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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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

Defendant.

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

PLAINTIFFS' COMBINED OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: April 20, 2020
Time: 1:30 p.m.
Courtroom: 5
Trial Date: Not set.

The Honorable William B. Shubb

Case Filed: Nov. 15, 2017

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INTRODUCTION AND SUMMARY OF ARGUMENT

Two years ago this Court recognized that "virtually all . . . government agencies and health organizations that have reviewed studies on [glyphosate] ha[ve] found there was no evidence that it caused cancer." Mem. & Order re: Mot. for Prelim. Inj. 14 (Dkt. No. 75) ("PI Order"). Yet under Proposition 65, California sought to compel Plaintiffs to tell consumers that glyphosate is "known to the state to cause cancer" based on the view of one nongovernmental health entity in Europe—the International Agency for Research on Cancer ("IARC")—that glyphosate "probably" can cause cancer. The Court concluded on that record that the warning would be "misleading at best" and that it could not be constitutionally compelled under the First Amendment. *Id.* And the Court preliminarily enjoined the Attorney General (and those in privity with him) from enforcing the Proposition 65 requirement for glyphosate.

Nothing has changed that warrants a different conclusion today. The Attorney General has identified no new material facts: The Attorney General does not claim that a single regulator or health agency now agrees with IARC. There have also been no material changes in the law. This Court stayed proceedings to await the Ninth Circuit's decisions in *American Beverage Ass'n v. City of San Francisco* and *CTIA – The Wireless Ass'n v. City of Berkeley*. The Ninth Circuit has issued opinions in both cases, and nothing in them undermines this Court's conclusion that the First Amendment forbids California from compelling Plaintiffs to convey a controversial and misleading message on the State's behalf. Finally, there have been no pertinent changes to

Proposition 65: The statute still requires a "clear and reasonable warning" before "expos[ing] any individual to a chemical known to the state to cause cancer." Cal. Health & Safety Code § 25249.6. And private bounty hunters can still sue to enforce that requirement, regardless of the views of California's Attorney General.

The Attorney General nonetheless insists that this Court should reach a different conclusion today. The arguments he advances have no merit.

1. The Attorney General argues (at 14-20) that the facts have changed because in a handful of personal injury cases juries have concluded that glyphosate caused the plaintiffs' lymphomas. But set against the overwhelming consensus of EPA and other national regulators, a few personal injury verdicts are not a material development for this case. Furthermore, the plaintiffs in each of those actions leaned heavily on IARC's outlier conclusions, and Monsanto was prevented from fully informing the juries of the worldwide consensus that glyphosate does not cause cancer. And, even then, the trial courts found that the science just barely allowed plaintiffs' experts to get to a jury or their claims to survive summary judgment. Judge Chhabria in the Northern District of California, for example, found that the evidence "seem[ed] too equivocal to support any firm conclusion that glyphosate causes" lymphoma. *See In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1108-09 (N.D. Cal. 2018). He also recognized that the plaintiffs introduced "complete[] junk science" at trial. Supplemental Declaration of David C. Heering (Heering Suppl. MSJ Decl.) Ex. B, Trial Tr. of Proceedings at

1875:4-14, *Hardeman v. Monsanto Co.*, No. C 16-00525 VC (N.D. Cal. Mar. 11, 2019) ("*Hardeman* Trial Tr."). These personal injury cases, all currently pending on appeal, change nothing here.

The Attorney General also attempts to undermine EPA's conclusion that glyphosate does not cause cancer. (He conspicuously ignores almost every other international regulator.) But EPA's conclusion is demonstrably better supported than IARC's. EPA considered a much broader range of scientific data, followed a much more rigorous and open process, and explicitly considered and rejected IARC's contrary conclusions. And while the Attorney General continues to argue (at 23-25) that Monsanto has "improperly influenced EPA's scientific determination" over the decades, the facts do not support this conspiracy theory. *See also In re Roundup Prod. Liab. Litig.*, 385 F. Supp. 3d 1042, 1047 (N.D. Cal. 2019) (finding "[plaintiff] did not present evidence that Monsanto hid evidence from the EPA or, alternatively, that it had managed to capture the EPA"). Indeed, in the course of its glyphosate risk assessment in 2018, EPA reviewed multiple public comments leveling similar accusations of improper influence. *See* Heering Suppl. MSJ Decl. Ex. D, Nat. Res. Defense Council, Comments on Draft Human Health and Ecological Risk Assessment for Glyphosate, EPA-HQ-OPP-2009-0361-0066, at 5 (Apr. 30, 2018) (asserting "communication and collaboration between Monsanto" and EPA). But EPA expressly noted that the comments submitted to it "did not result in changes to the agency's risk assessment." Heering Suppl. MSJ Decl. Ex. E, EPA, Response from the Pesticide Re-evaluation Div. (PRD) to Comments on the Glyphosate Proposed Interim Decision at 2 (Jan. 16, 2020).

2. Lacking any material factual developments that could change the outcome of this case, the Attorney General once again asks this Court to dismiss Plaintiffs' claims as unripe. He emphasizes OEHHA's finalization of a "no significant risk level" (NSRL) for glyphosate, which may be used by Proposition 65 defendants to mount an affirmative defense to enforcement actions. But this Court previously rejected the very same ripeness argument premised on OEHHA's likely finalization of an NSRL, explaining that even assuming Plaintiffs' "products were tested and found to contain concentrations of glyphosate below the" NSRL, they would "still have no reasonable assurance that they would not be subject to enforcement action." PI Order 7.

That holding is equally valid today. Even if most glyphosate exposures will be below the NSRL, that will not deter professional bounty hunters from bringing suits to extract settlements—suits that may need to be litigated to summary judgment or even trial to fully establish an NSRL-based defense. Given the history of Proposition 65 litigation, and the incentives created by the statutory scheme, such strike suits are inevitable. And that "credible threat of enforcement" by "private citizens [given] a right of action to sue for damages" more than suffices to establish that Plaintiffs' First Amendment claim is justiciable. *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1171-73 (9th Cir. 2018).

Moreover, Plaintiffs will in any event be forced to test their products to determine whether they fall below the NSRL—testing that even the Attorney General concedes (at 35) will cost, at minimum, hundreds of dollars per product. As this Court previously

recognized, that necessary expenditure of money and resources by itself confirms that this case is justiciable. PI Order 9; *see also Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154-55 (2010). And this is to say nothing of the massive litigation costs involved in defending against bounty hunter suits, or the evidence Plaintiffs have produced that they will face lost sales from retailers who will fear to sell glyphosate products without a Proposition 65 warning. In short, Plaintiffs stand to suffer multiple independent injuries from Proposition 65's warning requirement—injuries that militate for this Court's immediate review.

3. On the merits, the Attorney General makes little effort to argue that either OEHHA's safe-harbor warnings or the two alternative warnings he previously proffered can constitutionally be applied to glyphosate. Instead, the Attorney General now offers up a *third* proposed alternative warning. But like the last two, this iteration complies neither with Proposition 65 nor the First Amendment.

As an initial matter, the third proposed warning would fail to comply with Proposition 65's warning requirement. The California Supreme Court has held unequivocally that the statute requires a warning stating that the chemical at issue (here, glyphosate) is "'known to the state of California to cause [cancer],' or words to that effect." *Dowhal v. Smithkline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 918 (2004). This Court has recognized that the message conveyed by that compelled statement

is that "exposure to glyphosate *in fact causes cancer*." PI Order 14 (emphasis added). The third proposal runs afoul of that statutory requirement because "by discussing the EPA's contrary finding that glyphosate does not cause cancer," it (like the Attorney General's prior efforts) "appears to 'contradict or obfuscate otherwise acceptable warning language' in violation of [the Attorney General's own] regulation" interpreting Proposition 65. Mem. & Order re: Mot. to Alter or Amend Prelim. Inj. Order 9 n.7 (Dkt. No. 97) ("Order Denying Mot. to Amend") (quoting Cal. Code Regs. Tit. 11 § 3202(b)). And this problem cannot be fixed by tinkering further with the warning language: "[A] warning properly characterizing the debate as to glyphosate's carcinogenicity would not comply with Proposition 65 and the applicable regulations," because any truthful description of the science necessarily would contradict the core message required by Proposition 65. *Id.*

The procession of new alternative warnings proffered in this litigation itself militates against the Attorney General's interpretation of Proposition 65: if the statute's warning requirement were really as formless and malleable as he suggests, it would fail to provide the "degree of specificity and clarity" necessary when "First Amendment freedoms are at stake." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). To be clear, Plaintiffs do not contend that Proposition 65 is, in fact, unconstitutionally vague; we believe its requirements——as interpreted authoritatively by the California Supreme Court and the Attorney General's own regulations——are clear (and clearly unconstitutional as applied to glyphosate).

Rather, the serious constitutional doubts that would be raised by a compelled-speech requirement as standardless as the Attorney General's litigation-driven characterization of Proposition 65 provides an *additional* reason to reject his "flexible" interpretation of the statute.

Even if the Attorney General's third proposed warning complied with Proposition 65, however, it would not comply with the First Amendment. That problem is inescapable because the message conveyed by Proposition 65's core statement—that *glyphosate causes cancer*—is false or, at a minimum, profoundly misleading. PI Order 14. And the First Amendment flatly forbids the government from compelling false or misleading speech, regardless of whether the government permits the speaker to add further text (such as that in the third proposal) in an effort to undo the damage caused by the compelled falsehood. Indeed, forcing private parties to engage in additional speech responding to IARC's outlier views inflicts a further First Amendment harm. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 4, 11-12, 20-21 (1986) (holding that "the State is not free . . . to force [a party] to respond to views that others may hold").

And even if allowing additional language could in theory cure the First Amendment violation, the third proposed warning's text would not suffice. To the contrary, telling consumers that glyphosate is "known" by California to "cause" cancer "because the International Agency for Research on Cancer has classified it as a carcinogen, concluding . . . that it is probably carcinogenic to humans" *exacerbates* the problem, because it reinforces the message that glyphosate in fact causes cancer. Nor is that constitutional

problem remedied by the third proposal's brief acknowledgement that "EPA has concluded that glyphosate is not likely to be carcinogenic to humans." As this Court has recognized, this text, at most, "conveys the message that there is equal weight of authority for and against the proposition that glyphosate causes cancer," which is itself misleading "when the heavy weight of evidence in the record is that glyphosate is not known to cause cancer." Order Denying Mot. to Amend 9.

Because the third proposed warning is inaccurate and misleading, it is ineligible for review under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and it cannot survive scrutiny under *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980). First, the government has no legitimate interest, much less a substantial interest, in misleading consumers. Second, the governmental interest the Attorney General now invokes—informing consumers whenever one of a handful of entities (including IARC) determines that a substance *may* cause cancer at a level that may be beyond any relevant human exposure—is not in fact the interest underlying the statute's notice requirement. The voters who enacted Proposition 65 were told that the purpose of the law would be to require "businesses to warn people before knowingly and intentionally exposing them to chemicals *that cause cancer*." Zuckerman Cross-MSJ Decl. Ex. WW (Dkt. No. 138-23) (Ballot Summary at 52 (emphasis added)).[1] Third, even if it were in actuality the

[1] *See Legislature v. Deukmejian*, 34 Cal. 3d 658, 673 n.14 (1983) (noting that courts look to the "[b]allot summaries and arguments" to determine voters' intent).

interest the statute was meant to advance, this new, nebulous interest the Attorney General articulates is not a substantial governmental interest that can justify compelled speech under *Central Hudson*. While consumers certainly have a substantial interest in being told about products that actually cause cancer, and perhaps about products that likely cause cancer, that cannot justify the warning here, since even IARC did not conclude that glyphosate can cause cancer in humans under realistic exposure conditions—and the worldwide consensus is that glyphosate does *not* present a cancer risk to humans. Finally, to the extent the State has any legitimate interest in informing consumers about IARC's probable "hazard" finding, the Attorney General fails to explain why the State could not advance that interest, without burdening private speech, by providing consumers that information itself. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("*NIFLA*") (holding disclosure law unconstitutional in part because California "could inform [its citizens] itself with a public-information campaign").

ARGUMENT

I. THE OVERWHELMING WEIGHT OF AUTHORITY IS THAT GLYPHOSATE DOES NOT CAUSE CANCER

A. IARC's Probable Hazard Conclusion Remains An Outlier

Throughout this litigation one thing has remained crystal clear: the weight of global authority overwhelmingly reflects that glyphosate does not cause cancer. As this Court noted, aside from IARC, "virtually all other government agencies and health organizations that have reviewed studies on the chemical ha[ve] found there was no evidence that it caused cancer." PI Order 14.

That was true in 2018, and it is equally true today. Most notably, "EPA has reviewed studies regarding the carcinogenicity of glyphosate multiple times and has determined each time that there was no or insufficient evidence that glyphosate causes cancer." *Id.* at 15-16. EPA has explicitly rejected IARC's contrary conclusion, found the claim that glyphosate is carcinogenic to be "false and misleading," and cautioned that including a cancer warning on the labeling of glyphosate products would render the products unlawfully "misbranded." *See* Heering MSJ Decl. Ex. E (Dkt. No. 117-9). Indeed, just last month, after spending years "thoroughly evaluat[ing] potential human health risk associated with exposure to glyphosate," EPA conclusively reaffirmed that "there are no risks to human health from the current registered uses of glyphosate and that glyphosate is not likely to be carcinogenic to humans." Heering Suppl. MSJ Decl. Ex. F, EPA, Glyphosate: Interim Registration Review Decision Case No. 0178 at 10 (Jan. 2020).

And regulators worldwide continue to agree with EPA. "Several international agencies have likewise concluded that there is insufficient evidence that glyphosate causes cancer, including the European Commission's Health and Consumer Protection Directorate-General, multiple divisions of the World Health Organization besides the IARC, and Germany's lead consumer health and safety regulator." PI Order 16. The Attorney General does not dispute that expert regulators in Canada, Australia, New Zealand, Japan, South Korea, and even California's OEHHA[2] have also concluded that

[2] The Attorney General suggests (at 13) that during the NSRL process OEHHA changed its earlier stance and now agrees with IARC's carcinogenicity conclusions. Not so. OEHHA's Final Statement of

glyphosate is not carcinogenic. *See* Pls.' MSJ at 37-38 (Dkt. No. 117-1); *see also* Def.'s Resp. to Pls.' Statement of Undisputed Facts ¶¶ 16-17, 25-29 (Dkt. No. 125-2) (registering no substantive dispute or objection to these entities' findings). Just as in 2018, the "heavy weight of evidence in the record [is] that glyphosate is not in fact known to cause cancer." PI Order 17; Order Denying Mot. to Amend 9 (same).[3]

The Attorney General mostly ignores this international consensus, and instead claims (at 12-20) that "an accumulation of evidence has bolstered IARC's classification of glyphosate's

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Reasons *noted* IARC's "finding of sufficient evidence of carcinogenicity in experimental animals," *without* endorsing the correctness of those findings. *See* Zuckerman Cross-MSJ Decl. Ex. O at 4 (Dkt. No. 135-2). Indeed, OEHHA steadfastly refused to opine on the validity of "IARC's scientific conclusions," instead finding that comments addressed to those issues were "not directed to the subject of this rulemaking." *Id.* at 2-3. OEHHA did "agree" with IARC that two mouse studies showed increased incidences of tumors that were "treatment-related," but OEHHA did not weigh these studies against others to reach a broader conclusion on carcinogenicity. *Id.* at 19-20. The only action OEHHA took—as required under Proposition 65—was to set the NSRL at a level supposedly based on "evidence . . . of comparable scientific validity to the evidence . . . which form the scientific basis for listing the chemical as known to the state to cause cancer" based on "the most sensitive study deemed to be of sufficient quality." 27 Cal. Code Regs. § 25703.

[3] In his Response to Plaintiffs' Statement of Undisputed Facts (Dkt. No. 125-2 ¶ 19), the Attorney General takes issue with Plaintiffs' reliance on the World Health Organization Guidelines for Drinking-Water Quality for the view that "glyphosate presents no evidence of carcinogenicity." But while those Guidelines did not reach an express conclusion on glyphosate's potential carcinogenicity, the Guidelines did review multiple mouse studies concerning long-term exposure and carcinogenicity, found "no effect on survival," and discounted one study reflecting a potential "carcinogenic effect in rats" "in light of the absence of an effect at much higher dose levels in the more recent 2-year study in rats." Heering MSJ Decl. Ex. S (Dkt. No. 117-23) (WHO, WHO/SDE/WSH/03.04/97, Glyphosate and AMPA in Drinking water: Background Document for Development of WHO Guidelines for Drinking-Water Quality at 5-6 (rev. June 2005)).

carcinogenicity." But "additional support for the IARC determination does not change the fact that the overwhelming majority of agencies that . . . have examined glyphosate have determined it is not a cancer risk." Order Denying Mot. to Amend 5. And, in fact, the recent accumulation of evidence shows even more strongly that IARC was wrong.

Many regulators, including EPA and the national regulators in Canada, Australia, and New Zealand, have directly addressed IARC's glyphosate findings and concluded that they are wrong, or, at best, unpersuasive. EPA, for instance, explained just last year why IARC's process was deficient and why EPA was standing by its non-carcinogenicity conclusion. *See* Heering MSJ Decl. Ex. WW at 7 (Dkt. No. 117-54). As EPA explained, its own "cancer evaluation is more robust than IARC's evaluation." *Id.* IARC "only considers data that have been published or accepted for publication in the openly available scientific literature," but EPA considered much more information when it evaluated glyphosate. *Id.*; *see also id.* ("IARC only considered 8 animal carcinogenicity studies while [EPA] used 15 acceptable carcinogenicity studies . . . .").[4] And some of the studies IARC *did* consider "were not appropriate for

[4] This artificial, self-imposed limitation severely compromises IARC's conclusions. For example, IARC had access to data from the 2017 AHS study—sponsored by the U.S. National Institutes of Health, National Cancer Institute, and the National Institute of Environmental Health Science—that analyzed health effects in over 54,000 pesticide applicators over the course of three decades and confirmed there is "no evidence of an association between glyphosate use and risk of any" cancer. *See* Heering MSJ Decl. Ex. AA (Dkt. No. 117-32). Yet IARC's artificial, self-imposed restrictions prevented it from considering that data, because the study was still two years away from publication. Of course, the fact that the data underlying this gold-standard study was not yet published does not make it irrelevant.

determining the human carcinogenic potential of glyphosate" because they were conducted in "non-mammalian species (*i.e.*, worms, fish, reptiles, and plants)" where results do not extrapolate to humans. *Id.*

Not only was it more robust, EPA's glyphosate review was also "more transparent" than IARC's. *Id.* at 8. EPA's finding went through "external peer review" and was subject to public comments. *Id.* And EPA "responded to [the external peer review] report, addressed [specific] recommendations, and made revisions to its cancer assessment that were transparent and provided to the public." *Id.* In contrast, IARC's process was completely closed-door: it was "not accessible to the public"; IARC's "deliberations are closed," "its process does not allow for public comments," and its "reports are final without an external peer review." *Id.*

Canada's Pest Management Regulatory Agency also expressly rejected IARC's conclusion. *See* Heering MSJ Decl. Ex. NN. app. I at 18-24 (Dkt. No. 117-45). Just like EPA, Canada "assessed a much larger and more relevant body of scientific information than was considered by IARC," *id.* at 18, including significant and "detailed information" that IARC lacked, *id.* at 21. And others in the broader global community have similarly rejected IARC's conclusion. *See* Heering MSJ Decl. Ex. PP at 8-9 (Dkt. No. 117-47) (Australia's Pesticides and Veterinary Medicines Authority "chose to consider glyphosate for reconsideration following the publication of the IARC Monograph," but retained its conclusion that "the scientific weight-of-evidence indicates that: exposure to glyphosate does not pose a carcinogenic or genotoxic risk to humans"); Heering MSJ Decl. Ex. QQ at 2, 16 (Dkt. No. 117-48) (New

Zealand EPA "review[ed] the basis on which [IARC] classified [glyphosate] as a probable human carcinogen," and concluded that "based on a weight of evidence approach . . . glyphosate is unlikely to be genotoxic or carcinogenic to humans").

B. No Recent Developments Undermine the International Consensus That Glyphosate Does Not Cause Cancer In Humans

Unable to identify a single national regulator that shares IARC's view that glyphosate is a probable carcinogen, the Attorney General instead claims that a handful of *personal injury* verdicts (all of which are currently on appeal), a letter written by an expert for tort plaintiffs, and a single new scientific article reinforce IARC's finding. None of these developments provides the Attorney General material support.

1. Jury verdicts in personal injury cases should have little weight in the face of the overwhelming contrary consensus by expert regulators who have intensively studied the issue. But in any event, a closer look demonstrates that those personal injury verdicts, even taken on their own terms, fail to undermine the international consensus.

In the federal multidistrict litigation, *Hardeman v. Monsanto*, No. 16-cv-0525-VC (N.D. Cal.), plaintiffs are claiming that Monsanto's glyphosate-based herbicides caused Non-Hodgkin Lymphoma (NHL). At the pre-trial phase the parties disputed both general causation (whether glyphosate is capable of causing NHL at all) and specific causation (whether exposure to Monsanto's glyphosate-based products caused plaintiffs' NHL). *See In re Roundup*, 390 F. Supp. 3d at 1110. Monsanto moved to exclude plaintiffs' proffered experts on both issues, arguing their

testimony fell short of the minimum standards for admission of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Judge Chhabria explained that throughout the *Hardeman* litigation plaintiffs "heav[il]y reli[ed] on IARC's classification of glyphosate" and "put forward some expert opinions that largely parrot IARC's analysis and conclusions." *See In re Roundup*, 390 F. Supp. 3d at 1113; *see also* Heering Suppl. MSJ Decl. Exs. A & C, Trial Tr. of Proceedings at 358-59, 2015:15-20, *Hardeman v. Monsanto Co.*, No. 16-cv-00525 VC (2019). But, he warned, even IARC recognizes that its conclusion is a "first step" in an overall public health assessment, designed only to "identify cancer hazards even when *risks* are very low at current exposure levels." *See In re Roundup*, 390 F. Supp. 3d at 1114 (emphasis added). IARC's "hazard" determination does not involve the second necessary step—an actual "risk assessment," which gauges potential carcinogenic effects from realistic levels of human exposure—an assessment that IARC left to "other public health entities." *Id.* at 1108. At the general causation stage, Judge Chhabria concluded that "[t]he evidence, viewed in its totality, seem[ed] too equivocal to support any firm conclusion that glyphosate causes NHL" and that "evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak." *Id.* at 1108-09. Judge Chhabria nonetheless permitted the plaintiffs' experts to testify, but only because in his view the Ninth Circuit's *Daubert* precedent requires "more room for deference to experts in close cases than might be appropriate in some other Circuits." *Id.* at 1113.

The ensuing jury verdict reflects only that very particular presentation of the science at trial. Although Judge Chhabria properly excluded IARC's Monograph, he permitted the plaintiffs to introduce the *fact* of IARC's glyphosate classification. *See* Heering Suppl. MSJ Decl. Ex. G, Pretrial Order No. 81 at 1, *In re Roundup Prods. Liab. Litig.*, No. 16-md-02741-VC (N.D. Cal. Feb. 18, 2019). And while he permitted Monsanto to advise the jury of EPA's contrary conclusion, he excluded as "cumulative" *all* findings of foreign regulators that glyphosate is non-carcinogenic (*id.*; Ex. H, Pretrial Order No. 159 at 1, *In re Roundup Prods. Liab. Litig.*, No. 16-md-02741-VC (N.D. Cal. July 12, 2019)), thus obscuring from the jury the overwhelming regulatory consensus supporting glyphosate's safety. The trial was further impacted by the plaintiffs' introduction of testimony that Judge Chhabria acknowledged was "complete[] junk science." Heering Suppl. MSJ Decl. Ex. B, *Hardeman* Trial Tr. 1875:4-14. He later reprimanded plaintiffs, and indicated that if he "understood the lack of basis for that testimony, [he] would have excluded it." *Id.* Monsanto's appeal is pending, but regardless of its outcome, the jury verdict in that case provides the Attorney General no meaningful support.

The two state court verdicts the Attorney General identifies (at 15-17, 19) are no more helpful. In *Johnson v. Monsanto*, for example, only *one* expert—Dr. Nabhan—claimed that glyphosate caused the plaintiff's NHL. That same expert was excluded on *Daubert* grounds by Judge Chhabria at the *Hardeman* general causation stage because the doctor "all but admitted that he reached his conclusion regarding glyphosate upon reading the IARC report, and that contrary new evidence was unlikely to shake his faith in

IARC's conclusion." *In re Roundup*, 390 F. Supp. 3d at 1148. Dr. Nabhan also appeared in the second state court case, *Pilliod v. Monsanto*, but in that case he *expressly admitted* "that reasonable people can disagree on whether glyphosate causes NHL." Zuckerman Cross-MSJ Ex. OO at 19 (Dkt. No. 138-15).

Again, to be clear, these few jury verdicts are entirely irrelevant to the questions before this Court. Despite the Attorney General's suggestions to the contrary, a personal injury verdict could not possibly render a Proposition 65 warning purely factual and uncontroversial given the consensus of expert regulators worldwide that glyphosate does not cause cancer. But even if the verdicts were somehow relevant, the particular and limited presentation of evidence to which the juries in the personal injury cases were exposed would fatally undermine any reliance on them.

2. The Attorney General next argues (at 11) that IARC's conclusions are bolstered by a letter in which, he asserts, "94 scientists concluded that [the European Food Safety Authority's (EFSA)] analysis of glyphosate [finding no evidence of carcinogenicity] contained serious flaws." In fact, this letter was drafted by a *single* individual, Christopher Portier, who was at the time a paid plaintiffs' consultant in the glyphosate personal injury litigation. Portier solicited the other letter signatories without disclosing to them his financial stake in the issue.[5] And even putting aside this blatant conflict of interest,

[5] *See* Heering Suppl. MSJ Decl. Ex. I, Portier Dep. 69:11-15, *Hardeman v. Monsanto*, No. 16-md-02741-VC (N.D. Cal. Sept. 5, 2017) (Portier admitting he asked signatories to join his letter); *id.* at 72:1-72:14 (Portier admitting he did not disclose to signatories that he was a paid plaintiffs' consultant); *id.* at 84:1-8(Portier

EFSA ultimately reviewed and rejected all of Portier's arguments. Heering Suppl. MSJ Ex. J at 12, EFSA Letter to Prof. Christopher J. Portier, Subject: Open Letter; Review of the Carcinogenicity of Glyphosate by EFSA and BfR (Jan. 13, 2016) ("EFSA considers that the arguments brought forward in the open letter do not have an impact on the EFSA conclusion on glyphosate. The arguments expressed in the open letter reflect a misunderstanding of the evidence used for the EFSA evaluation.")]

The only other evidence the Attorney General claims supports IARC's conclusion (at 14) is a recently published meta-analysis (Zhang et al.) finding a link "between exposures to [glyphosate-based herbicides] and increased risk for NHL."[6] EPA thoroughly evaluated and rejected this meta-analysis as part of its recent glyphosate registration review. *See* Heering Suppl. MSJ Decl. Ex. K, EPA, Glyphosate: Epidemiology Review of Zhang et al. (2019) and Leon et al. (2019) Publications for Response to Comments on the Proposed Interim Decision (Jan. 6, 2020). As EPA explained, the meta-analysis unjustifiably *started* with a hypothesis that "the highest exposures to glyphosate based herbicides . . . will lead to increased risk of NHL in humans." *Id.* at 2; *id.* at 7 (concluding that there was "little justification" for this hypothesis). EPA also found numerous "methodological and logical flaws" in the meta-

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admitting that "[d]uring the entire period of time in which [he] had conversations with U.S. and European regulators about glyphosate, [he was] a paid consultant for plaintiffs' counsel in" personal injury litigation).

[6] *Citing* Zuckerman Cross-MSJ Decl. Ex. CC at 186 (purporting to attach Zhang, L. et al., *Exposure to glyphosate-based herbicides and risk for non-Hodgkin lymphoma: A meta-analysis and supporting evidence*, 781 Mutation Research-Reviews 186 (Feb. 5, 2019)).

analysis. *Id.* at 5. And ultimately, Zhang et al. merely "summarized and re-interpreted" older data that had all "previously been considered by EPA" as part of its conclusion that glyphosate is not likely to be carcinogenic to humans. *Id.* at 3.

C. The Attorney General's Attacks on EPA Lack Merit

The Attorney General (at 20) next tries to cast doubt on EPA's repeated non-carcinogenic conclusions about glyphosate. That is likely because he realizes that the conclusions of EPA, as an "authoritative body under Proposition 65" (at 77), are particularly destructive to his case. But the Attorney General's efforts to discredit EPA are meritless.

The Attorney General first points (at 20-21) to deliberative documents suggesting that some small minority of EPA staff believed glyphosate was at least possibly carcinogenic. But "the fact that people in the chain of command have expressed divergent views does not diminish the effect of the agency's resolution of [a] dispute[]." *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987). An expert agency's views are reflected in the actions of "the decisionmaker authorized to speak on behalf of the agency." *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1320-21 (D.C. Cir. 1998) (rejecting relevance of "memoranda indicat[ing] there was some disagreement among FDA chemists as to" technical question about "active ingredients" in a drug). And far from undermining the agency's final determination, debates among staff holding differing views during the deliberative process reinforce the transparent and comprehensive nature of EPA's consideration of the issue. Notably, moreover, EPA has reached the same ultimate conclusions about glyphosate going back five

presidential administrations. *See* Heering MSJ Decl. Ex. N (Dkt. No. 117-18) (EPA R.E.D. Facts – Glyphosate (Sept. 1993)).

Next, the Attorney General contends (at 22) that EPA considered different data points than IARC: specifically, that (1) EPA relied "mostly on unpublished studies," while IARC "relied mostly on published, peer-reviewed studies"; (2) "EPA focused on studies of pure glyphosate, while IARC" considered glyphosate-based products; and (3) "EPA focused on data for lower exposures typical of dietary exposures . . . while IARC did not limit its focus to those scenarios." These contentions do nothing to advance the Attorney General's position.

The first allegation is misleading. EPA had access to all of IARC's data, and more. *See supra* at 12-13 & n.4. IARC's more limited data-set should, if anything, undermine its conclusion. *See* Heering MSJ Decl. Ex. WW at 7 (Dkt. No. 117-54) (EPA explaining why this makes its evaluations "more robust" than IARC's).

Second, EPA's evaluations of pure glyphosate make EPA's findings *more* relevant to this case than IARC's. As OEHHA itself explains: "The Proposition 65 warning requirement applies only to chemicals listed for causing cancer or reproductive toxicity. In this case, the substance listed as causing cancer is glyphosate, *not commercial formulations of glyphosate*." *See* Final Statement of Reasons, No Significant Risk Level: Glyphosate, Zuckerman Cross-MSJ Decl. Ex. O at 13 (Dkt. No. 135-2) (emphasis added). (Moreover, EPA approves the formulated product when registering a pesticide. *See, e.g.*, 7 U.S.C. § 136a(e)-(f); 40 C.F.R. § 152.43.)

Third, it is true that IARC evaluated carcinogenicity under heightened exposure scenarios—ones that humans will never

actually face.[7] But this again undermines rather than advances the Attorney General's position. A Proposition 65 warning must state that "glyphosate is known to cause cancer." Consumers will interpret that to mean that glyphosate causes cancer in the real world, *not* that glyphosate may only be carcinogenic under unrealistically extreme exposure scenarios. *See* PI Order 14 ("[T]he most obvious reading of the Proposition 65 cancer warning is that exposure to glyphosate in fact causes cancer."). And this likely interpretation is directly contradicted by EPA's conclusion that "there are no risks to human health" for real-world glyphosate exposures. Heering Suppl. MSJ Decl. Ex. F, EPA Interim Registration Review Decision at 10; *see also id.* at 9 ("The agency . . . concluded that there are no residential, non-occupational bystander, aggregate, or occupational risks of concern.").

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[7] For example, IARC evaluated a mouse study in which mice were fed glyphosate of 98.6% purity, which (according to IARC) only resulted in statistically significant effects at a dose of 1,000 milligram/kg of body weight per day. See Heering MSJ Decl. Ex. W at 353 (Dkt. No. 117-27) (112 Int'l Agency for Research on Cancer (IARC), WHO, Some Organophosphate Insecticides and Herbicides, IARC Monographs (2017)). That is many orders of magnitude above California's NSRL. *Compare id.*, *with* Zuckerman Cross-MSJ Decl. Ex. O at 1 (Dkt. No. 135-2) (Final Statement of Reasons, No Significant Risk Level: Glyphosate). And even the import of that mouse study is subject to serious doubt: In 2006 the WHO and the Food and Agriculture Organization of the UN reviewed that study and concluded that "[o]wing to the lack of a dose-response relationship, the lack of statistical significance and the fact that the incidences recorded in this study fell within the historical ranges for controls, these changes are not considered to be caused by administration of glyphosate," and that the "administration of glyphosate to CD-1 mice for 104 weeks produced no signs of carcinogenic potential at any dose." Heering MSJ Decl. Ex. BBB (Dkt. No. 117-59) (Int'l Programme on Chem. Safety, WHO, Pesticide Residues in Food – 2004: Toxicology Evaluations at 122 (2006)); Pls.' SUF ¶ 57 (Dkt. No. 117-2).

The Attorney General also claims (at 23-24) that "EPA failed to follow its own guidelines in determining that glyphosate is not a carcinogen." The Attorney General is copying these talking points directly from Christopher Portier and Charles Benbrook, both paid plaintiffs' experts in the glyphosate litigation.[8] And EPA expressly addressed each of these criticisms. In one instance, EPA addressed the issue as early as the 1980s.[9] And as to the Attorney General's additional assertion (at 24) that EPA's Science

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[8] *See* Def.'s Cross-MSJ 23-24 & nn.69-71, 73 (relying on Portier's trial testimony and an article authored by Benbrook).

[9] EPA has been aware of concerns with the laboratory that performed the Reyna and Gordon (1973) study since the 1980s, and in light of that history, analyzed that study as only one among six mouse studies considered in its weight-of-evidence analysis. *Compare* Zuckerman Cross-MSJ Decl. Ex. RR at 1784:8-1787:18 (Dkt. No. 138-18) (Portier discussing EPA's knowledge dating back to the 1980s), *with* Heering MSJ Decl. Ex. SS at 85 (Dkt. No. 117-50) (2017 EPA paper weighing this mouse study among others). EPA also expressly refuted the criticism (Def.'s Cross-MSJ 23) of the agency's "statistical determinations" by explaining why its statistical approach was valid. *Compare* Zuckerman Cross-MSJ Decl. Ex. RR at 1788:4-1806:9 (Dkt. No. 138-18) (Portier discussing criticisms of EPA's statistical determinations), *with* Heering Suppl. MSJ Decl. Ex. L, EPA, Response to the Final Report of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) on the Evaluation of the Human Carcinogenic Potential of Glyphosate 7-8 (Dec. 12, 2017) (addressing and rejecting criticisms of EPA's "statistical analyses and interpretation of . . . results"). EPA similarly addressed Portier's criticism (Def.'s Cross-MSJ 23) that it should have included a particular study that was contaminated by "a leukemia virus in the [mouse] colony." *Compare* Zuckerman Cross-MSJ Decl. Ex. RR at 1807:20-1814:11 (Dkt. No. 138-18)(Portier arguing that the contaminated data should have been included in EPA's analysis), *with* Heering MSJ Decl. Ex. SS at 70 (Dkt. No. 117-50) (EPA explaining that the study was not included "due to the presence of a viral infection within the colony, which confounded the interpretation of the study findings."). Finally, Benbrook's criticism (Def.'s Cross-MSJ 24) that "EPA relied on a large number of studies on bacteria," "all of which were negative," makes no sense: Neither Benbrook, nor the Attorney General, argues that those studies were in some way invalid, so their criticism simply amounts to a demand to ignore available scientific data (which is the same thing the Attorney General repeatedly *criticizes* EPA for (*e.g.*, at 23-24)).

Advisory Panel concluded that "the EPA evaluation does not appear to follow the EPA 2005 cancer guidelines," EPA issued a detailed response that squarely addressed that criticism. *See* Heering Suppl. MSJ Decl. Ex. L, EPA, Response to the Final Report of the FIFRA Scientific Advisory Panel (FIFRA SAP) on the Evaluation of the Human Carcinogenic Potential of Glyphosate (Dec. 12, 2017).

Unable to undermine EPA's conclusion on its scientific merits, the Attorney General next insinuates that EPA's process was somehow tainted. He claims (at 25) that the judges in the three personal injury cases found evidence "that Monsanto engaged in conduct that skewed the scientific debate over the safety of glyphosate." But this is just false. Judge Chhabria, for example, noted that the multi-district bellwether plaintiff (Hardeman) "did *not* present evidence that Monsanto hid evidence from the EPA or, alternatively, that it had managed to capture the EPA." *In re Roundup Prods. Liab. Litig.*, 385 F. Supp. 3d 1042, 1047 (N.D. Cal. 2019) (emphasis added). Nor, as Judge Chhabria noted, did Hardeman adduce any "evidence that Monsanto was in fact aware that glyphosate caused cancer but concealed it." *Id.* The *Johnson* court made a similar finding. *See* Zuckerman Cross-MSJ Decl. Ex. EE at 5 (Dkt. No. 138-5). The *Pilliod* court did (erroneously) conclude that Monsanto made "efforts to impede, discourage, or distort the scientific inquiry about glyphosate," Zuckerman Cross-MSJ Decl. Ex. OO at 19 (Dkt. No. 138-15), but even that court recognized that "Monsanto did not hide evidence from the EPA," *id.* at 21. And most of the reasons the *Pilliod* court offered for its outlier finding merely reflect examples of Monsanto vigorously defending

the safety of its product. *See id.* at 17 (expressing that Monsanto attempted to discredit IARC).[10]

The Attorney General also argues more generally (at 24-25) that EPA may have been "influenced by Monsanto's efforts to skew the scientific debate," but identifies no evidence that Monsanto tainted the conclusions of EPA over the course of decades—much less the conclusions of Canada, Germany, Japan, and the host of expert regulators that agree with EPA. To the contrary, Canada's expert regulator recently addressed similar accusations of improper influence by Monsanto and found them meritless. *See* Statement from Health Canada on Glyphosate (Jan. 11, 2019), *https://www.canada.ca/en/health-canada/news/2019/01/statement-from-health-canada-on-glyphosate.html.* A group of twenty Health Canada scientists who had not been involved in that agency's 2017 re-evaluation of glyphosate "assessed the validity of any studies in question" and "whether any of the issues raised would influence the results of the [2017] assessment." *Id.* That independent review "concluded that the concerns raised by the objectors could

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[10] The personal injury judges' explanations for why punitive damages awards were nonetheless justified should not survive appeal, and in any event, they again afford the Attorney General no support in this case. Judge Chhabria's bottom line was that "Monsanto's behavior betrayed a lack of concern about the risk that its product might be carcinogenic." *In re Roundup*, 385 F. Supp. 3d at 1047. And the *Johnson* court found that "[t]he jury could find that the decision by Monsanto to continue marketing [glyphosate products] notwithstanding a possible link with NHL constitutes corporate malice." Zuckerman Cross-MSJ Decl. Ex. EE at 5-6 (Dkt. No. 138-5). In other words, these courts faulted Monsanto for unwaveringly standing behind glyphosate, a position that is eminently warranted by the overwhelming consensus of national regulators that the pesticide does not cause cancer and EPA's recent guidance that a cancer warning would be "false and misleading."

not be scientifically supported," and that the accusations "did not create doubt or concern regarding the scientific basis for the 2017 re-evaluation decision for glyphosate." *Id.*

Contrary to the Attorney General's accusations of misconduct, the evidence shows that Monsanto has vigorously defended its product because it vigorously believes in its product. For instance, Judge Chhabria recognized that Monsanto's experts viewed the AHS study——a study that found no evidence glyphosate causes cancer——to be the "most powerful" evidence on the carcinogenicity question. *See In re Roundup*, 390 F. Supp. 3d at 1126. It is easy to see why: the AHS study "considered by far the largest number of NHL cases across a broad range of exposures and for the longest period of time," it "appropriately controlled for confounding by lifestyle factors and other pesticides" and it took efforts to control for "selection bias" among study subjects. *Id.* And this study was itself an update on a "2005 study" that also "reported no statistically significant association between glyphosate use and NHL." *Id.* at 1124. Monsanto's advocacy is informed by and consistent with this science, and much more besides.

In sum, nothing the Attorney General has identified undermines EPA's conclusion, much less the conclusion of the many other international health regulators. The record remains clear that the heavy weight of authority reflects that glyphosate does not cause cancer.

II. PLAINTIFFS' FIRST AMENDMENT CLAIM IS RIPE

The Attorney General (at 41-50) reasserts that this case is unripe for judicial review because Plaintiffs will likely be able to establish, if sued, that glyphosate exposures from their

products fall within Proposition 65's affirmative defense for goods that pose "no significant risk" of cancer at normal exposure levels. Cal. Health & Safety Code § 25249.10. The Attorney General points to the limited regulatory safe harbor created by OEHHA in June 2018, which establishes a "no significant risk level" (NSRL) for glyphosate, as well as evidence that glyphosate exposures from common food products and from lawn and garden pesticide applications fall below that threshold. *See also* 27 Cal. Code Regs. § 25705.

Although Plaintiffs applaud the Attorney General's concession that their products pose "no significant risk" of causing cancer, this Court has already recognized that the NSRL does not render Plaintiffs' First Amendment challenge unripe. *See* PI Order 7-10. The Court was aware of OEHHA's *proposed* glyphosate NSRL at the time of its preliminary injunction ruling (*see id.* at 6-7), assumed for purposes of its ripeness analysis that the proposed NSRL would be adopted as the final NSRL (*id.* at 6-9), and concluded that OEHHA's later adoption of that regulation was not a reason to reconsider its preliminary injunction order (*see* Order Denying Mot. to Amend 4-5). Nothing has changed that would render Plaintiffs' suit either constitutionally or prudentially unripe.

A. Plaintiffs' Claims Are Constitutionally Ripe.

The constitutional component of ripeness "overlaps with the 'injury in fact' analysis for Article III standing," and ultimately asks whether "the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (citations omitted). Courts ask whether plaintiffs face "a realistic danger of sustaining a direct injury

as a result of the statute's operation or enforcement," or whether the alleged injury is instead "imaginary or speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Where the First Amendment is implicated, this "inquiry tilts dramatically toward a finding of standing." *Libertarian Party of L.A. Cty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013). There is nothing imaginary about Plaintiffs' injuries here.

There is no question that Proposition 65's warning mandate applies to Plaintiffs. The statute on its face requires Plaintiffs to give a "clear and reasonable warning" before exposing "any individual" to glyphosate. Cal. Health & Safety Code § 25249.6. If Plaintiffs violate this requirement, they are subject to civil money penalties and an injunction against sale of the products at issue. *Id.* § 25249.7. Only if Plaintiffs can prove at trial that "the [challenged] exposure poses no significant risk assuming lifetime exposure at the level in question" will they have an affirmative defense to liability. *Id.* § 25249.10(c). OEHHA regulations further provide that a level of exposure "shall be deemed to pose no significant risk" if it falls below an established NSRL. 27 Cal. Code. Regs. § 25701(b)(3)(A). In July 2018, OEHHA finalized the NSRL for glyphosate at 1,100 micrograms (or 1.1 milligrams) per day. *Id.* § 25705(b)(1). Thus, in an enforcement action, proof that glyphosate exposure amounts to less than 1,100 micrograms per day will establish an affirmative defense. Contrary to the Attorney General's arguments, that potential affirmative defense does not mean that Plaintiffs are not injured by Proposition 65, or that their claim is now unripe.

At the preliminary injunction phase, the Attorney General made the exact same argument he makes now, contending that Plaintiffs would not have to "provide any warning if their products' glyphosate levels are below" the NSRL that "will likely be adopted." PI Order 6; *see also* Mot. for Reconsideration at 10 n.15. Citing the same articles on which he currently relies regarding glyphosate exposure,[11] the Attorney General then asserted that "it is doubtful that a single one of [Plaintiffs' food] products would require a warning if the 1,100 [micrograms per day] safe harbor level is adopted." Defs' Opp'n to PI Mot. 22-23. But this Court correctly concluded that OEHHA's expected adoption of a 1,100-microgram NSRL did not render Plaintiffs' claim unripe, and it declined to reconsider that judgment when informed by the Attorney General that the NSRL had been finalized. *See* PI Order 7-10; *see also* Reconsideration Order at 4. The Attorney General provides no reason for the Court to alter its conclusion.

The concepts here are well established. As California courts have recognized, Proposition 65 presents entities like Plaintiffs with a "Hobson's choice": they must either attach false and "stigmatizing" cancer warnings to their products or "risk having to defend" against costly private enforcement actions. *Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 344 (Cal. App. 2004). If Plaintiffs acquiesce and adopt warnings, they will be injured by being forced to defame their own products. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205,

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[11] *Compare* Def.'s Opp. to PI Mot. 22-23 (Dkt. No. 50) (relying on studies by Food Democracy Now and the Organic Consumers Association), *with* Lee Cross-MSJ Decl. ¶¶ 13-21 (Dkt. No. 129) (relying on those same studies at summary judgment stage).

213 (2013) ("It is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" (citation omitted)); *see also* PI Order 17. And they will bear the costs associated with relabeling their products. *See, e.g.*, Heering MSJ Decl. ¶ 49 (Dkt. No. 117-4).

Companies choosing not to issue a Proposition 65 warning, on the other hand, will also suffer Article III injury because they will need to expend money and resources testing their products to determine "whether their products exceeded the safe harbor level," which is "itself is a cognizable injury." PI Order 9; *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154-55 (2010). Courts routinely recognize that the costs of such regulatory compliance confer standing. *See, e.g.*, *Cellco P'Ship v. FCC*, 357 F.3d 88, 100 (D.C. Cir. 2004) (standing present where business was "continuously burdened by the costs of complying . . . with what it contends are 'unnecessary' regulations"). The Attorney General has no meaningful response. He asserts (at 35) that "[m]any" foods have glyphosate levels "so low that significant product testing is not likely to be necessary." But the Attorney General does not suggest that *no* testing will be necessary. Nor could he, given the need to conduct testing to establish the affirmative no-significant-risk defense. Instead, the Attorney General claims (at 35) that testing will not be "overly costly" because it will cost less than $300, and will not be "complex." But the cost and complexity of testing is entirely irrelevant—the need to expend *any* amount of time and money satisfies Article III. *See Monsanto*, 561 U.S. at 154-55; *United States v. Students Challenging Regulatory Agency Procedure*, 412 U.S. 669, 689 n.14

(1973) (recognizing that plaintiffs need only "an identifiable trifle" of harm); *Cyzewski*, 137 S. Ct. at 983. And as discussed below (at 32-33), the process for assessing compliance with the NSRL for consumer products—which requires calculation of the "average rate of . . . exposure for average users" of a "general category or categories" of products, 27 Cal. Code Regs. § 25721(d)(4)—is likely to be far more expensive and complex. The need to expend resources on testing and compliance alone defeats the Attorney General's ripeness arguments.

Refusing to issue Proposition 65 warnings would also expose Plaintiffs to the near-certain threat of enforcement actions by bounty hunters. As this Court recognized, Plaintiffs "face a credible threat of enforcement" if they decline to adopt a glyphosate warning, "regardless of the possible enactment of a safe harbor level for glyphosate." PI Order 7-8. And such a "genuine threat of imminent prosecution" presents an Article III injury, especially in the First Amendment context. *Wolfson*, 616 F.3d at 1058 (citation omitted); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014) (holding that "a credible threat of enforcement" "amounts to an Article III injury in fact"); *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1173 (9th Cir. 2018) (finding standing because "even if the Attorney General would not enforce the law, [the statute under review] gives private citizens a right of action to sue for damages").

Proposition 65's statutory scheme and the long history of bounty hunter suits establishes that such a suit is not just credible, but highly likely. The Attorney General asserts (at 49-50) that the threat of enforcement suits cannot support standing

here because "[i]t is always the case that plaintiffs can file non-meritorious enforcement actions." But the question is simply whether there is "a well-founded fear" of prosecution. *Wolfson*, 616 F.3d at 1062-63. And the Supreme Court has recognized that the "credibility of [a] threat [of prosecution] is bolstered" where the challenged statute "allows 'any person' with knowledge of the purported violation to file a complaint." *Susan B. Anthony List*, 573 U.S. at 164 (citation omitted). Under Proposition 65, *any* person may bring an enforcement action on behalf of the public. Cal. Health & Safety Code § 25249.7(d). Bounty hunters need not make a threshold showing that a product contains any particular amount of glyphosate (so long as it contains some), or that a product actually poses any risk of cancer. Instead, the "no significant risk" showing is an affirmative defense provable only after litigation has commenced and the defendant has borne the costs of testing to establish the level of exposure. *See id.* § 25249.10(c) ("[T]he burden of showing that an exposure meets the criteria of this subdivision shall be on the defendant."). In short, as California's own courts have recognized, "the instigation of Proposition 65 litigation [is] easy—and almost absurdly easy at the pleading stage and pretrial stages." *See Consumer Def. Grp. v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1215 (Cal. App. 2006).

It is also lucrative. Private plaintiffs stand to recover twenty-five percent of any civil penalty assessed in a court-approved settlement agreement—which can amount to $2,500 per violation, per day. *See* Cal. Health & Safety Code § 25249.7(b); Cal. Code Regs. Tit. 11, § 3203(b). Given this powerful economic

incentive, professional bounty hunters routinely file strike suits in which "businesses are forced by litigation costs and the risk of statutory damages to simply acquiesce and post a warning, even if those businesses know the warning is affirmatively false and misleading." Heering MSJ Decl. ¶ 51. Moreover, Plaintiffs have received "specific . . . threat[s] to initiate proceedings" from prior Proposition 65 litigants, *Wolfson*, 616 F.3d at 1058, who have made clear that they will sue over glyphosate should Proposition 65's warning requirement be allowed to take effect, Heering MSJ Decl. ¶ 52.

Moreover, the Attorney General is wrong to suggest (at 41) that the NSRL will prevent bounty hunter suits. Despite published reports that common food products will rarely, if ever, contain sufficient concentrations of glyphosate to expose consumers to levels exceeding the NSRL, and home and garden users of glyphosate-based products are unlikely to be exposed at levels that exceed the NSRL, bounty hunters are sure to argue otherwise. Determining exposure levels for home and garden use, in particular, requires a multitude of assumptions. Businesses must determine the "average rate of . . . exposure for average users of [a] consumer product," based on "data for use of a general category or categories" of products. 27 Cal. Code Regs. § 25721(d)(4). The declaration submitted by the Attorney General, for instance, simply assumes that exactly one drop of glyphosate product comes in contact with users' skin during each use, and that the product is used only twelve weeks per year. *See* Sandy Decl. ¶ 5. Paid plaintiffs' experts are likely to offer very different exposure assumptions. Indeed, they already have done so. In one tort suit, plaintiffs

produced an expert report claiming that they had been exposed to as much as 12,950 micrograms per day while using a glyphosate product for residential purposes. *See* Heering Suppl. MSJ Ex. M, Report of Toxicology Consultants and Assessment Specialists, LLC, at 18-19 (Jan. 14, 2019), *Pilliod v. Monsanto Co.*, No. RG-17-862702 (Cal. Super. Ct. filed June 2, 2017). And disputes regarding "average . . . exposure," the identity of "average users," and the relevant "category or categories of consumer products," 27 Cal. Code Regs. § 25721(d)(4), are unlikely to be resolved at summary judgment, leaving Plaintiffs to the uncertainties of trial. *See Envtl. Law Found. v. Beech-Nut Nutrition Corp.*, 235 Cal. App. 4th 307, 314 (Cal. App. 2015) (safe-harbor defense litigated at trial, even where OEHHA had set a regulatory safe-harbor level for that substance); *Consumer Def. Grp.*, 137 Cal. App. 4th at 1214 (explaining that "it [is] virtually impossible for a private defendant to defend a warning action on the theory that the amount of carcinogenic exposure is so low as to pose 'no significant risk' short of actual trial" (citation omitted)).

Furthermore, the Attorney General acknowledges (at 47 n.103) that his exposure estimates do "not apply to workers who may apply glyphosate more frequently and in greater quantities as part of their job requirements." *See also* Ex. N, Report of Dr. William Sawyer at 152, 156 (Dec. 21, 2017), *Johnson v. Monsanto Co.*, No. CGC-16-550128 (Cal. Super. Ct. filed Jan. 28, 2016) (full-time landscaping worker claimed that he was exposed to 50 milligrams (5,000 micrograms) of glyphosate per day). The Attorney General instead argues (at 48-49) that at least *one subset* of these users

——occupational workers——will receive safety data sheets (SDS) that the Occupational Safety and Health Administration (OSHA) requires employers to give their employees, and which serve as a substitute for Proposition 65 warnings. *See* 27 Cal. Code Regs. § 25606(a).[12] But not all occupational users of glyphosate products will receive SDSs, because not all occupational users are "employees" to whom an SDS must be provided. 29 C.F.R. § 1910.1200(g)(8).[13] Self-employed farmers or landscapers, for instance, are not "employees." Bounty hunters will almost certainly file strike suits asserting that glyphosate manufacturers and retailers must provide Proposition 65 warnings to such independent farmers or landscapers when selling them glyphosate products.

Defendants point to various procedural protections afforded by Proposition 65, but these provide cold comfort to businesses besieged by private enforcement litigation. For example, the statute requires private plaintiffs to provide notice to the Attorney General 60 days before initiating any litigation, and requires the Attorney General to inform the potential plaintiff in a public letter if he determines the complaint lacks merit. *See*

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[12] Notably, the language of Monsanto's SDS for Roundup would not be compliant with Proposition 65, even under the Attorney General's this-case-only flexible reading of the statute's requirements. It states that although glyphosate is "[l]isted as Category 2A by [IARC]," "our expert opinion is that classification as a carcinogen is not warranted." Zuckerman Cross-MSJ Decl. Ex. K (Dkt. No. 133-10).

[13] Indeed, OEHHA acknowledged as much. Heering Suppl. MSJ Decl. Ex. O, Final Statement of Reasons, Title 27, California Code of Regulations, Proposed Repeal of Article 6 and Adoption of New Article 6 Regulations for Clear and Reasonable Warnings at 29 (Response to Comment 35) ("[I]n an occupational setting where a warning is not required for a given chemical exposure under federal or California OSHA regulations, a person may still be required to provide a warning under Proposition 65.").

Cal. Health & Safety Code § 25249.7(d)(1), (e)(1)(A). The Attorney General asserts (at 38) that it will be his "practice" to assess whether a plaintiff suing over glyphosate residue in food products has submitted evidence suggesting that exposure will be above the NSRL. But while this commitment to a fulsome analysis of a likely affirmative defense (the NSRL) is quite welcome, it does not appear to be required by statute or regulation—and thus is not a commitment that Plaintiffs can rely on under future attorneys general. *See id.* More fundamentally, nothing gives the Attorney General the power to *prevent* a bounty hunter from filing a complaint even if the Attorney General determines that complaint to be meritless. *Cf. Mangual v. Rotger-Sabat*, 317 F.3d 45, 59 (1st Cir. 2003) (finding standing because "[e]ven if the [Puerto Rico] Department of Justice did disavow any intention to" enforce a law, it "exercises no control over whom the local police choose to prosecute"). The Attorney General hypothesizes that bounty hunters would likely be discouraged from filing suit after receiving such a letter, but Plaintiffs have presented evidence to the contrary. *See* Norris Decl. ¶¶ 8-10 (describing Proposition 65 litigation that lasted for six years despite no-merit letter from the Attorney General).

The Attorney General also points to Proposition 65's provision for the assessment of costs and attorney's fees for "frivolous" private enforcement actions. *See* Cal. Health & Safety Code § 25249.7(h)(2); *see also* Cal. Code Civ. Proc. § 128.5. But this sanction is available only if a trial court "determines that there was no actual or threatened exposure to a listed chemical" at any level and makes a further finding that "there was no

credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened." Cal. Health & Safety Code § 25249.7(h)(2). Thus, bounty hunters have no fear of sanction in cases where *some* exposure to glyphosate indisputably occurred, even where it is far below the NSRL. Private bounty hunters know to target businesses (like Plaintiffs) who sell products that result in at least some glyphosate exposure.

Finally, Plaintiffs stand to incur harm from lost sales if they roll the dice and decline to issue glyphosate warnings. *See* PI Order 8 n.8 (recognizing that Plaintiffs have presented evidence of likely lost sales). Given the litigation risks created by Proposition 65, retailers of Plaintiffs' glyphosate products—who could themselves be subject to private enforcement actions should the warning requirement be allowed to take effect—have informed Monsanto that they will not sell glyphosate-based products without Proposition 65 warnings. Heering MSJ Decl. ¶ 45. This represents an independent Article III injury. *See Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (finding that plaintiff had standing to challenge compelled disclaimer that would likely cause third parties not to vote for him); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 45-46 (1st Cir. 2005) (finding standing for First Amendment challenge to a statute that had an "obviously coercive effect" on a plaintiff's business franchisees which would ultimately cause the plaintiff economic harm). Just as the plaintiff in an unfair-competition suit undoubtedly has standing to challenge the business practices of a competitor on the basis that third-party consumers will refrain from buying the plaintiff's products, Plaintiffs here have standing based on the

lost sales that will result from retailers' justifiable fear of the consequences of selling glyphosate products without a Proposition 65 warning. *Cf. TrafficSchool.com, Inc. v. eDriver Inc.*, 653 F.3d 820, 825-26 (9th Cir. 2011) (recognizing standing for Lanham Act claim based on theory that customers were likely to be deceived into buying defendant's products rather than plaintiff's).

B. Plaintiffs' Claims Are Prudentially Ripe.

The Attorney General similarly offers no reason for this Court to reconsider its conclusion that Plaintiffs' claims are prudentially ripe. *See* PI Order 6. Prudential ripeness consists of two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). As Plaintiffs previously argued (*see* Pls.' Prelim. Inj. Reply at 15 (Dkt. No. 66)), this case is on all fours with *Susan B. Anthony List*. In that case, as here, the plaintiffs suffered a hardship for ripeness purposes because they were put to an untenable choice: comply with a statutory mandate that infringed on First Amendment rights or risk statutory penalties. *Susan B. Anthony List*, 573 U.S. 167-68. Indeed, the hardship caused by delaying review is particularly acute here, as absent the Court's preliminary injunction, Proposition 65's warning requirement would take effect immediately and Plaintiffs would have to begin immediately to test or relabel their products. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 743-44 (1997) (finding ripeness "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious

penalties attached to noncompliance"). Moreover, Plaintiffs' case is fit for judicial review, because the issues would "not be clarified by further factual development." *Susan B. Anthony List*, 573 U.S. 167; *see also Abbott Labs.*, 387 U.S. at 149 (case prudentially ripe where "issue[s] tendered" are "purely legal"). At this late stage, no factual issues remain, and the case is fit for judicial review.

III. THE ATTORNEY GENERAL HAS FAILED TO ESTABLISH THAT PROPOSITION 65'S WARNING REQUIREMENT CAN BE APPLIED CONSTITUTIONALLY TO GLYPHOSATE

On the merits of Plaintiffs' First Amendment challenge, Plaintiffs and the Attorney General agree on several key points. First, the Attorney General recognizes (at 57) that *Zauderer*'s narrow exception to intermediate scrutiny applies only to compelled disclosures that are "purely factual and uncontroversial." (quoting *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844-45 (9th Cir. 2019) ("*CTIA II*")). Second, the Attorney General acknowledges (at 77) that the "core information" that must be communicated by any warning is that "the state of California has determined that glyphosate is known to cause cancer under Proposition 65." And finally, the Attorney General does not seriously dispute that the two safe harbor warnings provided by OEHHA's regulations would be inaccurate and misleading, and therefore unconstitutional, as applied to glyphosate. *See* Cal. Code Regs. Tit. 27, § 25603(a), (b).

Those points of agreement dictate this case's outcome. It is neither "purely factual" nor "uncontroversial" to say that glyphosate is "known" by California to cause cancer, which is the core message that a compliant Proposition 65 warning must convey.

As this Court previously held, "the most obvious reading of the Proposition 65 cancer warning is that exposure to glyphosate in fact causes cancer," PI Order 14. And that message "is inherently misleading" when "all other regulatory and governmental bodies . . ., including the EPA," and regulators for the European Union, Germany, Canada, Japan, South Korea, and New Zealand,[14] "have found the opposite." *Id.* at 16.

The Attorney General (at 59) now offers up a third alternative warning that only slightly rephrases the second proposed warning that this Court already rejected:[15]

> WARNING: This product can expose you to glyphosate. The State of California has determined that glyphosate is known to cause cancer under Proposition 65 because the International Agency for Research on Cancer has classified it as a carcinogen, concluding that there is sufficient evidence of carcinogenicity from studies in experimental animals and limited evidence in humans, and that it is probably carcinogenic to humans. The EPA has concluded that glyphosate is not likely to be carcinogenic to humans. For more information about glyphosate and Proposition 65, see www.P65warnings.ca.gov.

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[14] *See supra* 10-14.

[15] The second proposed warning read:

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

This third attempt fails like its predecessors because the warning does not meet the requirements of Proposition 65, and even if it did, it would still emphatically violate the First Amendment.

A. The Third Proposed Warning Would Not Comply With Proposition 65

The Attorney General acknowledges (at 32) that Proposition 65 requires a "clear and reasonable warning." And he does not dispute the California Supreme Court's controlling holding that a clear and reasonable Proposition 65 warning must state that a "'product contains [chemical], a chemical known to the state of California to cause reproductive harm [or cancer],' or words to that effect." *Dowhal*, 32 Cal. 4th at 918; *see* Cal. Health & Safety Code §§ 25249.6, 25249.10(b); *see also* PI Order 14-15 ("[I]n order for a warning to be per se clear and reasonable, the warning must state that the chemical is *known* to cause cancer."). Further, the Attorney General's own regulations specify that a warning is necessarily not clear and reasonable if it "use[s] . . . the adverb 'may' to modify whether the chemical causes cancer" or contains "additional words or phrases that contradict or obfuscate otherwise acceptable warning language." Cal. Code Regs. Tit. 11, § 3202(b).

Just like his second proposed warning, the Attorney General's newest warning, "by discussing the EPA's contrary finding that glyphosate does not cause cancer, appears to 'contradict or obfuscate otherwise acceptable warning language' in violation of [the Attorney General's] regulation." Order Denying Mot. to Amend 9 n.7. After all, if parties cannot use the word "may" to qualify whether glyphosate causes cancer, they obviously cannot call into

even greater doubt whether glyphosate causes cancer by citing the contrary conclusion of EPA. Tellingly, the Attorney General himself "essentially took the position that the warning he now advocates was insufficient," when his counsel rejected at the preliminary injunction hearing a warning "that would state that glyphosate was a carcinogen as 'determined by one of the agencies but not by the others' because such language would 'dilute' the warning." *Id.* at 7-8. Because the third proposed warning does not comply with Proposition 65, it affords no defense to Plaintiff's claim that the warning required by the statute violates the First Amendment.

The failure of this latest proposed alternative warning is unsurprising. This Court was rightly skeptical that any "warning properly characterizing the debate as to glyphosate's carcinogenicity would . . . comply with Proposition 65 and the applicable regulations." *Id.* at 9 n.7. It is impossible to envision a warning that could both accurately account for the great weight of authority concluding that glyphosate is unlikely to cause cancer while complying with the statute's prohibition against "words or phrases that contradict or obfuscate" the core Proposition 65 message, as interpreted by the Attorney General's regulations.

Recognizing this difficulty, the Attorney General now argues (at 78) that this Court should ignore his regulations. That is a remarkable argument: even granting that those regulations "simply provide[] guidelines that the Attorney General will consider in his review of Proposition 65 settlements," *id.*, they undoubtedly reflect the Attorney General's considered interpretation of what

the statute itself requires. *See People ex rel. Lockyer v. Tri-Union Seafoods, LLC*, Nos. CGC-01-402975, CGC-04-432394, 2006 WL 1544384, at *61 (Cal. Super. Ct. May 11, 2006) (concluding that language that "dilutes the actual warning" is non-compliant, citing Attorney General's regulation). In other words, the Attorney General's regulations prohibit the approval in settlements of text that dilutes or qualifies the core Proposition 65 message that a chemical is known to cause cancer because he (correctly) interprets Proposition 65 to require that this core warning be conveyed "clear[ly]." *See* Cal. Health & Safety Code § 25249.6. His attempt now to argue that this interpretation is not germane because it addresses only terms permissible in settlements is nonsensical. And it is wildly inconsistent with the fact that the only examples the Attorney General provides this Court of non-standard warnings that assertedly satisfy Proposition 65 (at 76-77) *come from settlements with the Attorney General*. The Attorney General cannot ground his case on a series of consent decrees while arguing that his regulations governing consent decrees are irrelevant.

Moreover, those consent decrees do not support his argument that speakers may add text that dilutes the core Proposition 65 warning. In each cited instance (at 76-77), the substance at issue——mercury and acrylamide——was not disputed at the time to cause cancer or birth defects, the warnings said as much, and additional text approved in the decrees merely added information that did not qualify or undermine that core statement. In the case of mercury in fish, the modified warning added that "[f]ish and shellfish are an important part of a healthy diet and a source

of essential nutrients," Zuckerman Cross-MSJ Decl. Ex. AAA (Dkt. No. 141-1 at 17), while in the case of acrylamide the modification noted that the carcinogenic substance was not "added to . . . foods," that other foods sold by the restaurant did not contain the substance, that cancer risk "is affected by a wide variety of factors," and that the "FDA has not advised people to stop eating baked or fried potatoes," Zuckerman Cross-MSJ Decl. Ex. BBB at 4-5 (Dkt. No. 141-2). None of those modifications "contradict[s] or obfuscate[s]" the central message: that the substance at issue causes cancer or birth defects. *See* Cal. Code Reg. Tit. 11, § 3202(b). By contrast, the third proposed warning contradicts the proposition that glyphosate causes cancer by noting EPA's contrary determination.

The Attorney General's third successive attempt at a permissible warning also highlights an additional and fundamental flaw in his underlying statutory interpretation. Although Plaintiffs believe that Proposition 65 is perfectly clear—and clearly requires them to utter misleading and controversial speech in contravention of the First Amendment—if, as the Attorney General seems to argue, the requirements of Proposition 65 are infinitely malleable, they would also necessarily be unconstitutionally vague. The Attorney General touts the benefits of a warning requirement that can be tailored to "unique circumstances" (at 77) and permit "nuance[]" (at 76). But imposing serious penalties based on a disclosure law that fails to "specify precisely what disclosures [are] required" would, as the Supreme Court has explained, "raise significant due process concerns." *Zauderer*, 471 U.S. at 653 n.15; *see also Cal. Teachers Ass'n*, 271

F.3d at 1150 ("When First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly, requiring statutes to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles.").

The succession of warnings the Attorney General has proposed in this litigation demonstrates at the very least that (if those warnings were compliant with Proposition 65) Plaintiffs would lack "fair notice" as to what conduct is required of them. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). It cannot be the case that in order to know what speech the statute requires, businesses must make their best guess and face potentially crushing liability in a future suit by a bounty hunter or prosecutor who takes a less "flexible" view than this Attorney General, should a court decide that a modified warning was insufficiently justified by the "unique circumstances" (at 77) to pass statutory muster. *See Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 793 (1988) ("[W]e could not agree to a measure that requires the speaker to prove 'reasonableness' case by case . . . ."). In addition to its fundamental inconsistency with the authoritative holding of the California Supreme Court and the Attorney General's own regulations, the Attorney General's continually evolving interpretation of Proposition 65 should be rejected because it poses serious constitutional difficulties. *See, e.g., Office of Sen. Mark Dayton v. Hanson*, 550 U.S. 511, 514 (2007).[16]

[16] To be clear, Plaintiffs are not asserting a freestanding vagueness or due process claim, so the Attorney General's argument (at 80) that these claims were not pleaded by Plaintiffs misses the mark entirely—as does his digression into the distinction between as-applied and facial claims (at 80-82). Instead, Plaintiffs merely argue, as a matter of statutory construction,

B. The Third Proposed Warning Violates The First Amendment

This Court previously recognized that any warning for glyphosate that complies with Proposition 65 would violate the First Amendment. Nothing has changed. The Attorney General's third proposed warning——like his prior two——violates the First Amendment. The warning requirement he envisions is ineligible for review under *Zauderer*, and the Attorney General has failed to carry his burden under *Central Hudson*.

1. The Third Proposed Warning Is Not Eligible For Review Under *Zauderer*

In order for a compelled speech mandate to be eligible for review under *Zauderer*, the speech compelled must be "purely factual and uncontroversial." *See NIFLA*, 138 S. Ct. at 2372; *Am. Beverage Ass'n v. City of S.F.*, 916 F.3d 749, 756 (9th Cir. 2019) (reaffirming that *Zauderer* applies to speech that is purely factual, noncontroversial, and not unjustified or unduly burdensome). The Attorney General's third proposed warning fails that test because it is as misleading as his first two attempts. Indeed, this will be the case with any conceivable warning that the Attorney General invents that would even arguably comply with Proposition 65, because regardless of any "flexibility" or "nuance[]" that Proposition 65 might allow (at 74-76), the fundamental requirement of its speech mandate is that a party communicate that its products contain a chemical "known to the state of California to cause [cancer], or words to that effect." *Dowhal*, 32 Cal. 4th at 918. Thus, as required by Proposition 65,

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that the Court should reject an interpretation that would raise serious doubts about the constitutionality of Proposition 65.

the third proposed warning states (at 59) that "California has determined that glyphosate is known to cause cancer." And because the great weight of authority is that glyphosate does *not* cause cancer, *supra* Section I, this core message is neither "purely factual" nor "uncontroversial."

There is simply no way to simultaneously state that California "knows" that glyphosate "causes" cancer and convey a purely factual warning. Knowledge means a perception of truth. *See Know*, Merriam-Webster's Collegiate Dictionary (10th ed. 1993) (defining "know" as to "perceive directly" to "recognize the nature of" or "to be aware of the truth or factuality of"); *Know*, Webster's II New College Dictionary (3d ed. 2005) (defining "know" as "[t]o perceive directly with the senses or mind" or to "believe to be true with absolute certainty," and defining "known" as "[p]roved"); *Known*, Webster's Third New International Dictionary Unabridged (1993) (defining "known" to include "a known truth that no one denies"). And "cause" is defined as a "reason for an action or condition." *Cause*, Merriam-Webster's Collegiate Dictionary (10th ed. 1997); *see also Cause*, American Heritage Dictionary of the English Language (3d ed. 2000) (defining verb "cause" to mean "[t]o be the cause of or reason for"). To state that glyphosate is "known" by California to "cause" cancer thus conveys a certainty that glyphosate in fact causes cancer, and in light of the overwhelming consensus to the contrary, that message is inaccurate and inherently misleading. This precludes review under *Zauderer* because a message that is inaccurate and/or misleading is, by definition, not "purely factual and uncontroversial." *See Video*

Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 966-67 (9th Cir. 2009).

That is so even though "known to the state of California to cause cancer" is a statutory term of art. As this Court has recognized, "[o]rdinary consumers do not interpret warnings in accordance with a complex web of statutes, regulations, and court decisions." PI Order 14; *see also Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 529-30 (D.C. Cir. 2015) (rejecting government's attempt to apply *Zauderer* to a warning that a product was not "conflict free" because that term had a statutory definition, as "there would be no end to the government's ability to skew public debate by forcing companies to use the government's preferred language"); *id.* at 540 (Srinivasan, J., dissenting) (acknowledging that government does not have "carte blanche to compel commercial speakers to voice any prescribed set of words as long as the words are defined by statute or regulation"). And a reasonable consumer will understand this language in a commonsense way to mean that "exposure to glyphosate in fact causes cancer." Order Denying Mot. to Amend 6.

The Attorney General's third proposed warning also is "controversial" in the sense that it is subject to "disagree[ment]" regarding "the truth of the facts required to be disclosed." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014). His brief attacks a straw man by arguing (at 63) that the First Amendment "does not prohibit compelled disclosures relating to every topic over which there exists some scientific disagreement." This is not a circumstance in which the compelled statement is the consensus view, with only fringe "scientific

disagreement" on the other side of the debate. It is the opposite circumstance: The vast weight of authority *disagrees* with the proposition that glyphosate causes cancer. *See supra* at 9-14. Proposition 65's compelled statement to the contrary is *highly* controversial.[17]

These problems, which render the core Proposition 65 statement for glyphosate ineligible for review under *Zauderer*, are not remedied by the additional text of the third proposed warning. For two reasons. First, the only warning that Proposition 65 *compels* is that glyphosate is "known to the State to cause cancer." The supplemental text proffered by the Attorney General is not required by the statute; it is, at best, clarifying language that Proposition 65 permits a speaker to append. As such, it does not affect the appropriate level of scrutiny. The scrutiny afforded a compelled warning depends on the message conveyed by the compelled speech, not on whatever additional language the government allows the speaker to add to prevent listeners from being deceived by that compelled speech. Ample precedent makes clear that a misleading compelled warning is not eligible for *Zauderer* review, *see CTIA II*, 928 F.3d at 845, and is in fact flatly forbidden, *see Video Software Dealers*, 556 F.3d at 967.

[17] The Attorney General's reliance (at 63-64) on *CTIA II* is entirely misplaced. The Ninth Circuit expressly found that the compelled disclosure at issue in that case was uncontroversial only because it "was factual and not misleading," and to support that conclusion the court relied heavily on the fact that the disclosure was "a short-hand description of the warning the FCC already requires cell phone manufacturers to include in their user manuals." *CTIA II*, 928 F.3d at 848. This case presents the polar opposite situation, given EPA's express conclusion that a Proposition 65 cancer warning for glyphosate would be false and misleading. Heering MSJ Decl., Exh. E.

And the Attorney General offers no support for the remarkable proposition that the government may nonetheless compel a false and misleading statement so long as it permits the speaker to simultaneously rebut that statement.[18] To the contrary, when courts have taken account of a speaker's ability to add additional information to a compelled statement, they have done so only *after* first determining that the compelled statement is purely factual and uncontroversial on its own terms. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (noting that speaker was legally permitted to "convey[] any additional information" only after the Court determined that compelled "disclosures entail only an accurate statement").

Second, even if the supplemental text of the third proposed warning were properly considered, it does not render the statement as a whole purely factual and uncontroversial. Consider first its statement (at 59) that California "has determined that glyphosate is known to cause cancer under Proposition 65 *because the International Agency for Research on Cancer has classified it as a carcinogen*" (emphasis added). The clear import of that sentence remains that California "knows" that glyphosate "causes" cancer *because it causes cancer*. Specifying that California knows this

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[18] If a speaker were compelled to state that "the sky is green," that would be neither purely factual nor uncontroversial. And that statement would remain false and misleading even if the speaker were legally permitted to append additional text noting that some individuals believe the sky is actually blue. The First Amendment harm arises from being forced to utter a false and misleading statement, and that harm is not cured merely because a speaker is permitted in the next breath to disavow the statement. *See Pac. Gas & Elec. Co.*, 475 U.S. at 11-12 ("[T]he State is not free . . . to force [a party] to respond to views that others may hold.").

because an entity called "the International Agency for Research on Cancer" "classified glyphosate as a carcinogen" does nothing to undermine that central truth; if anything, it reinforces the gravity of the misleading message by referencing an entity whose name suggests authoritative scientific knowledge. True, the statement goes on to explain the basis for IARC's classification, and to note that its actual finding was that glyphosate is "probably carcinogenic to humans." But even then, it misleads because it fails to acknowledge that IARC made no finding that glyphosate entails any risk of cancer to humans at real-world exposure levels.

These problems are not cured by the remaining supplementary text. After stating that glyphosate is "known" by California "to cause cancer," and discussing at length IARC's classification of glyphosate as a carcinogen, the third proposed warning briefly notes that EPA "has concluded that glyphosate is not likely to be carcinogenic to humans." But it does not mention that EPA considered and rejected IARC's conclusion after reviewing a far broader scope of scientific studies, and conspicuously fails to note the host of international regulators that have unanimously found that glyphosate poses no cancer risk.[19] By mentioning only

[19] The Attorney General seemingly justifies excluding the consensus among international regulators by observing (at 60) that the disclosure includes the views only of "two authoritative agencies" under Proposition 65. But California cannot by statute limit what evidence is relevant under the First Amendment. Regardless of California voters' purported desire to be informed when any of a small subset of agencies classifies a chemical as a carcinogen, the resulting statement that the chemical is "known to cause cancer" will be misleading and controversial where, as here, the singular agency's classification runs counter to a worldwide consensus that the chemical does not cause cancer.

IARC and EPA's opposing findings, the warning adds yet another layer of deception because it "conveys the message that there is equal weight of authority for and against the proposition that glyphosate causes cancer . . . when the heavy weight of evidence in the record is that glyphosate is not known to cause cancer." Order Denying Mot. to Amend 9; *Amidon v. Student Ass'n of S.U.N.Y.*, 508 F.3d 94, 101 (2d Cir. 2007) (holding that the amount of space "allocated to a [controversial view], whether a lot or a little, can skew [the] debate on issues" unconstitutionally); *AMI*, 760 F.3d at 27 (compelled disclosure is controversial if it is "one-sided [and] incomplete"); *Nat'l Ass'n of Mfrs.*, 800 F.3d at 537 (Srinivisan, J., dissenting) (acknowledging that a one-sided or incomplete warning would "fall outside *Zauderer*'s zone").[20]

Finally, the Attorney General's contention (at 65) that his third proposed warning is nonetheless factual and uncontroversial because it "conveys information similar to that provided by" several federal agencies is fundamentally misleading. *None* of those agencies has concluded that glyphosate causes or is known to cause cancer. *See* Zuckerman Cross-MSJ Decl. Exs. GGG-JJJ (Dkt. Nos. 141-7 to 141-10). And several of the agency factsheets cited by the Attorney General indicate precisely the opposite. *See* Zuckerman Cross-MSJ Decl. Ex. HHH at 2 (Dkt. No. 141-8) (FDA factsheet noting that "[o]ne international organization (the International Agency for Research on Cancer) concluded that

[20] The Attorney General asserts (at 60) that, as between the views of IARC and EPA, the third proposed warning does not "purport[] to tell the consumer which position is correct." That is absurd. By stating that glyphosate is known to California to cause cancer, the proposed warning definitively takes a side.

glyphosate may be a carcinogen," but explaining that EPA has repeatedly reaffirmed that glyphosate does not cause cancer, and noting that several other organizations, "including the European Food Safety Authority" and another component of the World Health Organization "have determined that it is unlikely to be a carcinogen").

More fundamentally, the fact that some agencies, *in their own factsheets*, include IARC's conclusion regarding glyphosate (along with the contrary findings from regulators around the world) has no bearing on the First Amendment analysis. When speaking for itself, an agency's message need not be "purely factual" nor "uncontroversial." *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."). Governments are generally free to disseminate their own opinions, however controversial—but that does not mean that they can compel private parties to do so.

2. The Attorney General Still Fails To Carry the State's Burden Under *Central* Hudson

Central Hudson requires that the government show a "substantial" government interest that its regulation "directly" advances through burdens on speech no more "extensive than . . . necessary to serve that interest." *Cent. Hudson Gas*, 447 U.S. at 566. To show that a regulation will "directly advance the state interest," the government must demonstrate that it "will in fact alleviate [the asserted harms] to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (same). The government's "burden under this test is 'heavy,'" and it "cannot satisfy it 'by mere

speculation or conjecture.'" *Italian Colors*, 878 F.3d at 1176 (citations omitted).

The glyphosate warning requirement flunks each step of the *Central Hudson* test. The Attorney General has neither established that the warning directly and materially advances a substantial governmental interest, nor shown that the warning requirement is sufficiently tailored to such an interest.

a. The Attorney General Fails To Show That the Warning Advances a Substantial Governmental Interest

The Attorney General has no answer to the fundamental truth that California has no legitimate interest, much less a substantial one, in requiring Plaintiffs to convey an inaccurate and misleading message. As this Court previously concluded, any message about glyphosate that complied with Proposition 65's requirements would necessarily be inaccurate and misleading because a "reasonable consumer would not understand that a substance is 'known to cause cancer' where only one health organization had found that the substance in question causes cancer and virtually all other government agencies and health organizations . . . had found there was no evidence that it caused cancer." PI Order 14. That finding is sufficient to resolve this case under any level of First Amendment scrutiny. *See Video Software Dealers*, 556 F.3d at 967 (state "has no legitimate reason to force retailers to affix false information on their products"); *see also Nat'l Ass'n of Mfrs.*, 800 F.3d at 539 (Srinivisan, J., dissenting) (recognizing that not only would a misleading disclosure "not qualify for *Zauderer's* relaxed standard," but would "run into a more basic First Amendment problem still").

Even apart from its misleading nature, the glyphosate message advances no substantial governmental interest. The Attorney General argues (at 66 and 73) that the governmental interests underlying the Proposition 65 warning requirement are satisfying the desire of voters "to know if they would be exposed to chemicals that IARC . . . had determined are likely carcinogenic," and "providing Californians with information they wanted to receive about the products they purchase." To the extent those interests animate the statute, they are not substantial: mere consumer curiosity does not justify encroaching on the First Amendment rights of private parties. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (holding that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement . . . in a commercial context").

To illustrate, if California voters passed an initiative compelling vaccine manufacturers to state that a "vaccine is known by the State of California to cause autism" whenever an organization of anti-vaccination activists listed that vaccine as harmful—even if the organization's listing was contradicted by the vast weight of scientific evidence—that requirement would not advance a substantial interest in conveying accurate health information. It might serve an interest in conveying to California voters scientifically inaccurate information that they nonetheless wish to receive. But such a mere curiosity interest is not substantial—and certainly cannot justify compelling private parties to utter false or misleading speech.

California does of course have a substantial interest in informing consumers about *actual* cancer risks. *See NIFLA*, 138 S. Ct. at 2376 (recognizing interest in speech that actually advances health and safety).[21] And that is the interest voters in fact intended to advance through Proposition 65. In enacting the law, California voters relied on the ballot summary, which explained that Proposition 65 would require "businesses to warn people before knowingly and intentionally exposing them to chemicals *that cause cancer*." Zuckerman Cross-MSJ Decl. Ex. WW (Dkt. No. 138-23) (Ballot Summary at 52 (emphasis added)); *see also People v. Canty*, 32 Cal. 4th 1266, 1281 (2004) (recognizing that "analyses and arguments contained in the official ballot pamphlet" are particularly probative of voters' intent). Notably, the ballot summary disclaimed any suggestion that the law served an interest merely in warning of substances that *might* cause cancer, instead assuring voters that there "are certain chemicals that are scientifically known[,] not merely suspected, but known[] to cause cancer," and that Proposition 65 would "[w]arn *us* before we're exposed to any of these dangerous chemicals." Zuckerman Cross-MSJ Decl. Ex. WW at 54 (Dkt. No. 138-23). Similarly, the statutory text of Proposition 65 declared the right to "be informed about exposures to chemicals *that cause* cancer, birth defects, or other reproductive harm"——not the right to be informed each time a foreign agency believes that such harms may be present at some unrealistically high level, even if that belief contradicts the

[21] This case is thus fundamentally unlike *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), where no one disputed that the substance at issue——mercury——would in fact pose a health and safety threat.

weight of scientific evidence. Safe Drinking Water and Toxic Enforcement Act of 1986 § 1, Cal. Health & Safety Code §§ 25249.5-25249.13 (emphasis added).

The question is thus whether "California has shown that requiring a Proposition 65 warning" sufficiently serves "the law's stated interest in informing Californians about exposures to chemicals that cause cancer." Order Denying Mot. to Amend 8. And the Attorney General cannot and does not contend that a glyphosate warning advances *that* interest. The Attorney General may be correct (at 68) that California's interest is not limited to situations where "there is 100% certainty and universal agreement that [a substance] causes cancer." But, again, that is irrelevant to this case. There is a worldwide consensus that glyphosate does *not* cause cancer, despite the dissenting views of IARC. *See supra* 9-14. Regardless of what the answer might be if there "[were] stronger evidence in support of the chemical's carcinogenicity," *cf.* Order Denying Mot. to Amend at 9 n.8, the Attorney General has failed to show that, under the facts as they actually exist, enforcing a Proposition 65 warning for glyphosate would directly and materially advance California's interest in informing consumers about substances that cause cancer.

b. The Attorney General Fails To Show that the Warning Requirement Is Narrowly Tailored

The Attorney General maintains (at 74) that the warning requirement is narrowly tailored because it "allows for flexibility such that a variety of warnings are available to businesses." This argument fails for the reasons explained above. Even taking into account the limited flexibility allowed by the

statute and regulations, a Proposition 65-compliant glyphosate warning would necessarily be inaccurate and misleading.

To the extent that California wishes to inform residents about the outlier views of individual agencies, the Attorney General has failed to show that the State could not accomplish that goal by informing residents itself. *See NIFLA*, 138 S. Ct. at 2376 (holding that disclosure law was not narrowly tailored where California "identified no evidence" that it could not accomplish its stated interest "itself with a public-information campaign"). Indeed, "California could inform" its citizens about IARC's conclusions "without burdening a speaker with unwanted speech," and the Attorney General has provided no meaningful evidence "that an advertising campaign is not a sufficient alternative" to compelled speech. *Id.* (quoting *Riley*, 487 U.S. at 800). The Attorney General notes (at 74) that OEHHA already "provides information about glyphosate" on its own website and on the Proposition 65 website. But in *NIFLA*, too, California "argue[d] that it ha[d] already tried an advertising campaign"—yet the Supreme Court held that even a "tepid response" to that campaign "d[id] not prove that an advertising campaign is not a sufficient alternative." *Id.* Here, the Attorney General points to no evidence *at all* that its own speech is so inadequate that it is entitled to "co-opt [Plaintiffs] to deliver its message for it." *Id.*

CONCLUSION

For the foregoing reasons, this Court should enter summary judgment for Plaintiffs on Claim I (First Amendment) of their First Amended Complaint and permanently enjoin the Attorney General and those in privity with him from enforcing the Proposition 65 warning requirement as to glyphosate.[22] And the Court should deny the Attorney General's cross-motion for summary judgment.

[22] The Attorney General does not dispute that if Plaintiffs are correct on the merits, they have satisfied the remaining elements necessary for permanent equitable relief. *See* Pls.' MSJ 54-61.

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Respectfully submitted,

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