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10 UNITED STATES DISTRICT COURT

11 EASTERN DISTRICT OF CALIFORNIA

12 NATIONAL ASSOCIATION OF WHEAT
 13 GROWERS; NATIONAL CORN GROWERS
 14 ASSOCIATION; UNITED STATES
 15 DURUM GROWERS ASSOCIATION;
 16 WESTERN PLANT HEALTH
 17 ASSOCIATION; MISSOURI FARM
 18 BUREAU; IOWA SOYBEAN
 19 ASSOCIATION; SOUTH DAKOTA
 20 AGRI-BUSINESS ASSOCIATION;
 21 NORTH DAKOTA GRAIN GROWERS
 22 ASSOCIATION; MISSOURI CHAMBER
 23 OF COMMERCE AND INDUSTRY;
 24 MONSANTO COMPANY; ASSOCIATED
 25 INDUSTRIES OF MISSOURI;
 26 AGRIBUSINESS ASSOCIATION OF
 27 IOWA; CROPLIFE AMERICA; AND
 28 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

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

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

The Honorable William B. Shubb

Case Filed: Nov. 15, 2017

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1 INTRODUCTION

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

10 The First Amendment generally forbids regulations that compel
11 speech to the same extent that it forbids regulations that restrict
12 speech. See, e.g., *Janus v. Am. Fed’n of State, Cty., & Mun.*
13 *Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018); *Hurley v. Irish-*
14 *American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995).
15 In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of*
16 *Ohio*, 471 U.S. 626, 651 (1985), the Supreme Court recognized a
17 narrow exception to this rule permitting the government in certain
18 circumstances to require commercial speakers to disclose “purely
19 factual and uncontroversial” information about their products.
20 *Id.* at 651. Most common health and safety disclosures fit that
21 mold, informing consumers of indisputable facts, such as
22 ingredient lists, calorie counts, country of origin, and
23 universally acknowledged health risks. The compelled speech at
24 issue in this case is nothing like those. Under threat of steep
25 civil penalties and bounty hunter lawsuits, California is
26 requiring that products sold in-state that expose consumers to the
27 herbicide glyphosate be accompanied by a warning communicating to
28 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 Hearing 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 Hearing 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 Hearing
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. Hearing Decl. ¶¶ 8, 9,
27 31-33, 67; SUF No. 3.

28

1 In the United States, glyphosate is approved for use in more
2 than 250 agricultural crop applications. Hearing 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. Hearing
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. Hearing Decl. ¶¶ 13, 30-
8 31; *see also, e.g.*, Hearing 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 Hearing 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. Hearing
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.¹

23
24 ¹ *See, e.g.*, Hearing Decl. ¶¶ 15, 17; Hearing 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

1 As an herbicide, glyphosate is subject to comprehensive
2 federal regulation. Under the Federal Insecticide, Fungicide, and
3 Rodenticide Act (FIFRA), all commercial herbicides must be
4 "registered" with EPA. 7 U.S.C. § 136a. Before EPA grants a
5 registration, it must conclude that the herbicide will not cause
6 "unreasonable adverse effects on the environment," which include
7 "any unreasonable risk to man or the environment" or "human dietary
8 risk." 7 U.S.C. §§ 136(bb), 136a. Among other things, EPA's
9 review includes an evaluation of whether the herbicide is
10 potentially carcinogenic. See, e.g., Heering Decl. Ex. C (EPA,
11 EPA/630/P-03/001F, Guidelines for Carcinogen Risk Assessment (Mar.
12 2005)); SUF No. 10. The Federal Food, Drug, and Cosmetic Act
13 (FDCA), in turn, regulates the presence of herbicides on food
14 products. 21 U.S.C. §§ 342(a), 331(b). Under the FDCA, EPA is
15 charged with evaluating the human health impact of the presence of
16 the herbicide's residue, including its potential carcinogenicity.
17 21 U.S.C. § 346a(b)(2)(A). After concluding that "there is a
18 reasonable certainty that no harm will result," 21 U.S.C.
19 § 346a(b)(2)(A)(ii), EPA has allowed the presence of glyphosate
20 residues on all relevant United States crops and food inputs. 40
21 C.F.R. § 180.364.

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

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

27 Growers Ass'n ¶¶ 5-9; Decl. of Gordon Stoner, Nat'l Ass'n of Wheat
28 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 Hearing 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 Hearing 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 Hearing 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
25 concentrations *in vitro*, which could be
26 secondary to oxidative stress, and effects on
27 mouse bone marrow after very large
28 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." Hearing
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 Hearing 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 Hearing 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")); Hearing 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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1 the European Chemicals Agency, have also reached the same
2 conclusion.²

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

8 _____
9 ² See, e.g., Hearing Decl. Ex. U (1 European Comm'n, Renewal
10 Assessment Report: Glyphosate 35 (rev. Mar. 31, 2015) (glyphosate
11 is "unlikely to pose a carcinogenic risk in humans")); *id.* at 36
12 ("In epidemiological studies in humans, there was *no* evidence of
13 carcinogenicity" (emphasis added)); Hearing Decl. Ex. Z
14 (Fed. Inst. for Risk Assessment (BfR), BfR Comm'cn No. 007/2015,
15 Does Glyphosate Cause Cancer? (Mar. 23, 2015)); Hearing Decl. Ex.
16 LL (*Conclusion on the Peer Review of the Pesticide Risk Assessment*
17 *of the Active Substance Glyphosate*, EFSA J., Nov. 12, 2015, at
18 11)); Hearing Decl. Ex. MM (Food & Agric. Org. of U.N. (FAO) &
19 WHO, Joint FAO/WHO Meeting on Pesticide Residues: Summary Report
20 § 1.2 (May 16, 2016) (finding that "glyphosate is *unlikely* to pose
21 a carcinogenic risk to humans")); Hearing Decl. Ex. NN (Pest Mgmt.
22 Regulatory Agency, Health Can., RVD2017-01, Re-evaluation
23 Decision: Glyphosate 1 (Apr. 28, 2017) ("Glyphosate is not
24 genotoxic and is unlikely to pose a human cancer risk.)); Hearing
25 Decl. Ex. PP (Austl. Pesticides & Veterinary Meds. Auth., Austl.
26 Gov't, Final Regulatory Position: Consideration of the Evidence
27 for a Formal Reconsideration of Glyphosate 9 (Mar. 2017)
28 (concluding "that the scientific weight-of-evidence indicates that
. . . exposure to glyphosate does not pose a carcinogenic or
genotoxic risk to humans")); Hearing 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")); Hearing Decl.
Ex. RR (Food Safety Comm'n of Japan, Risk Assessment Report:
Pesticides: Glyphosate Summary (Sept. 2016)); Hearing Decl. Ex.
CCC (Korea Rural Dev. Admin., Safety of Pesticides Containing
Glyphosate and Diazinon Confirmed (Mar. 10, 2017)); see also
Hearing 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 Rathi & 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

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

7 Global regulators, from Germany, to Canada, to Australia, to
8 New Zealand, to Japan, to South Korea, to the European Chemicals
9 Agency, which have reviewed the same studies that IARC relied upon,
10 have likewise rejected IARC's conclusion. See, e.g., Hearing Decl.
11 Ex. Z (Fed. Inst. for Risk Assessment (BfR), BfR Comm'cn No.
12 007/2015, Does Glyphosate Cause Cancer? (German regulator
13 considering and explicitly rejecting IARC's bases for its
14 carcinogenic conclusion)); SUF Nos. 21-30. One of the most recent
15 and most extensive epidemiological studies ever conducted of
16 glyphosate also refutes IARC's conclusions. SUF No. 31. The
17 Agricultural Health Study—sponsored by the U.S. National
18 Institutes of Health, National Cancer Institute, and the National
19 Institute of Environmental Health Science—analyzed health effects
20 in over 54,000 pesticide applicators over the course of three
21 decades and confirmed there is "no evidence of an association
22 between glyphosate use and risk of any" cancer. See Hearing Decl.
23 Ex. AA (Gabriella Andreotti et al., *Glyphosate Use and Cancer*

24
25
26 ³ This letter reflects a duly delegated exercise of EPA's FIFRA
27 authorities, including instructing any registrants who have added
28 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.").⁴

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


25 ⁴ 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.

6  **WARNING:** Cancer - www.P65Warnings.ca.gov

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

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

26
27 ⁵ 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 Hearing Decl. Ex. FF (Press

1 Release, Governor Brown Proposes to Reform Proposition 65 (May 7,
2 2013)); SUF No. 41.⁶ 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 ⁶ 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 1215.⁷

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*

24 ⁷ 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 Hearing 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 Hearing 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." Hearing 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 Hearing Decl. ¶ 52; Hearing 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 Hearing 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

1 On April 6, 2018, the California Office of Administrative Law
2 approved an amendment to Cal. Code Regs. tit. 27, § 25705(b)(1),
3 establishing a safe harbor NSRL of 1100 micrograms per day for
4 glyphosate, effective July 1, 2018. See Hearing Decl. Ex. YY
5 (OEHHA, Notice of Amendment to Section 25705, No Significant Risk
6 Level - Glyphosate (2018)); Hearing Decl. Ex. ZZ (OEHHA, Final
7 Regulatory Amendment Section 25705, Glyphosate (2018)); Hearing
8 Decl. Ex. AAA (OEHHA, Final Statement of Reasons, Section 25705(b),
9 Specific Regulatory Levels Posing No Significant Risk, No
10 Significant Risk Level: Glyphosate (2018) [hereinafter "OEHHA
11 Final Statement of Reasons for NSRL"]); SUF No. 53. OEHHA felt
12 constrained by regulation when developing the NSRL for glyphosate
13 to rely on the same narrow set of studies and flawed analysis that
14 IARC itself considered. See Hearing Decl. Ex. AAA (OEHHA Final
15 Statement of Reasons for NSRL at 6-7); SUF No. 54.⁸ Indeed, OEHHA
16 expressly concluded in setting the NSRL that comments regarding
17 whether IARC correctly classified glyphosate as "probably
18 carcinogenic" were "not directed to the subject of this
19 rulemaking," and refused to address such comments. See Hearing

20
21 ⁸ As OEHHA pointed out, in developing the NSRL for glyphosate,
22 OEHHA "followed the guidance set forth in Section 25703 that [its]
23 assessment 'be based on evidence and standards of comparable
24 scientific validity to the evidence and standards which form the
25 scientific basis for the listing of the chemical as known to the
26 state to cause cancer', and based the NSRL on the results of the
27 most sensitive scientific study deemed to be of sufficient
28 quality." Hearing 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." Hearing Decl. Ex. AA (OEHHA
Final Statement of Reasons for NSRL at 4).

1 Decl. Ex. AAA (OEHHA Final Statement of Reasons for NSRL at 2
2 (noting OEHHA's refusal to address comments "supporting or
3 disagreeing with IARC's classification of glyphosate as a Group 2A
4 carcinogen")); SUF No. 55. Instead, OEHHA identified a single
5 mouse study on which IARC relied as the "most sensitive study
6 deemed to be of sufficient quality," Cal. Code Regs. tit. 27,
7 § 25703(a)(3), and derived the NSRL 1100 micrograms per day for
8 glyphosate based on data in that one study. See Hearing Decl. Ex.
9 AAA (OEHHA Final Statement of Reasons for NSRL at 6-7 & n.24); SUF
10 No. 56.⁹

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

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

23 ⁹ Notably, in 2006 the World Health Organization and the Food and
24 Agriculture Organization of the UN reviewed that same mouse study,
25 and concluded that "[o]wing to the lack of a dose-response
26 relationship, the lack of statistical significance and the fact
27 that the incidences recorded in this study fell within the
28 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

1 practices and businesses of farmers across the country, including
 2 members of Plaintiffs National Association of Wheat Growers,
 3 National Corn Growers Association, United States Durum Growers
 4 Association, Missouri Farm Bureau, Iowa Soybean Association, North
 5 Dakota Grain Growers Association, and Missouri Chamber of Commerce
 6 and Industry.¹⁰ Mehan Decl., Mo. Chamber of Com. & Indus. ¶¶ 10-
 7 19; Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 15-25; Hurst Decl.,
 8 Mo. Farm Bureau ¶¶ 13-25; Inman Decl., U.S. Durum Growers Ass'n
 9 ¶¶ 16-30; Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 17-30;
 10 Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 9-20; Doggett Decl.,
 11 Nat'l Corn Growers Ass'n ¶¶ 12-23; Zander Decl., S.D. Agri-
 12 Business Ass'n ¶¶ 12-20; Jackson Decl., Iowa Soybean Ass'n ¶¶ 17-
 13 28; Martinson Decl., U.S. Durum Growers Ass'n ¶¶ 15-26; Pinel
 14 Decl., W. Plant Health Ass'n ¶¶ 17-18, 20; SUF No. 64.

15 **F. Proceedings Before This Court**

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

24
 25 ¹⁰ For these and other reasons, Plaintiffs have Article III standing
 26 and this case is ripe. See, e.g., *Libertarian Party of L.A. Cty.*
 27 *v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (recognizing that the
 28 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

1
2 A party may move for summary judgment on any claim, defense,
3 or part of any claim or defense, and the Court “shall grant summary
4 judgment if the movant shows that there is no genuine dispute as
5 to any material fact and the movant is entitled to judgment as a
6 matter of law.” Fed R. Civ. P. 56(a). Thus, “[s]ummary judgment
7 is appropriate when, viewing the evidence in the light most
8 favorable to the nonmoving party, there is no genuine dispute as
9 to any material fact.” *Italian Colors Rest. v. Becerra*, 878 F.3d
10 1165, 1171 (9th Cir. 2018) (quoting *Zetwick v. Cty. of Yolo*,
11 850 F.3d 436, 440 (9th Cir. 2017)). Here, as a matter of law,
12 Proposition 65’s warning requirement for glyphosate violates the
13 First Amendment. Thus, summary judgment should be entered in favor
14 of Plaintiffs, along with a permanent injunction against
15 enforcement of the warning requirement as it pertains to
16 glyphosate.

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

18 In general, the First Amendment forbids regulations that
19 *compel* speech to the same extent that it forbids regulations that
20 *restrict* speech. *See, e.g., Janus*, 138 S. Ct. at 2464 (“Perhaps
21 because such compulsion so plainly violates the Constitution, most
22 of our free speech cases have involved restrictions on what can be
23 said, rather than laws compelling speech. But measures compelling
24 speech are at least as threatening.”); *Hurley*, 515 U.S. at 573
25 (“[O]ne important manifestation of the principle of free speech is
26 that one who chooses to speak may also decide ‘what not to say.’”
27 (citation omitted)). And regulations of non-misleading commercial
28 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 756.¹¹

25
26 ¹¹ *NIFLA* also held that the more lenient *Zauderer* standard applies
27 only to required disclosures of "information about the terms under
28 which . . . services will be available." *NIFLA*, 138 S. Ct. at
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

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

20

21

22

23 disclosures" only where, as in *Zauderer* itself, the disclosure is
24 "justified by the need to 'dissipate the possibility of consumer
25 confusion or deception.'" *Video Software Dealers Ass'n*, 556 F.3d
26 at 966 (quoting *Zauderer*, 471 U.S. at 651)). Where, as here, the
27 required warning does not operate to correct misleading
28 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**
5 **Sustained Under Zauderer**

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

18 A state requirement that Plaintiffs issue such warnings for
19 glyphosate cannot be upheld under *Zauderer*. As just discussed,
20 review under *Zauderer's* more lenient standard is limited to
21 compelled disclosure of uncontroversial factual information, the
22 accuracy of which cannot be reasonably disputed. See *supra* at 32-
23 33. For example, courts have allowed the government to compel the
24 disclosure of a product's country of origin, *American Meat*
25 *Institute*, 760 F.3d at 27; whether a product contains mercury,
26 *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104,
27 107 (2d Cir. 2001); the costs a client is liable to pay, *Zauderer*,
28 471 U.S. at 650; and what contents are included in a package of
 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* Hearing 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 Hearing 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 Hearing 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 Hearing
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 Hearing 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.)); Hearing
18 Decl. Ex. DDD (Statement from Health Canada on Glyphosate, Health
19 Can. (Jan. 11, 2019)); Hearing 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.)); Hearing 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

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

3 In *CTIA v. City of San Francisco*, the warning's conflict with
4 the view of FCC was sufficient to establish that the warning was
5 not purely factual and uncontroversial. 494 F. App'x at 753
6 (contrasting San Francisco's warning language, which "could prove
7 to be interpreted by consumers as expressing San Francisco's
8 opinion that using cell phones is dangerous," with the position of
9 the "FCC . . . [which] has established limits of radiofrequency
10 energy exposure, within which it has concluded using cell phones
11 is safe"). Here, the chorus of dissent is far louder. A purported
12 health warning cannot be upheld as "purely factual and
13 uncontroversial" when nearly every regulator worldwide believes it
14 is wrong, and the primary federal agency with jurisdiction to
15 address the issue has expressly concluded that *giving* the warning
16 would be "false and misleading." Heering Decl. Ex. E (EPA Aug.
17 2019 Letter); SUF No. 37.

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

20 In an attempt to escape the fundamental inconsistency between
21 the First Amendment and Proposition 65's warning requirement as
22 applied to glyphosate, the Attorney General previously proffered
23 two alternative "Warning Options." See Mot. to Alter at 5-16,
24 ECF No. 81-1. This Court held that neither alternative warning
25 would solve the Attorney General's constitutional problem.
26 See Order on Mot. to Alter at 4-5, ECF No. 97 (finding that, even
27 if compliant with Proposition 65, the Attorney General's
28 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.

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

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

10 Under *Zauderer*, a compelled disclosure stands or falls based
11 on what it “convey[s]” to the “consumer[.]” *Video Software Dealers*
12 *Ass’n*, 556 F.3d at 967. And regardless of whether it is literally
13 true, the statement that glyphosate is “a chemical listed as
14 *causing cancer* pursuant to the requirements of California law”
15 conveys to consumers that glyphosate causes cancer. “Ordinary
16 consumers do not interpret warnings in accordance with a complex
17 web of statutes, regulations, and court decisions.” PI Order at
18 14, ECF No. 75; *see also* Order on Mot. to Alter at 6, ECF No. 97
19 (same). And “‘the most obvious reading’ of [this] warning” is
20 that glyphosate is “listed as causing cancer” *because it causes*
21 *cancer*. Order on Mot. to Alter at 6 (citation omitted). What
22 else could a reasonable consumer take from such a message?
23 Certainly not the truth—that after a thorough review of the
24 science, virtually all regulatory and governmental bodies do not
25 believe that glyphosate causes cancer. California cannot
26 circumvent through word games the First Amendment’s prohibition on
27 laws that compel false, misleading, or factually controversial
28 speech.

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

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

5 **WARNING:** This product can expose you to glyphosate, a
6 chemical listed as causing cancer pursuant to the
7 requirements of California law. The listing is based on
8 a determination by the United Nations International
9 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.

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

11 This warning would not even arguably comply with Proposition
12 65. Indeed, the Attorney General did not genuinely contend that
13 it would. See *id.* at 2 (arguing only that "[i]n the event the
14 Court were to find that even Warning Option 1 was misleading in
15 light of the unique circumstances of this case," Warning Option 2
16 would become available). Because Warning Option 2 is designed to
17 acknowledge (albeit to a grossly inadequate extent) that there is
18 reason to doubt IARC's determination, it would violate the Attorney
19 General's own interpretation of Proposition 65. Regulations
20 issued by the Attorney General state that use of "additional words
21 or phrases that contradict or obfuscate otherwise acceptable
22 warning language" will prevent a warning from being "clear and
23 reasonable" as required by the statute. Cal. Code Regs. tit. 11,
24 § 3202(b). According to those regulations, the statute bars even
25 the "use of the adverb 'may' to modify whether the chemical causes
26 cancer," *id.*, because that would cast doubt on the required message
27 that the chemical in question *does* cause cancer. If introducing
28 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

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

26 Even as to the one mainstream view that the Attorney General
27 deemed “relevant,” moreover, Warning Option 2 is misleading. Under
28 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.¹² See *Italian Colors*, 878 F.3d at 1177 ("[T]he Attorney
22 General must do more than merely identify a state interest served

23
24 ¹² OEHHA has acknowledged that it was precluded from conducting a
25 scientific analysis of whether glyphosate causes cancer in listing
26 glyphosate because the statute required that it list glyphosate
27 under Proposition 65 automatically once IARC made its
28 determination. See Heering Decl. Ex. JJ (OEHHA, *Notice of Intent*
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

1 Proposition 65 because it reduces “unnecessary warnings, which
2 could distract the public from other important warnings on consumer
3 products” (quoting OEHHA); *Johnson v. Am. Standard, Inc.*, 43 Cal.
4 4th 56, 70 (2008) (overwarning “invite[s] mass consumer disregard
5 and ultimate contempt for the warning process”); *Dowhal*, 32 Cal.
6 4th at 932 (“problems of overwarning are exacerbated” where, as
7 here, “warnings must be given even as to very remote risks”);
8 *Thompson v. Cty. of Alameda*, 27 Cal. 3d 741, 754-55 (1980) (noting
9 that “by reason of their sheer volume,” insignificant warnings
10 “would add little to the effective protection of the public”); see
11 also *Gaeta v. Perrigo Pharm. Co.*, 562 F. Supp. 2d 1091, 1097 (N.D.
12 Cal. 2008) (noting that overwarning can “have a negative effect
13 on . . . public health”); *Mason v. SmithKline Beecham Corp.*, 596
14 F.3d 387, 392 (7th Cir. 2010) (concluding that overwarning “can
15 deter potentially beneficial uses of [the substance] by making it
16 seem riskier than warranted and can dilute the effectiveness of
17 valid warnings”); see also Br. for 11 States as Amici Curiae in
18 Supp. of Pls.’ Mot. for Prelim. Inj. at 9, ECF No. 34-1 (explaining
19 how Proposition 65 warning requirement would “decrease[] the
20 efficacy of disclosures already required by” many other states).

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

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

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

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

22 The foregoing has shown that, as applied to glyphosate, the
23 First Amendment protects Plaintiffs from any obligation to make
24 the warning California courts have held Proposition 65 requires,
25 and that none of the alternative warnings the Attorney General has
26 to date suggested might satisfy Proposition 65 would comply with
27 the First Amendment. But if past is prologue, the Attorney General
28 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 65.¹³ 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—

21
22 ¹³ The Attorney General's own regulations prohibit use of diluting
23 and qualifying language. Cal. Code Regs. tit. 11, § 3202(b); see
24 also *Tri-Union*, 2006 WL 1544384, at *61 (concluding language that
25 "dilutes the actual warning" is non-compliant, citing Attorney
26 General's regulation). It therefore should be no surprise that
27 every one of the hundreds of approved Proposition 65 warning
28 settlements since September 2016 mandated inclusion of the
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.

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

7 **II. A PERMANENT INJUNCTION SHOULD ISSUE**

8 For the reasons set forth above, enforcement of Proposition
 9 65’s warning requirement as to glyphosate would violate

10
 11 ¹⁴ In their First Amended Complaint, Plaintiffs also explained that
 12 OEHHA’s listing of glyphosate and the related warning violated the
 13 Due Process Clause for the additional reason that the State has no
 14 rational basis to assert that it “know[s]” glyphosate causes
 15 cancer. See FAC ¶¶ 118-24, ECF No. 23. Plaintiffs subsequently
 16 agreed to dismiss their claims against the Director of OEHHA,
 17 Lauren Zeise, eliminating from the case the separate question of
 18 whether the *listing* is constitutional. See Stip. & Order for
 19 Dismissal of Def. Dr. Lauren Zeise, ECF No. 93. In light of that
 20 development, there is no longer any need for this Court to
 21 independently evaluate whether the classic Proposition 65 warning
 22 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.

23 Plaintiffs also explained in their First Amended Complaint that
 24 the Proposition 65 warning would be preempted as to food products
 25 under the FDCA. But this Court need not address that argument now
 26 because Plaintiffs Western Plant Health Association and Monsanto
 27 Company do not produce food and did not join this claim, see FAC
 28 ¶ 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

1 (1976)); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th
2 Cir. 2011); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d
3 Cir. 1996) (finding irreparable harm because "compelled speech
4 'contravene[s] core First Amendment values'" (alteration in
5 original) (citation omitted)).

6 Plaintiffs would also suffer irreparable reputational,
7 business, and monetary injuries from enforcement of the warning
8 requirement. In addition to the constitutional injury, the
9 compelled warning requirement would cause several additional types
10 of injury that constitute irreparable harms:¹⁵

- 11 • The compelled glyphosate warning would damage the
12 reputation and goodwill associated with Plaintiffs (and
13 their members) and their products by misleading
14 consumers and branding their products as cancer-causing
15 killers. Heering Decl. ¶¶ 41, 49, 68-69; Inman Decl.,
16 U.S. Durum Growers Ass'n ¶¶ 16-17; Doggett Decl., Nat'l
17 Corn Growers Ass'n ¶ 17; Kessel Decl., N.D. Grain
18 Growers Ass'n ¶ 17; Zander Decl., S.D. Agri-Business
19 ¶ 12; Pinel Decl., W. Plant Health Ass'n ¶ 25; Jackson
20 Decl., Iowa Soybean ¶ 26; Martinson Decl., U.S. Durum
21 Growers Ass'n ¶¶ 25-26; McCarty Decl., Associated Indus.
22 of Mo. ¶¶ 15-16; SUF No. 65; *see Life Alert Emergency*
23 *Resp., Inc. v. LifeWatch, Inc.*, 601 F. App'x 469, 474
24 (9th Cir. 2015) (threat to "reputation and
25 goodwill . . . constitutes irreparable harm"); *see also*

26
27 ¹⁵ Plaintiffs' success on their First Amendment claim is sufficient
28 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.

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

- 10 • This reputational disparagement would put Plaintiffs at
11 a significant competitive disadvantage. *Hurst Decl.*,
12 *Mo. Farm Bureau* ¶¶ 25-28; *Inman Decl.*, U.S. *Durum*
13 *Growers Ass'n* ¶¶ 30-33; *Wogsland Decl.*, N.D. *Grain*
14 *Growers Ass'n* ¶¶ 25-28; *Stoner Decl.*, Nat'l Ass'n of
15 *Wheat Growers* ¶¶ 30-33; *Zander Decl.*, S.D. *Agri-Business*
16 ¶¶ 19-22; *Jackson Decl.*, *Iowa Soybean Ass'n* ¶¶ 28-31;
17 *McCarty Decl.*, *Associated Indus. of Mo.* ¶¶ 21-24; *SUF*
18 *No. 66*; *see also, e.g., Int'l Franchise Ass'n v. City*
19 *of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) ("A rule
20 putting plaintiffs at a competitive disadvantage
21 constitutes irreparable harm.").
- 22 • The threat of the warning requirement caused some
23 Plaintiffs to lose customers prior to this Court's entry
24 of a preliminary injunction, and Plaintiffs would
25 certainly lose additional customers if the warning
26 requirement were allowed to go into effect. *Pinel*
27 *Decl.*, *W. Plant Health Ass'n* ¶ 21; *Heering Decl.* ¶¶ 59-
28 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

1 a minimum) extensive and wholly unnecessary testing
2 requirements, and disruption to and segregation of
3 supply chains. See, e.g., Hurst Decl., Mo. Farm Bureau
4 ¶¶ 25-28; Inman Decl., U.S. Durum Growers Ass'n ¶¶ 30-
5 33; Doggett Decl., Nat'l Corn Growers Ass'n ¶¶ 12-13;
6 Wogsland Decl., N.D. Grain Growers Ass'n ¶¶ 15-21;
7 Stoner Decl., Nat'l Ass'n of Wheat Growers ¶¶ 30-33;
8 Kessel Decl., N.D. Grain Growers Ass'n ¶¶ 19-23; Jackson
9 Decl., Iowa Soybean Ass'n ¶¶ 20-25; Martinson Decl.,
10 U.S. Durum Growers Ass'n ¶¶ 20-24; McCarty Decl.,
11 Associated Indus. of Mo. ¶¶ 17-19; Heering Decl. ¶¶ 37,
12 49-50; SUF No. 72. It also threatens to cause burdensome
13 operational changes in the retail setting, which will
14 further impair the goodwill of Plaintiffs and their
15 relationships with suppliers and retailers. Heering
16 Decl. ¶ 49; SUF No. 73.

- 17 • If Plaintiffs who farm using glyphosate are forced to
18 cease using glyphosate by suppliers, this will result
19 in significant disruption to their longstanding business
20 practices. See, e.g., Hurst Decl., Mo. Farm Bureau
21 ¶¶ 5-7, 17-22; Wogsland Decl., N.D. Grain Growers Ass'n
22 ¶¶ 19-22; Stoner Decl., Nat'l Ass'n of Wheat Growers
23 ¶¶ 7-9, 24-27; Kessel Decl., N.D. Grain Growers Ass'n
24 ¶¶ 3, 11-14; Jackson Decl., Iowa Soybean Ass'n ¶¶ 6-12,
25 22-25; SUF No. 74; see *Am. Trucking Ass'ns, Inc. v. City*
26 *of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) (forcing a
27 "change [in] the whole nature of [plaintiff's] business"
28 constitutes irreparable harm).

1 Moreover, to the extent any of these injuries could be deemed
2 financial in nature, they are not reparable as a matter of law
3 because California's sovereign immunity precludes them from being
4 remedied by money damages. See *Idaho v. Couer d'Alene Tribe*, 794
5 F.3d 1039, 1046 (9th Cir. 2015) (finding irreparable harm due to
6 economic loss where sovereign immunity prevents recovery of money
7 damages); *Pac. Merch. Shipping Ass'n v. Cackette*, No. CIV. S-06-
8 2791 WBS KJM, 2007 WL 2914961, at *3 (E.D. Cal. Oct. 5, 2007)
9 (Shubb, J.) ("irreparable harm" from "complying with regulations"
10 where "Eleventh Amendment" prohibits recovery); *N.E. Med. Servs.,*
11 *Inc. v. Cal. Dep't of Health Care Servs.*, 712 F.3d 461, 466 (9th
12 Cir. 2013) (California has immunity from "monetary damages.").

13 As a matter of law, Plaintiffs' constitutional injuries
14 cannot adequately be compensated by legal remedies. See *Nelson v.*
15 *NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*,
16 562 U.S. 134 (2011) ("Unlike monetary injuries, constitutional
17 violations cannot be adequately remedied through damages."); see
18 also *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir.
19 2009). And as a matter of fact, the harms that they would suffer
20 to their reputations and businesses from enforcement of the warning
21 requirement are *literally* non-compensable, because California's
22 sovereign immunity precludes them from being remedied by money
23 damages. See *supra* at 59-60.

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

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Respectfully submitted,

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