30-  
 8 31; *see also, e.g.,* Heering Decl. Ex. M (Michael Livingston et  
 9 al., *Economic Returns to Herbicide Resistance Management in the*  
 10 *Short and Long Run: The Role of Neighbor Effects*, 64 Weed Sci.  
 11 (Special Issue) 595, 595-96 (2016) ("The percentage of acres  
 12 treated with glyphosate rose from 1 to 77% for corn from 1996 to  
 13 2014, from 13 to 99% for cotton from 1996 to 2010, and from 25 to  
 14 98% for soybean from 1996 to 2012.")); SUF No. 6. It is also  
 15 widely used in Canada, including for cultivation of oats and wheat.  
 16 Heering Decl. ¶ 13; SUF No. 7. Glyphosate-based herbicides are  
 17 also widely used by government agencies to control vegetation in  
 18 rights of way, in aquatic environments, in garden settings, and to  
 19 reduce the risk associated with rapid-spreading wildfire. Heering  
 20 Decl. ¶ 16; SUF No. 8. Glyphosate is used for this broad range of  
 21 applications because of its well-recognized benefits over other  
 22 cultivation and weed-suppression techniques.<sup>1</sup>

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23  
 24 <sup>1</sup> *See, e.g.,* Heering Decl. ¶¶ 15, 17; Heering Decl. Ex. B (Stephen  
 25 O. Duke & Stephen B. Powles, *Glyphosate: A Once-in-a-Century*  
 26 *Herbicide*, 64 Pest Mgmt. Sci. 319, 322 (2008)); *see also, e.g.,*  
 27 Decl. of Blake Hurst, Mo. Farm Bureau ¶ 5 ("Glyphosate is an  
 28 integral tool because it enables farmers to engage in no-till  
 farming, a conservation tilling tactic that reduces soil erosion,  
 is widely accepted to be better for the environment, and reduces  
 the labor involved in farming practices."); Decl. of Jefferson Jon  
 Doggett, Nat'l Corn Growers Ass'n ¶ 4; Decl. of Dan Mehan, Mo.  
 Chamber of Com. & Indus. ¶ 6; Decl. of Dan Wogsland, N.D. Grain

As an herbicide, glyphosate is subject to comprehensive federal regulation. Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), all commercial herbicides must be "registered" with EPA. 7 U.S.C. § 136a. Before EPA grants a registration, it must conclude that the herbicide will not cause "unreasonable adverse effects on the environment," which include "any unreasonable risk to man or the environment" or "human dietary risk." 7 U.S.C. §§ 136(bb), 136a. Among other things, EPA's review includes an evaluation of whether the herbicide is potentially carcinogenic. See, e.g., Heering Decl. Ex. C (EPA, EPA/630/P-03/001F, Guidelines for Carcinogen Risk Assessment (Mar. 2005)); SUF No. 10. The Federal Food, Drug, and Cosmetic Act (FDCA), in turn, regulates the presence of herbicides on food products. 21 U.S.C. §§ 342(a), 331(b). Under the FDCA, EPA is charged with evaluating the human health impact of the presence of the herbicide's residue, including its potential carcinogenicity. 21 U.S.C. § 346a(b)(2)(A). After concluding that "there is a reasonable certainty that no harm will result," 21 U.S.C. § 346a(b)(2)(A)(ii), EPA has allowed the presence of glyphosate residues on all relevant United States crops and food inputs. 40 C.F.R. § 180.364.

**B. The International Scientific Consensus That Glyphosate Does Not Cause Cancer, And IARC's Contrary Outlier View**

Because of its immense popularity and widespread use, glyphosate is one of the most, if not *the* most, studied herbicides in the world. Regulators worldwide, including EPA and even

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Growers Ass'n ¶¶ 5-9; Decl. of Gordon Stoner, Nat'l Ass'n of Wheat Growers ¶¶ 7-10; Decl. of Greg Kessel, N.D. Grain Growers Ass'n ¶ 4; Decl. of Mark Jackson, Iowa Soybean Ass'n ¶¶ 6-12; Decl. of Mark Martinson, U.S. Durum Growers Ass'n ¶¶ 5-8; SUF No. 9.

1 California's own expert regulator, have recognized for over 40  
2 years that glyphosate is safe when used as directed.

3 The overwhelming scientific consensus is that glyphosate does  
4 not cause cancer. EPA has repeatedly reached and re-affirmed this  
5 conclusion. In 1993, when it approved a renewal of glyphosate's  
6 registration under FIFRA, EPA reported as follows:

7 Several chronic toxicity/carcinogenicity  
8 studies . . . resulted in no effects based on  
9 the parameters examined, or resulted in  
10 findings that glyphosate was not carcinogenic  
11 in the study. In June 1991, EPA classified  
12 glyphosate as a Group E oncogen—one that  
shows evidence of non-carcinogenicity for  
humans—based on the lack of convincing  
evidence of carcinogenicity in adequate  
studies.

13 See Heering Decl. Ex. N (EPA, EPA-738-F-93-011, Registration  
14 Eligibility Decision (R.E.D.) Facts: Glyphosate 2 (Sept. 1993));  
15 SUF No. 11. More recently, "[i]n 2014, EPA reviewed more than 55  
16 epidemiological studies conducted on the possible cancer and non-  
17 cancer effects of glyphosate. [Its] review concluded that 'this  
18 body of research does not provide evidence to show that glyphosate  
19 causes cancer.'" See Heering Decl. Ex. O (Eric Sfiligoj, *EPA Plans*  
20 *Response to IARC Glyphosate Finding ... But Not Just Yet*, CropLife  
21 (Apr. 6, 2015) (quoting Carissa Cyran, Chemical Review Manager for  
22 the EPA Office of Pesticide Programs)); SUF No. 12. In late 2017,  
23 EPA issued a comprehensive evaluation of glyphosate, and again  
24 determined that glyphosate is "not likely to be carcinogenic to  
25 humans" and that "[b]ased on all of the available data, the weight-  
26 of-evidence clearly do not support the descriptors 'carcinogenic  
27 to humans' and 'likely to be carcinogenic to humans' at this time."  
28 Heering Decl. Ex. SS (EPA, Revised Glyphosate Issue Paper:

1 Evaluation of Carcinogenic Potential EPA's Office of Pesticide  
2 Programs 139, 144 (Dec. 12, 2017)); SUF No. 13. And in April 2019,  
3 EPA issued another evaluation, reaffirming that "glyphosate is  
4 'not likely to be carcinogenic to humans.'" Heering Decl. Ex. WW  
5 (EPA, Glyphosate: Proposed Interim Registration Review Decision,  
6 Case No. 0178, 7-8, 19-20 (Apr. 23, 2019)); *see also* Heering Decl.  
7 Ex. XX (EPA, Glyphosate: Response to Comments on the Human Health  
8 Draft Risk Assessment 2-3 (Apr. 23, 2018)); SUF No. 14.

9 Prior evaluations by California's own OEHHA have been  
10 materially in agreement with EPA. In 1997 and 2007, OEHHA  
11 conducted risk assessments for glyphosate in drinking water in  
12 order to set public health goals, including an evaluation of  
13 glyphosate's potential carcinogenicity. *See* Heering Decl. Ex. P  
14 (OEHHA, Public Health Goal for Glyphosate in Drinking Water (Dec.  
15 1997)); Heering Decl. Ex. Q (OEHHA, Public Health Goal for  
16 Glyphosate in Drinking Water 1 (June 2007)); SUF No. 15. It  
17 reported as follows:

18 Three carcinogenicity studies [were]  
19 conducted, two in rats and one in mice, and  
20 all [we]re considered to be negative. *In*  
21 *vitro* and *in vivo* genotoxicity tests [we]re  
22 generally negative. There [we]re a few  
23 reports of increased sister chromatid exchange  
24 in human and bovine lymphocytes at high  
concentrations *in vitro*, which could be  
secondary to oxidative stress, and effects on  
mouse bone marrow after very large  
intraperitoneal doses. Based on the weight of  
evidence, glyphosate [wa]s judged *unlikely to*  
*pose a cancer hazard to humans.*"

25 *See* Heering Decl. Ex. Q (OEHHA, Public Health Goal for Glyphosate  
26 in Drinking Water at 1 (emphasis added)); SUF No. 17; *see also*  
27 Heering Decl. Ex. P (OEHHA, Public Health Goal for Glyphosate in  
28 Drinking Water at 10 ("Glyphosate is a Group E carcinogen (evidence

1 of no carcinogenic effects).")); SUF No. 16. OEHHA has never re-  
2 evaluated or modified those views.

3 The global community has long been in accord. The European  
4 Chemicals Agency recently concluded "the available scientific  
5 evidence did not meet the criteria to classify glyphosate as a  
6 carcinogen, as a mutagen or as toxic for reproduction." Heering  
7 Decl. Ex. OO (Press Release, European Chems. Agency (ECHA),  
8 ECHA/PR/17/06, Glyphosate Not Classified as a Carcinogen by ECHA  
9 (Mar. 15, 2017); SUF No. 30. The European Commission's Health and  
10 Consumer Protection Directorate-General has concluded that  
11 glyphosate presents "[n]o evidence of carcinogenicity." See  
12 Heering Decl. Ex. R (Health & Consumer Prot. Directorate-Gen.,  
13 European Comm'n, 6511/VI/99-final, Review Report for the Active  
14 Substance Glyphosate app. II at 12 (Jan. 21, 2002)); SUF No. 18.  
15 Two divisions of the World Health Organization ("WHO") have reached  
16 the same conclusion. See Heering Decl. Ex. S (WHO,  
17 WHO/SDE/WSH/03.04/97, Glyphosate and AMPA in Drinking Water:  
18 Background Document for Development of WHO Guidelines for  
19 Drinking-Water Quality 5 (rev. June 2005) ("[n]o effect on  
20 survival" in glyphosate "carcinogenicity study")); Heering Decl.  
21 Ex. T (Int'l Programme on Chem. Safety, WHO, Environmental Health  
22 Criteria 159: Glyphosate 15 (1994) ("The available studies do not  
23 indicate that technical glyphosate is mutagenic, carcinogenic or  
24 teratogenic.)); SUF Nos. 19-20. And global regulators, from  
25 Germany to Canada, Australia, New Zealand, Japan, South Korea, and

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the European Chemicals Agency, have also reached the same conclusion.<sup>2</sup>

An organization known as IARC, based in Lyon, France, disagrees with this worldwide consensus. IARC is not a regulator. It is an agency within the WHO that forms *ad hoc* panels to prepare informational "Monographs" regarding the possibility that a variety of "agents" (e.g., chemicals, complex mixtures,

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<sup>2</sup> See, e.g., Heering Decl. Ex. U (1 European Comm'n, Renewal Assessment Report: Glyphosate 35 (rev. Mar. 31, 2015) (glyphosate is "unlikely to pose a carcinogenic risk in humans")); *id.* at 36 ("In epidemiological studies in humans, there was no evidence of carcinogenicity . . . ." (emphasis added)); Heering Decl. Ex. Z (Fed. Inst. for Risk Assessment (BfR), BfR Comm'n No. 007/2015, Does Glyphosate Cause Cancer? (Mar. 23, 2015)); Heering Decl. Ex. LL (*Conclusion on the Peer Review of the Pesticide Risk Assessment of the Active Substance Glyphosate*, EFSA J., Nov. 12, 2015, at 11)); Heering Decl. Ex. MM (Food & Agric. Org. of U.N. (FAO) & WHO, Joint FAO/WHO Meeting on Pesticide Residues: Summary Report § 1.2 (May 16, 2016) (finding that "glyphosate is unlikely to pose a carcinogenic risk to humans")); Heering Decl. Ex. NN (Pest Mgmt. Regulatory Agency, Health Can., RVD2017-01, Re-evaluation Decision: Glyphosate 1 (Apr. 28, 2017) ("Glyphosate is not genotoxic and is unlikely to pose a human cancer risk.")); Heering Decl. Ex. PP (Austl. Pesticides & Veterinary Meds. Auth., Austl. Gov't, Final Regulatory Position: Consideration of the Evidence for a Formal Reconsideration of Glyphosate 9 (Mar. 2017) (concluding "that the scientific weight-of-evidence indicates that . . . exposure to glyphosate does not pose a carcinogenic or genotoxic risk to humans")); Heering Decl. Ex. QQ (Wayne Temple, N.Z. Env'tl. Prot. Auth., Review of the Evidence Relating to Glyphosate and Carcinogenicity 16 (Aug. 2016) ("[G]lyphosate is unlikely to be genotoxic or carcinogenic . . . .")); Heering Decl. Ex. RR (Food Safety Comm'n of Japan, Risk Assessment Report: Pesticides: Glyphosate Summary (Sept. 2016)); Heering Decl. Ex. CCC (Korea Rural Dev. Admin., Safety of Pesticides Containing Glyphosate and Diazinon Confirmed (Mar. 10, 2017)); see also Heering Decl. Ex. AA (Gabriella Andreotti et al., *Glyphosate Use and Cancer Incidence in the Agricultural Health Study*, 110 J. Nat'l Cancer Inst. at 5) (study sponsored by the U.S. National Institutes of Health, National Cancer Institute, and the National Institute of Environmental Health Science, confirming that there is "no evidence of an association between glyphosate use and risk of any" cancer); SUF No. 21-31.

1 occupational exposures, and personal habits) may be carcinogenic.  
 2 "[O]f all the things the IARC has looked at, there is just one it  
 3 is pretty sure *doesn't* cause cancer." Heering Decl. Ex. V (Akshat  
 4 Rath & Gideon Lichfield, *Why it Sometimes Seems Like Everything*  
 5 *Causes Cancer*, Quartz (June 23, 2016) (emphasis added)); SUF No.  
 6 32. In March 2015, IARC released a Monograph concluding, despite  
 7 the global consensus otherwise, that "[g]lyphosate is *probably*  
 8 *carcinogenic to humans*." Heering Decl. Ex. W (IARC Monograph 112  
 9 at 398 (emphasis in original)); SUF No. 33. IARC reached that  
 10 conclusion based on what it conceded was "*limited evidence in*  
 11 *humans for the carcinogenicity of glyphosate*," (i.e., "chance,  
 12 bias, or confounding could not be ruled out with reasonable  
 13 confidence") and it seems to have based its conclusion primarily  
 14 on its (again outlier) interpretation of a limited subset of  
 15 studies on "experimental animals" and "mechanistic" data. Heering  
 16 Decl. Ex. W (IARC Monograph 112 at 27, 398 (emphasis in original));  
 17 SUF No. 33.

18 Many of IARC's pronouncements have provoked substantial  
 19 backlash among the scientific and public health communities, and  
 20 that has been especially true with IARC's 2015 glyphosate  
 21 classification. Immediately after IARC published its Monograph,  
 22 EPA's Deputy Director for Pesticide Programs testified before the  
 23 U.S. Senate Committee on Agriculture, Nutrition and Forestry to  
 24 reaffirm EPA's long-standing non-carcinogenic evaluation. See  
 25 Heering Decl. Ex. X (*Agriculture Biotechnology: A Look at Federal*  
 26 *Regulation and Stakeholder Perspectives: Hr'g Before the S. Comm.*  
 27 *on Agric., Nutrition, & Forestry*, 114 Cong. 261, 6-7 (2015)  
 28 (statement of William Jordan, Deputy Dir., Office of Pesticide

1 Programs, EPA)); SUF No. 34. Others at that hearing, such as the  
2 Chief Physician at MassGeneral's Hospital for Children, observed  
3 that IARC's conclusion was "not supported by the data" and "flies  
4 in the face of comprehensive assessments from multiple agencies  
5 globally." Heering Decl. Ex. X (*Agriculture Biotechnology: A Look*  
6 *at Federal Regulation and Stakeholder Perspectives: Hr'g Before*  
7 *the S. Comm. on Agric., Nutrition, & Forestry*, 114 Cong. 261, 43);  
8 SUF No. 35. The following year, EPA's Office of Pesticide Programs  
9 issued a 227-page glyphosate issue paper that concluded based upon  
10 "an extensive database . . . for evaluating the carcinogenic  
11 potential of glyphosate, including 23 epidemiological studies, 15  
12 animal carcinogenicity studies, and nearly 90 genotoxicity  
13 studies" that the available data "do no[t] support a carcinogenic  
14 process for glyphosate." See Heering Decl. Ex. Y (EPA, *Glyphosate*  
15 *Issue Paper: Evaluation of Carcinogenic Potential* 140 (Sept. 12,  
16 2016)); SUF No. 36. EPA confirmed again in December 2017 that  
17 glyphosate is "not likely to be carcinogenic to humans" in a  
18 revised version of this Glyphosate Issue Paper. Heering Decl. Ex.  
19 SS (EPA, *Revised Glyphosate Issue Paper: Evaluation of*  
20 *Carcinogenic Potential* EPA's Office of Pesticide Programs 139,  
21 144); SUF No. 13. In April 2019, another EPA evaluation reaffirmed  
22 that "glyphosate is 'not likely to be carcinogenic to humans.'"   
23 Heering Decl. Ex. WW (EPA, *Glyphosate: Proposed Interim*  
24 *Registration Review Decision* 7-8, 19-20); *see also* Heering Decl.  
25 Ex. XX (EPA, *Glyphosate: Response to Comments on the Human Health*  
26 *Draft Risk Assessment* 2-3); SUF No. 14. And most recently, in an  
27 August 2019 letter to registrants, EPA's Office of Pesticide  
28 Programs reiterated that "EPA disagrees with IARC's assessment of

glyphosate," that EPA had instead "determin[ed] that glyphosate is 'not likely to be carcinogenic to humans,'" and that EPA would therefore not approve herbicide labels bearing the contrary Proposition 65 cancer warning, which would be "false and misleading" and render a product "misbranded" under FIFRA. Heering Decl. Ex. E (EPA Aug. 2019 Letter)<sup>3</sup>; SUF No. 37.

Global regulators, from Germany, to Canada, to Australia, to New Zealand, to Japan, to South Korea, to the European Chemicals Agency, which have reviewed the same studies that IARC relied upon, have likewise rejected IARC's conclusion. *See, e.g.,* Heering Decl. Ex. Z (Fed. Inst. for Risk Assessment (BfR), BfR Comm'cn No. 007/2015, Does Glyphosate Cause Cancer? (German regulator considering and explicitly rejecting IARC's bases for its carcinogenic conclusion)); SUF Nos. 21-30. One of the most recent and most extensive epidemiological studies ever conducted of glyphosate also refutes IARC's conclusions. SUF No. 31. The Agricultural Health Study—sponsored by the U.S. National Institutes of Health, National Cancer Institute, and the National Institute of Environmental Health Science—analyzed health effects in over 54,000 pesticide applicators over the course of three decades and confirmed there is "no evidence of an association between glyphosate use and risk of any" cancer. *See* Heering Decl. Ex. AA (Gabriella Andreotti et al., *Glyphosate Use and Cancer*

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<sup>3</sup> This letter reflects a duly delegated exercise of EPA's FIFRA authorities, including instructing any registrants who have added such warnings to remove them. *See Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1138 (D.C. Cir. 2010) ("EPA, which is charged with administering FIFRA, has made an authoritative interpretation of its FIFRA misbranding authority that has practical and significant legal effects.").

1 *Incidence in the Agricultural Health Study*, 110 J. Nat'l Cancer  
2 Inst. 5 (Nov. 9, 2017)); SUF No. 31.

3 IARC's review process, in contrast, has been criticized as  
4 less robust and transparent than regulators'. For example, in its  
5 most recent review, EPA observed that "EPA's cancer evaluation is  
6 more robust than IARC's" because IARC only considers publicly  
7 available scientific literature. Hearing Decl. Ex. WW (EPA,  
8 Glyphosate: Proposed Interim Registration Review Decision, Case  
9 No. 0178, 7 (Apr. 23, 2019)); SUF No. 38. Thus, for example, IARC  
10 considered only slightly more than half of the animal  
11 carcinogenicity studies that EPA considered, and IARC did not  
12 consider the Agricultural Health Study, which at the time of its  
13 publication in 2018 was the largest epidemiologic study to address  
14 the question. Hearing Decl. Ex. WW (EPA, Glyphosate: Proposed  
15 Interim Registration Review Decision, Case No. 0178, 7 (Apr. 23,  
16 2019)); SUF No. 39. As EPA further observed, unlike regulatory  
17 interactions, IARC's "closed door" process does not allow for  
18 public participation, comment, or peer review. Hearing Decl. Ex.  
19 WW (EPA, Glyphosate: Proposed Interim Registration Review  
20 Decision, Case No. 0178, 7 (Apr. 23, 2019)). Indeed, OEHHA itself  
21 has raised questions about IARC's assessment of other substances  
22 in the past. See Hearing Decl. Ex. EE (Letter from Joan E. Denton,  
23 Dir., OEHHA, to Dr. Paul Kleihues, Dir., IARC, at 2 (Feb. 7,  
24 2002)); SUF No. 40.

25 Despite the overwhelming scientific consensus that glyphosate  
26 does not cause cancer, over the last year juries in several  
27 California cases have returned verdicts for tort claimants after  
28 being informed of IARC's determination. See *In re Roundup Prods.*

1 *Liab. Litig.*, 385 F. Supp. 3d 1042, 1044 (N.D. Cal. 2019). Those  
 2 cases do not alter the scientific consensus. But they do  
 3 illustrate the degree to which California would mislead consumers  
 4 and trample on Plaintiffs' First Amendment rights if the State  
 5 were allowed to force Plaintiffs *themselves* to repeat IARC's  
 6 conclusions as though they were established scientific fact.  
 7 Indeed, the district court overseeing the federal multi-district  
 8 litigation in which the tort claims have been consolidated found  
 9 it a "close question" whether even the tort claimants—who claim  
 10 to *believe* IARC's conclusion—could present that conclusion into  
 11 evidence themselves. *In re Roundup Prods. Liab. Litig.*, 390 F.  
 12 Supp. 3d 1102, 1151 (N.D. Cal. 2018). And while it ultimately  
 13 concluded that the tort claimants could present the evidence to  
 14 the jury, the court made clear its view that "[t]he evidence,  
 15 viewed in its totality, seems too equivocal to support any firm  
 16 conclusion that glyphosate causes" Non-Hodgkins' Lymphoma. *Id.* at  
 17 1109; *see also id.* at 1108-09 ("[T]he evidence of a causal link  
 18 between glyphosate exposure and [Non-Hodgkins' Lymphoma] in the  
 19 human population seems rather weak," with "the largest and most  
 20 recent [studies] suggest[ing] there is no link at all.").<sup>4</sup>

### 21 **C. The Proposition 65 Scheme**

22 California's Proposition 65 prohibits businesses from  
 23 exposing California residents to chemicals listed by the State as  
 24 causing cancer without providing prescribed warnings. Cal. Health

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25 <sup>4</sup> The record in these tort cases also does not reflect what is  
 26 before this Court. *See, e.g., In re Roundup Prods. Liab. Litig.*,  
 27 No. 16-md-02741-VC, 2019 WL 1371806, at \*4 (N.D. Cal. Feb. 18,  
 28 2019) (granting plaintiff's motion "to exclude decisions by  
 foreign regulators" from the Phase 1 causation stage of the trial,  
 and excluding those same regulators' post-2012 findings from the  
 Phase 2 liability stage of the trial).


1 & Safety Code § 25249.6. OEHHA is required to maintain "a list of  
 2 those chemicals known to the state to cause cancer." *Id.*  
 3 § 25249.8(a). Within twelve months after a chemical is listed,  
 4 the statute requires that any "person in the course of doing  
 5 business" provide a "clear and reasonable warning" before  
 6 "expos[ing] any individual to" the listed chemical, unless the  
 7 business can prove that an affirmative defense to the warning  
 8 requirement applies. *Id.* §§ 25249.6, 25249.10(b). Although  
 9 Proposition 65 does not define precisely what text suffices to  
 10 convey a "clear and reasonable warning," the California Supreme  
 11 Court has held that the statute requires a warning which conveys  
 12 that the "product contains [chemical], a chemical known to the  
 13 state of California to cause [cancer],' or words to that effect."  
 14 *Dowhal*, 32 Cal. 4th at 918. Lower courts in California are in  
 15 accord. *See, e.g., Tri-Union*, 2006 WL 1544384, at \*61 (providing  
 16 that this is the "core language . . . in any warning"). And OEHHA  
 17 was in lockstep until this litigation. *See, e.g., Heering Decl.*  
 18 *Ex. VV* (OEHHA, Revised Final Statement of Reasons, Section 12601,  
 19 Clear and Reasonable Warning at 2, 4 (1988) (providing that this  
 20 is a "minimum" for the warning)). Indeed, for years, OEHHA's  
 21 regulations provided that a warning message "must clearly  
 22 communicate that the chemical in question is known to the state to  
 23 cause cancer . . . ." Cal. Code Regs. tit. 27, § 25603.2  
 24 (abrogated Aug. 30, 2018).

25 The only warnings that are assured to be found to comply with  
 26 that statutory standard are OEHHA's safe harbor warnings. Under  
 27 OEHHA's new regulations, which became effective August 30, 2016  
 28 and completely replaced the prior regulations two years later,



1 Plaintiffs can shield themselves from threat of enforcement only  
2 if they adopt one of the two following safe harbor warnings:

3  **WARNING:** This product can expose you to chemicals including glyphosate,  
4 which is known to the State of California to cause cancer. For more information go to  
5 [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

6  **WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

7 Cal. Code Regs. tit. 27, §§ 25603(a), (b) (operative Aug. 30,  
8 2018).<sup>5</sup>

9 Proposition 65 provides that, in addition to other  
10 substances, OEHHA's "list shall include at a minimum those  
11 substances identified by reference in Labor Code Section  
12 6382(b)(1)." Cal. Health & Safety Code § 25249.8(a). Section  
13 6382(b)(1) of the California Labor Code in turn references  
14 "[s]ubstances listed as human or animal carcinogens by" any one of  
15 several entities, including IARC. According to OEHHA, once IARC  
16 finds that a chemical is potentially carcinogenic to humans, the  
17 agency's listing task is "ministerial"—it publishes a "Notice of  
18 Intent to List" and provides a 30-day comment period during which  
19 interested parties may claim the chemical in question has *not* "been  
20 identified by reference in Labor Code section 6382(b)(1)." Cal.  
21 Code Regs. tit. 27, § 25904(c). But OEHHA will "not consider  
22 comments related to the underlying scientific basis for  
23 classification." *Id.* In other words, OEHHA will consider whether  
24 it misunderstood which chemical IARC had classified as  
25

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26  
27 <sup>5</sup> OEHHA subsequently amended the new regulations to allow  
28 substitution of the word "ATTENTION" or "NOTICE" for "WARNING" if  
a pesticide label is regulated by EPA under FIFRA. See Cal. Code  
Regs. tit. 27, § 25603(d) (effective Jan. 1, 2019).



1 carcinogenic, but it will *not* consider whether IARC erred in its  
2 assessment or is a radical outlier.

3 Proposition 65 has a multi-faceted enforcement scheme. The  
4 statute imposes penalties on businesses of up to \$2,500 *per day*  
5 for *each* failure to provide an adequate warning. Cal. Health &  
6 Safety Code § 25249.7(b). In addition to these penalties, the  
7 statute also provides that any person who “*threatens to violate*”  
8 —that is, “create[s] a condition in which there is a substantial  
9 probability that a violation will occur”—may be “enjoined in any  
10 court of competent jurisdiction.” Cal. Health & Safety Code  
11 §§ 25249.7(a), 25249.11(e) (emphasis added). Claims may be  
12 brought by the Attorney General, a district attorney, or a variety  
13 of local government attorneys. *Id.* § 25249.7(c). In addition,  
14 *any person* (even someone who has not been injured) may bring a  
15 private enforcement action on behalf of the public. Such a private  
16 plaintiff—colloquially known as a “bounty hunter”—may recover up  
17 to a quarter of the civil penalties plus attorneys’ fees, Cal.  
18 Code Regs. tit. 11, §§ 3203(b), (d), 3201. Accordingly, private  
19 litigation under Proposition 65 is a “lucrative” business. See  
20 James T. O’Reilly, *Stop the World, We Want Our Own Labels:*  
21 *Treaties, State Voter Initiative Laws, and Federal Pre-Emption*, 18  
22 U. Pa. J. Int’l Econ. L. 617, 635 (1997).

23 Because *any* exposure to *any* listed chemical sold without the  
24 mandated warning may trigger civil penalties, there has been wide-  
25 scale abuse of the Proposition 65 regime through bounty-hunter  
26 plaintiff “strike suits.” In the words of then-Governor Jerry  
27 Brown, the law has been abused by “unscrupulous lawyers driven by  
28 profit rather than public health.” See Heering Decl. Ex. FF (Press

1 Release, Governor Brown Proposes to Reform Proposition 65 (May 7,  
 2 2013)); SUF No. 41.<sup>6</sup> For example, one bounty hunter plaintiff  
 3 successfully sued Whole Foods for "selling firewood" without the  
 4 warning label. *Consumer Cause, Inc. v. Mrs. Gooch's Nat. Food*  
 5 *Mkts., Inc.*, 127 Cal. App. 4th 387, 392 (2005) (emphasis added).  
 6 As California judges have noted, the Proposition 65 framework  
 7 allows even frivolous suits to result in "judicial extortion" that  
 8 forces defendants to settle to avoid legal fees and the costs of  
 9 proving that they are not in violation of the Act. *Consumer Cause,*  
 10 *Inc. v. SmileCare*, 91 Cal. App. 4th 454, 477-79 (2001) (Vogel, J.,  
 11 dissenting); see also *Consumer Def. Grp. v. Rental Hous. Indus.*  
 12 *Members*, 137 Cal. App. 4th 1185, 1216 (2006) (strike suits are  
 13 "intended to frighten all but the most hardy of targets (certainly  
 14 any small, ma and pa business)[] into a quick settlement").

15 The reason for this widespread abuse is straightforward—it  
 16 is "absurdly easy" to initiate Proposition 65 litigation. *Consumer*  
 17 *Def. Grp.*, 137 Cal. App. 4th. at 1215. The principal check against  
 18 frivolous lawsuits is that private parties must file a "certificate  
 19 of merit" indicating a legitimate basis for their claim. Cal.  
 20 Health & Safety Code § 25249.7(d)(1). But this requirement is  
 21 trivial to satisfy. A bounty hunter need only "go on the internet  
 22 \_\_\_\_\_

23 <sup>6</sup> See also, e.g., Heering Decl. Ex. GG (Anthony T. Caso, *Bounty*  
 24 *Hunters and the Public Interest—A Study of California Proposition*  
 25 *65*, 13 Engage (Issue 1), Mar. 2012, at 30, 31 (describing case in  
 26 which "law firm created an 'astroturf' environmental group to be  
 27 a plaintiff in Proposition 65 litigation," which group "consisted  
 28 of partners from the law firm" and which "sent out hundreds of  
 demand letters charging businesses with failure to provide  
 warnings" and "extort[ing] payments of attorney fees or  
 contributions to the front group"); Heering Decl. Ex. HH (Leeton  
 Lee, *Nailed by a Bounty Hunter—A California Prop 65 Violation Can*  
*Cost Your Company*, PPB Mag. (Jan. 24, 2013) (documenting  
 Proposition 65 bounty hunter suits)); SUF No. 42.

1 and find some common objects (e.g., furniture, paper, carpeting)  
 2 which may 'contain' a substance on the regulatory carcinogen  
 3 list. . . . [A] common place item, like a chair, doesn't have to  
 4 contain any significant amount either, even a few molecules will  
 5 do. Next, [the bounty hunter] call[s] up a local chemistry  
 6 professor who will tell [him] that, at least in sufficient  
 7 quantities, substances in those common objects will cause cancer,  
 8 and are in fact on the list. . . . This phone call to your friendly  
 9 professor will allow you to file the certificate of merit."  
 10 *Consumer Def. Grp.*, 137 Cal. App. 4th at 1215.<sup>7</sup>

11 In contrast to established First Amendment principles, which  
 12 place the burden on the government to prove that the product in  
 13 fact poses the warned-of risk, under Proposition 65, once a suit  
 14 is initiated, the burden is on the defendant to establish as an  
 15 affirmative defense that "the exposure"—to the extent there is  
 16 any—"poses no significant risk assuming lifetime exposure at the  
 17 level in question." Cal. Health & Safety Code § 25249.10(c). In  
 18 some instances, OEHHA will predetermine a "No Significant Risk  
 19 Level" (NSRL) for a particular listed substance, commonly referred  
 20 to as a "safe harbor" exposure level. But this safe harbor does  
 21 not eliminate the prospect of strike suits. Proof that a  
 22 defendant's product fits within the safe harbor is an alternative  
 23 way the defendant may establish the affirmative defense, *DiPirro*

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24 <sup>7</sup> The California Attorney General may additionally send "a letter"  
 25 to a Proposition 65 plaintiff if he believes the enforcer's claim  
 26 lacks merit, "stating the Attorney General believes there is no  
 27 merit to the action." Cal. Health & Safety Code  
 28 § 25249.7(e)(1)(A). But the Attorney General is not required to  
 send such a letter. *Id.* § 25249.7(e)(1)(B). The private enforcer  
 is also free to ignore the letter, as exemplified by past actions  
 in California state court. See Decl. of Trenton H. Norris. ¶¶ 10-  
 12.

1 *v. Bondo Corp.*, 153 Cal. App. 4th 150, 185 (2007); Cal. Health &  
 2 Safety Code § 25249.10(c), but a bounty hunter “need not make any  
 3 *showing at all*” that the product falls outside the safe harbor  
 4 before filing suit, *Consumer Cause*, 91 Cal. App. 4th at 469  
 5 (emphasis added). And, in contrast, establishing the affirmative  
 6 defense is costly for the defendant, usually requiring detailed  
 7 scientific analyses, possibly of multiple products. Litigating  
 8 lifetime exposure or even the safe harbor is generally extremely  
 9 expensive and often drags on to trial. See, e.g., *Envtl. Law*  
 10 *Found. v. Beech-Nut Nutrition Corp.*, 235 Cal. App. 4th 307, 314  
 11 (2015) (safe harbor defense litigated at trial).

12 Likely because a product’s compliance with an NSRL is a  
 13 question of fact reliant on complex testing procedures and expert  
 14 testimony, the existence of the NSRL defense has not effectively  
 15 deterred bounty hunter suits; suits have been maintained even where  
 16 the California Attorney General said a proposed enforcement action  
 17 had no merit. See, e.g., Norris Decl. ¶¶ 11-17 (discussing lawsuit  
 18 lasting for 6 years brought against McDonald’s Corporation and  
 19 other restaurants based on allegations that their cooked chicken  
 20 exposed Californians to the listed carcinogen “PhIP,” despite a  
 21 California Attorney General determination that the level of PhIP  
 22 in cooked chicken fell far below the level that would require a  
 23 warning under Proposition 65); SUF No. 43; see also *Sciortino v.*  
 24 *Pepsico, Inc.*, 108 F. Supp. 3d 780, 786 (N.D. Cal. 2015) (bounty  
 25 hunter suit where safe harbor NSRL present); *Envtl. World Watch,*  
 26 *Inc. v. Walt Disney Co.*, No. CV 09-04045 DDP (PLAx), 2009 WL  
 27 3365915, at \*1 (C.D. Cal. Oct. 19, 2009) (same); *CKE Rests., Inc.*  
 28 *v. Moore*, 159 Cal. App. 4th 262, 265 (2008) (dismissing suit

1 seeking declaration that bounty hunter could not initiate  
 2 Proposition 65 litigation because NSRL was not exceeded). Indeed,  
 3 although OEHHA promulgated a safe harbor NSRL for the chemical  
 4 acrylamide decades ago, bounty hunters have sued over 180 food  
 5 manufacturers and retailers, seeking Proposition 65 warnings on  
 6 foods as diverse as coffee, breakfast cereal, french fries, olives,  
 7 and prune juice. See Norris Decl. ¶¶ 31-33; SUF No. 44. Faced  
 8 with such daunting litigation fees and the costs of commissioning  
 9 an expert assessment, most parties logically "[s]ettle with the  
 10 plaintiff," "[s]ave the cost of the assessment," "[s]ave the legal  
 11 fees," and "[g]et rid of the case." *Consumer Cause*, 91 Cal. App.  
 12 4th at 478 (Vogel, J., dissenting). In other words, they succumb  
 13 to "judicial extortion" and adopt a Proposition 65 warning  
 14 regardless of their opposition. *Id.*

#### 15 D. OEHHA's Glyphosate Listing And NSRL

16 On July 7, 2017, despite the overwhelming contrary views of  
 17 the U.S. government, the international regulatory community, and  
 18 even OEHHA itself that glyphosate is not carcinogenic, OEHHA listed  
 19 glyphosate under Proposition 65 as a chemical "known to the state  
 20 to cause cancer." See Heering Decl. Ex. II (OEHHA, *Glyphosate*  
 21 *Listed Effective July 7, 2017, as Known to the State of California*  
 22 *to Cause Cancer* (June 26, 2017)); SUF No. 47. OEHHA acknowledged  
 23 that it made this listing mechanically—without conducting its own  
 24 scientific analysis—based solely on the fact that IARC had issued  
 25 a monograph concluding that glyphosate is "probably" carcinogenic  
 26 to humans. See Heering Decl. Ex. JJ (OEHHA, *Notice of Intent to*  
 27 *List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate* (Sept.  
 28 4, 2015) (citation omitted)); SUF No. 48. OEHHA refused to

1 consider comments critiquing IARC's process and conclusion, and  
2 disclaimed any ability to address the underlying scientific  
3 dispute or reassess "the weight or quality of the evidence  
4 considered by IARC." Heering Decl. Ex. JJ (OEHHA, *Notice of Intent*  
5 *to List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate*); SUF  
6 No. 49.

7 As a result of OEHHA's listing, as of July 2018 any seller or  
8 manufacturer of a product sold in California that could expose a  
9 consumer to glyphosate would have been required—but for this  
10 litigation—to either provide a "clear and conspicuous" warning  
11 conveying that the product contains a chemical "known to the state  
12 of California to cause cancer," or prepare to defend against a  
13 costly enforcement action or strike suit. Professional bounty  
14 hunters have already threatened new strike suits regarding  
15 glyphosate. See Heering Decl. ¶ 52; Heering Decl. Ex. KK (Joseph  
16 Perrone, *Advocacy Groups Have Ulterior Motive in Wanting*  
17 *Weedkiller Banned*, Modesto Bee (June 21, 2017 12:55 PM) (describing  
18 how "environmental groups cheered" at the glyphosate listing  
19 because it will be "a boon to their pocketbook")); SUF No. 51.  
20 This is consistent with past experience—Proposition 65 litigants  
21 routinely threaten litigation *within days* of the active warning  
22 date. See Heering Decl. ¶ 52; Norris Decl. ¶¶ 8-9; SUF No. 52.  
23 The only thing preventing the warning requirement from coming into  
24 effect—and the avalanche of bounty hunter lawsuits from  
25 beginning—is this Court's preliminary injunction enjoining  
26 enforcement of Proposition 65's warning requirement as it pertains  
27 to glyphosate. See PI Order at 16, ECF No. 75.

28

On April 6, 2018, the California Office of Administrative Law approved an amendment to Cal. Code Regs. tit. 27, § 25705(b)(1), establishing a safe harbor NSRL of 1100 micrograms per day for glyphosate, effective July 1, 2018. See Heering Decl. Ex. YY (OEHHA, Notice of Amendment to Section 25705, No Significant Risk Level - Glyphosate (2018)); Heering Decl. Ex. ZZ (OEHHA, Final Regulatory Amendment Section 25705, Glyphosate (2018)); Heering Decl. Ex. AAA (OEHHA, Final Statement of Reasons, Section 25705(b), Specific Regulatory Levels Posing No Significant Risk, No Significant Risk Level: Glyphosate (2018) [hereinafter "OEHHA Final Statement of Reasons for NSRL"]); SUF No. 53. OEHHA felt constrained by regulation when developing the NSRL for glyphosate to rely on the same narrow set of studies and flawed analysis that IARC itself considered. See Heering Decl. Ex. AAA (OEHHA Final Statement of Reasons for NSRL at 6-7); SUF No. 54.<sup>8</sup> Indeed, OEHHA expressly concluded in setting the NSRL that comments regarding whether IARC correctly classified glyphosate as "probably carcinogenic" were "not directed to the subject of this rulemaking," and refused to address such comments. See Heering

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<sup>8</sup> As OEHHA pointed out, in developing the NSRL for glyphosate, OEHHA "followed the guidance set forth in Section 25703 that [its] assessment 'be based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of the chemical as known to the state to cause cancer', and based the NSRL on the results of the most sensitive scientific study deemed to be of sufficient quality." Heering Decl. Ex. AA (OEHHA Final Statement of Reasons for NSRL at 7 (citing Cal. Code Regs. tit. 27, § 25703(a)(3))). Nowhere in the NSRL process was OEHHA authorized to reconsider whether glyphosate is "known" to "cause cancer" taking all available scientific studies into account. See Cal. Health & Safety Code § 25249.10(c); Cal. Code Regs. tit. 27, §§ 25701, 25703. Nor was OEHHA authorized to consider whether IARC was correct in concluding based on "limited evidence in humans," that glyphosate is "probably carcinogenic." Heering Decl. Ex. AA (OEHHA Final Statement of Reasons for NSRL at 4).



Decl. Ex. AAA (OEHHA Final Statement of Reasons for NSRL at 2 (noting OEHHA's refusal to address comments "supporting or disagreeing with IARC's classification of glyphosate as a Group 2A carcinogen")); SUF No. 55. Instead, OEHHA identified a single mouse study on which IARC relied as the "most sensitive study deemed to be of sufficient quality," Cal. Code Regs. tit. 27, § 25703(a)(3), and derived the NSRL 1100 micrograms per day for glyphosate based on data in that one study. See Hearing Decl. Ex. AAA (OEHHA Final Statement of Reasons for NSRL at 6-7 & n.24); SUF No. 56.<sup>9</sup>

**E. Significant Effects Of Proposition 65's Glyphosate Warning Requirement**

Absent a permanent injunction, the Proposition 65 glyphosate warning requirement would have severe adverse impacts on Plaintiffs. Plaintiffs (and their members) who sell glyphosate to public and private entities (including consumers) in California will be faced with a "Hobson's choice," *Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 344 (2004)—either communicate to consumers a disparaging health warning about glyphosate products that is contrary to nearly all global scientific regulatory findings of glyphosate's safety (and, indeed, contrary to EPA's determination that the warning would be false and misleading) or

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<sup>9</sup> Notably, in 2006 the World Health Organization and the Food and Agriculture Organization of the UN reviewed that same mouse study, and concluded that "[o]wing to the lack of a dose-response relationship, the lack of statistical significance and the fact that the incidences recorded in this study fell within the historical ranges for controls, these changes are not considered to be caused by administration of glyphosate," and that the "administration of glyphosate to CD-1 mice for 104 weeks produced no signs of carcinogenic potential at any dose." See Hearing Decl. Ex. BBB (Int'l Programme on Chem. Safety, WHO, Pesticide Residues in Food - 2004: Toxicology Evaluations (2006)); SUF No. 57.



1 face the significant risk of suit under Proposition 65 for failing  
2 to do so. Heering Decl. ¶¶ 41-45, 55; Decl. of Renee Pinel,  
3 W. Plant Health Ass'n ¶¶ 14-15; SUF No. 59.

4 That remains true notwithstanding OEHHA's establishment of a  
5 safe harbor NSRL. As explained above, showing that a product  
6 satisfies a safe harbor NSRL established by OEHHA is merely an  
7 alternative way of seeking to prove the general "no significant  
8 risk" affirmative defense, and does nothing to prevent a plaintiff  
9 from litigating a Proposition 65 lawsuit up through trial. Cal.  
10 Health & Safety Code § 25249.10(c). Without an injunction,  
11 Plaintiffs would be forced to choose between providing the warning,  
12 or undertaking costly assessments to demonstrate that exposures to  
13 glyphosate from their products will fall below the NSRL and  
14 incurring the substantial risks and costs of defending against  
15 enforcement actions. Heering Decl. ¶¶ 41-42, 45, 55; Pinel Decl.,  
16 W. Plant Health Ass'n ¶¶ 13-16; Decl. of Ray McCarty, Associated  
17 Indus. of Mo. ¶ 10; Mehan Decl., Mo. Chamber of Com. & Indus.  
18 ¶¶ 10-11; SUF No. 60.

19 The warning requirement would have similar impacts, should it  
20 come into effect, for entities that sell finished food products  
21 into California that are made using glyphosate-treated crops, like  
22 members of Plaintiffs Missouri Chamber of Commerce and Industry  
23 and Associated Industries of Missouri. See, e.g., Jackson Decl.,  
24 Iowa Soybean ¶¶ 14-32; Mehan Decl., Mo. Chamber of Com. & Indus.  
25 ¶¶ 9-17; McCarty Decl., Associated Indus. of Mo. ¶¶ 10-12; SUF No.  
26 61. Members of these Plaintiffs would face an imminent choice  
27 between (1) providing a disparaging glyphosate warning for their  
28 products that is contrary to the worldwide scientific consensus,

1 which would diminish demand for those products; (2) engaging in  
 2 costly efforts to demonstrate that any exposures to glyphosate  
 3 residues on their products would fall below any established NSRL  
 4 or requiring their suppliers to undertake those efforts (which  
 5 still would not prevent the likely prospect of expensive  
 6 enforcement actions); or (3) halting the use of glyphosate-treated  
 7 crops as inputs. See Mehan Decl., Mo. Chamber of Com. & Indus.  
 8 ¶¶ 10-11; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 17-21;  
 9 Decl. of Kathleen Zander, S.D. Agri-Business Ass'n ¶¶ 14-18;  
 10 Jackson Decl., Iowa Soybean Ass'n ¶¶ 17-20; Martinson Decl., U.S.  
 11 Durum Growers Ass'n ¶¶ 15-19; McCarty Decl., Associated Indus. of  
 12 Mo. ¶¶ 8-13; SUF No. 62.

13       The pressures on these Plaintiffs would then have ripple  
 14 effects on farmers upstream: Under the threat of Proposition 65  
 15 enforcement, many grain handlers and finished food producers would  
 16 demand that farmers providing inputs either cease using glyphosate  
 17 on their crops altogether or certify that their crops do not  
 18 contain glyphosate residues beyond particular levels, which would  
 19 require expensive testing or segregation of glyphosate-treated  
 20 crops from non-glyphosate-treated crops—each an undesirable  
 21 option that would require modifications to business practices  
 22 around the country and carry considerable expense. See, e.g.,  
 23 Hurst Decl., Mo. Farm Bureau ¶¶ 12-14; Decl. of Blake Inman, U.S.  
 24 Durum Growers Ass'n ¶¶ 18-21; Mehan Decl., Mo. Chamber of Com. &  
 25 Indus. ¶¶ 10-17; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 14-  
 26 21; Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 8-13; Jackson Decl.,  
 27 Iowa Soybean Ass'n ¶¶ 18-20; McCarty Decl., Associated Indus. of  
 28 Mo. ¶¶ 11-14; SUF No. 63. This would dramatically affect the

practices and businesses of farmers across the country, including members of Plaintiffs National Association of Wheat Growers, National Corn Growers Association, United States Durum Growers Association, Missouri Farm Bureau, Iowa Soybean Association, North Dakota Grain Growers Association, and Missouri Chamber of Commerce and Industry.<sup>10</sup> Mehan Decl., Mo. Chamber of Com. & Indus. ¶¶ 10-19; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 15-25; Hurst Decl., Mo. Farm Bureau ¶¶ 13-25; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 16-30; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 17-30; Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 9-20; Doggett Decl., Nat'l Corn Growers Ass'n ¶¶ 12-23; Zander Decl., S.D. Agri-Business Ass'n ¶¶ 12-20; Jackson Decl., Iowa Soybean Ass'n ¶¶ 17-28; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 15-26; Pinel Decl., W. Plant Health Ass'n ¶¶ 17-18, 20; SUF No. 64.

#### **F. Proceedings Before This Court**

Plaintiffs filed their complaint on November 15, 2017, and filed an amended complaint on December 5, 2017, bringing claims under the First Amendment, the Supremacy Clause, and the Due Process Clause of the Fourteenth Amendment, and seeking declaratory and injunctive relief. See ECF Nos. 1, 23. Shortly thereafter, Plaintiffs moved for a preliminary injunction based solely on their First Amendment claim. See ECF Nos. 29, 29-1. After briefing and oral argument, this Court granted that

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<sup>10</sup> For these and other reasons, Plaintiffs have Article III standing and this case is ripe. See, e.g., *Libertarian Party of L.A. Cty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (recognizing that the Article III "inquiry tilts dramatically toward a finding of standing" in the case of "First Amendment challenges"); see also PI Order at 6-10, ECF No. 75 (concluding that Plaintiffs have identified multiple "cognizable injuries" and that their challenge is ripe); Reply in Supp. of Prelim. Inj. at 8-30, ECF No. 66 (addressing standing and ripeness arguments).

1 preliminary injunction. See PI Order at 19, ECF No. 75. The Court  
2 first found that Plaintiffs' First Amendment challenge was both  
3 constitutionally and prudentially ripe for decision. *Id.* at 5-  
4 10. Applying *Zauderer*, this Court then held that Plaintiffs had  
5 "established a likelihood of success on the merits of their claim  
6 that the warning requirement violates their First Amendment  
7 rights" because "the required warning is factually inaccurate and  
8 controversial" in light of "the heavy weight of evidence in the  
9 record that glyphosate is not in fact known to cause cancer." *Id.*  
10 at 17.

11 The Attorney General sought reconsideration. See Defs.' Mot.  
12 to Alter or Amend Court's Order Granting Prelim. Inj. at 1, ECF  
13 No. 81-1 ("Motion to Alter"). The Attorney General argued that  
14 this Court's First Amendment holding was clearly erroneous and, in  
15 addition, urged the Court to consider the permissibility of certain  
16 supposedly Proposition 65-compliant alternative warning options.  
17 *Id.* at 4-5, 12. But the Court denied that motion. The Court found  
18 that its initial decision was not clearly erroneous, and that even  
19 assuming the Attorney General's alternative warning options  
20 complied with Proposition 65 they would "not change the court's  
21 conclusion that the required Proposition 65 warning for glyphosate  
22 is not purely factual and uncontroversial." Mem. & Order re: Mot.  
23 to Alter or Amend PI Order at 4-5, ECF No. 97 ("Order on Motion to  
24 Alter"). That conclusion, this Court recognized, would likely  
25 require entry of judgment in favor of Plaintiffs on their First  
26 Amendment claim. *Id.*

27

28

**ARGUMENT**

A party may move for summary judgment on any claim, defense, or part of any claim or defense, and the Court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed R. Civ. P. 56(a). Thus, “[s]ummary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact.” *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) (quoting *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017)). Here, as a matter of law, Proposition 65’s warning requirement for glyphosate violates the First Amendment. Thus, summary judgment should be entered in favor of Plaintiffs, along with a permanent injunction against enforcement of the warning requirement as it pertains to glyphosate.

**I. THE COMPELLED GLYPHOSATE WARNING VIOLATES THE FIRST AMENDMENT**

In general, the First Amendment forbids regulations that *compel* speech to the same extent that it forbids regulations that *restrict* speech. See, e.g., *Janus*, 138 S. Ct. at 2464 (“Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.”); *Hurley*, 515 U.S. at 573 (“[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’” (citation omitted)). And regulations of non-misleading commercial speech are, in general, subject at least to intermediate scrutiny,

1 under which the government must show its regulation directly  
 2 advances a substantial government interest and is no more  
 3 "extensive than is necessary to serve that interest." *Cent. Hudson*  
 4 *Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566  
 5 (1980).

6 In *Zauderer*, the Supreme Court recognized a narrow exception  
 7 to this intermediate scrutiny. *Zauderer* held that the government  
 8 may compel the disclosure of "purely factual and uncontroversial  
 9 information" about commercial products or services in certain  
 10 circumstances where the compelled message is reasonably related to  
 11 a substantial governmental interest and is neither "unjustified  
 12 [n]or unduly burdensome." 471 U.S. at 651 (upholding rule  
 13 requiring lawyer to disclose on advertisements that in contingency  
 14 cases client would still be liable for costs, because the  
 15 advertisements would otherwise be misleading). But as the Supreme  
 16 Court recently emphasized in *NIFLA*, *Zauderer's* more lenient form  
 17 of First Amendment scrutiny is available *only* where the state-  
 18 mandated compelled speech is "purely factual and uncontroversial."  
 19 138 S. Ct. at 2372. Where a compelled disclosure is not "purely  
 20 factual and uncontroversial," the "*Zauderer* standard does not  
 21 apply." *Id.*; see also *CTIA*, 928 F.3d at 842 ("Under *Zauderer* . . .  
 22 the compelled disclosure . . . [must] involve[] 'purely factual  
 23 and uncontroversial information' that relates to the service or  
 24 product provided."); *Am. Beverage Ass'n*, 916 F.3d at 756.<sup>11</sup>

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25 <sup>11</sup> *NIFLA* also held that the more lenient *Zauderer* standard applies  
 26 only to required disclosures of "information about the terms under  
 27 which . . . services will be available." *NIFLA*, 138 S. Ct. at  
 28 2372 (emphasis added); see *id.* ("*Zauderer* does not apply outside  
 of these circumstances."). Plaintiffs believe that earlier cases  
 show that such information can be the subject of "[c]ompelled

Here, that heightened review is appropriate because the Attorney General cannot satisfy his "burden of demonstrating that [the] disclosure requirement is purely factual and uncontroversial." PI Order at 12, ECF No. 75; *see also NIFLA*, 138 S. Ct. at 2377 (government "has the burden to prove that [compelled speech] is neither unjustified nor unduly burdensome"); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26 (D. C. Cir. 2014) (en banc) (the government must "meet[] its burden of showing that the mandate advances its interest in making the 'purely factual and uncontroversial information' accessible to the recipients"). That is true whether one considers just the warnings authorized by Proposition 65 and its implementing regulations, or the additional warnings the Attorney General produced when he moved for reconsideration of the Court's preliminary injunction. These inaccurate, misleading, and controversial warnings plainly fail under the *Central Hudson* test, and the First Amendment and Due Process Clause prevent any further efforts by the Attorney General to invent new warnings even less moored to the statute in his efforts to avoid judgment.

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disclosures" only where, as in *Zauderer* itself, the disclosure is "justified by the need to 'dissipate the possibility of consumer confusion or deception.'" *Video Software Dealers Ass'n*, 556 F.3d at 966 (quoting *Zauderer*, 471 U.S. at 651)). Where, as here, the required warning does not operate to correct misleading advertising, Plaintiffs believe that *Zauderer* is inapplicable and the more exacting *Central Hudson* standard should govern. *See id.*; *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). The Ninth Circuit recently held otherwise, however, and Plaintiffs therefore raise the issue only to preserve it for future review, should such review become necessary. *See Am. Beverage Ass'n*, 916 F.3d at 756.

1           **A.    The Compelled Glyphosate Warning Cannot Be Sustained**  
 2                   **Under Zauderer Because It Is Not "Purely Factual And**  
 3                   **Uncontroversial"**

4                   1.    ***The Warning Mandated By Proposition 65 Cannot Be***  
                           ***Sustained Under Zauderer***

5           Once a chemical is "listed" under Proposition 65, the statute  
 6 requires that any "person in the course of doing business" provide  
 7 a "clear and reasonable warning" before "expos[ing] any individual  
 8 to" the listed chemical, unless an affirmative defense to the  
 9 warning requirement applies. Cal. Health & Safety Code §§ 25249.6,  
 10 25249.10(b). The California Supreme Court has held that, under  
 11 the statute, such a warning must convey that "this product contains  
 12 [chemical], a chemical known to the state of California to cause  
 13 reproductive harm [or cancer],' or words to that effect." *Dowhal*,  
 14 32 Cal. 4th at 918; *see also, e.g., Tri-Union*, 2006 WL 1544384, at  
 15 \*61 (providing that this is the "core language . . . in any warning"  
 16 (emphasis added)).

17           A state requirement that Plaintiffs issue such warnings for  
 18 glyphosate cannot be upheld under *Zauderer*. As just discussed,  
 19 review under *Zauderer's* more lenient standard is limited to  
 20 compelled disclosure of uncontroversial factual information, the  
 21 accuracy of which cannot be reasonably disputed. *See supra* at 32-  
 22 33. For example, courts have allowed the government to compel the  
 23 disclosure of a product's country of origin, *American Meat*  
 24 *Institute*, 760 F.3d at 27; whether a product contains mercury,  
 25 *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104,  
 26 107 (2d Cir. 2001); the costs a client is liable to pay, *Zauderer*,  
 27 471 U.S. at 650; and what contents are included in a package of  
 28 services offered, *Milavetz, Gallop & Milavetz*, 559 U.S. at 232—



1 all uncontroversial facts that can be reasonably and definitively  
2 ascertained.

3 By contrast, the government cannot force its citizens to  
4 broadcast the government's—or any third party's—subjective  
5 opinions. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*,  
6 475 U.S. 1, 13-14 (1986) (plurality op.); *Video Software Dealers*  
7 *Ass'n*, 556 F.3d at 965-67. Thus, the government cannot under  
8 *Zauderer* compel disclosure of purported "facts" over which there  
9 is significant room for disagreement, either directly  
10 ("Controversial Fact X is true") or indirectly ("The Government  
11 has concluded that Controversial Fact X is true."). For example,  
12 in *CTIA-Wireless Ass'n v. City & County of San Francisco*, the Ninth  
13 Circuit affirmed a preliminary injunction of a requirement that  
14 cell phone dealers inform consumers about health risks from the  
15 phones' radiofrequency energy emissions. 494 F. App'x 752, 753  
16 (9th Cir. 2012). The warning contained suggestions as to "what  
17 consumers should do" to avoid exposure—language that  
18 "could . . . be interpreted by consumers as expressing San  
19 Francisco's opinion that using cell phones is dangerous." *Id.*  
20 Such an impression would have conflicted with the Federal  
21 Communications Commission's (FCC) "established limits," within  
22 which radiofrequency energy exposure is considered safe, and would  
23 have waded directly into an ongoing "debate in the scientific  
24 community about the health effects of cell phones." *Id.* at 753-  
25 54; see also *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 537  
26 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (conceding that,  
27 under *Zauderer*, "the government cannot attempt to prescribe, under  
28 the guise of requiring disclosure of 'purely factual' information,

1 . . . 'matters of opinion.' If a compelled statement communicates  
2 a 'matter of opinion,' it of course would not be 'purely factual'"  
3 (citation omitted)).

4 Sometimes, determining whether a compelled warning is purely  
5 factual and uncontroversial "may be difficult." *Am. Meat Inst.*,  
6 760 F.3d at 34 (Kavanaugh, J., concurring). But the determination  
7 is easy in this case. As this Court has previously found, "the  
8 most obvious reading of the Proposition 65 cancer warning is that  
9 exposure to glyphosate in fact causes cancer." PI Order at 14,  
10 ECF No. 75. That message is the opposite of "purely factual and  
11 uncontroversial." As the chart attached as Appendix 1  
12 demonstrates, the chief U.S. glyphosate regulator—the EPA—and  
13 virtually every other national regulator that has studied the  
14 question has concluded that the message is wrong. *See supra* at 7-  
15 11. Even *California's own expert regulator* has twice found that  
16 glyphosate does not cause cancer. *See supra* at 9-10.

17 Indeed, regulators around the world specifically rejected  
18 IARC's conclusion after it was rendered and after reviewing much  
19 of the same evidence as IARC. For example, Germany's BfR  
20 concluded, despite IARC's contrary designation, that it continued  
21 to assess "glyphosate as non-carcinogenic." *See* Heering Decl. Ex.  
22 Z (BfR, Does Glyphosate Cause Cancer? at 1); SUF No. 22. BfR noted  
23 that it "ha[d] compiled the most comprehensive toxicological  
24 database, presumably worldwide, for glyphosate" and that "the  
25 entire database"—rather than IARC's "more or less arbitrary  
26 selection of studies"—supported the non-carcinogenic conclusion.  
27 Heering Decl. Ex. Z (BfR, Does Glyphosate Cause Cancer? at 1-2).  
28 The European Union's European Food Safety Authority (EFSA)

1 likewise rebutted IARC's unfounded classification and set forth  
2 reasons for its disagreement similar to those expressed by BfR.  
3 See Heering Decl. Ex. LL (EFSA, *Conclusion on the Peer Review of*  
4 *the Pesticide Risk Assessment of the Active Substance Glyphosate*  
5 at 11, EFSA J. (Nov. 12, 2015)); SUF No. 23. And, notably, although  
6 IARC is part of the WHO, a separate component of the WHO concluded  
7 in a 2016 review, after the IARC classification, that "glyphosate  
8 is *unlikely* to pose a carcinogenic risk to humans." See Heering  
9 Decl. Ex. MM (Food & Agric. Org. of U.N. (FAO) & WHO, Joint FAO/WHO  
10 Meeting on Pesticide Residues: Summary Report § 1.2 (May 16, 2016)  
11 (emphasis added)); SUF No. 24. At the risk of belaboring the  
12 point, regulators from Canada, the European Chemicals Agency,  
13 Australia, New Zealand, Japan, and South Korea also agree with the  
14 non-carcinogenic consensus. See Heering Decl. Ex. NN (Pest Mgmt.  
15 Regulatory Agency, Health Can., RVD2017-01, Re-evaluation  
16 Decision: Glyphosate 1 (Apr. 28, 2017) ("Glyphosate is not  
17 genotoxic and is unlikely to pose a human cancer risk.)); Heering  
18 Decl. Ex. DDD (Statement from Health Canada on Glyphosate, Health  
19 Can. (Jan. 11, 2019)); Heering Decl. Ex. OO (Press Release,  
20 European Chems. Agency (ECHA), ECHA/PR/17/06, Glyphosate Not  
21 Classified as a Carcinogen by ECHA (Mar. 15, 2017) (March 2017  
22 conclusion that "the available scientific evidence did not meet  
23 the criteria to classify glyphosate as a carcinogen, as a mutagen  
24 or as toxic for reproduction.)); Heering Decl. Ex. PP (Austl.  
25 Pesticides & Veterinary Meds. Auth., Final Regulatory Position:  
26 Consideration of the Evidence for a Formal Reconsideration of  
27 Glyphosate 9 (Mar. 2016) (concluding "that the scientific weight-  
28 of-evidence indicates that . . . exposure to glyphosate does not

1 pose a carcinogenic or genotoxic risk to humans")); Heering Decl.  
2 Ex. QQ (Wayne Temple, N.Z. Env'tl. Prot. Auth., Review of the  
3 Evidence Relating to Glyphosate and Carcinogenicity 16 (Aug. 2016)  
4 ("[G]lyphosate is unlikely to be genotoxic or carcinogenic.));  
5 Heering Decl. Ex. RR (Food Safety Comm'n of Japan, Risk Assessment  
6 Report: Pesticides, Glyphosate Summary (Sept. 2016)); Heering  
7 Decl. Ex. CCC (Korea Rural Dev. Admin., Assessment of the Safety  
8 of Pesticides Containing Glyphosate and Diazinon (Mar. 10, 2017));  
9 SUF Nos. 25-30; *see also* Heering Decl. Ex. AA (Gabriella Andreotti  
10 et al., *Glyphosate Use and Cancer Incidence in the Agricultural*  
11 *Health Study*, 110 J. Nat'l Cancer Inst. at 7) (study sponsored by  
12 the U.S. National Institutes of Health, National Cancer Institute,  
13 and the National Institute of Environmental Health Science,  
14 confirming that there is "no evidence of an association between  
15 glyphosate use and risk of any" cancer); Heering Decl. Ex. SS (EPA,  
16 Revised Glyphosate Issue Paper: Evaluation of Carcinogenic  
17 Potential EPA's Office of Pesticide Programs 138, 144) (EPA  
18 evaluation finding that glyphosate is "not likely to be  
19 carcinogenic to humans" and that "[b]ased on all of the available  
20 data, the weight-of-evidence clearly do not support the  
21 descriptors 'carcinogenic to humans' and 'likely to be  
22 carcinogenic to humans' at this time."); Heering Decl. Ex. WW (EPA,  
23 Glyphosate: Proposed Interim Registration Review Decision 7-8,  
24 19-20 (explaining that "EPA's cancer evaluation" concluding that  
25 "glyphosate is 'not likely to be carcinogenic to humans'" is both  
26 "more robust" and "more transparent" than IARC's evaluation));  
27 Heering Decl. Ex. XX (EPA, Glyphosate: Response to Comments on the  
28

Human Health Draft Risk Assessment 2-3); Heering Decl. Ex. E (EPA Aug. 2019 Letter); SUF Nos. 13-14, 31.

In *CTIA v. City of San Francisco*, the warning's conflict with the view of FCC was sufficient to establish that the warning was not purely factual and uncontroversial. 494 F. App'x at 753 (contrasting San Francisco's warning language, which "could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous," with the position of the "FCC . . . [which] has established limits of radiofrequency energy exposure, within which it has concluded using cell phones is safe"). Here, the chorus of dissent is far louder. A purported health warning cannot be upheld as "purely factual and uncontroversial" when nearly every regulator worldwide believes it is wrong, and the primary federal agency with jurisdiction to address the issue has expressly concluded that *giving* the warning would be "false and misleading." Heering Decl. Ex. E (EPA Aug. 2019 Letter); SUF No. 37.

**2. *The Alternative Warnings Proposed By The Attorney General Also Cannot Be Upheld Under Zauderer***

In an attempt to escape the fundamental inconsistency between the First Amendment and Proposition 65's warning requirement as applied to glyphosate, the Attorney General previously proffered two alternative "Warning Options." See Mot. to Alter at 5-16, ECF No. 81-1. This Court held that neither alternative warning would solve the Attorney General's constitutional problem. See Order on Mot. to Alter at 4-5, ECF No. 97 (finding that, even if compliant with Proposition 65, the Attorney General's additional warning options would "not change the court's

1 conclusion that the required Proposition 65 warning for glyphosate  
2 is not purely factual and uncontroversial"). Should the Attorney  
3 General attempt to resuscitate this argument at the summary  
4 judgment stage, the Court should reject it again.

5 a. "Warning Option 1" Would Not Comply With  
6 Zauderer

7 The first warning offered up by the Attorney General—Warning  
8 Option 1—would require Plaintiffs to inform their customers as  
9 follows:

10 **WARNING:** This product can expose you to glyphosate, a  
11 chemical listed as causing cancer pursuant to the  
12 requirements of California law. For more information go  
to [www.P65warnings.ca.gov](http://www.P65warnings.ca.gov).

13 Mot. to Alter at 5, ECF No. 81-1. But this is no solution. To  
14 the extent this warning complies with Proposition 65's  
15 requirements, it conclusively falls short of Zauderer's.

16 As discussed, the California Supreme Court has held that a  
17 Proposition 65 warning must convey that "th[e] product contains  
18 [chemical], a chemical known to the state of California to cause  
19 reproductive harm [or cancer],' or words to that effect." Dowhal,  
20 32 Cal. 4th at 918; see also *supra* at 17 (collecting additional  
21 sources). It is far from certain that, in an enforcement action,  
22 Warning Option 1 would be found compliant. In arguing that it  
23 would, the Attorney General previously contended that Warning  
24 Option 1 would comply with Proposition 65 because it "clearly  
25 communicate[s] that [glyphosate] is known to the state to cause  
26 cancer," as the regulations then in effect explicitly required.  
27 Cal. Code Regs. tit. 27, § 25601 (abrogated Aug. 30, 2018); see  
28 also see Mot. to Alter at 4 n.4, ECF No. 81-1. But if Warning

Option 1 conveys that message, and is thereby compliant with Proposition 65, it would not be compliant with the First Amendment because—as this Court previously recognized—“the message that glyphosate is known to cause cancer is misleading at best.” PI Order at 14, ECF No. 75; see also Order on Mot. to Alter at 6, ECF No. 97 (“Stating that a chemical is listed as causing cancer ‘pursuant the requirements of California law’ conveys essentially the same message to consumers as stating that a chemical is known to the state of California to cause cancer.”).

Under *Zauderer*, a compelled disclosure stands or falls based on what it “convey[s]” to the “consumer[.]” *Video Software Dealers Ass’n*, 556 F.3d at 967. And regardless of whether it is literally true, the statement that glyphosate is “a chemical listed as causing cancer pursuant to the requirements of California law” conveys to consumers that glyphosate causes cancer. “Ordinary consumers do not interpret warnings in accordance with a complex web of statutes, regulations, and court decisions.” PI Order at 14, ECF No. 75; see also Order on Mot. to Alter at 6, ECF No. 97 (same). And “‘the most obvious reading’ of [this] warning” is that glyphosate is “listed as causing cancer” *because it causes cancer*. Order on Mot. to Alter at 6 (citation omitted). What else could a reasonable consumer take from such a message? Certainly not the truth—that after a thorough review of the science, virtually all regulatory and governmental bodies do not believe that glyphosate causes cancer. California cannot circumvent through word games the First Amendment’s prohibition on laws that compel false, misleading, or factually controversial speech.

b. "Warning Option 2" Would Not Comply with  
Zauderer

Warning Option 2 fares no better. Under this "option,"  
Plaintiffs would provide the following warning:

**WARNING:** This product can expose you to glyphosate, a chemical listed as causing cancer pursuant to the requirements of California law. The listing is based on a determination by the United Nations International Agency for Research on Cancer that glyphosate presents a cancer hazard. The U.S. Environmental Protection Agency has tentatively concluded in a draft document that glyphosate does not present a cancer hazard. For more information go to [www.P65warnings.ca.gov](http://www.P65warnings.ca.gov).

Mot. to Alter at 12, ECF No. 81-1.

This warning would not even arguably comply with Proposition 65. Indeed, the Attorney General did not genuinely contend that it would. See *id.* at 2 (arguing only that "[i]n the event the Court were to find that even Warning Option 1 was misleading in light of the unique circumstances of this case," Warning Option 2 would become available). Because Warning Option 2 is designed to acknowledge (albeit to a grossly inadequate extent) that there is reason to doubt IARC's determination, it would violate the Attorney General's own interpretation of Proposition 65. Regulations issued by the Attorney General state that use of "additional words or phrases that contradict or obfuscate otherwise acceptable warning language" will prevent a warning from being "clear and reasonable" as required by the statute. Cal. Code Regs. tit. 11, § 3202(b). According to those regulations, the statute bars even the "use of the adverb 'may' to modify whether the chemical causes cancer," *id.*, because that would cast doubt on the required message that the chemical in question *does* cause cancer. If introducing uncertainty of even that limited sort is impermissible, then it



1 obviously is impermissible to introduce uncertainty of a greater  
2 sort—not just suggesting that the State’s cancer determination  
3 “may” be wrong, but providing readers with information about one  
4 of the (innumerable) studies that directly contradicts the State’s  
5 determination and says that it *is* wrong. As this Court recognized,  
6 “[i]t . . . appears that a warning properly characterizing the  
7 debate as to glyphosate’s carcinogenicity would not comply with  
8 Proposition 65,” and “[t]he Attorney General’s second alternate  
9 warning, by discussing the EPA’s contrary finding that glyphosate  
10 does not cause cancer, appears to ‘contradict or obfuscate  
11 otherwise acceptable warning language’ in violation of” Cal. Code  
12 Regs. tit. 11 § 3202(b). Order on Mot. to Alter at 9 n.7, ECF No.  
13 97; see also PI Order at 15 n.12, ECF No. 75 (“California’s  
14 regulations appear to make it impossible for plaintiffs to explain  
15 in the warning that the IARC’s determination is contrary to that  
16 reached by other organizations . . . .”). Because Plaintiffs  
17 using Warning Option 2 would be found non-compliant with  
18 Proposition 65, it is not a viable option.

19 But even if the Attorney General were correct in his earlier,  
20 equivocal suggestion that Warning Option 2 complies with  
21 Proposition 65, see Mot. to Alter at 3 & n.3, ECF No. 81-1, it  
22 would still be unconstitutional. The limited additional  
23 information permitted in Warning Option 2 would not remedy the  
24 misleading message conveyed by its “listed as causing cancer”  
25 language; rather, it would make express that the State’s compelled  
26 disclosure *is* controversial. *Zauderer* does not permit the  
27 government to end-run its “uncontroversial” requirement by  
28 disclosing the fact of controversiality within the mandated

speech. *Cf. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights*  
*Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring)  
(explaining similar option was unavailing because if successful it  
could be used to "justify any law compelling speech"). Further,  
even though Warning Option 2 adds some additional context to the  
basic Proposition 65 warning by providing the views of one body  
from each side of the debate, depicting this debate as evenly  
balanced is *itself* misleading where "only one health organization  
ha[s] found that the substance in question causes cancer and  
virtually all other government agencies and health organizations  
that have reviewed studies on the chemical ha[ve] found there was  
no evidence that it caused cancer." PI Order at 14, ECF No. 75;  
Order on Mot. to Alter at 9, ECF No. 97 ("The Attorney General's  
second alternative warning is also deficient because it conveys  
the message that there is equal weight of authority for and against  
the proposition that glyphosate causes cancer, or that there is  
more evidence that it does . . . ."); *see also supra* at 7-11  
(describing the almost entirely uniform body of research finding  
no evidence that glyphosate causes cancer). The amount of space  
"allocated to a [controversial view], whether a lot or a little,  
can skew debate on issues" unconstitutionally. *Amidon v. Student*  
*Ass'n of S.U.N.Y.*, 508 F.3d 94, 101 (2d Cir. 2007). Here, forcing  
Plaintiffs to devote more than half of the warning to the outlier  
view that glyphosate is a carcinogen has precisely that  
unconstitutional skewing effect.

Even as to the one mainstream view that the Attorney General  
deemed "relevant," moreover, Warning Option 2 is misleading. Under  
Warning Option 2, Plaintiffs would be required to report that EPA

1 has "tentatively concluded in a draft document that glyphosate  
2 does not present a cancer hazard." Mot. to Alter at 12, ECF No.  
3 81-1 (emphases added). That dramatically understates the  
4 definitiveness of EPA's conclusion. In fact, "[t]he human  
5 carcinogenic potential of glyphosate has been evaluated by the  
6 agency *several times*," Heering Decl. Ex. SS (EPA, Revised  
7 Glyphosate Issue Paper: Evaluation of Carcinogenic Potential EPA's  
8 Office of Pesticide Programs 143 (emphasis added)), and the agency  
9 has time and time again found it non-carcinogenic. See, e.g.,  
10 Heering Decl. Ex. N (EPA, R.E.D. Facts: Glyphosate at 2); Heering  
11 Decl. Ex. Y (EPA, Glyphosate Issue Paper: Evaluation of  
12 Carcinogenic Potential 139); SUF Nos. 11, 13, 36. EPA reaffirmed  
13 those prior findings in a revised version of that Issue Paper,  
14 concluding the evidence "strong[ly] support[ed]" that glyphosate  
15 is "not likely to be carcinogenic to humans." Heering Decl.  
16 Ex. SS, (EPA, Revised Glyphosate Issue Paper: Evaluation of  
17 Carcinogenic Potential EPA's Office of Pesticide Programs 144);  
18 SUF No. 13. To be sure, this finding was part of a broader  
19 "[r]egistration [r]eview" for glyphosate that remains ongoing—a  
20 regulatory process that considers various evaluations additional  
21 to carcinogenicity, see Heering Decl. Ex. SS, (EPA, Revised  
22 Glyphosate Issue Paper: Evaluation of Carcinogenic Potential EPA's  
23 Office of Pesticide Programs 12)—but the carcinogenicity  
24 conclusion *itself* was in no way "tentative." Indeed, in April  
25 2019, as part of that registration review, EPA issued its most  
26 recent evaluation in a Proposed Interim Registration Review  
27 Decision, reaffirming that "glyphosate is 'not likely to be  
28 carcinogenic to humans.'" Heering Decl. Ex. WW (EPA, Glyphosate:

1 Proposed Interim Registration Review Decision 7-8, 19-20); see  
 2 also Heering Decl. Ex. XX (EPA, Glyphosate: Response to Comments  
 3 on the Human Health Draft Risk Assessment 2-3); SUF No. 14. And  
 4 EPA's August 2019 letter to registrants reiterated that it had  
 5 "determin[ed] that glyphosate is 'not likely to be carcinogenic to  
 6 humans,'" such that a warning that glyphosate causes cancer would  
 7 be "false and misleading." Heering Decl. Ex. E (EPA Aug. 2019  
 8 Letter); SUF No. 37. That conclusion was unequivocal and in no  
 9 way "tentative."

10 \*\*\*\*\*

11 Because any glyphosate warning that complied with Proposition  
 12 65 would be inaccurate, misleading, and controversial—and thus  
 13 not be "purely factual and uncontroversial"—the warning  
 14 requirement cannot be upheld under *Zauderer*. *NIFLA*, 138 S. Ct. at  
 15 2372.

16 **B. The Warning Mandate Fails Intermediate Scrutiny**

17 The glyphosate warning does not come close to surviving  
 18 intermediate scrutiny, either. Indeed, to Plaintiffs' knowledge,  
 19 no court *anywhere* has ever found a compelled warning that is  
 20 inaccurate and misleading to be permissible under any standard of  
 21 First Amendment review.

22 Under *Central Hudson*, intermediate scrutiny requires the  
 23 government to establish a "substantial" government interest that  
 24 its regulation "directly" advances through burdens on speech no  
 25 more "extensive than . . . necessary to serve that interest."  
 26 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 528 (1996); see  
 27 also *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 437  
 28 (9th Cir. 1993). To "directly advance the state interest" under

1 Central Hudson, the government must demonstrate that "its  
 2 restriction will in fact alleviate [the asserted harms] to a  
 3 material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993);  
 4 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (same). The  
 5 government's "burden under this test is 'heavy,'" and it "cannot  
 6 satisfy it 'by mere speculation or conjecture.'" *Italian Colors*,  
 7 878 F.3d at 1176 (citations omitted); see also *NIFLA*, 138 S. Ct.  
 8 at 2377 (reaffirming that the government has the burden of proving  
 9 that the compelled speech mandate "remed[ies] a harm that is  
 10 'potentially real not purely hypothetical,'" and "extend[s] 'no  
 11 broader than reasonably necessary'" (citation omitted).

12 California can neither establish that its warning directly  
 13 and materially advances a substantial interest, nor that the  
 14 warning requirement is narrowly tailored.

15 1. ***The Attorney General Cannot Prove That The Warning***  
 16 ***Directly And Materially Advances The State's***  
***Legitimate Interests***

17 The glyphosate warning requirement fails intermediate  
 18 scrutiny at the outset because, as discussed above, any message  
 19 about glyphosate that complied with Proposition 65's requirements  
 20 would necessarily be misleading and controversial. See *supra* at  
 21 34-45. And as a matter of law, California has no legitimate  
 22 interest in requiring Plaintiffs to repeat a misleading and  
 23 controversial message. See, e.g., *Video Software Dealers Ass'n*,  
 24 556 F.3d at 953 (holding that a law that "compels the carrying of  
 25 the State's controversial opinion" is "unconstitutional[]" under  
 26 any standard of review); *id.* at 967 ("[T]he State has no legitimate  
 27 reason to force retailers to affix false information on their  
 28 products."); *Am. Beverage Ass'n*, 916 F.3d at 756 ("The Zauderer

1 test, as applied in *NIFLA*, contains three inquiries: whether the  
 2 notice is (1) purely factual, (2) noncontroversial, and (3) not  
 3 unjustified or unduly burdensome. A compelled disclosure  
 4 accompanying a related product or service must meet all three  
 5 criteria to be constitutional." (emphasis added)); *id.* at 764  
 6 (Christen, J., & Thomas, C.J., concurring in part) ("[A]ny  
 7 government-compelled speech must be, at the very least, factually  
 8 accurate."); see also PI Order at 17, ECF No. 75 ("[W]here  
 9 California seeks to compel businesses to provide cancer warnings,  
 10 the warnings must be factually accurate and not misleading."  
 11 (emphasis added)). The Court need go no further to resolve the  
 12 merits of this case.

13 But the glyphosate message fails intermediate scrutiny for  
 14 other reasons as well. California's asserted interest in mandating  
 15 disclosures under Proposition 65 is in "informing [its residents]  
 16 about exposures to chemicals that cause cancer." *Cal. Chamber of*  
 17 *Com. v. Brown*, 196 Cal. App. 4th 233, 258 (2011) (quoting preamble  
 18 to Proposition 65 ballot initiative). Here, though, California  
 19 has not conducted a causation analysis showing that the warning  
 20 would inform consumers about a chemical that actually causes cancer  
 21 in humans.<sup>12</sup> See *Italian Colors*, 878 F.3d at 1177 ("[T]he Attorney  
 22 General must do more than merely identify a state interest served

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23 <sup>12</sup> OEHHA has acknowledged that it was precluded from conducting a  
 24 scientific analysis of whether glyphosate causes cancer in listing  
 25 glyphosate because the statute required that it list glyphosate  
 26 under Proposition 65 automatically once IARC made its  
 27 determination. See Heering Decl. Ex. JJ (OEHHA, *Notice of Intent*  
 28 *to List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate*); *SUF*  
 No. 50. And the Attorney General cannot evade his burden to prove  
 material advancement in this case by complaining that the State  
 was required by its own laws to accept IARC's conclusions as  
 definitive and ignore the larger body of scientific evidence about  
 glyphosate.

1 by the statute . . . [he] 'must demonstrate that . . . [the speech]  
2 restriction will in fact alleviate [the harms] to a material  
3 degree.'" (second alteration in original) (citation omitted)); *id.*  
4 at 1176 (the government cannot satisfy its "heavy burden" by "mere  
5 speculation or conjecture" (citation omitted)); *Cal-Almond*, 14  
6 F.3d at 438 (no direct advancement where government admits it has  
7 not conducted its own analysis). Indeed, the evidence instead  
8 shows that the message would not inform consumers about a genuine  
9 cancer risk, given that the State's own regulators have found that  
10 glyphosate is "unlikely to pose a cancer hazard to humans," EPA  
11 has concluded that the statement is "false and misleading," the  
12 worldwide consensus is that glyphosate does not cause cancer, and  
13 even IARC only goes so far as saying it "probably" does.

14 The Attorney General's equivocal suggestions that a  
15 Proposition 65 warning could be diluted to the point that it need  
16 not actually communicate that glyphosate causes cancer, *see supra*  
17 at 40-46, only exacerbate this problem. Such a *non-cancer* warning  
18 could not possibly serve Proposition 65's intended purpose of  
19 "informing [Californians] about exposures to chemicals that cause  
20 cancer." *Cal. Chamber of Com.*, 196 Cal. App. 4th at 258 (emphasis  
21 added); *see also* Order on Mot. to Alter at 8-9, ECF No. 97. Indeed,  
22 requiring Plaintiffs to provide such a warning would actively  
23 *undermine* the State's stated interest. Mandating warnings without  
24 an adequate basis contributes to overwarning, which causes  
25 consumers to tune warnings out entirely, even when (unlike here)  
26 they are well-founded and important. *See, e.g., Nicolle-Wagner v.*  
27 *Deukmejian*, 230 Cal. App. 3d 652 (1991) (upholding OEHHA  
28 regulation exempting "naturally occurring" chemicals from

Proposition 65 because it reduces "unnecessary warnings, which could distract the public from other important warnings on consumer products" (quoting OEHHA)); *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 70 (2008) (overwarning "invite[s] mass consumer disregard and ultimate contempt for the warning process"); *Dowhal*, 32 Cal. 4th at 932 ("problems of overwarning are exacerbated" where, as here, "warnings must be given even as to very remote risks"); *Thompson v. Cty. of Alameda*, 27 Cal. 3d 741, 754-55 (1980) (noting that "by reason of their sheer volume," insignificant warnings "would add little to the effective protection of the public"); see also *Gaeta v. Perrigo Pharm. Co.*, 562 F. Supp. 2d 1091, 1097 (N.D. Cal. 2008) (noting that overwarning can "have a negative effect on . . . public health"); *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 392 (7th Cir. 2010) (concluding that overwarning "can deter potentially beneficial uses of [the substance] by making it seem riskier than warranted and can dilute the effectiveness of valid warnings"); see also Br. for 11 States as Amici Curiae in Supp. of Pls.' Mot. for Prelim. Inj. at 9, ECF No. 34-1 (explaining how Proposition 65 warning requirement would "decrease[] the efficacy of disclosures already required by" many other states).

**2. The Attorney General Cannot Prove That The Warning Requirement Is Narrowly Tailored**

Finally, the compelled glyphosate warning also fails intermediate scrutiny for the independent reason that it is not narrowly tailored. Indeed, there is no evidence that California has explored any less restrictive alternatives to communicate concerns about glyphosate. See *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013) (holding that a speech restriction



is overinclusive where it "restricted more speech than necessary"). And such alternatives are obvious. In particular, as *NIFLA* explained, the most straightforward alternative to "coopt[ing] [a private speaker] to deliver its message for it" is for the State to convey its message on its own media and on its own dime. 138 S. Ct. at 2376 ("California could inform low-income women about its services 'without burdening a speaker with unwanted speech[,] [m]ost obviously [through its own] public-information campaign."); see also *Linkmark Assocs., Inc. v. Willingboro*, 431 U.S. 86, 97 (1977) (government could have used alternative of speaking itself to give "widespread publicity" to issue); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578 (2011) ("The State can express [its] view through its own speech."); *Evergreen Ass'n v. N.Y.C.*, 740 F.3d 233, 250-51 (2d Cir. 2014) (city could have communicated message through its own advertisements). California's complete failure to explore such alternatives, or to show why they are inadequate, means that it cannot meet its burden under *Central Hudson*.

**C. The First Amendment and Due Process Clause Do Not Permit The State To Continually Invent New Warnings To Save The Warning Mandate From Invalidity**

The foregoing has shown that, as applied to glyphosate, the First Amendment protects Plaintiffs from any obligation to make the warning California courts have held Proposition 65 requires, and that none of the alternative warnings the Attorney General has to date suggested might satisfy Proposition 65 would comply with the First Amendment. But if past is prologue, the Attorney General may respond by now proposing Warning Option 3 (and maybe 4 and 5). After all, it was only after Plaintiffs demonstrated the inadequacy

1 of Proposition 65's classic warning that the Attorney General  
 2 proposed Warning Options 1 and 2 in the first place, arguing that  
 3 "[t]he statute says nothing about what constitutes a clear and  
 4 reasonable warning" and that he was therefore free to make up new  
 5 options. Mot. to Alter at 4, ECF No. 81-1. Then, once Plaintiffs  
 6 demonstrated that his new proposals were inadequate, too, the  
 7 Attorney General insisted that "[i]f the Court disagrees as to the  
 8 content of any particular warning, the warnings can be modified as  
 9 appropriate." Defs.' Reply in Supp. of Mot. to Alter at 11 n.17,  
 10 ECF No. 95.

11 This Court should not condone this sort of First Amendment  
 12 gamesmanship. As the Supreme Court explained in *Zauderer* itself,  
 13 imposing serious penalties based on a disclosure law that fails to  
 14 "specify precisely what disclosures [are] required" "would raise  
 15 significant due process concerns." 471 U.S. at 653 n.15. To  
 16 comply with Due Process and the First Amendment, a State must  
 17 "articulate its disclosure rules" to give a "sure guide" to those  
 18 tasked with following them. *Id.*; see also *Baggett v. Bullitt*, 377  
 19 U.S. 360, 372 (1964) (finding compelled loyalty oaths void for  
 20 vagueness under the First Amendment); *Bullfrog Films, Inc. v. Wick*,  
 21 847 F.2d 502, 512 (9th Cir. 1988) (government cannot "delegate[]  
 22 basic policy matters . . . for resolution on an *ad hoc* and  
 23 subjective basis" in litigation (citation omitted)). The State  
 24 must supply these warnings; it cannot shift the burden to devise  
 25 a lawful warning onto Plaintiffs. See *Illinois ex rel. Madigan v.*  
 26 *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 n.9 (2003) ("The  
 27 Court has long cautioned that, to avoid chilling protected speech,  
 28 the government must bear the burden of proving that the speech it

1 seeks to prohibit is unprotected."); *Riley v. Nat'l Fed'n of Blind*  
 2 *of N.C., Inc.*, 487 U.S. 781, 794 (1988) (holding that limitations  
 3 on charitable solicitations that "require[d] the speaker to prove  
 4 'reasonableness'" of their fees as a defense to liability were "in  
 5 direct contravention of the First Amendment[]"). Here, the  
 6 Attorney General has had every incentive, through multiple rounds  
 7 of briefing and multiple hearings before this Court, to "articulate  
 8 [Proposition 65's] disclosure rules" in the manner that was most  
 9 likely to comply with the First Amendment, *Zauderer*, 471 U.S. at  
 10 653 n.5. And for the reasons already discussed, the options he  
 11 has proposed fail. Any new hypothetical warning that is so obscure  
 12 and non-obvious that no one has even thought of it yet would be  
 13 extremely unlikely to satisfy Proposition 65.<sup>13</sup> But even if there  
 14 were a chance that a California court *might* accept some new warning  
 15 that the Attorney General now devises, the course of this  
 16 litigation has demonstrated at the very least that the statute and  
 17 binding regulations do not provide "fair notice" that such warning  
 18 options are available. *FCC v. Fox Television Stations, Inc.*, 567  
 19 U.S. 239, 253 (2012). A statute that so thoroughly disguised the  
 20 means of compliance would violate Due Process, *especially* where—

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21 <sup>13</sup> The Attorney General's own regulations prohibit use of diluting  
 22 and qualifying language. Cal. Code Regs. tit. 11, § 3202(b); see  
 23 also *Tri-Union*, 2006 WL 1544384, at \*61 (concluding language that  
 24 "dilutes the actual warning" is non-compliant, citing Attorney  
 25 General's regulation). It therefore should be no surprise that  
 26 every one of the hundreds of approved Proposition 65 warning  
 27 settlements since September 2016 mandated inclusion of the  
 28 specific phrase "known to the State of California to cause cancer"  
 or required the warning to otherwise "clearly communicate that the  
 chemical in question is known to the state to cause cancer."  
 Norris Decl. ¶¶ 3-7; SUF No. 45. And California courts have  
 declined to dismiss enforcement actions even where the warnings  
 provided deviated only slightly from approved safe harbor  
 warnings. Norris Decl. ¶¶ 13-20; SUF No. 46.

as here—it “touch[es] upon ‘sensitive areas of basic First Amendment freedoms.’” *Id.* at 254 (citation omitted); see also First Am. Compl. ¶ 125, ECF No. 23 (“FAC”) (asserting, as an additional basis for relief, that “California’s listing of glyphosate and the attendant warning requirement are therefore invalid under the Fourteenth Amendment’s Due Process Clause”).<sup>14</sup>

## II. A PERMANENT INJUNCTION SHOULD ISSUE

For the reasons set forth above, enforcement of Proposition 65’s warning requirement as to glyphosate would violate

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<sup>14</sup> In their First Amended Complaint, Plaintiffs also explained that OEHHA’s listing of glyphosate and the related warning violated the Due Process Clause for the additional reason that the State has no rational basis to assert that it “know[s]” glyphosate causes cancer. See FAC ¶¶ 118-24, ECF No. 23. Plaintiffs subsequently agreed to dismiss their claims against the Director of OEHHA, Lauren Zeise, eliminating from the case the separate question of whether the *listing* is constitutional. See Stip. & Order for Dismissal of Def. Dr. Lauren Zeise, ECF No. 93. In light of that development, there is no longer any need for this Court to independently evaluate whether the classic Proposition 65 warning requirement violates the Due Process Clause. Indeed, where a “plaintiff’s claim can be analyzed under an explicit textual source of rights in the Constitution” like the First Amendment—as the Attorney General has conceded is true with respect to the warning requirement—“a court should not resort to the more subjective standard of substantive due process.” *Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001); see also *Corales v. Bennett*, 567 F.3d 554, 569 n.11 (9th Cir. 2009). Accordingly, the Due Process Clause remains relevant in this case only insofar as it prevents the Attorney General from continuing to make the warning requirement—a warning requirement that *the State* bears the burden of showing is constitutional, see *NIFLA*, 138 S. Ct. at 2377—a moving target. See *supra* at 52-54.

Plaintiffs also explained in their First Amended Complaint that the Proposition 65 warning would be preempted as to food products under the FDCA. But this Court need not address that argument now because Plaintiffs Western Plant Health Association and Monsanto Company do not produce food and did not join this claim, see FAC ¶ 12 n.2, ECF No. 23, and because Plaintiffs’ First Amendment claim can resolve the Proposition 65 warning’s constitutionality in all of its iterations and as regards all Plaintiffs. *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part) (“[I]f it is not necessary to decide more, it is necessary not to decide more.”). Plaintiffs reserve the right, however, to press this claim at a later stage of this litigation, if warranted.

1 Plaintiffs' First Amendment rights and conflict with federal  
 2 statutory law. In light of that showing, Plaintiffs easily satisfy  
 3 the remaining elements for permanent equitable relief—namely,  
 4 that (i) Plaintiffs have suffered or will likely suffer an  
 5 "irreparable injury" absent an injunction, (ii) "remedies  
 6 available at law, such as monetary damages, are inadequate to  
 7 compensate for that injury," (iii) "a remedy in equity is  
 8 warranted" in light of the "balance of hardships between the  
 9 plaintiff and defendant," and (iv) "the public interest would not  
 10 be disserved by a permanent injunction." *Monsanto Co. v. Geertson*  
 11 *Seed Farms*, 561 U.S. 139, 156-57 (2010). Indeed, the Court already  
 12 concluded that Plaintiffs satisfied the analogous requirements for  
 13 issuance of a preliminary injunction. PI Order at 17-20, ECF No.  
 14 75.

15 Plaintiffs' demonstration that enforcement of the warning  
 16 requirement would violate their First Amendment rights satisfies  
 17 the "irreparable injury" requirement. *Id.* at 17-18. Absent an  
 18 injunction, Plaintiffs will be unlawfully coerced by the threat of  
 19 litigation and penalties to abandon their right not to disseminate  
 20 a factually controversial and literally false and misleading  
 21 warning with which they vehemently disagree. "It is well  
 22 established that the deprivation of constitutional rights  
 23 'unquestionably constitutes irreparable injury.'" *Hernandez v.*  
 24 *Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (quoting *Melendres v.*  
 25 *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); see also *Valle Del*  
 26 *Sol*, 709 F.3d at 828 ("[T]he loss of First Amendment freedoms, for  
 27 even minimal periods of time, unquestionably constitutes  
 28 irreparable injury." (quoting *Elrod v. Burns*, 427 U.S. 347, 373

(1976)); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996) (finding irreparable harm because "compelled speech 'contravene[s] core First Amendment values'" (alteration in original) (citation omitted)).

Plaintiffs would also suffer irreparable reputational, business, and monetary injuries from enforcement of the warning requirement. In addition to the constitutional injury, the compelled warning requirement would cause several additional types of injury that constitute irreparable harms:<sup>15</sup>

- The compelled glyphosate warning would damage the reputation and goodwill associated with Plaintiffs (and their members) and their products by misleading consumers and branding their products as cancer-causing killers. Heering Decl. ¶¶ 41, 49, 68-69; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 16-17; Doggett Decl., Nat'l Corn Growers Ass'n ¶ 17; Kessel Decl., N.D. Grain Growers Ass'n ¶ 17; Zander Decl., S.D. Agri-Business ¶ 12; Pinel Decl., W. Plant Health Ass'n ¶ 25; Jackson Decl., Iowa Soybean ¶ 26; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 25-26; McCarty Decl., Associated Indus. of Mo. ¶¶ 15-16; SUF No. 65; *see Life Alert Emergency Resp., Inc. v. LifeWatch, Inc.*, 601 F. App'x 469, 474 (9th Cir. 2015) (threat to "reputation and goodwill . . . constitutes irreparable harm"); *see also*

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<sup>15</sup> Plaintiffs' success on their First Amendment claim is sufficient standing alone to establish that irreparable harm would flow absent an injunction. See PI Order at 18. Plaintiffs provide the additional irreparable harms for completeness.

*Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (same); *Gerling Glob. Reinsurance Corp. of Am. v. Quackenbush*, No. Civ. S-00-0506WBSJFM et al., 2000 WL 777978, at \*13 (E.D. Cal. June 9, 2000) (Shubb, J.) (irreparable harm where defendant's actions "suggest" plaintiff's services are unsavory), *aff'd sub nom. Gerling Glob. Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001).

- This reputational disparagement would put Plaintiffs at a significant competitive disadvantage. *Hurst Decl.*, Mo. Farm Bureau ¶¶ 25-28; *Inman Decl.*, U.S. Durum Growers Ass'n ¶¶ 30-33; *Wogsland Decl.*, N.D. Grain Growers Ass'n ¶¶ 25-28; *Stoner Decl.*, Nat'l Ass'n of Wheat Growers ¶¶ 30-33; *Zander Decl.*, S.D. Agri-Business ¶¶ 19-22; *Jackson Decl.*, Iowa Soybean Ass'n ¶¶ 28-31; *McCarty Decl.*, Associated Indus. of Mo. ¶¶ 21-24; *SUF No. 66*; *see also, e.g., Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) ("A rule putting plaintiffs at a competitive disadvantage constitutes irreparable harm.").
- The threat of the warning requirement caused some Plaintiffs to lose customers prior to this Court's entry of a preliminary injunction, and Plaintiffs would certainly lose additional customers if the warning requirement were allowed to go into effect. *Pinel Decl.*, W. Plant Health Ass'n ¶ 21; *Heering Decl.* ¶¶ 59-60; *SUF No. 67*; *San Miguel Pure Foods Co. v. Ramar Int'l*

1 Corp., 625 F App'x 322, 327 (9th Cir. 2015) ("loss of  
 2 prospective customers sufficient evidence of  
 3 irreparable injury"); *Design Furnishings, Inc. v. Zen*  
 4 *Path LLC*, No. CIV. 2:10-02765 WBS GGH, 2010 WL 4321568,  
 5 at \*4 (E.D. Cal. Oct. 21, 2010) (Shubb, J.) (irreparable  
 6 harm where defendant's actions "cause plaintiff to lose  
 7 prospective customers").

- 8 • Major glyphosate retailers have previously indicated  
 9 that without an injunction, they will not carry  
 10 glyphosate-based products unless the products' labels  
 11 are updated to carry a warning with which Plaintiffs  
 12 vehemently disagree. Pinel Decl., W. Plant Health Ass'n  
 13 ¶ 22; Heering Decl. ¶ 45; SUF No. 68. This is true  
 14 without regard for the NSRL. Pinel Decl., W. Plant  
 15 Health Ass'n ¶ 31; Heering Decl. ¶¶ 46-48; SUF No. 69.  
 16 Accordingly, major retailers would remove Plaintiffs'  
 17 unlabeled glyphosate-based products from store shelves  
 18 and inventory if the warning requirement is allowed to  
 19 go into effect. Heering Decl. ¶ 45; SUF No. 70; see  
 20 *De Simone v. VSL Pharm., Inc.*, 133 F. Supp. 3d 776, 799  
 21 (D. Md. 2015) ("irreparable harm" from pulling products  
 22 "off the shelves"). Likewise, the warning requirement  
 23 would impose operational burdens on major retailers,  
 24 further impairing Plaintiffs' reputations and goodwill.  
 25 See, e.g., Heering Decl. ¶ 49; SUF No. 71. The warning  
 26 requirement threatens, if it is allowed to go into  
 27 effect, to force changes throughout the food,  
 28 agricultural, and herbicide industries by imposing (at



a minimum) extensive and wholly unnecessary testing requirements, and disruption to and segregation of supply chains. See, e.g., Hurst Decl., Mo. Farm Bureau ¶¶ 25-28; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 30-33; Doggett Decl., Nat'l Corn Growers Ass'n ¶¶ 12-13; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 15-21; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 30-33; Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 19-23; Jackson Decl., Iowa Soybean Ass'n ¶¶ 20-25; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 20-24; McCarty Decl., Associated Indus. of Mo. ¶¶ 17-19; Heering Decl. ¶¶ 37, 49-50; SUF No. 72. It also threatens to cause burdensome operational changes in the retail setting, which will further impair the goodwill of Plaintiffs and their relationships with suppliers and retailers. Heering Decl. ¶ 49; SUF No. 73.

- If Plaintiffs who farm using glyphosate are forced to cease using glyphosate by suppliers, this will result in significant disruption to their longstanding business practices. See, e.g., Hurst Decl., Mo. Farm Bureau ¶¶ 5-7, 17-22; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 19-22; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 7-9, 24-27; Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 3, 11-14; Jackson Decl., Iowa Soybean Ass'n ¶¶ 6-12, 22-25; SUF No. 74; see *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) (forcing a "change [in] the whole nature of [plaintiff's] business" constitutes irreparable harm).

Moreover, to the extent any of these injuries could be deemed financial in nature, they are not reparable as a matter of law because California's sovereign immunity precludes them from being remedied by money damages. See *Idaho v. Couer d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (finding irreparable harm due to economic loss where sovereign immunity prevents recovery of money damages); *Pac. Merch. Shipping Ass'n v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2914961, at \*3 (E.D. Cal. Oct. 5, 2007) (Shubb, J.) ("irreparable harm" from "complying with regulations" where "Eleventh Amendment" prohibits recovery); *N.E. Med. Servs., Inc. v. Cal. Dep't of Health Care Servs.*, 712 F.3d 461, 466 (9th Cir. 2013) (California has immunity from "monetary damages.").

As a matter of law, Plaintiffs' constitutional injuries cannot adequately be compensated by legal remedies. See *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages."); see also *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). And as a matter of fact, the harms that they would suffer to their reputations and businesses from enforcement of the warning requirement are *literally* non-compensable, because California's sovereign immunity precludes them from being remedied by money damages. See *supra* at 59-60.

An injunction is necessary, moreover, to prevent all of these irreparable injuries from occurring. Even if the Attorney General could be relied upon to comply with the Court's judgment absent an injunction, Plaintiffs have no comfort that those in privity with him—i.e., bounty hunters—would similarly comply.

The final two factors—the balance of equities and public interest—“merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors also strongly support permanent relief. It is well established that the government “cannot suffer harm from an injunction that merely ends an unlawful practice.” *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Likewise, the “public interest” tips sharply in favor of enjoining the constitutional violation, “because all citizens have a stake in upholding the Constitution.” *Id.* at 1146; see also *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (courts have “consistently recognized the significant public interest in upholding First Amendment principles.”); see also PI Order at 18-19, ECF No. 75. And neither the public nor the government “has [any] legitimate interest in enforcing an unconstitutional” law. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

## CONCLUSION

For the foregoing reasons, this Court should enter summary judgment for Plaintiffs on Claim I (First Amendment) of their First Amended Complaint and enjoin the Attorney General and those in privity with him from enforcing the Proposition 65 warning requirement as to glyphosate.

1 Dated: September 25, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF WHEAT  
GROWERS; NATIONAL CORN GROWERS  
ASSOCIATION; UNITED STATES  
DURUM GROWERS ASSOCIATION;  
WESTERN PLANT HEALTH  
ASSOCIATION; MISSOURI FARM  
BUREAU; IOWA SOYBEAN  
ASSOCIATION; SOUTH DAKOTA AGRI-  
BUSINESS ASSOCIATION; NORTH  
DAKOTA GRAIN GROWERS  
ASSOCIATION; MISSOURI CHAMBER  
OF COMMERCE AND INDUSTRY;  
MONSANTO COMPANY; ASSOCIATED  
INDUSTRIES OF MISSOURI;  
AGRIBUSINESS ASSOCIATION OF  
IOWA; CROPLIFE AMERICA; AND  
AGRICULTURAL RETAILERS  
ASSOCIATION,

Plaintiffs,

XAVIER BECERRA, IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL OF  
THE STATE OF CALIFORNIA,

Defendant.

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

**STATEMENT OF UNDISPUTED  
FACTS IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

Hearing: Feb. 10, 2020  
Time: 1:30 p.m.  
Ctrm: 5

The Honorable William B.  
Shubb

Case Filed: Nov. 15, 2017

Plaintiffs respectfully submit the following Statement of Undisputed Facts in support of their Motion for Summary Judgment, pursuant to Federal Rules of Civil Procedure, Rule 56(a) and Local Rule 260 of the District Court for the Eastern District of California:

UNDISPUTED FACTS	SUPPORTING EVIDENCE
1. Glyphosate is an herbicide that is used to control weeds in agricultural, residential, aquatic, and other settings.	1. Heering Decl. ¶¶ 6-17.
2. Since its introduction in 1974, glyphosate has become the world's most widely used herbicide because it is effective, economical, and "environmentally benign."	2. Heering Decl. Ex. A (Jorge Fernandez-Cornejo et al., USDA, EIB No. 124, Pesticide Use in U.S. Agriculture: 21 Selected Crops, 1960-2008 at 21 (May 2014)).
3. Glyphosate is the active ingredient in many commercial products that are marketed by multiple businesses under a number of trade names, including Roundup®, and has been registered for use in over 160 countries.	3. Heering Decl. ¶¶ 8, 9, 31-33, 67.
4. In the United States, glyphosate is approved for use	4. Heering Decl. ¶¶ 13, 31.

UNDISPUTED FACTS	SUPPORTING EVIDENCE
in more than 250 agricultural crop applications.	
5. In California, glyphosate is used, among other things, in the cultivation of almond, citrus, and cotton.	5. Heering Decl. ¶ 24.
6. In the United States, glyphosate is used on canola and on a high percentage of critical crops such as corn, wheat, cotton, and soybean.	6. Heering Decl. ¶¶ 13, 30-31; Heering Decl. Ex. M (Michael Livingston et al., <i>Economic Returns to Herbicide Resistance Management in the Short and Long Run: The Role of Neighbor Effects</i> , 64 Weed Sci. (Special Issue) 595, 595-96 (2016)).
7. Glyphosate is widely used in Canada, including for cultivation of oats and wheat.	7. Heering Decl. ¶ 13.
8. Glyphosate-based herbicides are widely used by government agencies to control vegetation in rights of way, in aquatic environments, in garden settings, and to reduce the risk associated with rapid-spreading wildfire.	8. Heering Decl. ¶ 16.

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>9. Glyphosate is used for a broad range of applications because of its well-recognized benefits over other cultivation and weed-suppression techniques.</p>	<p>9. Heering Decl. ¶¶ 15, 17; Heering Decl. Ex. B (Stephen O. Duke &amp; Stephen B. Powles, <i>Glyphosate: A Once-in-a-Century Herbicide</i>, 64 Pest Mgmt. Sci. 319, 322 (2008)); Decl. of Blake Hurst, Mo. Farm Bureau ¶ 5; Decl. of Jefferson Jon Doggett, Nat'l Corn Growers Ass'n ¶ 4; Decl. Of Dan Mehan, Mo. Chamber of Com. &amp; Indus. ¶ 6; Decl. of Dan Wogsland, N.D. Grain Growers Ass'n ¶¶ 5-9; Decl. of Gordon Stoner, Nat'l Ass'n of Wheat Growers ¶¶ 7-10; Decl. of Greg Kessel, N.D. Grain Growers Ass'n ¶ 4; Decl. of Mark Jackson, Iowa Soybean Ass'n ¶¶ 6-12; Decl. of Mark Martinson, U.S. Durum Growers Ass'n ¶¶ 5-8.</p>
<p>10. Among other things, EPA's review of an herbicide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) includes an evaluation of</p>	<p>10. Heering Decl. Ex. C (EPA, EPA/630/P-03/001F, Guidelines for Carcinogen Risk Assessment (Mar. 2005)).</p>



UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>whether the herbicide is potentially carcinogenic.</p>	
<p>11. In 1993, when EPA approved a renewal of glyphosate's registration under FIFRA, EPA concluded as follows: "Several chronic toxicity/carcinogenicity studies . . . resulted in no effects based on the parameters examined, or resulted in findings that glyphosate was not carcinogenic in the study. In June 1991, EPA classified glyphosate as a Group 3 oncogen—one that shows evidence of non-carcinogenicity for humans—based on the lack of convincing evidence of carcinogenicity in adequate studies."</p>	<p>11. Heering Decl. Ex. N (EPA, EPA-738-F-93-011, Registration Eligibility Decision (R.E.D.) Facts: Glyphosate 2 (Sept. 1993)).</p>
<p>12. In 2014, EPA reviewed more than 55 epidemiological studies conducted on the possible cancer and non-cancer effects of glyphosate. Its review concluded that this body of</p>	<p>12. Heering Decl. Ex. O (Eric Sfiligoj, <i>EPA Plans Response to IARC Glyphosate Finding...But Not Just Yet</i>, CropLife (Apr. 6, 2015)).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>research does not provide evidence to show that glyphosate causes cancer.</p>	
<p>13. In December 2017, EPA issued a comprehensive evaluation of glyphosate, and determined that glyphosate is "not likely to be carcinogenic to humans" and that "[b]ased on all of the available data, the weight-of-evidence clearly do not support the descriptors 'carcinogenic to humans' and 'likely to be carcinogenic to humans' at this time."</p>	<p>13. Heering Decl. Ex. SS (EPA, Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential EPA's Office of Pesticide Programs 139, 144 (Dec. 12, 2017)).</p>
<p>14. In April 2019, EPA reaffirmed that "glyphosate is 'not likely to be carcinogenic to humans.'"</p>	<p>14. Heering Decl. Ex. WW (EPA, Glyphosate: Proposed Interim Registration Review Decision, Case No. 0178, 7-8, 19-20 (Apr. 23, 2019)); Heering Decl Ex. XX (EPA, Glyphosate: Response to Comments on the Human Health Draft Risk Assessment 2-3 (Apr. 23, 2018)).</p>
<p>15. In 1997 and 2007, OEHHA conducted risk assessments for</p>	<p>15. Heering Decl. Ex. P (OEHHA, Public Health Goal for</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>glyphosate in drinking water in order to set public health goals, including an evaluation of glyphosate's potential carcinogenicity.</p>	<p>Glyphosate in Drinking Water (Dec. 1997)); Heering Decl. Ex. Q (OEHHA, Public Health Goal for Glyphosate in Drinking Water (June 2007)).</p>
<p>16. In December 1997, OEHHA concluded: "Glyphosate is a Group E carcinogen (evidence of no carcinogenic effects)."</p>	<p>16. Heering Decl. Ex. P (OEHHA, Public Health Goal for Glyphosate in Drinking Water at 10 (Dec. 1997)).</p>
<p>17. In June 2007, OEHHA concluded: "Three carcinogenicity studies [were] conducted, two in rats and one in mice, and all [we]re considered to be negative. In vitro and in vivo genotoxicity tests [we]re generally negative. There [we]re a few reports of increased sister chromatid exchange in human and bovine lymphocytes at high concentrations in vitro, which could be secondary to oxidative stress, and effects on mouse bone marrow after very large intraperitoneal doses. Based</p>	<p>17. Heering Decl. Ex. Q (OEHHA, Public Health Goal for Glyphosate in Drinking Water at 1 (June 2007)).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>on the weight of the evidence, glyphosate [wa]s judged unlikely to pose a cancer hazard to humans."</p>	
<p>18. The European Commission's Health and Consumer Protection Directorate-General concluded that glyphosate presents "[n]o evidence of carcinogenicity."</p>	<p>18. Heering Decl. Ex. R (Health &amp; Consumer Prot. Directorate-Gen., European Comm'n, 6511/VI/99-final, Review Report for the Active Substance Glyphosate app. II at 12 (Jan. 21, 2002)).</p>
<p>19. The World Health Organization Guidelines for Drinking-Water Quality concluded that glyphosate presents no evidence of carcinogenicity.</p>	<p>19. Heering Decl. Ex. S (WHO, WHO/SDE/WSH/03.04/97, Glyphosate and AMPA in Drinking water: Background Document for Development of WHO Guidelines for Drinking-Water Quality 5 (rev. June 2005)).</p>
<p>20. The World Health Organization International Programme on Chemical Safety concluded that glyphosate presents no evidence of carcinogenicity.</p>	<p>20. Heering Decl. Ex. T (Int'l Programme on Chem. Safety, WHO, Environmental Health Criteria 159: Glyphosate 15 (1994)).</p>
<p>21. The European Commission concluded that glyphosate</p>	<p>21. Heering Decl. Ex. U (1 European Comm'n, Renewal</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
presents no evidence of carcinogenicity.	Assessment Report: Glyphosate 35, 36 (rev. Mar. 31, 2015)).
22. The Federal Institute for Risk Assessment of Germany concluded that glyphosate presents no evidence of carcinogenicity.	22. Heering Decl. Ex. Z (Fed. Inst. for Risk Assessment (BfR), BfR Comm'cn No. 007/2015, Does Glyphosate Cause Cancer? (Mar. 23, 2015)).
23. The European Union's European Food Safety Authority concluded that glyphosate presents no evidence of carcinogenicity.	23. Heering Decl. Ex. LL ( <i>Conclusion on the Peer Review of the Pesticide Risk Assessment of the Active Substance Glyphosate</i> , EFSA J., at 11 (Nov. 12, 2015)).
24. The Food and Agriculture Organization of the United Nations Panel of Experts on Pesticide Residues in Food and the Environment and the World Health Organization Core Assessment Group on Pesticide Residues concluded that glyphosate presents no evidence of carcinogenicity.	24. Heering Decl. Ex. MM (Food & Agric. Org. of the U.N. (FAO) and WHO, Joint FAO/WHO Meeting on Pesticide Residues: Summary Report § 1.2 (May 16, 2016)).
25. The Pest Management Regulatory Agency of Health Canada concluded that	25. Heering Decl. Ex. NN (Pest Mgmt. Regulatory Agency, Health Can., RVD2017-01, Re-evaluation

UNDISPUTED FACTS	SUPPORTING EVIDENCE
glyphosate presents no evidence of carcinogenicity.	Decision: Glyphosate 1 (Apr. 28, 2017)).
26. The Australian Pesticides and Veterinary Medicines Authority concluded that glyphosate presents no evidence of carcinogenicity.	26. Heering Decl. Ex. PP (Austl. Pesticides & Veterinary Meds. Auth., Austl. Gov't, Final Regulatory Position: Consideration of the Evidence for a Formal Reconsideration of Glyphosate 9 (March 2017)).
27. The Environmental Protection Authority of New Zealand concluded that glyphosate presents no evidence of carcinogenicity.	27. Heering Decl. Ex. QQ (Wayne Temple, N.Z. Env'tl. Prot. Auth., Review of the Evidence Relating to Glyphosate and Carcinogenicity 16 (Aug. 2016)).
28. The Food Safety Commission of Japan concluded that glyphosate presents no evidence of carcinogenicity.	28. Heering Decl. Ex. RR (Food Safety Comm'n of Japan, Risk Assessment Report: Pesticides, Glyphosate Summary (Sept. 2016)).
29. The Rural Development Administration of Korea concluded that glyphosate presents no evidence of carcinogenicity.	29. Heering Decl. Ex. CCC (Korea Rural Dev. Admin., Safety of Pesticides Containing Glyphosate and Diazinon Confirmed (Mar. 10, 2017)).

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>30. The European Chemicals Agency concluded that glyphosate presents no evidence of carcinogenicity.</p>	<p>30. Heering Decl. Ex. OO (Press Release, European Chems. Agency (ECHA), ECHA/PR/17/06, Glyphosate Not Classified as a Carcinogen by ECHA (Mar. 15, 2017)).</p>
<p>31. The Agricultural Health Study, sponsored by the U.S. National Institutes of Health, National Cancer Institute and the National Institute of Environmental Health Science, analyzed the health effects in over 54,000 pesticide applicators over the course of three decades and concluded there is "no evidence of any association between glyphosate use and risk of any" cancer.</p>	<p>31. Heering Decl. Ex. AA (Gabriella Andreotti et al., <i>Glyphosate Use and Cancer Incidence in the Agricultural Health Study</i>, 110 J. Nat'l Cancer Inst. 5 (Nov. 9, 2017)).</p>
<p>32. IARC, an agency within the World Health Organization that is not a regulator, has only found that one substance it has looked at likely does not cause cancer.</p>	<p>32. Heering Decl. Ex. V (Akshat Rathi &amp; Gideon Lichfield, <i>Why it Sometimes Seems Like Everything Causes Cancer</i>, Quartz, (June 23, 2016)).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>33. In March 2015, IARC released a Monograph concluding that "[g]lyphosate is probably carcinogenic to humans." IARC reached that conclusion based on what it conceded was "limited evidence in humans for the carcinogenicity of glyphosate," (i.e., "chance, bias, or confounding could not be ruled out with reasonable confidence").</p>	<p>33. Heering Decl. Ex. W (112 Int'l Agency for Research on Cancer (IARC), WHO, Some Organophosphate Insecticides and Herbicides, IARC Monographs 27, 398 (2017)).</p>
<p>34. Immediately after IARC published its Monograph on glyphosate, EPA's Deputy Director for Pesticide Programs testified before the U.S. Senate Committee on Agriculture, Nutrition and Forestry to reaffirm EPA's long-standing non-carcinogenic evaluation of glyphosate.</p>	<p>34. Heering Decl. Ex. X (<i>Agriculture Biotechnology: A Look at Federal Regulation and Stakeholder Perspectives: Hr'g Before the S. Comm. on Agric., Nutrition, &amp; Forestry</i>, 114 Cong. 261, 6-7 (2015)).</p>
<p>35. The Chief Physician at MassGeneral's Hospital for Children testified before the U.S. Senate Committee on</p>	<p>35. Heering Decl. Ex. X (<i>Agriculture Biotechnology: A Look at Federal Regulation and Stakeholder Perspectives: Hr'g</i></p>



UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>Agriculture, Nutrition and Forestry that IARC's conclusion was "not supported by the data" and "flies in the face of comprehensive assessments from multiple agencies globally."</p>	<p><i>Before the S. Comm. on Agric., Nutrition, &amp; Forestry</i>, 114 Cong. 261, 43 (2015)).</p>
<p>36. In 2016, EPA's Office of Pesticide Programs issued a 227-page glyphosate issue paper that concluded based upon "an extensive database . . . for evaluating the carcinogenic potential of glyphosate, including 23 epidemiological studies, 15 animal carcinogenicity studies, and nearly 90 genotoxicity studies" that the available data "do no[t] support a carcinogenic process for glyphosate."</p>	<p>36. Heering Decl. Ex. Y (EPA, Glyphosate Issue Paper: Evaluation of Carcinogenic Potential 140 (Sept. 12, 2016)).</p>
<p>37. In an August 2019 letter to FIFRA registrants, EPA's Office of Pesticide Programs reiterated that "EPA disagrees with IARC's assessment of glyphosate," that EPA had</p>	<p>37. Heering Decl. Ex. E (Letter from Michael L. Goodis, Dir., Reg. Div., Office of Pesticide Programs, to Monsanto (Aug. 7, 2019)).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>instead "determin[ed] that glyphosate is 'not likely to be carcinogenic to humans,'" and that EPA would therefore not approve herbicide labels bearing the contrary Proposition 65 cancer warning, which would be "false and misleading" and render a product "misbranded" under FIFRA.</p>	
<p>38. IARC's review process has been criticized as less robust and transparent than regulators'. For example, in its most recent review, EPA observed that "EPA's cancer evaluation is more robust than IARC's" because IARC only considers publicly available scientific literature.</p>	<p>38. Heering Decl. Ex. WW (EPA, Glyphosate: Proposed Interim Registration Review Decision, Case No. 0178, 7 (Apr. 23, 2019)).</p>
<p>39. When evaluating glyphosate, IARC considered only slightly more than half of the animal carcinogenicity studies that EPA considered, and IARC did not</p>	<p>39. Heering Decl. Ex. WW (EPA, Glyphosate: Proposed Interim Registration Review Decision, Case No. 0178, 7 (Apr. 23, 2019)).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>consider the Agricultural Health Study, which at the time of its publication in 2018 was the largest epidemiologic study to address the question.</p>	
<p>40. OEHHA has raised questions directly with IARC about the accuracy of its information and scientific analyses.</p>	<p>40. Heering Decl. Ex. EE (Letter from Joan E. Denton, Dir., OEHHA, to Dr. Paul Kleihues, Dir., IARC, at 2 (Feb. 7, 2002)).</p>
<p>41. Former California Governor Jerry Brown stated that Proposition 65 has been abused by "unscrupulous lawyers driven by profit rather than the public health."</p>	<p>41. Heering Decl. Ex. FF (Press Release, Governor Brown Proposes to Reform Proposition 65 (May 7, 2013)).</p>
<p>42. Proposition 65 has been abused by lawyers to enrich themselves.</p>	<p>42. Heering Decl. Ex. GG (Anthony T. Caso, <i>Bounty Hunters and the Public Interest—A Study of California Proposition 65</i>, 13 Engage (Issue 1), Mar. 2012, at 30, 31); Heering Decl. Ex. HH (Leeton Lee, <i>Nailed by a Bounty Hunter—A California Prop 65 Violation Can Cost Your</i></p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
	<i>Company</i> , PPB Mag. (Jan. 24, 2013)).
43. Proposition 65 lawsuits have been maintained even where the California Attorney General said a proposed enforcement action had no merit.	43. Decl. of Trenton H. Norris Decl. ¶¶ 11-17.
44. Although OEHHA promulgated a "No Significant Risk Level" (NSRL) for the chemical acrylamide decades ago, bounty hunters have sued over 180 food manufacturers and retailers, seeking Proposition 65 warnings on foods allegedly containing acrylamide that include coffee, breakfast cereal, french fries, olives, and prune juice.	44. Norris Decl. ¶¶ 31-33.
45. There were 972 unique court-approved consent judgments issued in California under Proposition 65 between September 1, 2016 and September 19, 2019, and all of the judgments required a warning to contain the specific phrase	45. Norris Decl. ¶¶ 3-7.

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>"known to the State of California to cause cancer" or required the warning to otherwise "clearly communicate that the chemical in question is known to the state to cause cancer."</p>	
<p>46. California courts have declined to dismiss enforcement actions even where the warnings provided deviated only slightly from approved safe harbor warnings.</p>	<p>46. Norris Decl. ¶¶ 13-20.</p>
<p>47. On July 7, 2017, OEHHA listed glyphosate under Proposition 65 as a chemical "known to the state to cause cancer."</p>	<p>47. Heering Decl. Ex. II (OEHHA, <i>Glyphosate Listed Effective July 7, 2017, as Known to the State of California to Cause Cancer</i> (June 26, 2017)).</p>
<p>48. OEHHA listed glyphosate under Proposition 65 without conducting its own scientific analysis and based its decision solely on the fact that IARC had issued a monograph concluding that glyphosate is "probably" carcinogenic to humans.</p>	<p>48. Heering Decl. Ex. JJ (OEHHA, <i>Notice of Intent to List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate</i> (Sept. 4, 2015)).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>49. OEHHA refused to consider comments critiquing IARC's process and conclusion to list glyphosate as a carcinogenic chemical, and disclaimed any ability to address the underlying scientific dispute or reassess "the weight or quality of the evidence considered by IARC."</p>	<p>49. Hearing Decl. Ex. JJ (OEHHA, <i>Notice of Intent to List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate</i> (Sept. 4, 2015)).</p>
<p>50. OEHHA has acknowledged that it was precluded from conducting a scientific analysis of whether glyphosate causes cancer in listing glyphosate because the statute required that it list glyphosate under Proposition 65 automatically once IARC made its determination.</p>	<p>50. Hearing Decl. Ex. JJ (OEHHA, <i>Notice of Intent to List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate</i> (Sept. 4, 2015)).</p>
<p>51. After OEHHA's listing of glyphosate under Proposition 65, professional bounty hunters threatened new strike suits regarding glyphosate.</p>	<p>51. Hearing Decl. ¶ 52; Hearing Decl. Ex. KK (Joseph Perrone, <i>Advocacy Groups Have Ulterior Motive in Wanting Weedkiller Banned</i>, Modesto Bee (June 21, 2017 12:55 PM)).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>52. Proposition 65 litigants routinely threaten litigation within days of the active warning date.</p>	<p>52. Hearing Decl. ¶ 52.</p>
<p>53. On April 6, 2018, the California Office of Administrative Law approved an amendment to Cal. Code Regs. tit. 27, § 25705(b)(1), establishing a No Significant Risk Level (NSRL) of 1100 micrograms per day for glyphosate, effective July 1, 2018.</p>	<p>53. Hearing Decl. Ex. YY (OEHHA, Notice of Amendment To Section 25705, No Significant Risk Level - Glyphosate (2018)); Hearing Decl. Ex. ZZ (OEHHA, Final Regulatory Amendment Section 25705, Glyphosate (2018)); Hearing Decl. Ex. AAA (OEHHA, Final Statement Of Reasons, Section 25705(b) Specific Regulatory Levels Posing No Significant Risk Level: Glyphosate (2018)).</p>
<p>54. OEHHA was constrained by regulation when developing the NSRL for glyphosate to rely on the same narrow set of studies and analysis that IARC itself considered.</p>	<p>54. Hearing Decl. Ex. AAA (OEHHA, Final Statement Of Reasons, Section 25705(b) Specific Regulatory Levels Posing No Significant Risk Level: Glyphosate at 6-7 (2018)).</p>
<p>55. OEHHA expressly concluded in setting the NSRL that</p>	<p>55. Hearing Decl. Ex. AAA (OEHHA, Final Statement Of</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 comments regarding whether IARC</p> <p>2 correctly classified glyphosate</p> <p>3 as "probably carcinogenic" were</p> <p>4 "not directed to the subject of</p> <p>5 this rulemaking," and refused</p> <p>6 to address such comments.</p>	<p>Reasons, Section 25705(b)</p> <p>Specific Regulatory Levels</p> <p>Posing No Significant Risk</p> <p>Level: Glyphosate at 2 (2018)).</p>
<p>8 56. OEHHA identified a single</p> <p>9 mouse study on which IARC relied</p> <p>10 as the "most sensitive study</p> <p>11 deemed to be of sufficient</p> <p>12 quality," and derived the NSRL</p> <p>13 1100 micrograms per day for</p> <p>14 glyphosate based on data in that</p> <p>15 one study.</p>	<p>56. Heering Decl. Ex. AAA</p> <p>(OEHHA, Final Statement Of</p> <p>Reasons, Section 25705(B)</p> <p>Specific Regulatory Levels</p> <p>Posing No Significant Risk</p> <p>Level: Glyphosate at 6-7 &amp; n.24</p> <p>(2018)).</p>
<p>16 57. In 2006 the World Health</p> <p>17 Organization and the Food and</p> <p>18 Agriculture Organization of the</p> <p>19 UN reviewed the same mouse study</p> <p>20 that IARC based its glyphosate</p> <p>21 NSRL on, and concluded that</p> <p>22 "[o]wing to the lack of a dose-</p> <p>23 response relationship, the lack</p> <p>24 of statistical significance and</p> <p>25 the fact that the incidences</p> <p>26 recorded in this study fell</p> <p>27 within the historical ranges</p> <p>28</p>	<p>57. Heering Decl. Ex. BBB (Int'l</p> <p>Programme on Chem. Safety, WHO,</p> <p>Pesticide Residues in Food -</p> <p>2004: Toxicology Evaluations</p> <p>(2006)).</p>



UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>for controls, these changes are not considered to be caused by administration of glyphosate," and that the "administration of glyphosate to CD-1 mice for 104 weeks produced no signs of carcinogenic potential at any dose."</p>	
<p>58. Plaintiffs Missouri Chamber of Commerce and Industry, North Dakota Grain Growers Association, Missouri Farm Bureau, United States Durum Growers Association, National Association of Wheat Growers, National Corn Growers Association, South Dakota Agribusiness Association, and Iowa Soybean Association (and their members) produce and distribute food products—or inputs into finished food products—that are sold in California and regulated by the Federal Food, Drug and Cosmetic Act.</p>	<p>58. Mehan Decl., Mo. Chamber of Com. &amp; Indus. ¶¶ 5, 11; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 14, 17; Hurst Decl., Mo. Farm Bureau ¶¶ 12, 15; Decl. of Blake Inman, U.S. Durum Growers Ass'n ¶¶ 17, 22; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 16, 19; Kessel Decl., N.D. Grain Growers Ass'n ¶ 9; Doggett Decl., Nat'l Corn Growers Ass'n ¶¶ 6, 11; Decl. of Kathleen Zander, S.D. Agribusiness Ass'n ¶ 7; Jackson Decl., Iowa Soybean ¶ 17; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 14, 17; Decl.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
	of Ray McCarty, Associated Indus. of Mo. ¶¶ 4, 9.
<p>59. The Proposition 65 glyphosate warning requirement would require Plaintiffs (and their members) who sell glyphosate to public and private entities to either communicate to consumers a disparaging health warning about glyphosate products that is contrary to nearly every regulatory finding of glyphosate's safety or face the significant risk of suit under Proposition 65 for failing to do so.</p>	<p>59. Heering Decl. ¶¶ 41-45, 55; Decl. of Renee Pinel, W. Plant Health Ass'n ¶¶ 14-15.</p>
<p>60. Without an injunction, Plaintiffs would be forced to choose between providing the warning, or undertaking costly assessments to demonstrate that exposures to glyphosate from their products will fall below the NSRL and incurring the substantial risks and costs of</p>	<p>60. Heering Decl. ¶¶ 41-42, 45, 55; Pinel Decl., W. Plant Health Ass'n ¶¶ 13-16; McCarty Decl., Associated Indus. of Mo. ¶ 10; Mehan Decl., Mo. Chamber of Com. &amp; Indus. ¶¶ 10-11.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
defending against enforcement actions.	
61. Entities that sell finished food products into California that are made using glyphosate-treated crops would similarly be forced to choose between providing the warning, or undertaking costly assessments to demonstrate that exposures to glyphosate from their products will fall below the NSRL and incurring the substantial risks and costs of defending against enforcement actions.	61. Jackson Decl., Iowa Soybean ¶¶ 14-32; Mehan Decl., Mo. Chamber of Com. & Indus. ¶¶ 9-17; McCarty Decl., Associated Indus. of Mo. ¶¶ 10-12.
62. Members of these Plaintiffs would face an imminent choice between (1) providing a disparaging glyphosate warning for their products that is contrary to the worldwide scientific consensus, which would diminish demand for those products; (2) engaging in costly efforts to demonstrate	62. Mehan Decl., Mo. Chamber of Com. & Indus. ¶¶ 10-11; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 17-21; Zander Decl., S.D. Agri-Business Ass'n ¶¶ 14-18; Jackson Decl., Iowa Soybean Ass'n ¶¶ 17-20; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 15-19; McCarty Decl.,

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>that any exposures to glyphosate residues on their products would fall below any established NSRL or requiring their suppliers to undertake those efforts (which still would not prevent the likely prospect of expensive enforcement actions); or (3) halting the use of glyphosate-treated crops as inputs.</p>	<p>Associated Indus. of Mo. ¶¶ 8-13.</p>
<p>63. Under the threat of Proposition 65 enforcement, many grain handlers and finished food producers would demand that farmers providing inputs either cease using glyphosate on their crops altogether or certify that their crops do not contain glyphosate residues beyond particular levels, which would require expensive testing or segregation of glyphosate-treated crops from non-glyphosate-treated crops—each</p>	<p>63. Hurst Decl., Mo. Farm Bureau ¶¶ 12-14; Inman Decl., U.S. Durum Growers Ass’n ¶¶ 18-21; Mehan Decl., Mo. Chamber of Com. &amp; Indus. ¶¶ 10-17; Stoner Decl., Nat’l Ass’n of Wheat Growers ¶¶ 14-21; Kessel Decl., N.D. Grain Growers Ass’n ¶¶ 8-13; Jackson Decl., Iowa Soybean Ass’n ¶¶ 18-20; McCarty Decl., Associated Indus. of Mo. ¶¶ 11-14.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>an undesirable option that would require modifications to business practices around the country and that carries considerable expense.</p>	
<p>64. The practices and businesses of farmers across the country, including members of Plaintiffs National Association of Wheat Growers, National Corn Growers Association, United States Durum Growers Association, Missouri Farm Bureau, Iowa Soybean Association, North Dakota Grain Growers Association, and Missouri Chamber of Commerce and Industry, would be dramatically affected by the threat of Proposition 65 enforcement.</p>	<p>64. Mehan Decl., Mo. Chamber of Com. &amp; Indus. ¶¶ 10-19; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 15-25; Hurst Decl., Mo. Farm Bureau ¶¶ 13-25; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 16-30; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 17-30; Kessel Decl., N.D. Grain Growers ¶¶ 9-20; Doggett Decl., Nat'l Corn Growers Ass'n ¶¶ 12-23; Zander Decl., S.D. Agri-Business Ass'n ¶¶ 12-20; Jackson Decl., Iowa Soybean Ass'n ¶¶ 17-28; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 15-26; Pinel Decl., W. Plant Health Ass'n ¶¶ 17-18, 20.</p>
<p>65. The compelled glyphosate warning would damage the reputation and goodwill</p>	<p>65. Heering Decl. ¶¶ 41, 49, 68-69; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 16-17; Doggett</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>associated with Plaintiffs (and their members) and their products by misleading consumers and branding their products as cancer-causing killers.</p>	<p>Decl., Nat'l Corn Growers Ass'n ¶ 17; Kessel Decl., N.D. Grain Growers Ass'n ¶ 17; Zander Decl., S.D. Agri-Business ¶ 12; Pinel Decl., W. Plant Health Ass'n ¶ 25; Jackson Decl., Iowa Soybean ¶ 26; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 25-26; McCarty Decl., Associated Indus. of Mo. ¶¶ 15-16.</p>
<p>66. Reputational disparagement to Plaintiffs from the Proposition 65 warning would put Plaintiffs at a significant competitive disadvantage.</p>	<p>66. Hurst Decl., Mo. Farm Bureau ¶¶ 25-28; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 30-33; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 25-28; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 30-33; Zander Decl., S.D. Agri-Business ¶¶ 19-22; Jackson Decl., Iowa Soybean Ass'n ¶¶ 28-31; McCarty Decl., Associated Indus. of Mo. ¶¶ 21-24.</p>
<p>67. The threat of the warning requirement caused some Plaintiffs to lose customers prior to this Court's entry of</p>	<p>67. Pinel Decl., W. Plant Health Ass'n ¶ 21; Heering Decl. ¶¶ 59-60.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>a preliminary injunction, and Plaintiffs would certainly lose additional customers if the warning requirement was allowed to go into effect.</p>	
<p>68. Major glyphosate retailers have previously indicated that without an injunction, they will not carry glyphosate-based products unless the products' labels are updated to carry a warning with which Plaintiffs vehemently disagree.</p>	<p>68. Pinel Decl., W. Plant Health Ass'n ¶ 22; Heering Decl. ¶ 45.</p>
<p>69. Economic pressures on Plaintiffs will persist notwithstanding the NSRL for glyphosate.</p>	<p>69. Pinel Decl., W. Plant Health Ass'n ¶ 31; Heering Decl. ¶ 46-48.</p>
<p>70. Major retailers would remove Plaintiffs' unlabeled glyphosate-based products from store shelves and inventory if the warning requirement is allowed to go into effect.</p>	<p>70. Heering Decl. ¶ 45.</p>
<p>71. The warning requirement would impose operational burdens on major retailers,</p>	<p>71. Heering Decl. ¶ 49.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
further impairing Plaintiffs' reputations and goodwill.	
<p>72. The warning requirement threatens, if it is allowed to go into effect, to force changes throughout the food, agricultural, and herbicide industries by imposing (at a minimum) extensive and wholly unnecessary testing requirements, and disruption to and segregation of supply chains.</p>	<p>72. Hurst Decl., Mo. Farm Bureau ¶¶ 25-28; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 30-33; Doggett Decl., Nat'l Corn Growers Ass'n ¶¶ 12-13; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 15-21; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 30-33; Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 19-23; Jackson Decl., Iowa Soybean Ass'n ¶¶ 20-25; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 20-24; McCarty Decl., Associated Indus. of Mo. ¶¶ 17-19; Heering Decl. ¶¶ 37, 49-50.</p>
<p>73. The warning requirement threatens to cause burdensome operational changes in the retail setting, which will further impair the goodwill of Plaintiffs and their relationships with suppliers and retailers.</p>	<p>73. Heering Decl. ¶ 49.</p>



UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>74. If Plaintiffs who farm using glyphosate are forced to cease using glyphosate by suppliers, this will result in significant disruption to their longstanding business practices.</p>	<p>74. Hurst Decl., Mo. Farm Bureau ¶¶ 5-7, 17-22; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 19-22; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 7-9, 24-27; Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 3, 11-14; Jackson Decl., Iowa Soybean Ass'n ¶¶ 6-12, 22-25.</p>
<p>75. Plaintiffs do not believe glyphosate causes cancer and do not want to communicate false messages about their products.</p>	<p>75. Heering Decl. ¶¶ 41, 69; Mehan Decl., Mo. Chamber of Com. &amp; Indus. ¶ 8; Wogsland Decl., N.D. Grain Growers Ass'n ¶ 12; Hurst Decl., Mo. Farm Bureau ¶ 10; Inman Decl., U.S. Durum Growers Ass'n ¶ 14; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶ 14; Kessel Decl., N.D. Grain Growers ¶ 7; Doggett Decl., Nat'l Corn Growers Ass'n ¶ 9; Zander Decl., S.D. Agri-Business Ass'n ¶ 10; Jackson Decl., Iowa Soybean Ass'n ¶ 15; Martinson Decl., U.S. Durum Growers Ass'n ¶ 12; Pinel Decl., W. Plant Health Ass'n ¶¶ 15, 20;</p>

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UNDISPUTED FACTS	SUPPORTING EVIDENCE
	McCarty Decl., Nat'l Assoc. Indus. of Mo. ¶ 7.

1 Dated: September 25, 2019

Respectfully submitted,

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