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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

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

19  
20 Plaintiffs,

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

25 Defendants.  
26  
27  
28

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

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

Hearing: Feb. 20, 2018  
Time: 1:30 p.m.  
Ctrm: 5

The Honorable William B. Shubb

Case Filed: Nov. 15, 2017

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28

1 INTRODUCTION

2 This case presents a simple question: Can a State force  
3 private parties to defame their own products by compelling them  
4 to provide a cancer warning with which they vehemently disagree  
5 and that is contrary to the nearly unanimous worldwide scientific  
6 consensus? Under bedrock First Amendment principles, the answer  
7 is no.

8 The Supreme Court held in *Zauderer v. Office of Disciplinary*  
9 *Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), that  
10 the government may sometimes require commercial speakers to  
11 disclose certain information about their products—but because  
12 the First Amendment bars the government from conscripting its  
13 citizens to proclaim the government’s subjective views, any such  
14 disclosure must be, at a minimum, “purely factual and  
15 uncontroversial.” *Id.* at 651. Most common disclosures fit that  
16 mold, informing consumers of indisputable facts, such as  
17 ingredient lists, calorie counts, country of origin, and  
18 universally acknowledged health risks. The compelled speech at  
19 issue in this case is nothing like those. Under threat of steep  
20 civil penalties and bounty hunter lawsuits, California is  
21 requiring that every product sold in-state that exposes consumers  
22 to the herbicide glyphosate be accompanied by a warning that  
23 glyphosate is “known to the State of California to cause cancer”—  
24 even though California’s own scientists, the Environmental  
25 Protection Agency (EPA), and regulators around the world have  
26 declared otherwise. This requirement fails the *Zauderer* test and  
27 is plainly unconstitutional.

28



1 Plaintiffs are a nationwide coalition of agricultural  
2 producers and business entities, and together they represent a  
3 substantial segment of U.S. agriculture. Glyphosate is a  
4 critical tool in modern American agriculture, approved by the  
5 federal government for use in more than 250 agricultural crop  
6 applications in all 50 States. Plaintiffs use, sell,  
7 manufacture, grow, and rely upon products containing glyphosate  
8 or to which glyphosate is applied. Because of its longstanding  
9 and widespread use, glyphosate has been subject to rigorous  
10 scientific scrutiny by the federal government and regulators  
11 worldwide for decades. It is widely regarded as one of the  
12 safest herbicides ever developed, and the overwhelming scientific  
13 consensus is that it does not pose any risk of cancer. EPA has  
14 so concluded, numerous foreign regulators have so concluded, and,  
15 indeed, even California—through its regulatory arm, the Office  
16 of Environmental Health Hazard Assessment (OEHHA)—has twice  
17 reached the same conclusion.

18 One foreign entity in Lyon, France, the highly controversial  
19 International Agency for Research on Cancer (IARC) disagrees;  
20 IARC has concluded, based on admittedly “limited evidence in  
21 humans,” that glyphosate is “*probably* carcinogenic.” But, under  
22 California’s Safe Drinking Water and Toxic Enforcement Act of  
23 1986 (more commonly known as Proposition 65), the overwhelming  
24 scientific consensus that IARC is mistaken is irrelevant. By  
25 law, IARC’s extreme outlier determination triggered an automatic  
26 requirement that OEHHA list glyphosate as a chemical “known to  
27 the state to cause cancer.” CAL. HEALTH & SAFETY CODE § 25249.8(a)  
28 & CAL. LABOR CODE § 6382(b)(1) (IARC triggering mechanism). This

1 listing, in turn, triggers a requirement that any "person"  
2 exposing "any individual" to glyphosate must provide a warning  
3 that the product contains a chemical "known to the State of  
4 California to cause cancer." CAL. HEALTH & SAFETY CODE § 25249.6  
5 (requiring warning); CAL. CODE REGS. tit. 27, §§ 25603.2(a),  
6 25603.3 (providing for content of warning). Plaintiffs  
7 respectfully ask this Court to enjoin that warning requirement  
8 pending its final judgment in this case.

9 Plaintiffs are not asking this Court to decide whether  
10 IARC's outlier view or, instead, Plaintiffs' and the scientific  
11 consensus, is correct on the science. The Court does not need to  
12 resolve that question to decide this case. It is firmly  
13 established under the First Amendment that California cannot  
14 compel Plaintiffs to broadcast a warning that is—at best—  
15 factually controversial, and is also literally false on its face  
16 (because *California* does not "know" that glyphosate causes  
17 cancer; indeed, its own expert regulator has concluded  
18 otherwise). That legal conclusion is compelled by years of  
19 Supreme Court and Ninth Circuit precedent, including the Ninth  
20 Circuit's recent decision in *Am. Beverage Ass'n v. City and*  
21 *County of San Francisco*, 871 F.3d 884 (9th Cir. 2017) ("ABA").  
22 There, San Francisco sought to compel a warning about the  
23 purported contribution of beverages with added sugar to obesity,  
24 diabetes, and tooth decay. *Id.* at 888. Because this statement  
25 "convey[ed] [a] message" that was "contrary to statements by the  
26 FDA," the Court of Appeals found the compelled warning deceptive,  
27 misleading, and (at a minimum) controversial, and held that the  
28 warning requirement could not be sustained under *Zauderer*. *Id.*

1 at 895. The same analysis applies even more clearly here, where  
2 not just EPA but an overwhelming majority of government  
3 regulators and other experts have found that glyphosate is not  
4 carcinogenic and have flatly rejected IARC's contrary conclusion.

5 Plaintiffs believe the legal merit of their First Amendment  
6 claim is indisputable and obvious on the face of the attached  
7 documents without any need for discovery, and thus the claim is  
8 appropriate for expedited judicial resolution. Plaintiffs  
9 urgently need this Court's protection, moreover, to prevent  
10 California from infringing their First Amendment freedoms, the  
11 loss of which, "for even minimal periods of time, unquestionably  
12 constitutes irreparable injury." *Valle Del Sol Inc. v. Whiting*,  
13 709 F.3d 808, 828 (9th Cir. 2013) (quoting *Elrod v. Burns*, 427  
14 U.S. 347, 373 (1976)). If the warning requirement is allowed to  
15 go into effect, Plaintiffs face reputational, competitive, and  
16 economic harms for which they cannot be compensated. Plaintiffs  
17 need relief sufficiently in advance of California's upcoming July  
18 7, 2018, deadline for implementing the Proposition 65 warning to  
19 mitigate or avoid these irreparable harms, which have already  
20 begun and span across U.S. agriculture. Because Plaintiffs are  
21 likely to succeed on the merits of their First Amendment claim  
22 and the equitable factors tip sharply in their favor, the Court  
23 should preliminarily enjoin the listing of glyphosate under  
24 Proposition 65 and the application of its attendant warning  
25 requirement pending a final judgment in this case, and set a  
26 schedule for expedited final resolution of the case.

27

28

1 **BACKGROUND**

2 **A. Glyphosate And Its Federal Regulation**

3 Glyphosate is a broad-spectrum herbicide that is used to  
4 control weeds in agricultural, residential, aquatic, and other  
5 settings. Since its introduction in 1974, glyphosate has become  
6 the world's most widely used herbicide because it is effective,  
7 economical, and "environmentally benign." See Declaration of  
8 Andrew D. Prins (Prins Decl.), Exh. A (USDA, EIB No. 124,  
9 Pesticide Use in U.S. Agriculture: 21 Selected Crops, 1960-2008  
10 at 21 (May 2014)). It is the active ingredient in many  
11 commercial products that are marketed by multiple businesses  
12 under a number of trade names, including Roundup®, and is  
13 registered for use in over 160 countries. Declaration Of David  
14 C. Heering, Monsanto Company ¶¶ 8, 9, 31-33, 52.

15 Glyphosate is approved for use in more than 250 agricultural  
16 crop applications in the United States. *Id.* at ¶¶ 13, 24. In  
17 California, for instance, it is used for, among other things,  
18 cultivation of almond, citrus, and cotton. Heering Decl.,  
19 Monsanto ¶ 24. Elsewhere in the United States, glyphosate is  
20 used on canola and on a high percentage of critical crops such as  
21 corn, cotton, and soybean. *Id.* at ¶¶ 13, 23, 24; *see also, e.g.,*  
22 Prins Decl., Exh. B (Michael Livingston et al., *Economic Returns*  
23 *to Herbicide Resistance Management in the Short and Long Run: The*  
24 *Role of Neighbor Effects*, Weed Sci., 2016 Special Issue, at 595  
25 ("The percentage of acres treated with glyphosate rose from 1 to  
26 77% for corn from 1996 to 2014, from 13 to 99% for cotton from  
27 1996 to 2010, and from 25 to 98% for soybean from 1996 to

28

1 2012.”)). It is also widely used in Canada, including for  
2 cultivation of oats and wheat. Heering Decl., Monsanto ¶ 13.

3 Glyphosate-based herbicides are also widely used by  
4 government agencies to control vegetation in rights of way, in  
5 aquatic environments, in garden settings, and to reduce the risk  
6 associated with rapid-spreading wildfire. *Id.* at ¶ 16. These  
7 widespread uses are attributable to glyphosate’s well-recognized  
8 benefits over other cultivation and weed-suppression techniques.  
9 *See, e.g., id.* at ¶¶ 15, 17; Prins Decl., Exh. C (Stephen O. Duke  
10 & Stephen B. Powles, *Glyphosate: A Once-in-a-Century Herbicide*,  
11 64 *Pest Mgmt. Sci.* 319, 322 (2008)); *see also, e.g.,* Declaration  
12 Of Blake Hurst, Missouri Farm Bureau ¶ 5 (“Glyphosate is an  
13 integral tool because it enables farmers to engage in no-till  
14 farming, a conservation tilling tactic that reduces soil erosion,  
15 is widely accepted to be better for the environment, and reduces  
16 the labor involved in farming practices.”); Declaration Of Chris  
17 Novak, National Corn Growers Association ¶ 4; Declaration Of Dan  
18 Mehan, Missouri Chamber of Commerce and Industry ¶ 6; Declaration  
19 Of Dan Wogsland, North Dakota Grain Growers Association ¶¶ 5-9;  
20 Declaration Of Gordon Stoner, National Association of Wheat  
21 Growers ¶¶ 6-9; Declaration Of Greg Kessel, North Dakota Grain  
22 Growers Association ¶ 4; Declaration Of Kathleen Zander, South  
23 Dakota Agri-Business Association ¶ 8; Declaration Of Mark  
24 Jackson, Iowa Soybean Association ¶¶ 4-10; Declaration Of Mark  
25 Martinson, United States Durum Growers Association ¶¶ 5-8.

26 As an herbicide, glyphosate is subject to comprehensive  
27 federal regulation. Under the Federal Insecticide, Fungicide,  
28 and Rodenticide Act (FIFRA), all commercial herbicides must be

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

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

20 Because of its immense popularity and widespread use,  
21 glyphosate is one of, if not the most, studied herbicides in the  
22 world. It has been recognized as a safe herbicide for over 40  
23 years by EPA, regulators worldwide, and even California's own  
24 expert regulator.

25 The overwhelming scientific consensus is that glyphosate  
26 does not cause cancer. EPA has repeatedly reached and re-  
27 affirmed this conclusion. For example, when it approved a  
28

1 renewal of glyphosate's registration under FIFRA, EPA reported as  
2 follows:

3           Several chronic toxicity/carcinogenicity  
4 studies . . . resulted in no effects based on  
5 the parameters examined, or resulted in  
6 findings that glyphosate was not carcinogenic  
7 in the study. In June 1991, EPA classified  
8 glyphosate as a Group 3 oncogen—one that  
shows evidence of non-carcinogenicity for  
humans—based on the lack of convincing  
evidence of carcinogenicity in adequate  
studies.

9 See Prins Decl., Exh. E (U.S. EPA, EPA-738-F-93-011, Registration  
10 Eligibility Decision (R.E.D.) Facts: Glyphosate Sept. 1993).  
11 More recently, "[i]n 2014, EPA reviewed more than 55  
12 epidemiological studies conducted on the possible cancer and non-  
13 cancer effects of glyphosate. [Its] review concluded that 'this  
14 body of research does not provide evidence to show that  
15 glyphosate causes cancer.'" See Prins Decl., Exh. F (Eric  
16 Sfiligoj, *EPA Plans Response to IARC Glyphosate Finding...But Not  
17 Just Yet*, CropLife, Apr. 6, 2015 (quoting Carissa Cyran, Chemical  
18 Review Manager for the EPA Office of Pesticide Programs),  
19 [http://www.croplife.com/editorial/epa-plans-response-to-iarc-  
20 glyphosate-finding-but-not-just-yet/](http://www.croplife.com/editorial/epa-plans-response-to-iarc-glyphosate-finding-but-not-just-yet/)).

21           California's own OEHHA has been materially in agreement with  
22 EPA. In 1997 and 2007, OEHHA conducted risk assessments for  
23 glyphosate in drinking water in order to set public health goals,  
24 including an evaluation of glyphosate's potential  
25 carcinogenicity. See Prins Decl., Exh. G (OEHHA, Public Health  
26 Goal for Glyphosate in Drinking Water (Dec. 1997)); Prins Decl.,  
27 Exh. H (OEHHA, Public Health Goal for Glyphosate (June 2007)).  
28 It reported as follows:

1 Three carcinogenicity studies [were]  
2 conducted, two in rats and one in mice, and  
3 all [we]re considered to be negative. In  
4 *in vitro* and *in vivo* genotoxicity tests [we]re  
5 generally negative. There [we]re a few  
6 reports of increased sister chromatid  
7 exchange in human and bovine lymphocytes at  
8 high concentrations *in vitro*, which could be  
9 secondary to oxidative stress, and effects on  
10 mouse bone marrow after very large  
11 intraperitoneal doses. Based on the weight  
12 of the evidence, glyphosate [wa]s judged  
13 *unlikely to pose a cancer hazard to humans.*"

14 See Prins Decl., Exh. H (OEHHA, Public Health Goal for Glyphosate  
15 (June 2007), at 1 (emphasis added)); see also Prins Decl., Exh. G  
16 (OEHHA, Public Health Goal for Glyphosate in Drinking Water (Dec.  
17 1997)) ("Glyphosate is a Group E carcinogen (evidence of no  
18 carcinogenic effects).").

19 The global community has long been in accord. The European  
20 Commission's Health and Consumer Protection Directorate-General  
21 has concluded glyphosate presents "[n]o evidence of  
22 carcinogenicity." See Prins Decl., Exh. I (Health & Consumer  
23 Prot. Directorate-Gen., European Commission, Review Report for  
24 the Active Substance Glyphosate, 6511/VI/99-final, at 12 (Jan.  
25 21, 2002)). Multiple divisions of the World Health Organization  
26 ("WHO") have reached the same conclusion. See Prins Decl., Exh.  
27 J (WHO, WHO/SDE/WSH/03.04/97, Glyphosate and AMPA in Drinking  
28 water: Background Document for Development of WHO Guidelines for  
29 Drinking-water Quality at 5 (rev. June 2005) ("[n]o effect on  
30 survival" in glyphosate "carcinogenicity study")); Prins Decl.,  
31 Exh. K (Int'l Programme on Chemical Safety, Environmental Health  
32 Criteria 159: Glyphosate at 15 (1994) ("The available studies do  
33 not indicate that technical glyphosate is mutagenic, carcinogenic  
34 or teratogenic.")). Germany's lead regulator—BfR—has found the



1 same. See Prins Decl., Exh. L (Eur. Comm'n, Renewal Assessment  
2 Report: Glyphosate, Volume 1, at 35 (rev. Mar. 31, 2015)  
3 (glyphosate is "unlikely to pose a carcinogenic risk in  
4 humans")); *id.* at 36 ("In epidemiological studies in humans,  
5 there was *no evidence* of carcinogenicity" (emphasis added)).

6 IARC is the sole exception to this global consensus. IARC  
7 is an international organization based in Lyon, France. See  
8 *Johns Manville v. W.C.A.B.*, No. B179922, 2005 WL 1655858, at \*4  
9 n.8 (Cal. Ct. App. July 15, 2005). It is not a regulator, but is  
10 instead an agency within the WHO that prepares so-called  
11 informational "Monographs" regarding the possibility that a  
12 variety of "agents" (e.g., chemicals, complex mixtures,  
13 occupational exposures, and personal habits) may be carcinogenic.  
14 The organization is perhaps best known for its fringe conclusions  
15 that substances like coffee, aloe vera, pickled vegetables, and  
16 food exposed to "high temperatures" (i.e., French fries) are  
17 probably or possibly carcinogenic. See, e.g., Prins Decl., Exh.  
18 M (Akshat Rathi & Gideon Lichfield, *Why it Sometimes Seems Like*  
19 *Everything Causes Cancer*, Quartz, June 23, 2016 ("[O]f all the  
20 things the IARC has looked at, there is just one it is pretty  
21 sure *doesn't* cause cancer." (emphases added)),  
22 [https://qz.com/708925/why-it-sometimes-seems-like-everything-](https://qz.com/708925/why-it-sometimes-seems-like-everything-causes-cancer/)  
23 [causes-cancer/](https://qz.com/708925/why-it-sometimes-seems-like-everything-causes-cancer/)).

24 In March 2015, IARC released a Monograph concluding, despite  
25 the global consensus otherwise, that "[g]lyphosate is *probably*  
26 *carcinogenic to humans.*" Prins Decl., Exh. N (Int'l Agency for  
27 Research on Cancer (IARC), WHO, *Some Organophosphate Insecticides*  
28 *and Herbicides*, IARC Monographs Volume 112, at 398 (2017)

1 [hereinafter IARC Monograph 112] (emphasis in original)). IARC  
2 came to that conclusion based on what it conceded was "limited  
3 evidence in humans for the carcinogenicity of glyphosate," and it  
4 seems to have based its conclusion primarily on its (again  
5 outlier) interpretation of a limited subset of studies on  
6 "experimental animals" and "mechanistic" data. *Id.* (emphasis in  
7 original).

8 Many of IARC's pronouncements have provoked substantial  
9 backlash among the scientific and public health communities, and  
10 that has been especially true with IARC's 2015 glyphosate  
11 classification. Immediately after IARC published its Monograph,  
12 EPA's Deputy Director for Pesticide Programs testified before the  
13 U.S. Senate Committee on Agriculture, Nutrition and Forestry to  
14 reaffirm EPA's long-standing non-carcinogenic evaluation. See  
15 Prins Decl., Exh. O (*Agriculture Biotechnology: A Look at Federal*  
16 *Regulation and Stakeholder Perspectives: Before the S. Comm. on*  
17 *Agric., Nutrition, & Forestry*, 114 Cong. 261, 6-7 (2015)  
18 (statement of William Jordan, Deputy Dir., Office of Pesticide  
19 Programs, EPA)). Others at that hearing, such as the Chief  
20 Physician at MassGeneral's Hospital for Children, observed that  
21 IARC's conclusion was "not supported by the data" and "flies in  
22 the face of comprehensive assessments from multiple agencies  
23 globally." *Id.* at 43. The following year, EPA's Office of  
24 Pesticides Program issued a 227-page glyphosate issue paper that  
25 concluded based upon "an extensive database ... for evaluating the  
26 carcinogenic potential of glyphosate, including 23  
27 epidemiological studies, 15 animal carcinogenicity studies, and  
28 nearly 90 genotoxicity studies" that the available data "do not

1 support a carcinogenic process for glyphosate." See Prins Decl.,  
2 Exh. P (U.S. EPA, Glyphosate Issue Paper: Evaluation of  
3 Carcinogenic Potential (Sept. 12, 2016)).

4 Global regulators, from Germany, to Canada, to Australia, to  
5 New Zealand, to Japan, to South Korea, to the European Chemicals  
6 Agency, have likewise rejected IARC's conclusion. See, e.g.,  
7 Prins Decl., Exh. Q (Fed. Inst. for Risk Assessment (BfR), BfR  
8 Communication No. 007/2015, Does Glyphosate Cause Cancer? (Mar.  
9 23, 2015) (German regulator considering and explicitly rejecting  
10 IARC's bases for its carcinogenic conclusion); see also *infra* at  
11 28-30 (discussing these post-IARC conclusions in more detail).  
12 In the most recent study of glyphosate, the Agricultural Health  
13 Study—sponsored by the U.S. National Institutes of Health,  
14 National Cancer Institute, and the National Institute of  
15 Environmental Health Science—analyzed health effects in over  
16 54,000 pesticide applicators over the course of three decades and  
17 confirmed there is "no evidence of any association between  
18 glyphosate use and risk of any" cancer. See Prins Decl., Exh. R  
19 (Gabriella Andreotti et al., *Glyphosate Use and Cancer Incidence*  
20 *in the Agricultural Health Study*, 110 JNCI: Journal of the  
21 National Cancer Institute 5 (Nov. 9, 2017)).

22 Not only has IARC's controversial glyphosate conclusion been  
23 widely rejected; its review process procedures have been widely  
24 criticized. There are reports that IARC's scientists purposely  
25 withheld key data from the IARC team addressing glyphosate, see  
26 Prins Decl., Exh. S (Kate Kelland, *The WHO's Cancer Agency Left*  
27 *in the Dark Over Glyphosate Evidence*, Reuters, June 14, 2017),  
28 and that some of its team promptly signed on with plaintiffs'

1 attorneys bringing claims by cancer victims against glyphosate  
2 manufacturers, see Prins Decl., Exh. T (Ben Webster, *Weedkiller*  
3 *Scientist was Paid £120,000 by Cancer Lawyers*, The Times, Oct.  
4 18, 2017, [https://www.thetimes.co.uk/article/weedkiller-](https://www.thetimes.co.uk/article/weedkiller-scientist-was-paid-120-000-by-cancer-lawyers-v0qggbrk6)  
5 [scientist-was-paid-120-000-by-cancer-lawyers-v0qggbrk6](https://www.thetimes.co.uk/article/weedkiller-scientist-was-paid-120-000-by-cancer-lawyers-v0qggbrk6)). In  
6 light of these revelations and others, many questions have been  
7 raised about the reliability of IARC's review process, see Prins  
8 Decl., Exh. U (Kiera Butler, *A Scientist Didn't Disclose*  
9 *Important Data - and Let Everyone Believe a Popular Weedkiller*  
10 *Causes Cancer*, Mother Jones, June 15, 2017, [http://](http://www.motherjones.com/environment/2017/06/monsanto-roundup-glyphosate-cancer-who/)  
11 [www.motherjones.com/environment/2017/06/monsanto-roundup-](http://www.motherjones.com/environment/2017/06/monsanto-roundup-glyphosate-cancer-who/)  
12 [glyphosate-cancer-who/](http://www.motherjones.com/environment/2017/06/monsanto-roundup-glyphosate-cancer-who/)), including by OEHHA, see Prins Decl.,  
13 Exh. V (Letter from Joan E. Denton, Director, OEHHA, to Dr. Paul  
14 Kleihues, Director, IARC, 2 (Feb. 7, 2002)).

15 **C. The Proposition 65 Scheme**

16 California's Proposition 65 prohibits businesses from  
17 exposing California residents to chemicals known to the State to  
18 cause cancer without providing required warnings. CAL. HEALTH &  
19 SAFETY CODE § 25249.6. OEHHA is required to maintain "a list of  
20 those chemicals known to the state to cause cancer." *Id.*  
21 § 25249.8(a). Within twelve months after a chemical is listed,  
22 the statute requires that any "person in the course of doing  
23 business" provide a "clear and reasonable warning" before  
24 "expos[ing] any individual to" the listed chemical.  
25 *Id.* §§ 25249.6; 25249.10(b). Although Proposition 65 does not  
26 define precisely what text suffices to convey a "clear and  
27 reasonable warning," OEHHA's regulations have for decades  
28 provided what the cancer warning should convey: "WARNING: This

1 product contains a chemical known to the State of California to  
2 cause cancer." CAL. CODE REGS. tit. 27, § 25603.2. No matter what  
3 words are used, "[t]he message must clearly communicate that the  
4 chemical in question is known to the state to cause cancer."  
5 *Id.* § 25601.

6 Proposition 65 provides that, in addition to other  
7 substances, OEHHA's "list shall include at a minimum those  
8 substances identified by reference in Labor Code Section  
9 6382(b)(1)." CAL. HEALTH & SAFETY CODE § 25249.8(a). Section  
10 6382(b)(1) of the California Labor Code in turn references  
11 "[s]ubstances listed as human or animal carcinogens by [IARC]."  
12 According to OEHHA, once IARC finds a chemical to be potentially  
13 carcinogenic with sufficient evidence of carcinogenicity in  
14 experimental animals, the agency's listing task is "ministerial"—  
15 it publishes a "Notice of Intent to List" and provides a 30-day  
16 comment period during which interested parties may claim the  
17 chemical in question "has not been identified by reference in  
18 Labor Code section 6382(b)(1)." CAL. CODE REGS. tit. 27,  
19 § 25904(c) (emphasis added). But OEHHA will "not consider  
20 comments related to the underlying scientific basis for  
21 classification." *Id.* In other words, OEHHA will consider  
22 whether it has identified the wrong chemical, or IARC did not  
23 identify that chemical, but it will not consider whether IARC got  
24 its assessment wrong.

25 Proposition 65 has a multi-faceted enforcement scheme. The  
26 statute imposes penalties up to \$2,500 *per day* for each failure  
27 to provide an adequate warning, and provides for recovery of  
28 attorneys' fees. CAL. HEALTH & SAFETY CODE § 25249.7(b); CAL. CODE

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

18 Because any exposure to any listed chemical sold without the  
19 mandated warning may trigger civil penalties, there has been  
20 wide-scale abuse of the Proposition 65 regime through bounty-  
21 hunter plaintiff “strike suits.” In the words of Governor Brown,  
22 the law has been abused by “unscrupulous lawyers driven by profit  
23 rather than public health.” See Prins Decl., Exh. W (Press  
24 Release, Governor Brown Proposes to Reform Proposition 65 (May 7,  
25 2013)).<sup>1</sup> For example, one bounty hunter plaintiff successfully

26  
27 <sup>1</sup> See also e.g., Prins Decl., Exh. X (Anthony T. Caso, *Bounty*  
28 *Hunters and the Public Interest—A Study of California*  
*Proposition 65*, Engage, Mar. 2012, at 30, 31 (describing case in  
which “law firm created an ‘astroturf’ environmental group to be

1 sued Whole Foods for "selling firewood" without the warning  
2 label. *Consumer Cause, Inc. v. Mrs. Gooch's Nat. Food Markets,*  
3 *Inc.*, 127 Cal. App. 4th 387, 392 (Cal. Ct. App. 2005) (emphasis  
4 added). As California judges have noted, the Proposition 65  
5 framework allows even frivolous suits to result in "judicial  
6 extortion" that forces defendants to settle to avoid legal fees  
7 and the costs of proving that they are not in violation of the  
8 Act. *Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th 454,  
9 477-79 (Cal. Ct. App. 2001) (Vogel, J., dissenting); *see also*  
10 *Consumer Def. Grp. v. Rental Hous. Indust. Members*, 137 Cal. App.  
11 4th 1185, 1216 (Cal. Ct. App. 2006) (strike suits are "intended  
12 to frighten all but the most hardy of targets (certainly any  
13 small, ma and pa business)[] into a quick settlement").

14 The reason for this widespread abuse is straightforward—it  
15 is "absurdly easy" to initiate Proposition 65 litigation. *Id.* at  
16 1215. The principal check against frivolous lawsuits is that  
17 private parties must file a "certificate of merit" indicating a  
18 legitimate basis for their claim. CAL. HEALTH & SAFETY CODE  
19 § 25249.7(d)(1). But this requirement is trivial to satisfy. In  
20 the words of one of California's own appellate courts, a bounty  
21 hunter need only "go on the internet and find some common objects

22  
23 a plaintiff in Proposition 65 litigation," which group  
24 "consisted of partners from the law firm" and which "sent out  
25 hundreds of demand letters charging businesses with failure to  
26 provide warnings" and "extort[ing] payments of attorney fees or  
27 contributions to the front group"); Prins Decl., Exh. Y (Leeton  
28 Lee, *Nailed by a Bounty Hunter—A California Prop 65 Violation  
Can Cost Your Company*, PPB Magazine, Jan. 24, 2013,  
[https://web.archive.org/web/20130616164651/http://pubs.ppai.org/  
2013/01/nailed-by-a-bounty-hunter-a-california-prop-65-violation-  
can-cost-your-company/](https://web.archive.org/web/20130616164651/http://pubs.ppai.org/2013/01/nailed-by-a-bounty-hunter-a-california-prop-65-violation-can-cost-your-company/) (documenting Proposition 65 bounty  
hunter suits)).

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

11       Once a suit is initiated, the burden is then on the  
12 Proposition 65 defendant to establish that "the exposure"—to the  
13 extent there is any—"poses no significant risk assuming lifetime  
14 exposure at the level in question." CAL. HEALTH & SAFETY CODE  
15 § 25249.10(c). In some instances, OEHHA will predetermine the  
16 exposure threshold for particular listed substances in a  
17 determination called a "No Significant Risk Level" (NSRL),  
18 commonly referred to as a "safe harbor." But this safe harbor  
19 does not eliminate the prospect of strike suits. Proof that a  
20 defendant's product fits within the safe harbor is an  
21 "affirmative defense," *DiPirro v. Bondo Corp.*, 153 Cal. App. 4th  
22 150, 185 (Cal. Ct. App. 2007); CAL. HEALTH & SAFETY CODE  
23 § 25249.10(c), and a bounty hunter literally "need not make any  
24 *showing at all*" regarding its applicability or lack thereof  
25 before filing suit. *Consumer Cause*, 91 Cal. App. 4th at 469  
26 (emphasis added). Establishing the defense, in contrast, is very  
27 costly for the defendant, usually requiring detailed scientific  
28 analyses, possibly of multiple products. Litigating lifetime



1 exposure or even the safe harbor is generally extremely expensive  
2 and often drags on to trial. *See, e.g., Env'tl. Law Found. v.*  
3 *Beech-Nut Nutrition Corp.*, 235 Cal. App. 4th 307, 314 (Cal. Ct.  
4 App. 2015) (safe harbor defense litigated at trial). Faced with  
5 such daunting litigation fees and the costs of commissioning an  
6 expert assessment, most parties logically "[s]ettle with the  
7 plaintiff," "[s]ave the cost of the assessment," "[s]ave the  
8 legal fees," and "[g]et rid of the case." *Consumer Cause*, 91  
9 Cal. App. 4th at 478 (Vogel, J., dissenting). In other words,  
10 they succumb to "judicial extortion" and adopt a Proposition 65  
11 warning regardless of their opposition. *Id.*

12 **D. OEHHA's Glyphosate Listing And Its Significant Effects**

13 On July 7, 2017, despite the overwhelming contrary views of  
14 the U.S. government, the international regulatory community, and  
15 even OEHHA itself that glyphosate is not carcinogenic, OEHHA  
16 listed glyphosate under Proposition 65 as a chemical "known to  
17 the state to cause cancer." *See Prins Decl., Exh Z (OEHHA,*  
18 *Glyphosate Listed Effective July 7, 2017, as Known to the State*  
19 *of California to Cause Cancer* (June 26, 2017),  
20 [https://oehha.ca.gov/proposition-65/crn/glyphosate-listed-](https://oehha.ca.gov/proposition-65/crn/glyphosate-listed-effective-july-7-2017-known-state-california-cause-cancer)  
21 [effective-july-7-2017-known-state-california-cause-cancer](https://oehha.ca.gov/proposition-65/crn/glyphosate-listed-effective-july-7-2017-known-state-california-cause-cancer)).  
22 OEHHA made this listing mechanically—without conducting any of  
23 its own scientific analysis—based only on the fact that IARC had  
24 issued a monograph concluding that glyphosate is "probably"  
25 carcinogenic to humans. OEHHA refused to consider comments  
26 critiquing IARC's process and conclusion, and disclaimed any  
27 ability to address the underlying scientific dispute or reassess  
28 "the weight or quality of the evidence considered by IARC." *See*

1 Prins Decl., Exh. AA (OEHHA, *Notice of Intent to List:*  
2 *Tetrachlorvinphos, Parathion, Malathion, Glyphosate* (Sept. 4,  
3 2015), [https://oehha.ca.gov/proposition-65/crn/notice-intent-](https://oehha.ca.gov/proposition-65/crn/notice-intent-list-tetrachlorvinphos-parathion-malathion-glyphosate)  
4 [list-tetrachlorvinphos-parathion-malathion-glyphosate](https://oehha.ca.gov/proposition-65/crn/notice-intent-list-tetrachlorvinphos-parathion-malathion-glyphosate)).

5 As a result of OEHHA's listing, as of July 2018 any seller  
6 or manufacturer of a product sold in California that could expose  
7 a consumer to glyphosate must either provide a "clear and  
8 conspicuous" warning conveying that the product contains a  
9 chemical "known to the state of California to cause cancer," or  
10 prepare to defend against a costly enforcement action or strike  
11 suit. Past Proposition 65 litigants are already threatening new  
12 strike suits regarding glyphosate. See Heering Decl., Monsanto  
13 ¶ 42; Prins Decl., Exh. BB (Joseph Perrone, Ph.D., *Advocacy*  
14 *Groups Have Ulterior Motive in Wanting Weedkiller Banned*, The  
15 Modesto Bee, June 21, 2017, [http://www.modbee.com/opinion/state-](http://www.modbee.com/opinion/state-issues/article157416894.html)  
16 [issues/article157416894.html](http://www.modbee.com/opinion/state-issues/article157416894.html) (describing how "environmental  
17 groups cheered" at the glyphosate listing because it will be "a  
18 boon to their pocketbook")). This is consistent with past  
19 experience—Proposition 65 litigants routinely threaten  
20 litigation *within days* of the active warning date. See Prins  
21 Decl. ¶ 4. OEHHA has not yet established an NSRL for glyphosate,  
22 see *id.* at ¶ 2, but even if it does so, for the reasons discussed  
23 above (including that it would function only as an affirmative  
24 defense), that will not remove the threat of enforcement. See  
25 *supra* at 17-18.

26 Unless it is enjoined, the glyphosate listing and its  
27 associated warning requirement will have severe adverse impacts  
28 on Plaintiffs. For manufacturers and retailers of glyphosate,

1 the listing and the attendant warning requirement will broadly  
2 "stigmatiz[e]" these entities' products and reputations. *Baxter*  
3 *Healthcare Corp. v. Denton* 120 Cal. App. 4th 333, 344 (Cal. Ct.  
4 App. 2004); see also Heering Decl., Monsanto ¶¶ 45, 51-54.  
5 Members of Plaintiff Western Plant Health Association—which sell  
6 glyphosate in California—have already lost sales due to the  
7 Proposition 65 listing—even though the warning requirement is  
8 not yet in effect. Declaration of Renee Pinel, Western Plant  
9 Health Association ¶ 14. Similarly, Plaintiff Monsanto Company  
10 manufactures glyphosate and supplies glyphosate to public and  
11 private entities (including consumers) in California. Heering  
12 Decl., Monsanto ¶¶ 29-33. Major retailers in California already  
13 have informed Monsanto that they will not carry glyphosate-based  
14 products without a Proposition 65 warning and that they will  
15 begin removing those products without a warning from their  
16 shelves and inventory well before the warning requirement goes  
17 into effect. *Id.* at ¶ 35. This is true even if an NSRL is  
18 ultimately adopted. *Id.* at ¶ 36; see also Am. Complaint ¶¶ 79,  
19 85, 86.

20 Until and unless the warning requirement is enjoined,  
21 therefore, Plaintiffs (and their members) will be faced with a  
22 "Hobson's choice," *Baxter Healthcare Corp.* 120 Cal. App. 4th at  
23 344—either communicate to consumers a disparaging health warning  
24 about glyphosate products that is contrary to every regulatory  
25 finding of glyphosate's safety, or face the significant risk of  
26 an enforcement action or strike suit under Proposition 65 for  
27 failing to do so. Heering Decl., Monsanto ¶¶ 40-44; Pinel Decl.,  
28 Western Plant Health Association ¶ 15; Declaration Of Joel

1 Brinkmeyer, Agribusiness Association of Iowa ¶¶ 8-10. Decisions  
2 about labeling on products must be made imminently. Heering  
3 Decl., Monsanto ¶ 38.

4 Even if OEHHA ultimately establishes an NSRL, Plaintiffs  
5 will still be injured because they will be forced to choose  
6 between providing the warning, or undertaking costly assessments  
7 to demonstrate that exposures to glyphosate from their products  
8 will fall below the NSRL (an undertaking that would still not  
9 prevent a subsequent enforcement action or strike suit). Heering  
10 Decl., Monsanto ¶¶ 40, 41, 44; Pinel Decl., Western Plant Health  
11 Association ¶ 16.

12 For entities that sell finished food products into  
13 California that are made using glyphosate-treated crops—like  
14 members of Plaintiffs Missouri Chamber of Commerce and Industry  
15 and Associated Industries of Missouri—the listing will have  
16 similar effects. See, e.g., Jackson Decl., Iowa Soybean ¶¶ 14-  
17 19; Mehan Decl., Missouri Chamber ¶¶ 9-12; Declaration Of Ray  
18 McCarty, Associated Industries of Missouri ¶¶ 10-12. Members of  
19 these Plaintiffs will face an imminent choice between (1)  
20 providing a disparaging glyphosate warning for their products  
21 that is contrary to the worldwide scientific consensus, which  
22 likely will diminish demand for those products; (2) engaging in  
23 costly efforts to demonstrate that any exposures to glyphosate  
24 residues on their products will fall below any established NSRL  
25 or requiring their suppliers to undertake those efforts, and even  
26 so still facing the likely prospect of expensive enforcement  
27 actions; or (3) halting the use of glyphosate-treated crops as  
28 inputs. See Mehan Decl., Missouri Chamber ¶¶ 10-11; Stoner

1 Decl., Nat'l Assoc. Wheat Growers ¶¶ 11-14; Brinkmeyer Decl.,  
2 Iowa Agribusiness ¶ 10; Zander Decl., S.D. Agri-Business ¶¶ 8-11;  
3 Jackson Decl., Iowa Soybean ¶¶ 17-18; Martinson Decl., U.S. Durum  
4 Growers ¶¶ 13-17; McCarty Decl., Assoc. Indus. of Missouri ¶¶ 8-  
5 13.

6       The pressures on these Plaintiffs will then have ripple  
7 effects on farmers upstream: With the threat of enforcement  
8 under Proposition 65 looming, many grain handlers and finished  
9 food producers will demand that farmers providing inputs either  
10 cease using glyphosate on their crops or certify that their crops  
11 do not contain glyphosate residues beyond particular levels,  
12 which will require expensive testing or segregation of  
13 glyphosate-treated crops from non-glyphosate-treated crops—each  
14 an undesirable option that will require modifications to business  
15 practices around the country and that carries considerable  
16 expense. See, e.g., Hurst Decl., Missouri Farm Bureau ¶¶ 12-14;  
17 Declaration Of Blake Inman, United States Durum Growers  
18 Association ¶¶ 12-15; Mehan Decl., Missouri Chamber ¶¶ 10-11;  
19 Stoner Decl., Nat'l Assoc. Wheat Growers ¶¶ 14-15; Kessel Decl.,  
20 N.D. Grain Growers ¶¶ 8-10; Jackson Decl., Iowa Soybean ¶ 18;  
21 McCarty Decl., Assoc. Indus. of Missouri ¶¶ 11-13. This will  
22 dramatically affect the practices of farmers across the country,  
23 including members of Plaintiffs National Association of Wheat  
24 Growers, National Corn Growers Association, United States Durum  
25 Growers Association, Missouri Farm Bureau, Iowa Soybean  
26 Association, North Dakota Grain Growers Association, and Missouri  
27 Chamber of Commerce and Industry.

28

**ARGUMENT**

1  
2 Plaintiffs ask this Court to preliminarily enjoin the  
3 listing of glyphosate under Proposition 65 and its attendant  
4 warning requirement to maintain their First Amendment right  
5 against being compelled to disparage their own products with  
6 factually controversial and literally false warnings with which  
7 they vehemently disagree. "A plaintiff seeking a preliminary  
8 injunction must establish that he is likely to succeed on the  
9 merits, that he is likely to suffer irreparable harm in the  
10 absence of preliminary relief, that the balance of equities tips  
11 in his favor, and that an injunction is in the public interest."  
12 *Winter v. NRDC*, 555 U.S. 7, 20 (2008). "[I]n the First Amendment  
13 context, the moving party bears the initial burden of making a  
14 colorable claim that its First Amendment rights have been  
15 infringed, or are threatened with infringement, at which point  
16 the burden shifts to the government to justify the restriction"  
17 on speech and demonstrate that the plaintiff is unlikely to  
18 succeed on the merits. *Thalheimer v. City of San Diego*, 645 F.3d  
19 1109, 1116 (9th Cir. 2011). This Court should grant equitable  
20 relief here because Plaintiffs amply meet the "colorable"  
21 standard—the compelled glyphosate warning clearly violates the  
22 First Amendment—and the remaining factors all weigh heavily in  
23 Plaintiffs' favor.

24 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIM THAT THE**  
25 **COMPELLED GLYPHOSATE WARNING VIOLATES THE FIRST AMENDMENT**

26 In general, the First Amendment forbids regulations  
27 compelling speech to the same extent that it forbids regulations  
28 restricting speech. See, e.g., *Hurley v. Irish-American Gay,*

1 *Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995)  
2 (“[O]ne important manifestation of the principle of free speech  
3 is that one who chooses to speak may also decide what not to  
4 say.” (quotations omitted)). And regulations of non-misleading  
5 commercial speech are, in general, subject at least to  
6 intermediate scrutiny, under which the government must show its  
7 regulation directly advances a substantial government interest  
8 and is no more “extensive than is necessary to serve that  
9 interest.” *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n of*  
10 *New York*, 447 U.S. 557, 566 (1980).

11 In *Zauderer v. Office of Disciplinary Counsel of Supreme*  
12 *Court of Ohio*, the Supreme Court recognized a narrow exception to  
13 this intermediate scrutiny. Because businesses have only a  
14 “minimal” interest in “not providing any particular factual  
15 information,” *Zauderer* held that the government may compel the  
16 disclosure of “purely factual and uncontroversial information”  
17 about commercial products or services, so long as the compelled  
18 message is reasonably related to a substantial governmental  
19 interest and is neither “unjustified [n]or unduly burdensome.”  
20 471 U.S. at 651 (emphasis in original) (upholding rule requiring  
21 lawyer to disclose on advertisements that in contingency cases  
22 client would still be liable for costs). It is the government’s  
23 burden to demonstrate that all these requirements are satisfied.  
24 *ABA*, 871 F.3d at 895 (“[T]he government must carry the burden of  
25 demonstrating that its disclosure requirement is purely factual  
26 and uncontroversial [and] not unduly burdensome.”). Defendants  
27 will not be able to satisfy that burden in this case.

28

1           Because the glyphosate warning is not purely factual and  
2 uncontroversial, it cannot be upheld under *Zauderer*. Nor could  
3 it conceivably be upheld under the more demanding *Central Hudson*  
4 standard.

5           **A. The Compelled Glyphosate Warning Will Fail Under**  
6           ***Zauderer* Because It Is Not "Purely Factual and**  
7           **Uncontroversial"**

8           The First Amendment prohibits the government from forcing  
9 its citizens to repeat the government's—or any third party's—  
10 subjective opinion. See *Pac. Gas & Elec. Co. v. Pub. Utils.*  
11 *Comm'n of Cal.*, 475 U.S. 1, 13-14 (1986) (plurality op.); *Video*  
12 *Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965-67  
13 (9th Cir. 2009) (invalidating subjective "labeling requirement"  
14 for "violent" video games). The *Zauderer* exception is therefore  
15 necessarily limited to compelled disclosure of factual  
16 information, the accuracy of which cannot be reasonably disputed.  
17 *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1117  
18 (9th Cir. 2017) ("[U]ncontroversial in [the *Zauderer*] context  
19 refers to the factual accuracy of the compelled disclosure.");  
20 *ABA*, 871 F.3d at 892 n.5 ("As we have clarified, the term  
21 'uncontroversial' in this context refers to the factual accuracy  
22 of the compelled disclosure."); see also *Nat'l Ass'n of Mfrs. v.*  
23 *SEC*, 800 F.3d 518, 529 (D.C. Cir. 2015) ("A controversy, the  
24 dictionaries tell us, is a dispute, especially a public one.").  
25 For example, the government can compel the disclosure of a  
26 product's country of origin, *Am. Meat Inst. v. U.S. Dep't of*  
27 *Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014); whether a product  
28 contains mercury, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d



1 104, 107 (2d Cir. 2001); the costs a client is liable to pay,  
2 *Zauderer*, 471 U.S. at 650; and what contents are included in a  
3 package of services offered, *Milavetz, Gallop & Milavetz, P.A.,*  
4 *v. United States*, 559 U.S. 229, 232 (2010)—all facts that can be  
5 reasonably and definitively ascertained.

6 By contrast, the government cannot compel disclosure of  
7 purported “facts” over which there is significant room for  
8 disagreement. Thus, in *CTIA-Wireless Ass’n v. City & County of*  
9 *San Francisco*, the Ninth Circuit affirmed a preliminary  
10 injunction of a requirement that cell phone dealers inform  
11 consumers about health risks from the phones’ radiofrequency  
12 energy emissions. 494 F. App’x 752, 753 (9th Cir. 2012). The  
13 warning contained suggestions as to “what consumers should do” to  
14 avoid exposure—language that “could . . . be interpreted by  
15 consumers as expressing San Francisco’s opinion that using cell  
16 phones is dangerous.” *Id.* at 753 (emphasis added). Such an  
17 impression would have conflicted with the Federal Communications  
18 Commission’s “established limits,” within which radiofrequency  
19 energy exposure is safe, and would have waded directly into an  
20 ongoing “debate in the scientific community about the health  
21 effects of cell phones.” *Id.* at 753-54.<sup>2</sup>

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22  
23  
24 <sup>2</sup> By contrast, the Ninth Circuit held that the City of Berkeley  
25 was permitted to require disclosure that “[i]f you carry or use  
26 your phone” in certain areas close to your body, “you may exceed  
27 the federal guidelines for exposure to R[adio]F[requency]  
28 radiation.” *CTIA-The Wireless Ass’n v. City of Berkeley,*  
*California*, 854 F.3d 1105, 1111 (9th Cir. 2017). That warning  
largely mirrored FCC disclosure requirements that CTIA did not  
challenge. The Ninth Circuit upheld that warning requirement  
because it was “literally true” and not “misleading.” *Id.* at  
1119-20.

1           Similarly, the City of San Francisco recently enacted an  
2 ordinance requiring that most advertisements for sugar sweetened  
3 beverages ("SSBs") contain the following: "WARNING: Drinking  
4 beverages with added sugar(s) contributes to obesity, diabetes,  
5 and tooth decay. This is a message from the City and County of  
6 San Francisco." ABA, 871 F.3d at 888. The district court denied  
7 a preliminary injunction principally because it concluded that  
8 there was "no real dispute as to the literal accuracy of the  
9 required warning" (i.e., no dispute that added sugar contributes  
10 to tooth decay, diabetes, and obesity). *Am. Beverage Ass'n v.*  
11 *City and County of San Francisco*, 187 F. Supp. 3d 1123, 1139  
12 (N.D. Cal. 2016). The Ninth Circuit disagreed and reversed. It  
13 held that the "factual accuracy of the warning was, at a minimum,  
14 controversial" because "when consumed as part of a diet that  
15 balances caloric intake with energy output, consuming beverages  
16 with added sugar *does not* contribute to obesity or diabetes."  
17 ABA, 871 F.3d at 895 (emphasis added); see also *id.* (quoting FDA  
18 promulgations in conflict with San Francisco's warning). As a  
19 result, San Francisco was effectively compelling the plaintiffs  
20 "to convey San Francisco's disputed policy views." *Id.* at 896.

21           Sometimes, "determining whether a disclosure is  
22 'uncontroversial' may be difficult." *Am. Meat Inst. v. U.S.*  
23 *Dep't of Agric.*, 760 F.3d 18, 34 (D.C. Cir. 2014) (en banc)  
24 (Kavanaugh, J., concurring in the judgment). That is not so for  
25 California's glyphosate warning. The accuracy of this compelled  
26 warning is *indisputably* controversial. Attached as Appendix 1 is  
27 a chart comparing the relevant conclusions of U.S. and other  
28 national regulators and authoritative bodies with California's

1 warning requirement. For example, the chief U.S. glyphosate  
2 regulator—EPA—does not agree that glyphosate causes cancer.  
3 See *supra* at 7-8. Even California's own expert regulator has  
4 twice found that glyphosate does not cause cancer. See *supra* at  
5 8-9.

6 Indeed, regulators around the world specifically rejected  
7 IARC's conclusion *after* it was rendered and after reviewing much  
8 of the same evidence as IARC. For example, Germany's BfR  
9 concluded, despite IARC's contrary designation, that it continued  
10 to assess "glyphosate as non-carcinogenic." See Prins Decl.,  
11 Exh. Q (BfR, Does Glyphosate Cause Cancer?). BfR noted that it  
12 "ha[d] compiled the most comprehensive toxicological database,  
13 presumably worldwide, for glyphosate" and that "the entire  
14 database"—rather than IARC's "more or less arbitrary selection  
15 of studies"—supported the non-carcinogenic conclusion. *Id.* The  
16 European Union's European Food Safety Authority (EFSA) likewise  
17 rebutted IARC's unfounded classification and set forth several  
18 similar reasons as BfR for its disagreement. See Prins Decl.,  
19 Exh. CC (Eur. Food Safety Auth. (EFSA), Peer Review of the  
20 Pesticide Risk Assessment of the Active Substance Glyphosate, DOI  
21 10.2903/j.efsa.2015.4302, at 11 (Nov. 12, 2015)). And,  
22 remarkably, although IARC is part of the WHO, a separate  
23 component of the WHO concluded in a 2016 review, after the IARC  
24 classification, that "glyphosate is *unlikely* to pose a  
25 carcinogenic risk to humans." See Prins Decl., Exh. DD (Food &  
26 Agric. Org. of the U.N. (FAO) and WHO, Joint FAO/WHO Meeting on  
27 Pesticide Residues: Summary Report (May 16, 2016)). At risk of  
28 belaboring the point, regulators from Canada, the European

1 Chemicals Agency, Australia, New Zealand, Japan, and South Korea  
2 also agree with the non-carcinogenic consensus, including in very  
3 recent analyses. See Prins Decl., Exh. EE (Pest Mgmt. Regulatory  
4 Agency, Health Canada, RVD2017-01, Re-evaluation Decision:  
5 Glyphosate (Apr. 28, 2017), at 1 ("Glyphosate is not genotoxic  
6 and is unlikely to pose a human cancer risk.)); Prins Decl.,  
7 Exh. FF (Eur. Chems. Agency (ECHA) Press Release ECHA/PR/17/06,  
8 Glyphosate Not Classified as a Carcinogen by ECHA (Mar. 15, 2017)  
9 (March 2017 conclusion that "the available scientific evidence  
10 did not meet the criteria to classify glyphosate as a carcinogen,  
11 as a mutagen or as a toxic for reproduction.)); Prins Decl.,  
12 Exh. GG (Austl. Pesticides & Veterinary Meds. Auth., Regulatory  
13 Position: Consideration of the Evidence for a Formal  
14 Reconsideration of Glyphosate, 11 (Sept. 2016) ("Following the  
15 assessment of the 19 studies relevant to the IARC carcinogenicity  
16 classification of glyphosate . . . [we] concluded that there did  
17 not appear to be any new information to indicate that glyphosate  
18 poses a carcinogenic or genotoxic risk to humans.)); Prins  
19 Decl., Exh. HH (Envtl. Prot. Auth., Gov't of N.Z., Review of the  
20 Evidence Relating to Glyphosate and Carcinogenicity, at 16  
21 (August 2016) ("[G]lyphosate is unlikely to be genotoxic or  
22 carcinogenic.)); Prins Decl., Exh. II (Food Safety Commission of  
23 Japan, Risk Assessment Report: Pesticides, Glyphosate Summary  
24 (September 2016)); Hearing Decl., Monsanto, Exh. K (Rural  
25 Development Administration (Korea), Assessment of the Safety of  
26 Pesticides Containing Glyphosate and Diazinon (Mar. 10, 2017));  
27 *see also* Prins Decl., Exh. R (*Glyphosate Use and Cancer Incidence*  
28 *in the Agricultural Health Study*) (the most recent study of

1 glyphosate, sponsored by the U.S. National Institutes of Health,  
2 National Cancer Institute, and the National Institute of  
3 Environmental Health Science, confirming that there is “no  
4 evidence of any association between glyphosate use and risk of  
5 any” cancer).

6 The Ninth Circuit’s decision in *ABA* confirms that the  
7 accuracy of California’s compelled glyphosate warning is  
8 impermissibly controversial. In *ABA*, the warning’s conflict with  
9 the view of FDA was ample to establish controversy. 871 F.3d at  
10 895 (“conclud[ing] that the factual accuracy of the warning is,  
11 at a minimum, controversial” because it “is contrary to  
12 statements by the FDA”). Here, the chorus of dissent is far  
13 louder.

14 The compelled glyphosate warning also is not “purely factual  
15 and uncontroversial” for the *independent* reason that it is false  
16 and misleading to say that glyphosate is “known” to California to  
17 “cause” cancer. See *ABA*, 871 F.3d at 893. The ordinary meaning  
18 of the word “knows” includes “to apprehend with certitude as  
19 true, factual, sure, or valid.” *Webster’s Third New*  
20 *International Dictionary* (1986 ed.). California emphatically has  
21 no such “certitude” of glyphosate’s carcinogenicity. To the  
22 contrary, California has previously stated that it *knows* the  
23 opposite, see Prins Decl., Exh. G (OEHHA 1997) (OEHHA conclusion  
24 that glyphosate is “unlikely to pose a cancer hazard to humans”),  
25 and it has never revisited that conclusion. And because  
26 California affirmatively disclaims the ability under its law to  
27 independently evaluate IARC’s conclusions, it strains credulity  
28 and linguistics to say that California “knows” what IARC claims

1 to know. See Prins Decl., Exh. Z (OEHHA, *Notice of Intent to*  
2 *List*) (confirming “ministerial” nature of Proposition 65 listing  
3 based on IARC’s conclusion).

4 In addition to the fact that California cannot be said to  
5 “know” something that (i) its own expert scientific agency  
6 disagrees with, (ii) is based on nothing more than an analysis  
7 conducted by a non-regulatory entity (iii) that California admits  
8 it is legally constrained from questioning, the compelled  
9 glyphosate warning is also misleading because even IARC has not  
10 concluded that glyphosate is “known to cause” cancer in humans  
11 (which is the obvious import of an unqualified cancer warning  
12 placed on products intended for purchase by humans). The most  
13 IARC has concluded, based on admittedly “limited evidence in  
14 humans,” is that glyphosate is “probably carcinogenic” to humans.  
15 IARC Monograph 112 at 398 (emphasis omitted). Indeed, IARC  
16 specifically chose not to categorize glyphosate as a chemical  
17 that “is carcinogenic in humans” or for which there is  
18 “sufficient evidence of carcinogenicity in humans.” *Id.* at 30  
19 (emphasis omitted). Thus, the warning is misleading in a second  
20 respect because it overstates even IARC’s conclusion and thereby  
21 compels a statement about glyphosate that no entity anywhere has  
22 ever concluded is true.

23 Because California will not be able to establish that the  
24 compelled glyphosate warning is purely factual and  
25 uncontroversial, it will fail review under *Zauderer*.

26  
27  
28

1           **B.    The Compelled Glyphosate Warning Will Be Found To**  
2                           **Violate The First Amendment**

3           To Plaintiffs' knowledge, no court has ever upheld under the  
4 First Amendment a regulation compelling a disclosure or warning  
5 that fails *Zauderer's* "purely factual and uncontroversial"  
6 standard. That is unsurprising, because it is bedrock First  
7 Amendment law that the government cannot mandate allegiance to  
8 its subjective or disputed opinions. *See Video Software Dealers*,  
9 556 F.3d at 965-66; *ABA*, 871 F.3d at 898 n.12. But regardless of  
10 whether such regulations are per se unlawful or instead subject  
11 to an intermediate scrutiny that precious few if any can satisfy,  
12 the compelled warning in this case—which is not merely  
13 disputable, but contrary to the views of the overwhelming  
14 majority of government regulators and scientific experts  
15 worldwide and also literally false and misleading—cannot survive  
16 constitutional review.

17           Under *Central Hudson's* intermediate scrutiny, the burden is  
18 on the government to justify its speech mandate. *44 Liquormart*,  
19 *Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). And California  
20 cannot possibly satisfy that burden here. *Central Hudson*  
21 requires that the government show a "substantial" government  
22 interest that its regulation "directly" advances through burdens  
23 on speech no more "extensive than [] necessary to serve that  
24 interest." *Id.* at 566; *see also Cal-Almond, Inc. v. U.S. Dep't*  
25 *of Agric.*, 14 F.3d 429, 437 (9th Cir. 1993). As relevant here,  
26 Proposition 65's stated purpose is to "inform[] [Californians]  
27 about exposures to chemicals that cause cancer . . . ." *See Cal.*  
28 *Chamber of Com. v. Brown*, 196 Cal. App. 4th 233, 258 (Cal. Ct.

1 App. 2011). Assuming California's interest in so informing  
2 consumers is substantial, the compelled glyphosate warning would  
3 fail intermediate scrutiny for two independent reasons: it  
4 neither (1) materially advances that interest nor (2) is  
5 sufficiently tailored to serving it.

6 First, California cannot show that the warning materially  
7 advances its interest in informing consumers about cancer risks  
8 because California has conducted no analysis showing that this  
9 outlier warning informs consumers about a genuine cancer risk.  
10 See *Cal-Almond*, 14 F.3d at 438 (no direct advancement where  
11 government admits it has not conducted its own analysis).  
12 California admits that it is precluded from conducting such an  
13 analysis by its own statutes, which required that it list  
14 glyphosate under Proposition 65 automatically once IARC made its  
15 determination. See Prins Decl., Exh. Z (OEHHA, *Notice of Intent*  
16 *to List*). But California cannot evade its burden to prove  
17 material advancement in this case by complaining that it was  
18 required by its own laws to accept IARC's conclusions as  
19 definitive and ignore the larger body of scientific evidence  
20 about glyphosate.

21 By law, moreover, the Proposition 65 warning "must clearly  
22 communicate that the chemical in question is *known* to the state  
23 to cause cancer." CAL. CODE REGS. tit. 27, § 25601 (emphasis  
24 added). But as discussed earlier, that specific message is false  
25 and misleading both because California knows no such thing and  
26 because even IARC's monograph stops short of making any  
27 definitive conclusion about causation in humans. Even a simple  
28 comparison of IARC's conclusions and the compelled warning shows



1 that the Proposition 65 warning is literally false or at the  
2 least highly misleading on its face. Compare IARC Monograph 112  
3 at 398 ("There is *limited evidence* in humans for the  
4 carcinogenicity of glyphosate ... Glyphosate is *probably*  
5 *carcinogenic to humans.*") and *id.* at 27 (stating that "[l]imited  
6 evidence of carcinogenicity" means that "chance, bias or  
7 confounding could not be ruled out with reasonable confidence")  
8 with CAL. CODE REGS. tit. 27, § 25601 (providing that the "[t]he  
9 message must clearly communicate that the chemical in question is  
10 known to the state to cause cancer") and *id.* § 25603.2(a)  
11 (providing safe harbor only when the message "include[s] the  
12 following language: ... 'WARNING: This product contains a chemical  
13 known to the State of California to cause cancer.'"). Compelling  
14 a false or misleading warning does not advance any legitimate  
15 government interest. See, e.g., *Video Software Dealers*, 556 F.3d  
16 at 967 ("[T]he State *has no* legitimate reason to force retailers  
17 to affix false information on their products."); *Entm't Software*  
18 *Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1072 (D. Minn. 2006) ("A  
19 state's requirement that a business post a false statement serves  
20 no legitimate government interest.").

21 Indeed, not only does the glyphosate warning fail to  
22 materially advance California's interest in informing  
23 Californians about exposure to carcinogenic substances, it  
24 actively *undermines* that interest. Mandating warnings without an  
25 adequate basis contributes to overwarning—a real-life version of  
26 the Boy Who Cried Wolf—which causes consumers to tune warnings  
27 out entirely, even when they are well-founded and important.  
28 See, e.g., *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 70

1 (2008) (overwarning "invite[s] mass consumer disregard and  
2 ultimate contempt for the warning process"); *Dowhal v. SmithKline*  
3 *Beecham Consumer Healthcare*, 32 Cal. 4th 910, 932 (2004)  
4 ("problems of overwarning are exacerbated" where, as here,  
5 "warnings must be given even as to very remote risks"); *Thompson*  
6 *v. County of Alameda*, 27 Cal. 3d 741, 755 (1980) (noting that  
7 "by reason of their sheer volume," insignificant warnings "would  
8 add little to the effective protection of the public"); see also  
9 *Gaeta v. Perrigo Pharms.*, 562 F. Supp. 2d 1091, 1097 (N.D. Cal.  
10 2008) (noting that overwarning can "have a negative effect  
11 on . . . public health"); *Mason v. SmithKline Beecham Corp.*, 596  
12 F.3d 387, 392 (7th Cir. 2010) (concluding that overwarning "can  
13 deter potentially beneficial uses of [the substance] by making it  
14 seem riskier than warranted and can dilute the effectiveness of  
15 valid warnings").

16 Second, the compelled glyphosate warning independently fails  
17 intermediate scrutiny because it is not narrowly tailored.  
18 California has not explored any less restrictive alternatives to  
19 communicate any concerns about glyphosate, even though several  
20 obvious alternatives exist. See *Valle Del Sol*, 709 F.3d at 826  
21 (holding that a speech restriction is overinclusive where it  
22 "restricted more speech than necessary"). For one, California  
23 could itself inform the public about IARC's conclusion, and  
24 truthfully explain how that conclusion differs from the  
25 conclusions of EPA and regulators worldwide. See *Linkmark*  
26 *Assocs., Inc. v. Willingboro*, 431 U.S. 86, 97 (1977) (government  
27 could have used alternative of speaking itself to give  
28 "widespread publicity" to issue); *Sorrell v. IMS Health*, 564 U.S.

1 552, 578 (2011) ("The State can express [its] view through its  
2 own speech."); *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233,  
3 250-51 (2d Cir. 2014) (city could have communicated message  
4 through its own advertisements). And, of course, rather than  
5 mandating a warning that California "knows" glyphosate "causes"  
6 cancer, California might consider a very different disclosure—  
7 e.g., "California is aware of one report suggesting that  
8 glyphosate caused cancer in certain experimental animals. But  
9 many other reports disagree, including those conducted by U.S.  
10 and international regulators." Defendants cannot demonstrate why  
11 these or other less restrictive alternatives would not address  
12 the State's interests.

13 **II. THE REMAINING EQUITABLE FACTORS WEIGH HEAVILY IN PLAINTIFFS'**  
14 **FAVOR**

15 Plaintiffs easily satisfy the remaining elements for  
16 preliminary equitable relief: they are "likely to suffer  
17 irreparable harm in the absence of preliminary relief"; "the  
18 balance of equities tips in [their] favor"; and "an injunction is  
19 in the public interest." *Winter*, 555 U.S. at 20.

20 Plaintiffs' demonstrated likelihood of success satisfies the  
21 "likely to suffer irreparable injury" requirement. Absent an  
22 injunction, Plaintiffs will be unlawfully coerced by the threat  
23 of litigation and penalties to abandon their First Amendment  
24 rights and disseminate a factually controversial and literally  
25 false and misleading warning with which they vehemently disagree.  
26 "[T]he loss of First Amendment freedoms, for even minimal periods  
27 of time, unquestionably constitutes irreparable injury." *Valle*  
28 *Del Sol*, 709 F.3d at 828 (quoting *Elrod v. Burns*, 427 U.S. 347,

1 373 (1976). It is accordingly "relatively easy" to establish  
2 this factor in a First Amendment case," *CTIA-The Wireless Ass'n*  
3 854 F.3d at 1123; plaintiffs "need only demonstrate the existence  
4 of a colorable First Amendment claim," *Brown v. California Dep't*  
5 *of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003) (emphasis added).  
6 Plaintiffs here have done that in spades. *See supra* at 24-36.

7 In addition to the threatened constitutional injury, the  
8 compelled warning requirement will cause several additional forms  
9 of significant and/or intangible injuries that constitute  
10 irreparable harms:

- 11 • The compelled glyphosate warning will damage the  
12 reputation and goodwill associated with Plaintiffs  
13 (and their members) and their products by misleading  
14 consumers and branding their products as cancer-  
15 causing killers. Heering Decl., Monsanto ¶¶ 39, 45,  
16 52-54; Inman Decl., U.S. Durum Growers ¶¶ 10-11;  
17 Novak Decl., Nat'l Corn Growers Ass'n ¶ 7; Kessel  
18 Decl., N.D. Grain Growers ¶ 11; Brinkmeyer Decl., Iowa  
19 Agribusiness ¶¶ 9, 15; Zander Decl., S.D. Agri-  
20 Business ¶¶ 8-10; Pinel Decl., Western Plant Health  
21 Association ¶ 17; Jackson Decl., Iowa Soybean ¶ 13;  
22 Martinson Decl., U.S. Durum Growers ¶¶ 18-19; McCarty  
23 Decl., Assoc. Indus. of Missouri ¶¶ 8-10; *see Life*  
24 *Alert Emergency Response, Inc. v. LifeWatch, Inc.*, 601  
25 F. App'x 469, 474 (9th Cir. 2015) (threat to  
26 "reputation and goodwill . . . constitutes irreparable  
27 harm"); *see also Rent-A-Ctr., Inc. v. Canyon*  
28 *Television & Appliance Rental, Inc.*, 944 F.2d 597, 603

1 (9th Cir. 1991) (same); *Gerling Glob. Reinsurance*  
2 *Corp. of Am. v. Quackenbush*, Nos. Civ. S-00-  
3 0506WBSJFM, Civ. S-00-0613WBSJFM, CIV S-00-0779WBSJFM,  
4 Civ.S-00-0875WBSJFM, 2000 WL 777978, at \*13 (E.D. Cal.  
5 June 9, 2000) (Shubb, J.) (irreparable harm where  
6 defendant's actions "suggest" plaintiff's services are  
7 unsavory).

- 8 • This reputational disparagement will put Plaintiffs at  
9 a significant competitive disadvantage. Hurst Decl.,  
10 Missouri Farm Bureau ¶¶ 19-21; Inman Decl., U.S. Durum  
11 Growers ¶¶ 10-11, 17; Wogsland Decl., N.D. Grain  
12 Growers ¶¶ 13, 17-18; Stoner Decl., Nat'l Assoc. Wheat  
13 Growers ¶¶ 10, 16; Brinkmeyer Decl., Iowa Agribusiness  
14 ¶¶ 15-16; Zander Decl., S.D. Agri-Business ¶¶ 8, 13;  
15 Jackson Decl., Iowa Soybean ¶¶ 13, 19; McCarty Decl.,  
16 Assoc. Indus. of Missouri ¶¶ 8-10, 14; *see also, e.g.,*  
17 *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d  
18 389, 411 (9th Cir. 2015) ("A rule putting plaintiffs  
19 at a competitive disadvantage constitutes irreparable  
20 harm.").

- 21 • The glyphosate listing and warning requirement have  
22 already caused some Plaintiffs to lose customers and  
23 will certainly cause loss of prospective customers.  
24 Pinel Decl., Western Plant Health Association, ¶ 14;  
25 Heering Decl., Monsanto ¶¶ 35, 36, 39, 46-52;  
26 *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240  
27 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened  
28 loss of prospective customers or goodwill certainly

1 supports a finding of the possibility of irreparable  
2 harm."); *Design Furnishings, Inc. v. Zen Path LLC*, No.  
3 CIV. 2:10-02765 WBS GGH, 2010 WL 4321568, at \*4 (E.D.  
4 Cal. Oct. 21, 2010) (Shubb, J.) (irreparable harm  
5 where defendant's actions "cause plaintiff to lose  
6 prospective customers").

- 7 • The warning requirement has already caused major  
8 glyphosate retailers to determine that they will not  
9 carry glyphosate-based products without a warning on  
10 the products' labels with which Plaintiffs vehemently  
11 disagree. Pinel Decl., Western Plant Health  
12 Association ¶¶ 14-15; Heering Decl., Monsanto ¶ 35.  
13 This is true even if an NSRL is ultimately adopted.  
14 Pinel Decl., Western Plant Health Association ¶ 16;  
15 Heering Decl., Monsanto ¶ 36. Accordingly, major  
16 retailers will remove Plaintiffs' unlabeled  
17 glyphosate-based products from store shelves and  
18 inventory well in advance of the effective date of the  
19 warning requirement. Heering Decl., Monsanto ¶ 38;  
20 *see De Simone v. VSL Pharmaceuticals, Inc.*, 133 F.  
21 Supp. 3d 776, 799 (D. Md. 2015) ("irreparable harm"  
22 from pulling products "off the shelves"). Likewise,  
23 the warning requirement threatens to impose  
24 operational burdens on major retailers, further  
25 impairing Plaintiffs' reputations and goodwill. *See,*  
26 *e.g.*, Heering Decl., Monsanto ¶ 39.
- 27 • The warning requirement threatens to force changes  
28 throughout the food, agricultural, and herbicide

1 industries by imposing (at a minimum) extensive and  
2 wholly unnecessary testing requirements, and  
3 disruption to and segregation of supply chains. See,  
4 e.g., Hurst Decl., Missouri Farm Bureau ¶¶ 12-15;  
5 Inman Decl., U.S. Durum Growers ¶¶ 12-15; Novak Decl.,  
6 Nat'l Corn Growers Ass'n ¶¶ 9-10; Wogsland Decl., N.D.  
7 Grain Growers ¶¶ 13-16; Stoner Decl., Nat'l Assoc.  
8 Wheat Growers ¶¶ 11-14; Kessel Decl., N.D. Grain  
9 Growers ¶¶ 7-10; Brinkmeyer Decl., Iowa Agribusiness  
10 ¶ 13; Jackson Decl., Iowa Soybean ¶¶ 14-18; Martinson  
11 Decl., U.S. Durum Growers ¶¶ 13-15, 17; McCarty Decl.,  
12 Assoc. Indus. of Missouri ¶¶ 9, 11-13; Heering Decl.,  
13 Monsanto ¶¶ 37, 39-41. It also threatens to cause  
14 burdensome operational changes in the retail setting,  
15 which will further impair the goodwill of Plaintiffs  
16 and their relationships with suppliers and retailers.  
17 *Id.* at ¶ 39.

- 18 • If Plaintiffs who farm using glyphosate are forced to  
19 cease using glyphosate by suppliers, this will result  
20 in significant disruption to their longstanding  
21 business practices. See, e.g., Hurst Decl., Missouri  
22 Farm Bureau ¶¶ 5-7, 15-17; Wogsland Decl., N.D. Grain  
23 Growers ¶¶ 13-16; Stoner Decl., Nat'l Assoc. Wheat  
24 Growers ¶¶ 7-9, 14-15; Kessel Decl., N.D. Grain  
25 Growers ¶¶ 3, 7-10; Jackson Decl., Iowa Soybean ¶¶ 4-  
26 10, 16-18. See *Am. Trucking Ass'ns, Inc. v. City of*  
27 *Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009)

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1 (forcing a "change [in] the whole nature of  
2 [plaintiff's] business" constitutes irreparable harm).  
3 Moreover, to the extent any of these injuries could be deemed  
4 financial in nature, they are not reparable as a matter of law  
5 because California's sovereign immunity precludes them from being  
6 remedied by money damages. See *California Pharmacists Ass'n v.*  
7 *Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009) (finding  
8 irreparable harm due to economic loss where sovereign immunity  
9 prevents recovery of money damages); *Pac. Merch. Shipping Ass'n*  
10 *v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2914961, at \*3  
11 (E.D. Cal. Oct. 5, 2007) (Shubb, J.) ("irreparable harm" from  
12 "complying with regulations" where "Eleventh Amendment" prohibits  
13 recovery); *North East Medical Servs., Inc. v. Cal. Dep't of*  
14 *Health Care Servs.*, 712 F.3d 461, 466 (9th Cir. 2013) (California  
15 has immunity from "monetary damages").

16 The final two factors—the balance of equities and public  
17 interest—"merge when the Government is the opposing party."  
18 *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors also  
19 strongly support immediate relief. The courts have "consistently  
20 recognized the significant public interest in upholding First  
21 Amendment principles." *Doe v. Harris*, 772 F.3d 563, 583 (9th  
22 Cir. 2014). And neither the public nor the government "has [any]  
23 legitimate interest in enforcing an unconstitutional" law. *KH*  
24 *Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th  
25 Cir. 2006). The compelled warning is not yet in effect, so an  
26 injunction would merely preserve the status quo. As noted,  
27 moreover, *federal* regulators already account for pesticide  
28 residues, including *inter alia* their presence in foods. See



1 *supra* at 5-7. The public interest in health, therefore, is  
2 already protected. See *Am. Meat Inst. v. Ball*, 550 F. Supp. 285,  
3 294 (W.D. Mich. 1982) (state warning “does not further any  
4 legitimate state interest” where it conflicts with federal  
5 standards and invites consumer confusion), *aff’d sub nom. Am.*  
6 *Meat Inst. v. Pridgeon*, 724 F.2d 45 (6th Cir. 1984); *Kraft Foods*  
7 *N. Am. Inc. v. Rockland County*, No. 01 Civ. 6980(WHP), 2003 WL  
8 554796, at \*10 (S.D.N.Y. Feb. 26, 2003) (“[The] County imposes a  
9 [food labeling] standard that is impermissibly different from the  
10 federal regulations . . . . Thus, [the] County fails to  
11 establish a legitimate state purpose.”). Enforcement of  
12 California’s glyphosate warning will not make the public more  
13 safe—to the contrary, it will affirmatively harm the public by  
14 exacerbating the problem of rampant overwarning which undermines  
15 and diminishes the utility and effect of those warnings that are  
16 actually justified. See *supra* at 35.

17 **CONCLUSION**

18 For the foregoing reasons, the requested preliminary  
19 injunction should issue.  
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