

NO. 20-16758

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL ASSOCIATION OF WHEAT GROWERS, et al.,
Plaintiffs/Appellees,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, et al.,
Defendants/Appellants.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:17-cv-02401-WBS-EFB
Hon. William B. Shubb

**BRIEF OF *AMICUS CURIAE*
UC BERKELEY CENTER FOR
CONSUMER LAW & ECONOMIC JUSTICE
IN SUPPORT OF DEFENDANTS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

No party to this filing has a for-profit parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

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INTEREST OF AMICUS CURIAE

The UC Berkeley Center for Consumer Law & Economic Justice works to ensure safe, equal, and fair access to the marketplace. Through research and advocacy, the Center acts to create a society where economic security and opportunity, as well as health and safety, are available to all. The Center works on behalf of low-income consumers on a wide range of issues, advocating for development and enforcement of laws protecting and advancing consumer rights, economic justice, and public health.

The Center has participated in cases in this Court, the United States Supreme Court, and federal and state courts around the nation on issues of commercial speech and public health and safety. The Center appears in this proceeding to provide context on recent developments involving glyphosate, background on analogous efforts to provide important health information to the public, and perspective on the speech-enhancing First Amendment framework used to assess required factual disclosures like the one here at issue.¹

¹ The parties have consented to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amicus*, contributed money to the preparation or submission of this brief.

INTRODUCTION

Roundup herbicide products, manufactured by the Monsanto Corporation, use the active ingredient glyphosate. Glyphosate is the world's most widely used and most profitable weed-killing chemical.²

The International Agency for Research on Cancer (IARC), an independent, authoritative scientific body within the World Health Organization, determined in 2015 that glyphosate is a “probable” human carcinogen.³ IARC reached its conclusion about glyphosate's potential to cause cancer—which ran contrary to that of the U.S. Environmental Protection Agency (EPA)—by reviewing 113 scientific studies of glyphosate, most of them peer-reviewed; by analyzing chemical assays of the glyphosate found in consumer products; and by considering the extensive use of glyphosate in occupational and residential property settings (such as groundskeeping, weed control on highway verges, and home landscaping), rather than simply the use of glyphosate on commercial food crops.⁴

² Daniel Cressey, *Widely Used Herbicide Linked to Cancer*, NATURE – News Explainer (Mar. 24, 2015), <https://www.nature.com/news/widely-used-herbicide-linked-to-cancer-1.17181>.

³ International Agency for Research on Cancer (“IARC”) (2017), 12 IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS: SOME ORGANOPHOSPHATE INSECTICIDES AND HERBICIDES, <https://monographs.iarc.fr/wp-content/uploads/2018/07/mono112.pdf>.

⁴ Charles M. Benbrook, *How Did the US EPA and IARC Reach Diametrically Opposed Conclusions on the Genotoxicity of Glyphosate-Based Herbicides?*, 31

California juries have since returned multi-million-dollar plaintiffs’ verdicts to public school groundskeeper Dwayne Johnson, who developed non-Hodgkins lymphoma (NHL) after years of occupational use of Roundup⁵; Ed Hardeman, a landowner who developed NHL after decades of using Roundup for weed control⁶; and husband and wife home landscapers Alva and Alberta Pilliod, who both developed NHL—a noncontagious illness—after extended use of Roundup.⁷

In January 2021, the estate of Jaime Alvarez Calderon, a winery worker who sprayed glyphosate on Sutter Home vineyards for thirty-three years and was struck

ENVIRONMENTAL SCIENCES EUROPE (2019), <https://enveurope.springeropen.com/articles/10.1186/s12302-018-0184-7>. In contrast to IARC’s evaluative process, EPA relied mostly on unpublished studies funded by Monsanto, 99% of which yielded negative results for cancer potential; EPA examined data from studies on technical (*i.e.*, laboratory-grade) glyphosate, rather than the glyphosate in finished herbicide products; and EPA restricted its risk analysis to typical dietary exposures in the general population, omitting both exposure risks from occupational uses of glyphosate in weed control and risks from heavy-use scenarios. *Id.*

⁵ Reuters, *Monsanto Ordered to Pay 289 Million in Roundup Cancer Trial*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/business/monsanto-roundup-cancer-trial.html?module=inline>.

⁶ Mihir Zaveri, *Monsanto Weedkiller Roundup Was “Substantial Factor” in Causing Cancer, Jury Says*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/business/monsanto-roundup-cancer.html>.

⁷ Patricia Cohen, *\$2 Billion Verdict Against Monsanto is Third to Find Roundup Caused Cancer*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/business/monsanto-roundup-cancer-verdict.html>.

with NHL, obtained a favorable settlement after a failed Monsanto bid for summary judgment.⁸ He did not live to see this outcome.⁹

Juries and judges in these cases found Monsanto's misconduct so serious that they awarded punitive damages running to eight figures—*after* being reduced by the court.¹⁰ Those damages were based on Monsanto's deliberate distortion of glyphosate science; its improper efforts to influence federal regulators; and its

⁸ Carey Gillam, *Another Monsanto Roundup Case Likely to Settle as Bayer Works Through Tens of Thousands of Cancer Claims*, THE DEFENDER (Jan. 15, 2021), <https://childrenshealthdefense.org/defender/monsanto-roundup-case-bayer-cancer-claims/>

⁹ Suggestion of Death at 1, *In Re Roundup Products Liability*, MDL 2741 (N.D. Cal., Nov. 12, 2020), <https://usrtk.org/wp-content/uploads/2021/01/Alvarez-plaintiff-dies.pdf> (“Plaintiff Jaime Alvarez Calderon, after being deposed in this litigation, passed away from non-Hodgkin’s Lymphoma complications”).

¹⁰ See, e.g., Emily Sullivan, *Groundskeeper Accepts Reduced \$78 Million Award in Monsanto Cancer Suit*, NATIONAL PUBLIC RADIO (Nov. 1, 2018), <https://www.npr.org/2018/11/01/662812333/groundskeeper-accepts-reduced-78-million-in-monsanto-cancer-suit> (describing trial court’s reduction of award from \$289 to \$78 million).

A California appeals court further reduced the jury award, while acknowledging “significant” evidence that Johnson would continue to experience significant pain and suffering from his Roundup-induced illness. *Johnson v. Monsanto Co.*, 52 Cal. App. 5th 434, 450 (2020). The court’s reasoning was that Johnson — whose body was covered with lesions from NHL by the time of trial, and whose intensive chemotherapy left him too ill and weak to play with his children — was only expected to live for two years, reducing his entitlement to damages for future pain and suffering. *Id.* at 452.

The California Supreme Court declined to review the case, allowing the \$21.5 million damage award to stand. Bob Egelko, *Roundup Cancer Case Appeals—by Plaintiff and Defendant—Turned Down by Calif. Supreme Court*, S.F. CHRONICLE (Oct. 21, 2020), <https://www.sfchronicle.com/bayarea/article/Roundup-cancer-case-appeals-by-plaintiff-and-15665572.php>.

campaign to discredit and defund IARC, the body that had unfavorably assessed glyphosate's safety. Important to consistent plaintiffs' victories—and corresponding pressure on Monsanto for global settlement—were trial court findings that Monsanto had unlawfully failed to *warn* Roundup users about the product's potential to cause cancer.

In 2020, Monsanto announced its willingness to pay \$10 billion to resolve nearly 100,000 lawsuits regarding Roundup's carcinogenicity, in a deal “among the largest settlements ever in U.S. civil litigation.”¹¹ In a part of the settlement valued at up to \$2 billion, Monsanto in 2021 proposed to address class plaintiffs' claims by establishing “a compensation fund . . . [for] class members who have or develop NHL, together with a broad program of diagnostic assistance for NHL risk and other programmatic benefits.”¹²

In this agreement, Monsanto committed to seek federal approval to put on its product labeling a link to scientific studies about glyphosate, including studies that implicate glyphosate in NHL.¹³ Monsanto thus agreed to inform Roundup

¹¹ Patricia Cohen, *Roundup Maker to Pay \$10 Billion to Settle Cancer Suits*, N.Y. TIMES (June 24, 2020).

¹² See Motion for Preliminary Approval of Class Settlement at 2, *In re Roundup Products Liability Litigation* (N.D. Cal., MDL No. 2741, No. 3:19-cv-02224, Feb. 3, 2021), https://www.lieffcabraser.com/pdf/Class_Plan_Documents.pdf.

¹³ *Id.*, at Settlement Agreement, Art. IX (“Within 180 days of entry of the Final Order and Judgment, the Defendant will seek permission from the EPA to include in the labeling of Roundup Products a reference to information regarding whether exposure to Roundup Products causes NHL in humans.”).

consumers—and by extension, to warn them—of IARC’s determination that glyphosate probably causes cancer.

As injured individuals successfully pressed tort claims that glyphosate caused their lymphoma, the State of California, pursuant to its long-standing Proposition 65 right-to-know law, independently sought to require Monsanto to warn Roundup users that glyphosate is a carcinogen. The State did so based on IARC’s finding which, by automatic operation of state law, compels a Prop 65 listing of glyphosate as cancer-causing.¹⁴ A Prop 65 listing in turn compels a cancer warning where consumer exposure levels may exceed specified risk levels.¹⁵

Like the IARC determination and certain other studies that Monsanto has now through settlement agreed to provide to consumers via a web link on Roundup product labeling,¹⁶ the State-required factual disclosure would warn consumers that, according to IARC (but not EPA), glyphosate is a probable carcinogen.

¹⁴ Prop 65 mandates that chemicals be included on the state’s list of known carcinogens if any specified “authoritative body,” including IARC, formally identifies the substance as being known to cause cancer. *See* CAL. HEALTH & SAF. CODE § 25249.8(a); CAL. LAB. CODE §§ 6382(b)(1), (d).

¹⁵ For carcinogens, the significant risk level is 1 in 100,000 excess cases of cancer assuming lifetime exposure at the chemical level in question. Cal. Code Regs. tit 27 § 25703(b).

¹⁶ *See* Motion for Preliminary Approval of Proposed Class Settlement, *supra* n.12, at 3.

Consistent with the dual inform-and-protect purposes of Proposition 65,¹⁷ this warning would in turn enhance consumer choice, providing product users the option to mitigate their glyphosate exposure, such as by using personal protective equipment. The Pilliods’ lawyer noted, for example, that homeowners like Alva and Alberta were at greater risk of glyphosate exposure than professional gardeners, because the couple would not have been told to wear gloves or other protective clothing.¹⁸

Despite this litany of adjudicated harms, Monsanto contends that requiring it to warn Roundup product users that exposure to glyphosate may cause cancer violates the First Amendment. It does not.

SUMMARY OF ARGUMENT

The First Amendment favors the provision of information. Required commercial disclosures are subject to lenient review, because they “trench much more narrowly” on speech interests than do restrictions on speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (a company’s “constitutionally protected interest in not providing any particular factual information . . . is minimal.”) Indeed, providing information to consumers about a commercial product is the reason that the First Amendment applies to advertising

¹⁷ Kara Christenson, *Interpreting the Purposes of Initiatives: Proposition 65*, 40 HASTINGS L.J. 1031, 1065 (1989).

¹⁸ Cohen, *supra* n.7.

and other marketing in the first instance, rather than applying solely to political, religious, or artistic speech. *Id.*

This Circuit’s precedent permits the State of California to require an accurate factual disclosure that is reasonably related to a substantial government interest and neither unjustified nor unduly burdensome. *CTIA - The Wireless Ass’n v. City of Berkeley, California*, 928 F.3d 832, 848 (9th Cir.), *cert. denied* (2019) (*CTIA II*). The Prop 65 warning at issue meets this standard.¹⁹

The required disclosure states, accurately, that IARC has determined that glyphosate is a probable carcinogen; it notes, correctly, that EPA has not agreed with that determination; and it advances California’s interest in providing its residents information about their health and safety. Further—as thousands of victims and millions to billions of dollars in tort judgments make clear—the disclosure is not unjustified. Additionally, as Monsanto’s (inherently voluntary) global settlement proposal demonstrates, providing the required disclosure is not unduly burdensome.

The state-mandated Prop 65 warning about glyphosate’s cancer-causing potential comports with the First Amendment. And it responds to the increased

¹⁹ The words “warning” and “disclosure” are here used interchangeably, because Prop 65 disclosures for chemical exposures are required to contain the signal word “warning.” Cal. Code Regs. tit. 27 § 25603(a)(2).

public concern over the health effects of Roundup that has, for example, driven California cities to abandon or greatly reduce use of the herbicide.²⁰ It also serves the interests of all Californians using products containing glyphosate, who would benefit from truthful information about its hazards.

ARGUMENT

Since IARC's 2015 determination that glyphosate probably causes cancer in humans, Monsanto has been ordered or agreed to pay more than \$10 billion to compensate individuals who assert that Roundup products have caused or will cause them substantial harm. Against that background, the company's claim that the First Amendment prevents users of Roundup (and other products containing glyphosate) from being informed of the products' hazards strains credulity.

California has not banned the use of glyphosate. It has not restricted the product's use. All it has done is to require that businesses profiting from glyphosate-based products inform consumers of the products' risks, so that they may make informed decisions about their own health and safety. That is not something that the U.S. Constitution forbids. It is, to the contrary, precisely the

²⁰ Kristi Coale, *As Cancer Concerns Lead City to Ban Herbicide, S.F. Scales Back Use of Roundup*, SAN FRANCISCO PUBLIC PRESS (Nov. 18, 2020), <https://www.sfpublicpress.org/as-cancer-concerns-lead-cities-to-ban-herbicide-sf-scales-back-use-of-roundup/> (describing many California cities' reduction or elimination of Roundup use on public green spaces since IARC's 2015 determination).

truthful exchange of publicly salient information that the First Amendment is meant to promote.

I. The Glyphosate Disclosure Promotes The Key First Amendment Value Underlying Protection for Commercial Speech: The Free Flow Of Factual Information To Consumers.

The First Amendment does not prevent public agencies from requiring the disclosure of factual information that may assist members of the public in making considered decisions about their health and safety. Indeed, the rationale undergirding First Amendment protection for commercial speech is to “further[] the societal interest in the free flow of commercial information.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 792 n.30 (1978); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plur. op.) (“requir[ing] the disclosure of beneficial consumer information ... is consistent with the reasons for according constitutional protection to commercial speech”).

In the context of compelled commercial speech, the Court has consistently held that companies may be required to provide consumers with factual and accurate information, *Milavetz, Gallup & Milavetz v. U.S.*, 559 U.S. 229, 249 (2010), and that requirements that commercial advertisements and packaging include relevant factual information are subject to lenient First Amendment review. *CTIA II*, 928 F.3d at 844. As a noted First Amendment scholar explains:

Within commercial speech . . . the primary constitutional value concerns the circulation of accurate and useful information. For the state to mandate disclosures designed more fully and completely to convey information is thus to advance, rather than to contradict, pertinent constitutional values.

Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 28 (2000).

The Prop 65 disclosure at issue here provides purchasers of products containing glyphosate with crucial information: that a globally respected scientific organization has made a determination that glyphosate is a probable carcinogen, and a single U.S. agency has arrived at a different conclusion. Providing that information furthers the fundamental values of the First Amendment. *CTIA II*, 928 F.3d at 852 (“Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal”).

II. The Glyphosate Warning Readily Meets the Lenient Standard That Applies to Compelled Disclosures of Factual and Uncontroversial Commercial Information.

As this Court held less than two years ago, lenient review under the Supreme Court’s *Zauderer* standard is accorded to government-required disclosures that convey factual and uncontroversial material. *CTIA II*, 928 F.3d at 837 (“*Zauderer* . . . provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech”).

Specifically, under the standard first set out in *Zauderer*, the state may compel “factual and uncontroversial” disclosures, provided that the disclosure requirements are “reasonably related” to a substantial state interest, and are not “unjustified or unduly burdensome.” 471 U.S. at 651; *CTIA II*, 928 F.3d at 844.²¹ The glyphosate warning readily meets these criteria.

A. Because the Disclosure Provides Factual and Noncontroversial Information, It Is Subject to Review Under the *Zauderer* Standard.

The Prop 65 warning meets the threshold test for application of the lenient *Zauderer* standard: it provides information that is “factual and uncontroversial.” 471 U.S. at 651; *CTIA II*, 928 F.3d at 848.

²¹ The en banc opinion in *American Beverage Association v. San Francisco*, 916 F.3d 749 (9th Cir. 2019), did not change this framework. Because the en banc panel majority determined that the disclosure in question in that case was “unduly burdensome”—and therefore failed a necessary component of the *Zauderer* test—it reasoned that there was no need to apply the other elements of the test. *Id.* at 755-56. Similarly, the majority reasoned that if the disclosure would fail review under *Zauderer*, it could not survive any higher level of scrutiny. *Id.* There was therefore no need to address the threshold question whether the disclosure involved factual and uncontroversial information such that *Zauderer* review—as opposed to intermediate scrutiny under the *Central Hudson* standard (see *Philip Morris v. U.S.*, 566 F.3d 1095, 1142-43 (D.C. Cir. 2009))—applied in the first place. As a panel of this Court recently determined in *CTIA*, the traditional compelled commercial speech framework remains in place. 928 F.3d at 848.

1. The warning comprises statements that are wholly factual.

Like the statement concerning the federal government's conclusions about cell phone radiation in *CTIA II*, the glyphosate disclosure contains statements whose accuracy is not open to challenge. *CTIA II*, 928 F.3d at 846 (“The text of the compelled disclosure is literally true.”). The warning informs consumers that the product required to carry it may expose them to glyphosate, which is true. It explains that the reason for the warning is that the International Agency for Research on Cancer has classified glyphosate as a probable carcinogen, and therefore a warning is required under Prop 65,²² which is also true.

Despite recent jury verdicts and billion-dollar settlements, the disclosure makes no direct claims about whether it is correct that glyphosate is a carcinogen. It even acknowledges that another agency has reached a different conclusion. The disclosure therefore raises even less concern than the analogous warning, upheld in *CTIA II*, that accurately relayed Federal Communications Commission (FCC) findings on cell phone radiation. 928 F.3d at 846-47.

In both cases, the disclosure accurately represents an agency's conclusion about risk. Because it was literally true and not misleading that cell phones could expose users to levels of radio-frequency radiation that exceed FCC guidelines, the *CTIA II* court found the warnings factual and uncontroversial, even though other

²² See *supra* n.15.

bodies had not reached the same conclusions about cell phone radiation risk. *Id.* at 847. This Court found that the City of Berkeley could reasonably decide to weigh in on the side of caution in providing the public with information about a potential danger, and further First Amendment interests by empowering consumers to consider this information. *Id.* at 848. The warning required here is similarly factual, uncontroversial, and undisputed. It is true that products carrying the warning may lead to exposure to glyphosate. And it is true that IARC has classified glyphosate as a probable carcinogen.

Indeed, the warning here goes even further than the one upheld in *CTIA* in ensuring that consumers are not misled or unduly alarmed, by also including an acknowledgment that another agency has not determined that glyphosate is carcinogenic. That EPA has reached this divergent conclusion is likewise literally true, and not misleading, and it may help avert any misunderstanding about the degree to which the harmfulness of glyphosate is universally agreed.

Like the required disclosure in *CTIA II*, the Prop 65 disclosure here refers to a respected agency's scientific conclusions. It does not "force [glyphosate retailers] to take sides in a heated political controversy" (*CTIA II*, 928 F.3d at 848); instead, the "required disclosure is no more and no less than a safety warning." *Id.*; see also *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("[We] do not question the legality of health and safety warnings long

considered permissible, or purely factual and uncontroversial disclosures about commercial products”). The disclosure simply provides facts about the opinions of IARC and EPA to “better inform consumers about the products they purchase.” *Nat’l Elec. Mfrs. Ass’n (NEMA) v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

The potential for a Prop 65 disclosure to carry a negative connotation does not make the warning non-factual. *See CTIA II*, 854 F.3d at 1120 (rejecting argument that disclosure was nonfactual because “the phrase ‘RF radiation’ is ‘fraught with negative associations’”); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 733 (9th Cir. 2017) (“The mere fact that a corporation can conjure up a possibly negative connotation of a word in a disclosure does not make the disclosure nonfactual”). Moreover, Monsanto’s recent agreement,²³ as part of a class action settlement, to seek EPA’s permission to include a label that links to studies about the health effects of glyphosate undermines any claim the company may have about the “inflammatory” or “misleading” effect, *CTIA II*, 928 F.3d at 848, of a warning that mentions cancer.

²³ Motion for Preliminary Approval of Class Settlement, *supra* n.12; *see also* Tom Hals, *Bayer Reaches \$2 Billion Deal Over Future Roundup Cancer Claims*, REUTERS (Feb. 3, 2021), <https://www.reuters.com/article/us-bayer-glyphosate/bayer-reaches-2-billion-deal-over-future-roundup-cancer-claims-idUSKBN2A32MX> (describing disclosures contemplated by the settlement).

The state’s warning contains valuable information for consumers about IARC’s and EPA’s conclusions as to the potential risk from glyphosate exposure. That information is both factual and noncontroversial.

2. Scientific organizations may come to different conclusions, but that does not mean their statements are not factual — “uncontroversial” need not mean “unanimous.”

It is not, and never has been, a requirement that scientific consensus be reached before the government may require companies to provide health and safety warnings on consumer products. *See, e.g., CTIA II*, 928 F.3d at 848 (recognizing disagreement about whether radio-frequency radiation from cell phones is dangerous). To the contrary, it is precisely when there is ambiguity that providing consumers with information to make their own decisions is most crucial.

At the time that the Office of Environmental Health Hazard Assessment (OEHHA) listed multiple phthalates under Prop 65, for instance, the dangers of those chemicals were politically and scientifically contested.²⁴ Phthalates are a group of chemicals that soften hard plastics, and are used in a wide variety of products, from toys to pharmaceuticals to personal care products.²⁵ Phthalates have been linked to negative effects on the endocrine system, the reproductive system,

²⁴ Claudia Polsky & Megan Schwarzman, *The Hidden Success of a Conspicuous Law: Proposition 65 and the Reduction of Toxic Chemical Exposures*, 47 *ECOLOGY LAW Q.* 823, 844-48 (2020).

²⁵ *Id.* at 844.

and increased cancer risk.²⁶ However, at the time that OEHHA listed them for Prop 65, regulatory and scientific conflict was “exemplified by a unanimous statement by the U.S. Expert Panel for Cosmetic Ingredient Review declaring phthalates to be safe as used in cosmetics, coincident with a European Commission requirement that the industry remove two phthalates from cosmetics.”²⁷

For each Prop 65 listing, OEHHA generated substantial scientific support documents that helped to change public perception of phthalate safety, such that in 2007, the California Legislature became the first in the nation to impose regulations on the use of four Prop 65 phthalates.²⁸ Congress has since followed the State’s lead.²⁹

History teaches that the hazards of particular substances—even those now universally recognized as harmful—are rarely revealed suddenly, or, once revealed, met with consensus. Instead, understanding of hazards emerges gradually over time, and agencies respond with increasingly restrictive measures at widely varying tempos.³⁰

²⁶ Sailas Benjamin et al., *Phthalates Impact Human Health: Epidemiological Evidences and Plausible Mechanism of Action*, 340 J. HAZARDOUS MATERIALS 360 (2017).

²⁷ See Polsky & Schwarzman, *supra* n.24, at 847 n.97.

²⁸ *Id.* at 844-47.

²⁹ *Id.* at 847-48.

³⁰ See generally, EUROPEAN ENVIRONMENTAL AGENCY, LATE LESSONS FROM EARLY WARNINGS: SCIENCE, PRECAUTION, INNOVATION (Jan. 2013), <https://www.>

The dangers of tobacco,³¹ second-hand smoke,³² PCBs,³³ Agent Orange,³⁴

eea.europa.eu/publications/late-lessons-2. This massive dossier from Europe’s analog of the U.S. EPA presents seventeen peer-reviewed case studies of grave health and environmental harms stemming from historic failures to regulate despite early warnings. It also identifies “emerging hazards” that, based on “early warnings” available by 2013, warranted immediate attention. These then-emerging hazards included, *e.g.*, risk from cell-phone radiation.

³¹ In 1956, a Surgeon General’s scientific study group determined that there was a causal relationship between excessive cigarette smoking and lung cancer. CDC, *Smoking & Tobacco Use, 2000 Surgeon General’s Report Highlights: Tobacco Timeline*, (2000), https://www.cdc.gov/tobacco/data_statistics/sgr/2000/highlights/historical/index.htm (last accessed Feb. 19, 2021). However, the tobacco industry worked for decades to fund obfuscatory studies and create doubt in the minds of Americans as to the hazards of smoking. *See* NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH IN ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 13 (2010).

³² The Surgeon General identified secondhand smoke as a carcinogen in 1972, but the EPA did not evaluate it as a dangerous carcinogen until 20 years later. *2000 Surgeon General’s Report Highlights*, *supra* n.31.

³³ Monsanto knew that PCBs were dangerous as early as 1938; regulators did not ban them until the 1970s. *See* Graham Messick, 60 MINUTES, *Toxic Town* (Aug. 31, 2003), <https://www.youtube.com/watch?v=B1Xbu8kVncQ&t=23s>.

³⁴ In 1965, the National Cancer Institute conducted a study that discovered malformations and stillbirths in mice exposed to herbicides with active ingredient 2,4,5-T (a constituent of the defoliant Agent Orange). NCI, *VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM* 30 (1994), <https://www.ncbi.nlm.nih.gov/books/NBK236351/>. In 1970, the Surgeon General reported that use of herbicides containing 2,4,5-T could be hazardous to human health, prompting the Department of Agriculture (USDA) to suspend or cancel most domestic uses. *Id.* It took until 1979, however—14 years after the mouse study—for EPA to ban all domestic use of 2,4,5-T. *Id.*

DDT,³⁵ and asbestos³⁶ (among many other hazards) were still widely used and little regulated for decades after their dangers were first discovered. The number of hazardous substances that have followed this arc suggests that it is at the very least “not unjustified” for California to require that information about a well-respected agency’s chemical hazard determination be disseminated to users of products that expose them to that chemical. While it is easy to take for granted that substances such as tobacco smoke and asbestos are harmful, it was typically the case that the scientists who first discovered their adverse effects were unable, in the face of industry disinformation campaigns, to spur regulators to action until thousands of people had become sick or died.³⁷

The statutory structure of Prop 65 is designed to inform consumers when an expert source identifies a particular chemical as carcinogenic—even if other expert sources do not (yet) agree. The statute mandates that chemicals be included on the state’s list of known carcinogens if *any* of the authoritative bodies formally

³⁵ USDA began restricting use of DDT in 1957. EPA did not cancel all DDT registrations until 1971, however, and did so only under court order. Environmental Protection Agency, *DDT Regulatory History: A Brief Survey* (1975), <https://archive.epa.gov/epa/aboutepa/ddt-regulatory-history-brief-survey-1975.html>.

³⁶ The first descriptions of asbestos disease were published in 1918, but use restrictions did not occur until decades later. Richard Lemen, *Toward an Asbestos Ban in the United States*, 14 INT’L J. ENVIR. RES. PUB. HEALTH 1302 (2017).

³⁷ See generally DAVID MICHAELS, DOUBT IS THEIR PRODUCT xi (2008) (“Industry has learned that debating the *science* is easier and more effective than debating the *policy*”).

identifies the substance as being known to cause cancer. The Prop 65 listing regime is thus designed to be cautionary. *Monsanto Co. v. Office of Env'tl. Health Hazard Assessment*, 22 Cal. App. 5th 534, 556 (2018) (“the electorate adopted a broad system for listing products that included potential conflicts given the multiple sources for determining known carcinogens”).

Not only do Prop 65 warnings provide consumers information that they can use to make their own decisions about products they buy, but the Prop 65 list itself is an “independent scientific contribution” that has helped to further scientific understanding and regulation of toxic substances.³⁸ OEHHA has listed fifty-six carcinogens and fifty-five reproductive toxicants that were either not listed by any other authoritative body at all at the time of Prop 65 listing, or were not identified on other lists as reproductive or developmental toxicants.³⁹ Rather than requiring scientific consensus to list these substances—which has historically resulted in tragically late lesson-learning from early warnings⁴⁰—the state’s use of designated Qualified Experts makes the State of California’s Prop 65 list “significantly more responsive to emerging scientific data than many other toxic chemical lists.”⁴¹

³⁸ Polsky & Schwarzman, *supra* n.24, at 875.

³⁹ *Id.*

⁴⁰ *See* EUROPEAN ENVIRONMENTAL AGENCY, *supra* n.30.

⁴¹ *Id.*

Recognition that scientific data accrue over time (and with them, scientific certainty) is a reason to allow, rather than prohibit, health and safety warnings on consumer products. The glyphosate warning, which has come from the robust analysis of IARC and its rational incorporation by reference into a Prop 65 listing, will help consumers make their own choices based on personal risk tolerance. Providing information useful to individuals in making decisions about their health is a fundamental goal of the First Amendment. *NEMA*, 272 F.3d at 114.

3. Manufacturers of toxic substances, including Monsanto, have a demonstrated history of attempting to create scientific confusion once their products have been identified as hazardous.

Over the past several decades, manufacturers of hazardous products have deliberately—and effectively—cast doubt on evidence that the products they sell are dangerous.⁴² As example, smoking was linked to lung cancer as early as the 1940s, yet the tobacco industry employed scientists to attack mounting evidence of harm and create a false “debate” for decades.⁴³ Although the health harms of

⁴² MICHAELS, *supra* n.37, at X (A cigarette executive summarized the strategy of creating controversy: “Doubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the minds of the general public.”)

⁴³ ORESKES & CONWAY, *supra* n.31, at 19.

smoking are now widely understood, to this day the tobacco lobby uses its resources to challenge government efforts to enhance existing warning labels.⁴⁴

As to secondhand smoke, a 1972 Surgeon General report identified it as a health risk to nonsmokers, but the EPA lagged in classifying it as a “Group A” carcinogen (the most dangerous category) until two decades later.⁴⁵ When the EPA did issue this classification, the tobacco industry again engaged in a smear campaign to dismiss EPA’s belated determination as “junk science.”⁴⁶

The situation is the same for asbestos. Asbestos was known to be highly dangerous to workers as early as 1918, with hazards conclusively demonstrated by the 1930s. The asbestos industry nonetheless worked to delay regulation at every turn,⁴⁷ and when faced with mounting regulatory pressure in the 1970s, created a trade group to confuse consumers with pamphlets that claimed asbestos exposure

⁴⁴ Industry influence was evident in the Federal Cigarette Labeling and Advertising Act of 1965, which for the first time required placement of a small-print warning label on a side panel of each cigarette package. As a result of industry lobbying, Congress in that same statute prevented the Federal Trade Commission from regulating tobacco advertising. MICHAELS, *supra* n.37, at 11. Even today, the industry continues to challenge, on First Amendment grounds, new graphic warning labels developed by the FDA. *See* Complaint, *Philip Morris USA, Inc., v. FDA*, No. 1:20-cv-01181 (D.D.C., May 6, 2020).

⁴⁵ *2000 Surgeon General’s Report Highlights*, *supra* n.31.

⁴⁶ ORESKES & CONWAY, *supra* n.31, at 136.

⁴⁷ MICHAELS, *supra* n.37, at 13.

was not dangerous.⁴⁸ The trade group also used its influence to pressure the federal government to limit regulation, allowing asbestos to continue to be used in many consumer products for years.⁴⁹

Monsanto has a storied history of similar distortion tactics, and on a multi-chemical basis. As early as 1938, for example, Monsanto knew that the polychlorinated biphenyls (PCBs) used in electrical transformers and other products were dangerous,⁵⁰ yet in the 1960s Monsanto was still telling the public that PCBs were safe.⁵¹ Internally, however, the company was assessing its potential legal liability for ecological damage and health problems.⁵²

Monsanto flushed hundreds of tons of PCBs into streams and creeks, poisoning entire towns like Anniston, Alabama.⁵³ Long after Monsanto stopped producing PCBs, residents continued to suffer dire health effects: in 2002, an

⁴⁸ Gerald Markowitz, *Unleashed on an Unsuspecting World: The Asbestos Information Association and Its Role in Perpetuating a National Epidemic*, AM. J. PUB. HEALTH (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4985074/>.

⁴⁹ *Id.*

⁵⁰ See MESSICK, TOXIC TOWN, *supra* n.31.

⁵¹ Arthur Nelson, *Monsanto Sold Banned Chemicals for Years Despite Known Health Risks, Archives Reveal*, THE GUARDIAN (Aug. 10, 2017), <https://www.theguardian.com/environment/2017/aug/09/monsanto-continued-selling-pcbs-for-years-despite-knowing-health-risks-archives-reveal>.

⁵² *Id.*

⁵³ *Id.* See also Sean O'Hagan, *Toxic Neighbor: Monsanto and the Poisoned Town*, THE GUARDIAN (Apr. 20, 2018), <https://www.theguardian.com/artanddesign/2018/apr/20/mathieu-asselin-monsanto-deutsche-borse-anniston-alabama>.

Alabama jury found Monsanto liable for “suppression of the truth, negligence, trespass, nuisance,’ ‘wantonness,’ and ‘outrage,’” determining that Monsanto “had knowingly poisoned Anniston residents and then had hidden the danger from public knowledge.”⁵⁴ Monsanto also settled with Washington’s Attorney General for \$95 million over pollution and health hazards from PCBs in that state’s soil and water.⁵⁵ EPA did not intervene to protect the public until years after it learned of Monsanto’s actions, however, waiting until 1979 to ban PCBs.⁵⁶

4. There is mounting evidence of Monsanto’s attempts to conceal the dangers of exposure to glyphosate and to generate the “controversy” on which it now relies.

Evidence revealed in lawsuits against Monsanto has illuminated the tactics used by the company to deny glyphosate’s harmfulness and to influence government agencies. The cancer-stricken plaintiffs in recent litigation against Monsanto all based their claims in significant part on the company’s failure to warn them about the dangers of exposure to glyphosate—and won.⁵⁷ While the

⁵⁴ ELLEN GRIFFITH SPEARS, *BAPTIZED IN PCBs: RACE, POLLUTION, AND JUSTICE IN AN ALL-AMERICAN TOWN 1* (2014).

⁵⁵ Evan Bush, *Monsanto Will Pay \$95 Million in PCB Settlement*, SEATTLE TIMES (Jun. 24, 2020), <https://www.seattletimes.com/seattle-news/washington-state-to-get-95-million-settlement-against-monsanto-over-pcbs/>.

⁵⁶ EPA, *Learn About Polychlorinated Biphenyls (PCBs)*, <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs> (last accessed Feb. 19, 2021).

⁵⁷ *Pilliod v. Monsanto Co.*, No. RG-17-862702, 2019 WL 3540107, at *10 (Cal. Super. July 26, 2019); *In re Roundup Prod. Liab. Litigation*, No. 16-CV-0525-VC,

outcomes of these exhaustively litigated cases do not prove conclusively that glyphosate is dangerous, those verdicts—and the evidence these cases unearthed in discovery—provide an essential counter-narrative to Monsanto’s claims that glyphosate is safe.

As part of Monsanto’s behind-the-scenes work to influence the scientific conversation, for example, the company recruited respected scientists to write papers on the benefits of genetically modified organisms (GMOs), because it has patented profitable crops that can resist applications of Roundup.⁵⁸ Filings in Roundup liability litigation suggest that the company had also “ghostwritten research that was later attributed to academics.”⁵⁹

After IARC identified glyphosate as a probable human carcinogen, Monsanto predictably used its influence to try to prevent other agencies from investigating. Litigation discovery revealed, for example, that “a senior official at

2019 WL 3219360, at *1 (N.D. Cal., July 12, 2019); *Johnson v. Monsanto Co.*, 52 Cal. App. 5th at 440.

⁵⁸ CAREY GILLAM, *WHITEWASH: THE STORY OF A WEED KILLER, CANCER, AND THE CORRUPTION OF SCIENCE* 115 (2017); *see also* Laura Krantz, *Harvard Professor Failed to Disclose Connection*, BOSTON GLOBE (Oct. 1, 2015), <https://www.bostonglobe.com/metro/2015/10/01/harvard-professor-failed-disclose-monsanto-connection-paper-touting-gmos/ILJipJQmI5WKS6RAgQbnrN/story.html> (describing professor’s authorship of a pro-GMO article at Monsanto’s behest, without disclosing this connection).

⁵⁹ Danny Hakim, *Monsanto Weed Killer Roundup Faces New Doubts on Safety in Unsealed Documents*, N.Y. TIMES (Mar. 14, 2017), https://www.nytimes.com/2017/03/14/business/monsanto-roundup-safety-lawsuit.html?_r=1.

the Environmental Protection Agency had worked to quash a review of Roundup's main ingredient, glyphosate, that was to have been conducted by the United States Department of Health and Human Services."⁶⁰

One case uncovered "Monsanto's aggressive attempt to discredit the 2015 IARC decision to classify glyphosate as a probable carcinogen, as well as evidence of its efforts to influence U.S. regulators in the months leading up to and following the IARC decision," citing as but one example "evidence of an April 2015 conversation between a Monsanto executive and an EPA official in which the EPA official stated he 'should get a medal' if he could 'kill' an impending HHS investigation into glyphosate. *In re Roundup Prod. Liab. Litigation*, No. 16-CV-0525-VC, 2019 WL 3219360, at *3 (N.D. Cal. July 12, 2019).

Another lawsuit over exposure to Roundup revealed more evidence that Monsanto used its regulatory influence to maintain sales profits:

Shortly after the IARC announced that glyphosate was probably carcinogenic, representatives of Monsanto met with staff from the EPA, U.S. Department of Agriculture, U.S. Trade Representative and U.S. Department of State; key members of Congress; the Senate Agricultural Committee; and the Department of Health and Human Services. Monsanto claimed that these meetings were to provide 'proper context of the [IARC] classification for governments and regulators around the world.' But the jury could have inferred that these meetings were intended primarily to protect Monsanto's bottom line.

⁶⁰ *Id.*

Johnson v. Monsanto Co., 52 Cal. App. 5th 434, 458 (2020). That lawsuit also included “evidence that the company discounted questions about glyphosate’s safety and failed to adequately test its products.” *Id.* Thus, to the extent there is any “controversy” over the carcinogenicity of Roundup, it is controversy of Monsanto’s own self-serving making.

B. The Disclosure Is Reasonably Related to the Government’s Substantial Interest in Protecting Public Health and Informing Purchasers About the Risks of Glyphosate Exposure.

The Prop 65 glyphosate warning easily meets the next step of the *Zauderer* test. *CTIA II*, 928 F.3d at 842 (“[T]he government may compel truthful disclosure in commercial speech as long as the compelled disclosure is ‘reasonably related’ to a substantial governmental interest”). The warning serves to further California’s substantial interests in (1) protecting the public’s health and safety, and (2) educating purchasers of products that contain glyphosate about IARC’s and EPA’s conclusions. *See id.* at 845 (“There is no question that protecting the health and safety of consumers is a substantial governmental interest”). Warning and disclosure mandates have long been upheld on the basis of their reasonable relation to the state’s interest in promoting greater public understanding of health-related risks and promoting informed consumer decision-making. *See, e.g., Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 564 (6th Cir. 2012); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009).

Like the cell phone disclosure in *CTIA II*, the glyphosate disclosure informs consumers of a well-respected organization’s conclusion about the health effects of a very widely used product. In *CTIA II*, this Court determined that the Berkeley City Council’s decision to compel the City’s retailers to notify consumers that an agency recommended certain cell phone use precautions was reasonably related to the government’s substantial interest in health and safety. 928 F.3d at 845. Likewise, Prop 65 warnings, which have become more tailored and informative over time,⁶¹ are strongly related to the government’s interest in informing the public about matters that affect human health.

C. The Proposed Glyphosate Disclosure Is Neither Unjustified Nor Unduly Burdensome.

In light of recent jury verdicts consistently finding Monsanto liable for causing plaintiffs’ non-Hodgkins lymphoma, and the company’s proposed settlement involving potentially billions of dollars in compensation to tens or even hundreds of thousands of claimants, it is difficult for Monsanto to argue earnestly that including a warning with products containing glyphosate is “unjustified or unduly burdensome.” *Zauderer*, 471 U.S. at 651.

The justification for the warning is clear. And whatever “burden” it might entail to Monsanto is clearly supportable, and surely not undue. *See Nationwide*

⁶¹ *See* Cal. Code Regs. tit. 27, § 25600 (updating Prop 65 to require product-specific and ingredient-specific disclosures).

Biweekly Admin., Inc., 873 F.3d at 734 (“A disclosure is ‘unduly burdensome’ when the burden ‘effectively rules out’ the speech it accompanies” (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994))).

First, nothing about the proposed Prop 65 disclosure prevents Monsanto or other manufacturers from being able to advertise and market their products. *See Ibanez*, 512 U.S. at 146-47 (holding that disclosures were unduly burdensome where they were required on a business card and in a Yellow Pages ad); *NIFLA*, 138 S. Ct. at 2378 (holding that a 29-word statement, repeated in as many as 13 languages in text at least as large as the accompanying advertisement, would “drown[] out” the advertiser’s message on a billboard, or, “[m]ore likely . . . ‘effectively rule[] out’” billboard advertising”).

Second, the Prop 65 warning may come in a variety of forms, and need only be “displayed with such conspicuousness . . . as to render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use.” Cal. Code Regs. tit. 27, § 25601(c). Requiring such a disclosure does not “effectively rule out” Monsanto’s accompanying speech; instead, the disclosure is a “minimal requirement” that “does not interfere with advertising or threaten to drown out messaging.” *CTIA II*, 928 F.3d at 849; *see also Nationwide Biweekly Admin., Inc.*, 873 F.3d at 734 (finding it not unduly burdensome to require “relatively brief disclosures” in letters that “span one to two

full pages of text.”). Nothing about the flexible, customizable Prop 65 requirement would “‘drown[] out’ Plaintiffs’ messages,” or “‘effectively rule[] out the possibility of having [an advertisement] in the first place.’” *Am. Beverage Ass’n*, 916 F.3d at 757.

Third and finally, Monsanto’s recent agreement to seek EPA’s permission to include on its product labels an internet link to studies about the health effects of glyphosate⁶² undercuts any company claim that the Prop 65 warning is unjustified or an undue burden. The contemplated label link will include a reference to information regarding whether exposure to Roundup causes non-Hodgkins lymphoma — including, the IARC Monograph on glyphosate.⁶³ Roundup’s new label, then, could soon provide consumers with information consistent with what a Prop 65 warning would provide: that some authorities believe that glyphosate exposure is hazardous, and may cause cancer.

There is nothing in the proposed glyphosate label to suggest that this warning—viewed deferentially, and in light of the seriousness of the potential health harm—poses burdens that are either undue or unjustified.

⁶² Motion for Preliminary Approval of Class Settlement, Settlement Agreement at Art. IX, *supra* n.12.

⁶³ *Id.*

CONCLUSION

The Prop 65 warning requirement for products exposing consumers to certain levels of glyphosate readily withstands scrutiny under the deferential standard for mandatory disclosures set forth in *Zauderer* and *CTIA II*. The warning is factual and noncontroversial; it is reasonably related to a substantial government interest; and it places no undue or unjustified burdens on manufacturers' speech. The required disclosure provides to purchasers the scientific assessment of IARC as well as that of EPA, so that individuals may make their own decisions about the products they use. The First Amendment poses no obstacle to such a disclosure.

The judgment of the district court should be reversed.

DATED: February 19, 2021

Respectfully submitted,

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This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief contains 6947 words, according to Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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DATED: February 19, 2021

/s/ Seth E. Mermin
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I hereby certify that on February 19, 2021, I caused to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel, a true and correct copy of this Brief of *Amicus Curiae* UC Berkeley Center for Consumer Law & Economic Justice.

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/s/ Seth E. Mermin
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