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Attorneys for (Proposed) *Amici Curiae*,
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
and THE CALIFORNIA CHAMBER OF COMMERCE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest federation of businesses and associations. It represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. One important function of the U.S. Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's businesses.

The California Chamber of Commerce ("California Chamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, the California Chamber has been the voice of California business. While it represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. The California Chamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues. The California Chamber often advocates before federal and state courts by

filing *amicus curiae* briefs and letters in cases, like this one, involving issues of paramount concern to the business community.[1]

The U.S. Chamber and California Chamber have a substantial interest in the resolution of this case, which raises important issues relating to fundamental free-speech rights of their members. Many of the Chambers' members do business in California. They have regularly been subject to Proposition 65's warning requirements and faced private enforcement actions from so-called "bounty hunter" plaintiffs for products that pose no meaningful risk of cancer. The Chambers respectfully submit that their views on the implications of this case for all companies doing business in California will assist the Court in determining whether the preliminary injunction should be granted here.

SUMMARY OF THE ARGUMENT

A wide range of products sold throughout the world--such as raw and processed food products, textiles, and feminine hygiene products--may contain trace amounts of glyphosate, one of the most popular and widely studied herbicides in history. California has announced that, beginning in July 2018, it will require businesses that offer such products to warn consumers that the herbicide is "known to the State to cause cancer." But that warning is false: California "knows" no such thing; in fact, its own studies--as well as a December 2017 EPA review--show just the opposite. The warning is also highly misleading,

[1] No party counsel authored this brief in whole or in part. No one other than the U.S. Chamber, the California Chamber, their members, or their counsel contributed any money to fund its preparation or submission.

heavily debated, and deeply disparaging to the companies compelled to declare it. It amounts to nothing more than a requirement that businesses carry the State-favored subjective opinion of a third party.

The First Amendment has long prohibited States from forcing speakers to "use their private property as a *** 'billboard'" to convey the government's preferred message, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), or to "burden the speech of others in order to tilt public debate in a preferred direction," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-579 (2011). Because commandeering companies to carry subjective and stigmatizing speech serves no legitimate government justification, but instead undermines both the speakers' and the audience's well-established constitutional interests, the glyphosate warning cannot satisfy any level of First Amendment scrutiny.

That Proposition 65--the statutory and regulatory scheme under which California mandates the challenged warning--may allow for businesses to prove that their product falls below a No Significant Risk Level (NSRL) threshold in no way cures the compelled disclosure's constitutional defects. On the contrary, the NSRL framework imposes *additional* legal harms. On its face, it flips the free-speech presumption, forcing businesses to demonstrate that the compelled message lacks justification, when the First Amendment places the inverse burden squarely on the State.

Moreover, because the costs of establishing an NSRL defense in an enforcement proceeding are substantial, the regulation effectively imposes on businesses an unreasonable (and

unconstitutional) choice: prove that the State has no justified interest in compelling the challenged warning, carry a message they (and nearly all regulatory bodies) vehemently dispute, or throw in the towel by removing all glyphosate from their products. Pressuring businesses in this way impermissibly burdens their First Amendment right *not* to speak. This Court should enjoin the warning requirement pending its review of the important free-speech issues raised in this case.

ARGUMENT

I. THE GLYPHOSATE WARNING VIOLATES THE FIRST AMENDMENT

A. Compelled Disclosures That Are Misleading and Controversial Face Heightened First Amendment Scrutiny

In the commercial marketplace, as in the marketplace of ideas, the State may not burden speech "in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-579. That is because "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Id.* at 579 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)); *see also Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 964 (9th Cir. 2012) (noting that the pursuit of profit by corporations "does not make them any less entitled to protection under the First Amendment").

Just as governments may not restrict speech without triggering First Amendment scrutiny, they may not compel speech, either. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say," *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) ("PG&E") (plurality opinion), and courts therefore must be

vigilant of any government attempt to "compel a private party to express a view with which the private party disagrees," *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015); *see American Beverage Ass'n v. City & Cty. of San Francisco*, 871 F.3d 884, 894 (9th Cir. 2017) ("A compelled disclosure that requires [commercial] speakers 'to use their own property to convey an antagonistic ideological message,' *** or 'to be publicly identified or associated with another's message,' cannot withstand First Amendment scrutiny.") (quoting *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471 (1997)).

Although government regulations compelling speech in the commercial context are ordinarily subject to heightened scrutiny, *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980)), the Supreme Court carved out an exception for compelled commercial disclosures that are "purely factual and uncontroversial" and not "unjustified or unduly burdensome," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Courts have interpreted this exception narrowly, however, to prevent it from swallowing the rule. Thus, a "key inquiry" for applying *Zauderer* is whether there "is any controversy regarding the factual accuracy of the disclosure." *American Beverage Ass'n,* 871 F.3d at 892–94. That is because the justification for the lesser scrutiny is "that an advertiser's First Amendment interest in not providing 'purely factual and uncontroversial information' [is] low." *Id.* at 892-893; *see, e.g., CTIA-The Wireless Ass'n v. City of Berkeley*, 854

F.3d 1105, 1117-1120 (9th Cir. 2017) (upholding disclosure of "purely factual" FCC guidance); *American Meat Inst. V. United States Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (upholding disclosure of country of origin); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001) (upholding disclosure of mercury content).

By contrast, no commensurate First Amendment justification exists for compelling speakers to convey the government's *false, misleading,* or *factually controversial* messages: "The State has no legitimate reason to force retailers to affix false information on their products." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-967 (9th Cir. 2009), *aff'd sub nom. Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) (striking video-game labeling requirement because it did not convey "purely factual and uncontroversial information"). Outside the context of providing true, factual information to consumers, "[n]othing in *Zauderer* suggests *** that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views." *PG&E*, 475 U.S. at 15 n.12. When the government compels disclosure of false or factually controversial messages, the value to consumers of such speech is negative, and the forced disclosure itself a constitutional and commercial harm. *See Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas and Ginsburg, JJ., dissenting from denial of certiorari) ("If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech

regulation is defeated."). That is why, when "[t]here are divergent views regarding" an issue of public debate, "'the general rule is that the speaker and the audience, not the government, assess the value of the information'" available, *Sorrell*, 564 U.S. at 578 (quoting *Edenfield*, 507 U.S. at 767).

The rationale for skeptically reviewing government regulations that compel private speech is obvious. Affording the government broad powers to force individuals to convey messages with which they disagree can become "a subterfuge for favoring certain private speakers over others." *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009) (noting this risk as a "legitimate concern" in the related government speech doctrine context). Activist regulators or overzealous legislatures can use compelled speech requirements to pick winners and losers in the commercial marketplace--and in the public debate more broadly. After all, governments would have little incentive to spend their own resources to advocate for issues that are important to them if they could more easily and effectively coerce companies into subsidizing the communication of the government's policy positions--including its views on which products and services consumers should buy. But while "[r]equiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, *** that makes the requirement more constitutionally offensive, not less so." *National Ass'n of Mfrs. V. S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2015); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001)

(recognizing that "those whose business and livelihood depend in some way upon the product involved no doubt [correctly] deem First Amendment protection to be just as important for them as it is for" noncommercial actors).

The government has its own powerful megaphone to spread its preferred policy positions, including positions that are critical of commercial products. But one thing the government cannot due is coopt the messages of commercial speakers and force them to disparage their own products. Such coercion not only forces speakers to speak when they would rather remain silent, but deters them "from speaking out in the first instance." *PG&E*, 475 U.S. at 10. That result "reduc[es] the free flow of information and ideas that the First Amendment seeks to promote," *id.* at 14, to the detriment of companies and the public alike.

B. The False And Controversial Glyphosate Warning Undermines Important First Amendment Interests

Under the foregoing principles, this is an exceptionally easy case. The glyphosate warning forces businesses to provide a message to their own consumers that is not only misleading and factually controversial, but actually false on multiple levels.

California, through the Office of Environmental Health Assessment ("OEHHA"), has required businesses to warn consumers that glyphosate--a herbicide found in countless products manufactured or sold in California--is "*known* to the state to cause cancer." CAL. CODE REGS. tit. 27, § 25601 (emphasis added). That statement is false. The mandated warning derives from an International Agency for Research on Cancer ("IARC") finding

that California has never independently evaluated (and, under current regulations, *will* never evaluate). Yet OEHHA itself--*i.e.*, the same entity that now mandates the warning--earlier conducted its own research and concluded that "glyphosate is judged *unlikely* to pose a cancer hazard to humans." Ex. H to Decl. of Andrew D. Prins ("Prins Decl.") at 1, Dec. 6, 2017, ECF No. 29-11 (OEHHA, Public Health Goal for Chemicals in Drinking Water: Glyphosate (June 2007)) (emphasis added). California has thus asked corporations to report as true something that contradicts research from its own expert agency.[2]

The warning is also highly misleading and factually controversial: IARC's "probably carcinogenic" finding stands alone and in opposition to the overwhelming body of evidence from well-respected regulators in California, within the federal government, and around the globe. *See* Am. Compl. ¶¶ 36-48, Dec. 5, 2017, ECF No. 23; Plfs' Mem. in Support of Mot. for Prelim. Inj. ("Plfs' Mem.") 7-13, Dec. 6, 2017, ECF No. 29-1. In fact, earlier this month the Environmental Protection Agency--following a rigorous review of "extensive" data, including the studies evaluated by IARC--reaffirmed its prior conclusion that glyphosate "is not likely to be carcinogenic to humans." EPA,

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[2] The state-mandated warning is false--or at a minimum, highly misleading--for the additional reason that not even IARC "knows" that glyphosate causes cancer. Rather, IARC concluded merely that "[g]lyphosate is *probably carcinogenic to humans*," a finding further qualified by the admission that it is based on "limited evidence" and may be due to "chance, bias and confounding." Ex. N to Prins Decl. at 27, 398, Dec. 6, 2017, ECF No. 29-17 (IARC, WHO, Some Organophosphate Insecticides and Herbicides, IARC Monographs Vol. 112 (2017)).

Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, 13, 144 (Dec. 12, 2017).[3]

Making matters worse, by misidentifying the State (rather than the non-regulatory, unaccountable entity IARC) as the source of the supposed "knowledge," California has lent a deceptive imprimatur of legitimacy to the warning, giving it more weight than if California consumers knew the truth about IARC's outlier finding. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) ("If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.").

When historically confronted with similarly false, misleading, and factually controversial compelled statements, the Ninth Circuit has not hesitated to strike them down. *See, e.g., American Beverage Ass'n*, 871 F.3d at 896 ("In short, rather than being 'purely factual and uncontroversial,' the [sweetened-beverage] warning requires the Associations to convey San Francisco's disputed policy views."); *Video Software Dealers*, 556 F.3d at 953 (finding that warning-label regulation "unconstitutionally compel[s] speech under the First Amendment" because, instead of "requir[ing] the disclosure of purely factual information[,] [it] compels the carrying of the State's controversial opinion"). As *American Beverage Association* makes clear, the Ninth Circuit and other courts have found warnings

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[3] *Available at* https://www.epa.gov/sites/production/files/2017-12/documents/revised_glyphosate_issue_paper_evaluation_of_carcinogenic_potential.pdf.

unconstitutional that are false or misleading even in the face of government arguments that the warnings reflected "a clear scientific consensus." *American Bev. Ass'n*, 871 F.3d at 895; *see also*, *e.g.*, *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1209 (D.C. Cir. 2012). Here, the government could not even argue *that*, as the sole basis for the glyphosate warning is IARC's tentative outlier finding that directly conflicts with both California's own prior finding, and the global scientific and regulatory consensus.

California is, of course, free to "advance its own side of [the] debate" over whether glyphosate is carcinogenic "through its own speech." *Sorrell*, 564 U.S. at 579-580. "But [its] failure to persuade" even its own regulators "does not allow it to hamstring the opposition." *Id.* at 578. The false, misleading, and controversial--and therefore unconstitutional--glyphosate warning should never be allowed to go into effect.

II. THE NO-SIGNIFICANT-RISK-LEVEL "SAFE HARBOR" DOES NOT CURE THE GLYPHOSATE WARNING'S FIRST AMENDMENT HARMS

Under Proposition 65's regulatory scheme, a business selling a glyphosate-containing product is required to provide, under threat of civil penalties, a warning to consumers *unless* it can demonstrate that the product "poses no significant risk assuming lifetime exposure at the level in question"--a standard often defined by a regulatory determination called a "No Significant Risk Level" (NSRL). CAL. HEALTH & SAFETY CODE § 25249.10(c). Far from curing the harms imposed by the glyphosate warning, however, the NSRL "safe harbor" scheme exacerbates the regulation's defects.

A. The State Bears The Burden of Justifying The Need For Compelled Speech Under The First Amendment

Hornbook law declares that "it is *the State's burden* to justify its content-based law as consistent with the First Amendment" in all circumstances, even "[u]nder a commercial speech inquiry." *Sorrell*, 564 U.S. at 571-72 (emphasis added). Because laws stifling (or mandating) particular speech based on its content "are presumptively invalid" under Supreme Court precedent, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), "*the State must show* at least that the [regulation] directly advances a substantial governmental interest and that the measure is drawn to achieve that interest," *Sorrell*, 564 U.S. at 572 (emphasis added). In the compelled disclosure context, this means "*[t]he government* must carry the burden of demonstrating that its disclosure requirement is purely factual and uncontroversial." *American Beverage* Ass'n, 871 F.3d at 895 (emphasis added). That is because "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646.

Any other allocation of the burden would threaten to undermine and chill protected speech. For example, the First Amendment prohibits a State from "skew[ing] public debate" by requiring manufacturers to disclose factually controversial, policy-driven messages that their products have "not been found to be 'DRC conflict free,'" "environmentally sustainable," or "fair trade." *National Ass'n of Mfrs.*, 800 F.3d at 529–530. Such regulations clearly are not saved simply because some of

the regulated speakers might ultimately prove to the government's satisfaction (and at the speakers' own expense) that their products *do* fall within the government's conception of what is "conflict free," "sustainable," or "fair."[4]

In short, a regulatory mechanism that presumes a content-based speech burden is justified and forces the speaker to prove otherwise cannot be considered "narrowly crafted" to avoid constitutional harm, regardless of the legitimate--even laudable--purposes for the warning. *Zauderer*, 471 U.S. at 644.

B. California's NSRL "Safe Harbor" Unconstitutionally Inverts The First Amendment's Free-Speech Presumption

California's Proposition 65 regime turns this deeply enshrined constitutional principle on its head. Instead of forcing regulators to justify the necessity of compelled speech, businesses must justify why they should be allowed to remain *silent*. Specifically, because proving that a product fits within an established NSRL "safe harbor" is an *affirmative defense* under California law, Cal. Health & Safety Code § 25249.10(c), the burden falls on businesses to demonstrate that their speech--including their "choice of what not to say," PG&E, 475 U.S. at 16--is worthy of protection. The NSRL mechanism thereby inverts the ordinary burden by rendering compelled speech *presumptively valid*--no matter how weak or nonexistent the State's justification for the speech. And when

[4] The same would be true of a regulation requiring that only large-scale farmers label their meat products, under penalty of civil fines of up to $2,500 per day, "*NOT* CRUELTY FREE"--regardless of whether the regulation permitted those farmers to prove, as an affirmative defense, that their livestock were well-treated.

a state-mandated disclosure is as blatantly misleading and controversial as the glyphosate warning, the NSRL's presumption-flipping system effectively replaces the *constitutional* safe harbor that the First Amendment extends to all speakers with a *statutory* safe harbor that speakers can only access after first suffering significant risk and expense.

This is not an abstract or academic concern. Plaintiffs' Memorandum, together with the many declarations and exhibits attached to it, detail the economic hardship threatened by application of the Proposition 65 regime in this case. *See, e.g.*, Plfs.' Mem. 19-22, 37-41 (discussing lost sales, expensive testing and segregation of glyphosate-treated products, and costly certification procedures, with attendant ripple effects on upstream suppliers).

Many of the harms stem from the Proposition 65 framework, under which California actively encourages a multiplicity of "bounty hunter" enforcement actions. In addition to various government representatives, *any* person--even one who has not suffered, and is unlikely to suffer, any injury--can bring a private enforcement action on behalf of the public. CAL. HEALTH & SAFETY CODE § 25249.7(c), (d). Because "the Act does not have a standing requirement[,] a plaintiff need not allege or prove damages to maintain an action under Proposition 65." *DiPirro v. Bondo Corp.*, 62 Cal. Rptr. 3d 722, 748 (Cal. Ct. App. 2007); *see also National Paint & Coatings Ass'n v. State*, 68 Cal. Rptr. 2d 360, 365 (Cal. Ct. App. 1997) (stating that California's Constitution, unlike the U.S. Constitution, "contains no 'case or controversy' requirement").

Under the regulation's perverse incentive structure, California encourages enforcement actions with promises of a hefty bounty to successful plaintiffs, *see* CAL. HEALTH & SAFETY CODE § 25249.7(b), and lucrative fees to their attorneys, *see* CAL. CODE REGS. tit. 11, § 3201. These potential rewards--25% of up to $2,500 *per violation*, *per day*, *see* CAL. HEALTH & SAFETY CODE § 25249.7(b); CAL. CODE REGS. tit. 11, § 3203(b), (d)--have made opportunistic enforcement of Proposition 65 "a gold mine for activists and lawyers exploiting" the lax standard for imposing these presumptively valid warnings. Richard Berman, *Thanks To A Poorly-Designed Law, California Classifies Soft Drinks As A Cancer Risk*, FORBES, Feb. 20, 2014.[5]

Naturally, this scheme has led to Proposition 65 suits filed by "straw plaintiffs set up to enable *** law firm[s]" to threaten businesses associated with a host of commonplace items they allege might expose the public to harm. *Consumer Def. Grp v. Rental Hous. Indus. Members*, 40 Cal. Rptr. 3d 832, 835 (Cal. Ct. App. 2006). In one example, a law firm created an entity for the purpose of serving notices of violation "on literally hundreds of apartment owners and managers," based on (among other things) the fact that parking facilities "'exposed' tenants and visitors to carcinogens in auto exhaust without giving them a Proposition 65 warning." *Id.* at 834. A trade group representing the apartment owners and managers, which "wanted to buy its peace and was willing to pay off the law firm

[5] *Available at* https://www.forbes.com/sites/realspin/2014/02/20/thanks-to-a-poorly-designed-law-california-classifies-soft-drinks-as-a-cancer-risk/#7274b616b8c1.

to obtain it," settled with the "bounty hunter lawyers" for over half a million dollars--"which is what the whole thing was obviously about in the first place." *Id.* at 834-835; *see id.* at 856 (noting the "shake down process" and observing that "instead of $540,000, this legal work merited an award closer to a dollar ninety-eight"). Although the Attorney General stepped in to object to the settlement, *see id.* at 1189, that case reveals the tactics induced by California's scheme.

Unfortunately, the profit these bounty hunters stand to gain from a Proposition 65 suit is matched only by the "absurd[] eas[e]" of bringing it. David B. Fischer, *Proposition 65 Warnings at 30—Time For A Different Approach*, 11 J. BUS. & TECH. L. 131, 148 (2016) (quoting *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853). Suing under Proposition 65 "is as easy as shooting the side of a barn, drawing circles around the bullet holes and then claiming you hit the bull's eye." *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 857. Before filing suit, a plaintiff need only search out businesses that provide items containing substances listed under Proposition 65, find any person "with relevant and appropriate experience or expertise" to agree that there is a "reasonable" basis for a suit, and send off a boilerplate notice and demand letter. CAL. HEALTH & SAFETY CODE § 25249.7(d)(1) (outlining the minimal certification standard); *see also Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853-854 (explaining "just how simple it is for a hypothetical unemployed lawyer *** to extract money from businesses using the initiative").

Against this ripe opportunity to "cash in on Proposition 65," the regulatory scheme effectively shields plaintiffs from

any downside risk. *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 854. Notwithstanding the First Amendment harms meted out by Proposition 65, California courts have ruled that free-speech principles *prohibit* a business that receives a Proposition 65 notice from fighting back with a lawsuit against an abusive private enforcer. *Equilon Enters., LLC v. Consumer Cause, Inc.*, 102 Cal. Rptr. 2d 371, 378 (Cal. Ct. App. 2000) (holding that "[t]he chilling effect of a rule allowing Proposition 65 private enforcers to be sued before they themselves decide to bring suit [but after they serve a notice] would seriously undermine the goals of the state initiative," and that the affirmative defenses the business could raise if the private enforcer does pursue litigation constitute "an adequate remedy"), *aff'd*, 29 Cal. 4th 53 (2002). And unlike plaintiffs--who stand to receive attorneys' fees for successful bounty hunter suits, *see* CAL. CODE REGS. tit. 11, § 3201--the *defendants* who manage to prevail are generally not entitled to reimbursement for their own fees. *See DiPirro*, 62 Cal. Rptr. 3d at 761 (affirming denial of "public interest" attorneys' fees to successful Proposition 65 defendant because the "essence and fundamental outcome of its defense was the advancement of its own economic interests"). Given the huge potential for profit and the absence of significant drawbacks, serial bounty hunters are already threatening to bring new suits regarding glyphosate, even though the warning requirement is not set to go into effect until July 2018. *See* Plfs.' Mem. 19.

C. California's Operation Of The NSRL "Safe Harbor" Unconstitutionally Burdens Businesses With A Constrained Choice

In stark contrast to how cheaply and easily enforcement actions may be initiated by plaintiffs, establishing the NSRL affirmative defense comes at substantial expense to defendants--to such an extent that absent an injunction many companies will be forced to capitulate and simply deliver the State's outlier, controversial message rather than fight the First Amendment affront.

As the California Court of Appeal has recognized, "the burden shifting provisions [of Proposition 65] make it virtually impossible for a private defendant to defend a warning action *** short of actual trial." *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853. Even at trial, moreover, it is not enough to demonstrate a long history of safe use or longstanding approval by well-respected regulatory bodies. *See, e.g.*, *Consumer Cause, Inc. v. SmileCare*, 110 Cal. Rptr. 2d 627, 636 (Cal. Ct. App. 2001) (holding that evidence that a dental filling had been approved by the American Dental Association and used safely for 150 years was irrelevant because it did not meet the relevant Proposition 65 standard). Instead, even in a case where a product poses a "negligible, even microscopic exposure," proving that the associated risk falls within the NSRL safe harbor (or litigating lifetime exposure risk if the State does not predetermine an NSRL) usually requires hiring experts, commissioning "full scale scientific stud[ies]," and paying attorneys to accomplish what should in the first instance be the State's duty. *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853; *see*

also, e.g., *DiPirro*, 62 Cal. Rptr. 3d at 732-734 (explaining that the "focus of the trial was upon studies, tests, and surveys concerning the nature and level of exposure," conducted by experts according to "[a] hierarchy of accepted methodologies *** established by the [State]").

Given these asymmetric burdens, it is little wonder that the Proposition 65 regime is considered, in the words of one California judge, "a form of judicial extortion" that places immense pressure on businesses to "[s]ettle with the plaintiff," "[s]ave the cost of the assessment," "[s]ave the legal fees," and "[g]et rid of the case"--regardless of how strong one's NSRL defense may be. *SmileCare*, 110 Cal. Rptr. 2d at 645-646 (Vogel, J., dissenting); *see also Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 854. Because of the "impossible burden of proof" on companies, many determine that "the most prudent business decision is to pay any demanded attorney fees and penalties to the bounty hunter rather than contest[] the case in court." Anthony T. Caso, *Bounty Hunters and the Public Interest—A Study of California Proposition 65*, 13 J. FEDERALIST SOC'Y PRAC. GROUPS 68, 69 (2012).

In 2016 alone, businesses paid over $30 million in settlement payments to avoid Proposition 65 enforcement actions across 760 cases, with over $21 million going to plaintiffs' attorneys' fees and costs. *See* California Attorney General, *Proposition 65 Settlement Executive Summary 2016*.[6] And these

[6] *Available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/2016-summary-settlements.pdf.

figures do not account for expenses that are likely much greater but for which data is harder to come by, such as the legal fees and costs of cases that proceeded to trial, and the expenses businesses have undergone to reformulate their products to avoid trial. *See* Mike Lee, *State Law on Toxins Has Effects Worldwide; Companies Have Changed Thousands of Products to Avoid the Warnings Prop. 65 Requires*, SAN DIEGO UNION TRIBUNE, July 31, 2011, p. A-1 (estimating that, as of 2011, more than $1.24 billion had been spent to reformulate products under Proposition 65).

Even if a business is willing to risk the daunting NSRL process, its downstream retailers or upstream suppliers, who also are at risk under the law and may not be willing or able to bear the same threats, may deprive the business of that option and force it to reformulate its products. *See, e.g.*, Plfs.' Mem. 20 (stating that major retailers already have informed businesses they will remove from their shelves products covered by the regulation that lack a warning). While the immense expense and practical challenges of restructuring supply chains may be a tremendous "regulatory headache" for "large businesses operating in multiple states," for "local, family-owned businesses," these burdens "can mean bankruptcy." Mark Snyder, *Proposition 65 Can Spell Bankruptcy for Many California Small Businesses*, SACRAMENTO BEE, Nov. 17, 2014.[7] The evidence submitted in connection with Plaintiffs' preliminary injunction motion confirms these legitimate threats of disruption to longstanding

[7] *Available at* http://www.sacbee.com/opinion/op-ed/soapbox/article3941246.html.

business practices. Plfs.' Mem. 19-22. In turn, this disruption imposes great costs to them, downstream retailers, upstream suppliers, and ultimately consumers subjected to the twin indignities of paying higher prices for products bearing false warnings. *See id.* at 39-41.

It is no answer that businesses can attempt to counteract the compelled warning with their own speech. Placing "[t]his pressure to respond" on businesses that would "prefer to remain silent" "is [as] antithetical to the *** First Amendment" as if the State were to forbid them from speaking outright. *PG&E*, 475 U.S. at 15-16, 18. The First Amendment prohibits California from mandating false and controversial speech, and then asking businesses to pick up the costs of either complying, avoiding the regulatory burden, or disputing the compelled message. Instead, the solution to the constitutional infirmity the NSRL mechanism introduces at the back end of this scheme is to prevent California from compelling businesses to disclose false speech, like the glyphosate warning, at the front end.

CONCLUSION

For the reasons set forth above and in Plaintiffs' memorandum of points and authorities, the Court should grant Plaintiffs' motion and issue the requested preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pratik A. Shah, declare under penalty of perjury that on January 3, 2018, I caused the foregoing documents to be electronically filed with the Court's CM/ECF Filing System, which will send a Notice of Electronic Filing to all parties of record who are registered with CM/ECF.

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