

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

**ROB BONTA,\* IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL  
OF THE STATE OF CALIFORNIA,**

Defendant-Appellant.

Case No. 20-16758

On Appeal from the United States District Court  
for the Eastern District of California

Case No. 2:17-CV-02401  
(Hon. William B. Shubb)

**APPELLANT'S UNOPPOSED MOTION TO  
HOLD CASE IN ABEYANCE OR DEFER  
SUBMISSION PENDING RULEMAKING**

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Pursuant to Fed. R. App. P. 27 and Ninth Circuit Rules 27-1, Defendant-Appellant Rob Bonta, Attorney General of the State of California, respectfully requests that the Court hold this appeal in abeyance for 180 days, with status reports to be due every 60 days and upon completion of the rulemaking described herein. Plaintiffs-Appellees have stated that they do not oppose the request to hold the appeal in abeyance for 180 days, though they disagree that any final regulation promulgated by the Office of Environmental Health Hazard Assessment (OEHHA) would support a different outcome of their First Amendment claim.

This appeal presents the question whether, in the absence of scientific consensus on the carcinogenicity of glyphosate, Proposition 65's requirement that businesses provide warnings for glyphosate exposures violates the First Amendment. On July 20, 2021, OEHHA, the lead agency responsible for implementing Proposition 65, issued a Notice of Proposed Rulemaking directly relevant to the issue on appeal. The proposed regulation establishes "safe harbor" warning language specifically for exposures to glyphosate, the main ingredient in certain pesticides. If adopted by the agency in its proposed or similar form, the new regulation would substantially alter the legal landscape at issue in this appeal, and likely render it unnecessary to pass upon certain of the novel First Amendment questions raised before this Court. Because the agency anticipates that the rulemaking process will be completed within 180 days, and the language of the

proposed safe harbor warning may change while the appeal is still pending, the Court should temporarily hold the appeal in abeyance.

This case involves important issues of first impression concerning the constitutionality of health and safety laws like Proposition 65 that require businesses to provide warnings to consumers and workers exposed to hazardous chemicals. Specifically, this appeal concerns Proposition 65 warnings for exposures to glyphosate, the principal ingredient in Monsanto's Roundup and other glyphosate-based pesticides. The district court permanently enjoined enforcement of *any* Proposition 65 warning requirement for glyphosate exposures on the ground that *all* such warnings would violate the First Amendment. The district court primarily found fault with a general safe harbor warning that would identify glyphosate as a chemical "known to [the State of California] to cause cancer," pointing to the absence of a scientific consensus on the issue of glyphosate's carcinogenicity. It then enjoined enforcement of other possible differently worded warnings, reasoning that such warnings would necessarily be misleading. As explained in detail in the Opening Brief and the Reply Brief, the district court's sweeping judgment should be reversed: the First Amendment does not forbid the State from requiring companies to warn people that exposure to a chemical could cause cancer.

But recent developments could substantially change the scope of the issues on appeal, and thus counsel heavily in favor of holding the appeal in abeyance. First, awaiting resolution of the rulemaking is particularly important because the district court’s order broadly enjoined enforcement of any formulation of Proposition 65’s warning requirement for glyphosate exposures. OEHHA’s rulemaking presents specific warning language tailored to glyphosate that was not considered by the district court. Principles of judicial restraint weigh heavily in favor of waiting until OEHHA has concluded its formal rulemaking process so that the question whether all forms of Proposition 65 glyphosate warnings are unconstitutional can be addressed in the context of a concrete “safe harbor” warning. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

Second, OEHHA’s proposed regulation resolves many of the district court’s concerns about the warnings considered in the proceedings below. And if finalized in present (or similar) form, the safe harbor warning would shield businesses from enforcement actions and allow the businesses to fulfill their obligations under Proposition 65—without the type of compelled speech the district court believed to be problematic. Holding this case in abeyance for 180 days to await the outcome of the present rulemaking proceedings would thus best serve the interests of judicial economy and efficiency, and avoid the possibility of relevant circumstances shifting after this Court has heard oral argument but before it has

issued a decision.<sup>1</sup> Because Plaintiffs-Appellees currently benefit from an injunction in their favor, they would not be prejudiced by this delay in the State’s appeal. Plaintiffs-Appellees have stated that they do not oppose the request to hold the appeal in abeyance for 180 days, with status reports to be due every 60 days and upon completion of the rulemaking, though they disagree that any final regulation would support a different outcome of their First Amendment claim.

## **BACKGROUND**

### **I. STATUTORY AND REGULATORY BACKGROUND**

The Safe Drinking Water and Toxic Enforcement Act, better known as Proposition 65, was enacted by initiative in 1986. *See* Cal. Health and Safety Code §§ 25249.5–25249.14. The law requires the Governor of California to publish a “list of those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of this chapter.” Cal. Health & Safety Code § 25249.8(a). It requires businesses to give warnings before exposing people to these chemicals. Cal. Health & Safety Code § 25249.6. The warning requirement applies to exposures to chemicals that have been identified by any one of the expert organizations identified in the law and related regulations—including the

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<sup>1</sup> Oral argument in this case has been scheduled for October 8, 2021, in San Francisco. *See* Dkt. No. 67. As an alternative to this request, the Court could consider deferring submission of the case after oral argument and ordering supplemental briefing on the effect of the regulation ultimately adopted by OEHHA.

International Agency for Research on Cancer (IARC)—as causing cancer, even if other such agencies have made different findings. *See* Cal. Health & Safety Code §§ 25249.8(a) (b); Cal. Lab. Code §§ 6382(b)(1), (d).

**A. Proposition 65 Warning Requirement**

A business with ten or more employees must provide a clear and reasonable warning before it “knowingly and intentionally expose[s] any individual [in California] to a chemical known to the state to cause cancer or reproductive toxicity.” Cal. Health & Safety Code §§ 25249.6, 25249.11(b).

Proposition 65 does not dictate the contents of the warning, where one is required, as long as the warning is “clear and reasonable” in conveying that the chemical is “known to the state to cause cancer[,]” or “words to that effect.” Cal. Health & Safety Code § 25249.6; *see Dowhal v. SmithKline-Beecham Consumer Healthcare*, 32 Cal.4th 910, 918 (2004). Pursuant to its statutory authority to adopt regulations to implement the statute and further its purposes, Cal. Health & Safety Code § 25249.12(a), OEHHA has adopted “safe harbor” warning methods and content for consumer product, occupational, and environmental exposures to listed chemicals. Cal. Code Regs. tit. 27, §§ 25601-25607.37. These warnings are not mandatory, but they are significant to businesses: as the name “safe harbor” suggests, such warnings are deemed to be “clear and reasonable” for purposes of statutory compliance. Cal. Code Regs. tit. 27, §§ 25600(a), 25601. “The

‘safe harbor’ is offered simply to provide the businesses choosing to use them reasonable certainty that they will not be subjected to an enforcement action over the warning they provide.” *Env’t Law Found. v. Wykle Research, Inc.*, 134 Cal.App.4th 60, 66-67 (2005) (quoting OEHHA’s Rev. Final Statement of Reasons [Oct. 6, 1988], at 7-8, available at <https://oehha.ca.gov/media/downloads/crn/12601fsornov1988.pdf>). Most, but not all, of these safe harbor warnings, which include warnings for several specific chemical exposures, use the phrase, “known to the State of California to cause cancer,” but that language is not required by statute. RB 6-7; OB 13-14.

Use of the safe harbor warning is optional. A business may use any warning method or content that is clear and reasonable. Cal. Health & Safety Code § 25249.6; *see* Cal. Code Regs. tit. 27, § 25601. Whether a non-safe-harbor warning is clear and reasonable is determined on a case-by-case basis. *Ingredient Comm’n Council v. Lungren*, 2 Cal.App.4th 1480, 1491-92 (1992).

In certain circumstances, it may be reasonable to provide additional factual context in a warning. California courts have approved several Proposition 65 consent judgments in actions brought by the Attorney General in which the proposed warnings departed from the standard safe harbor warning language by providing additional information clarifying the risks of the exposures involved. *See* OB 14-15.

## **II. FACTUAL BACKGROUND**

### **A. IARC's 2015 Classification of Glyphosate as a Carcinogen**

As discussed in more detail in the Opening Brief, in March 2015, IARC, the cancer research arm of the United Nations World Health Organization, classified glyphosate as “probably carcinogenic to humans (Group 2A),” its second highest classification, based on “sufficient evidence” that it causes cancer in animals, and “limited evidence” in humans. OB 17-19, 22-23. In its Monograph, IARC cited evidence of a positive association in humans between exposures to glyphosate and non-Hodgkin lymphoma in studies of humans in different geographic regions (the U.S., Canada, and Sweden). OB 22-23. The Monograph represented the consensus findings of the 17-member Working Group. OB 23.

### **B. EPA's and Other Regulatory Agencies' Conclusions**

IARC's scientific conclusion that glyphosate is a cancer hazard is not shared by all regulatory bodies. The EPA has stated that glyphosate is “not likely to be carcinogenic to humans.” OB 28. Regulatory agencies in other countries have also concluded that there is insufficient evidence that glyphosate causes cancer, either at all (i.e., it is not a cancer hazard), or that, even if glyphosate poses a hazard, it does not pose a risk to humans at the levels to which humans are typically exposed. OB 29; *see* AB 7-14. Other than IARC, which is both identified by name in the Labor Code and designated an “authoritative” body under the Proposition 65 regulations, the EPA is the only one of these agencies that is

considered an “authoritative” body under Proposition 65. *See* Cal. Lab. Code § 6382(b)(1); Cal. Code Regs. tit. 27, § 25306(m).

### **C. OEHHA’s Placement of Glyphosate on the Proposition 65 List**

In September 2015, OEHHA issued a notice of its intention to add glyphosate to the Proposition 65 list of carcinogens based on IARC’s carcinogenicity determination. OB 24. OEHHA placed glyphosate on the Proposition 65 list on July 7, 2017. OB 25. In the Notice of Intent to List, OEHHA explained that IARC had concluded that there was “sufficient evidence of carcinogenicity in experimental animals” and “‘limited evidence’ in humans.” *Id.*

## **III. PROCEDURAL HISTORY**

### **A. Litigation Below**

Shortly after OEHHA placed glyphosate on its Proposition 65 list, but before warning requirements for businesses exposing consumers to glyphosate were triggered by the statute, Monsanto and 13 agricultural and business groups initiated this lawsuit against OEHHA’s director and the Attorney General in November 2017.<sup>2</sup> Plaintiffs sought a declaration that the listing of glyphosate and the Proposition 65 warning requirement as applied to glyphosate were unconstitutional on First Amendment grounds. 11-ER-2327. The focus of the First Amendment

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<sup>2</sup> OEHHA’s director was dismissed by stipulation, leaving the Attorney General the sole remaining defendant. *Nat’l Ass’n of Wheat Growers v. Zeise*, 2:17-cv-2401-WBS-EFB, Dkt. No. 93.

challenge to the warning requirement was on the general safe harbor warning as applied to glyphosate. *See* 11-ER-2322-2323. In 2019, the parties cross-moved for summary judgment. 11-ER-2383-84.

The Attorney General argued that the Proposition 65 warnings for glyphosate satisfied the test articulated by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). This Court in *CTIA-The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845-49 (9th Cir. 2019) (*CTIA II*), affirmed that *Zauderer* required upholding disclosure mandates if they are purely factual, uncontroversial, reasonably related to a substantial state interest, and not unduly burdensome. The Attorney General also argued, in the alternative, that the warnings he proposed satisfied the more stringent standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), because the State had “a substantial interest” in informing users of the facts regarding the carcinogenicity of glyphosate, and that the regulation directly advanced this interest through burdens on speech no more “extensive than . . . necessary to serve that interest.” 447 U.S. at 566, 571.

Rejecting these arguments, the district court granted plaintiffs’ motion for summary judgment, concluding that Proposition 65’s warning requirement could not be applied to glyphosate in a manner consistent with the First Amendment’s restrictions on compelled speech. *See* 1-ER-28-38. The court held that the First

Amendment bars the Attorney General from requiring businesses to use the general safe harbor warning language for warnings about the dangers of exposures to glyphosate. 1-ER-23. The court also rejected the examples of alternative warnings proposed by the Attorney General during the litigation, the most recent of which is discussed in the briefs in this appeal:

**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](http://www.P65warnings.ca.gov).

1-ER-28-33; OB 50-77.

In its analysis, the district court focused on the fact that both the general, most-commonly used regulatory safe harbor warning language and the Attorney General's proposed warning would require a business to state that glyphosate is "known" to cause cancer. 1-ER-23, 31. In the district court's view, the absence of a scientific consensus on the carcinogenicity of glyphosate and disagreement among certain regulatory bodies rendered any warning stating that California "know[s]" that glyphosate causes cancer misleading to the ordinary viewer of the

warning.<sup>3</sup> *See* 1-ER-23-24. The district court concluded that California could not compel companies to disclose the findings of one expert agency (IARC) when others disagree. 1-ER-25. The court also observed that the alternative language proposed by the Attorney General—alerting consumers that the EPA holds a different view—may not comply with the Attorney General’s guidance for Proposition 65 settlements, and is misleading in any event because the language suggests an even split among expert scientific agencies about the dangers posed by glyphosate. 1-ER-28-31.

The district court therefore permanently enjoined *all* public and private enforcement of any Proposition 65 warning requirement for glyphosate on the ground that there could be no warning for glyphosate that (1) complied with both Proposition 65 and the First Amendment and (2) would protect businesses from actions by private enforcers of Proposition 65. 1-ER-28-38. The court entered judgment on August 11, 2020. 1-ER-2. The Attorney General timely appealed.

**B. July 20, 2021, Notice of Proposed Rulemaking**

On July 20, 2021, OEHHA issued a notice of proposed rulemaking to propose a new “safe harbor” warning specifically for exposures to glyphosate. The

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<sup>3</sup> The court did not rule on whether the alternative warnings the Attorney General proposed would comply with Proposition 65, as it considered them misleading. The district court focused primarily on analyzing the language of the non-mandatory safe harbor warning, noting the protection it provides from suits by private enforcers. *See* 1-ER-22-27.

warning is required only for exposures to glyphosate that businesses cannot demonstrate fall below the regulatory “no significant risk level” or another “no significant risk level” they can prove. See <https://oehha.ca.gov/proposition-65/crn/notice-proposed-rulemaking-warnings-exposures-glyphosate-consumer-products-new> (“The new regulation would further the ‘right-to-know’ purposes of the Act and provide warning language tailored for exposures to glyphosate that exceed its NSRL.”). The notice of proposed rulemaking states that businesses that “choose to provide the [proposed] safe harbor warning language for such exposures would comply with the Act, because the content and methods provided in the regulation are deemed ‘clear and reasonable’ by the lead agency for purposes of the Act.” *Id.*

The proposed warning would allow businesses to comply with Proposition 65 with the following safe harbor warning:

**CALIFORNIA PROPOSITION 65 WARNING.** Using this product can expose you to glyphosate. The International Agency for Research on Cancer classified glyphosate as probably carcinogenic to humans. Other authorities, including USEPA, have determined that glyphosate is unlikely to cause cancer, or that the evidence is inconclusive. A wide variety of factors affect your personal cancer risk, including the level and duration of exposure to the chemical. For more information, including ways to reduce your exposure, go to [www.P65Warnings.ca.gov/glyphosate](http://www.P65Warnings.ca.gov/glyphosate).

<https://oehha.ca.gov/media/downloads/crn/glyphosateproposedregtext071921.pdf>

OEHHA's reasons for proposing the regulation are set forth in its Initial Statement Reasons, available at

<https://oehha.ca.gov/media/downloads/cnr/glyphosateisor071921.pdf>.

As described therein, OEHHA's proposed safe harbor warning for glyphosate is intended to comply fully with the First Amendment, while doing so in a manner that avoids the concerns that the district court cited. *Id.* at 15 (“To facilitate glyphosate warnings in a manner that avoids the First Amendment concerns that have been raised about the standard consumer product warnings when used in the context of glyphosate, OEHHA proposes to adopt a tailored warning.”).

The Notice was published in the California Regulatory Notice Register on July 23, 2021. <https://oal.ca.gov/wp-content/uploads/sites/166/2021/07/2021-Notice-Register-Number-30-Z-July-23-2021.pdf> at 939-942. The statutorily required public comment period ends on September 7, 2021. OEHHA has informed the Attorney General that it anticipates completing its rulemaking by January 2022.

### **ARGUMENT**

The Court should hold the appeal in abeyance for 180 days, pending the conclusion of the rulemaking process. The lone issue presented in the case is “[w]hether, in the absence of scientific consensus, the First Amendment prohibits California’s Proposition 65 from requiring a business to warn Californians before it

exposes them to significant amounts of glyphosate, a chemical that the International Agency for Research on Cancer, a worldwide leader in cancer research, has determined causes cancer in animals and is probably carcinogenic to humans.” OB 5. In the Attorney General’s view, the proposed warning, if it is ultimately adopted in the rulemaking process, could materially alter the First Amendment analysis in this appeal, potentially rendering unnecessary this Court’s resolution of several issues raised in the parties’ briefs.

As a threshold matter, principles of judicial restraint weigh heavily in favor of awaiting the results of OEHHA’s rulemaking. The Court should not reach the issue whether the Proposition 65 warning requirement for glyphosate is constitutional until OEHHA’s rulemaking has concluded. Only then can the dispute be addressed in the context of a concrete “safe harbor” warning adopted after a formal rulemaking process, which will also present the Court with the opportunity to resolve the appeal on narrower grounds. *See Wash. State Grange*, 552 U.S. at 450.

Moreover, the warning language OEHHA has proposed in connection with the notice of proposed rulemaking addresses the principal issues the district court considered in rejecting Proposition 65 warnings for glyphosate. First, the district court concluded that both the general safe harbor warning and the Attorney General’s final proposed warning were unconstitutional because they required

businesses to state that glyphosate is “known to cause cancer.” 1-ER-23, 31. The district court considered such a representation to be misleading, and therefore not permitted under either *Zauderer* or *Central Hudson*, because the scientific conclusion of one designated agency does not make the fact “known.” *See* 1-ER-23-25, 31-35. OEHHA’s proposed warning omits such language. Rather than stating that glyphosate is “known to cause” cancer, the proposed warning simply states that the International Agency for Research on Cancer found glyphosate to be a probable human carcinogen, which IARC indisputably has done.

Second, the district court also faulted the Attorney General’s warning for being misleading because, in its view, it implied that only one agency, the EPA, had disagreed with IARC. *See* 1-ER-31-33. OEHHA’s proposed warning, however, allows businesses to convey the fact that other agencies, including the EPA, disagree, or have found the evidence of carcinogenicity to be inconclusive. This addresses the district court’s concern that the Attorney General’s proposed warning, though mentioning the EPA’s contrary finding, could give the impression that there was an equal split of authority on the question of glyphosate’s carcinogenicity, and thus be misleading. *Id.*

Third, the district court also raised concerns that the Attorney General’s suggested language would not insulate businesses from enforcement action because private enforcers could challenge the warning language as inadequate. *See*

1-ER-28-29. In the proposed rulemaking, OEHHA explains that its warning, if adopted by regulation as a formal “safe harbor,” would insulate from enforcement action those businesses that choose to use it. *See* <https://oehha.ca.gov/proposition-65/crn/notice-proposed-rulemaking-warnings-exposures-glyphosate-consumer-products-new> and proposed new regulatory text (to be added as sections 25607.48 and 25607.49 of Title 27 of the California Code of Regulations).

In sum, if the proposed regulation is finalized, it would materially alter the First Amendment analysis in this appeal. Where the district court focused exclusively on the general safe harbor warning and the Attorney General’s proposed alternative warnings during the litigation, this Court would be able to focus instead on a new safe harbor warning promulgated by California’s lead agency following a formal rulemaking process. If adopted, the regulation will have the force of law.<sup>4</sup> Once the rulemaking process concludes, the Attorney General could provide additional briefing about how any final adopted warning language satisfies relevant First Amendment standards—either in supplemental briefing the Court orders the parties to submit, or through a motion for remand to the district court to consider such issues in the first instance. As the language is

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<sup>4</sup> Although the district court expressed doubt about whether a warning that complied with the First Amendment could also comply with Proposition 65, it did not resolve this issue when it ruled on the parties’ cross-motions for summary judgment. Plaintiffs-Appellees argue in their answering brief that it could not.

presently proposed, it satisfies the First Amendment, because it is factual, not misleading, and “even though it can be tied in some way to a controversial issue,” it is not “for that reason alone, controversial.” *CTIA II*, 928 F.3d at 845. It also advances the vital state interest in providing users with important facts about the carcinogenicity of glyphosate before they are exposed to significant amounts of the pesticide. And because the district court’s judgment broadly enjoined enforcement of *any* Proposition 65 warning language, the new rulemaking, when finalized, will allow the Court to address the issues in dispute in the context of a concrete, formally-promulgated regulation.

OEHHA has informed the Attorney General that it expects the rulemaking process, which includes a formal notice and comment period and potentially a public hearing, to be complete within 180 days of the date of issuance of the Notice of Proposed Rulemaking. Thus, to allow OEHHA sufficient time to complete this process, and to conserve judicial resources, the Attorney General respectfully requests that the appeal be held in abeyance for a period of 180 days, with status reports due at 60-day intervals and upon completion of the rulemaking. At the completion of the rulemaking process, the Attorney General would stand ready to provide supplemental briefing on the constitutionality of the final safe harbor warning language OEHHA adopts, or in the alternative, to request a remand

to the district court so that it may consider the constitutionality of the new safe harbor warning in the first instance.

Counsel for Plaintiffs-Appellees have authorized the Attorney General to state that they do not oppose this request to hold the appeal in abeyance for 180 days, though they disagree that any final regulation would support a different outcome of their First Amendment claim.

### CONCLUSION

The Court should hold the appeal in abeyance for 180 days, with status reports to be issued every 60 days and upon completion of the rulemaking.

Dated: July 30, 2021

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

**9th Cir. Case Number(s)** 20-16758

I am the attorney or self-represented party.

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that:

- (1) This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and 9th Cir. R. 27-1 because, according to Microsoft Word, this motion contains 3,900 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).
- (2) This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5)-(6), and 9th Cir. R. 27-1, because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point font size and Times New Roman type style.

**Signature** s/ Laura J. Zuckerman **Date** July 30, 2021  
*(use "s/[typed name]" to sign electronically-filed documents)*