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9 The National Health Federation
10 and Moms Across America

11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA

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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.

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

**NOTICE OF MOTION AND MOTION FOR
LEAVE TO FILE BRIEF OF THE
NATIONAL HEALTH FEDERATION AND
MOMS ACROSS AMERICA AS AMICI
CURIAE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: February 5, 2018
Time: 1:30 p.m.
Judge: Hon. William B. Shubb

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on February 5, 2018, at 1:30 p.m., or as
3 soon thereafter as the matter may be heard before the Honorable
4 William B. Shubb, in Courtroom 5 of the above titled Court,
5 located in the United States Courthouse at 501 I Street,
6 Sacramento, CA 95814, proposed *amici curiae* The National Health
7 Federation ("The NHF") and Moms Across America ("MAAM") will and
8 do move this Court for leave to file a brief as *amici curiae* in
9 opposition to Plaintiffs' motion for a preliminary injunction in
10 the above-captioned case. Pursuant to Local Rule 230(g), the
11 parties agree that the motion shall be submitted upon the record
12 and briefs on file without the need for oral argument.

13 As set forth in the attached memorandum of points and
14 authorities, the Court should grant leave to file the *proposed*
15 *amici curiae* brief because NHF and MAAM have a substantial
16 interest in this case and will assist the Court in resolving the
17 issues raised by Plaintiffs' motion for a preliminary injunction.
18 This motion is based upon this notice, the memorandum of points
19 and authorities in support thereof, and the proposed *amici curiae*
20 brief attached hereto. Counsel for NHF and MAAM conferred with
21 counsel for the parties before filing this motion. All parties
22 have provided their consent to the filing of this motion.

23 DATED: January 26, 2018

Respectfully submitted,

24 By: /s/ Scott C. Tips
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*Attorneys for (proposed) Amici
Curiae The National Health
Federation and Moms Across America*

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MEMORANDUM OF POINTS AND AUTHORITIES

A. The National Health Federation

Established in 1955, the NHF is the oldest health-freedom nonprofit organization in the world. Based in California, the NHF works to protect and enhance the health and health freedoms of individuals in California and around the world. The NHF has long warned public officials, scientists, and the general public, about the extreme health dangers of glyphosate, a Monsanto product banned due to its toxicity in multiple cities and countries throughout the globe. The NHF and its members have a substantial interest in ensuring the consumer protections of Prop 65 are applied to glyphosate as a proven and known carcinogen.

The NHF routinely monitors and participates in rulemaking processes governing consumer products and their labelling. For example, the NHF is recognized as the only nonprofit health-freedom organization able to speak, submit scientific research, and actively shape global policy at international meetings of the United Nations' Codex Alimentarius Commission and its committees. The NHF has been attending Codex meetings since approximately 1997, and has been accredited by Codex since 2002 as a participating International Nongovernmental Organization (INGO) at those meetings. Here is an example of just one year's work worldwide by The NHF in such regard to protect consumers:

- **February 2014 in Bergen, Norway:** NHF argued against the continued inclusion of aluminum in fish batter at the Codex Committee on Fish and Fishery Products. Aluminum was removed.

- 1 • **March 2014 in the United States:** NHF was the first to
2 notice and point out that the FDA, with its new proposed
3 food-labeling guidelines, was actually attempting to
4 harmonize vitamin-and-mineral Daily Allowances down to
5 low Codex levels.
- 6 • **March 2014 in Hong Kong, China:** NHF continued its work
7 in removing aluminum from food additives at the Codex
8 Committee on Food Additives, and argued that aspartame
9 is a dangerous and harmful artificial sweetener.
- 10 • **March-April 2014 in The Hague, Netherlands:** NHF argued
11 for lower permissible arsenic and lead levels in foods
12 at the Codex Committee on Contaminants in Foods meeting.
13 The debate continues with NHF persistently pushing its
14 views for safer foods.
- 15 • **April 2014 in Paris, France:** NHF participates at the
16 Codex Committee on General Principles meeting where
17 changes in the Codex Procedural Manual are being
18 proposed.
- 19 • **July 2014 in Geneva, Switzerland:** NHF actively
20 participates in the Codex Alimentarius Commission
21 meeting, where it argues strenuously for decreasing the
22 amount of lead permitted in infant formulas, the levels
23 of arsenic in rice, and against any continued use of
24 aluminum as a food additive.
- 25 • **September 2014 in The Hague, Netherlands:** NHF attends
26 the Codex European regional meeting (styled CCEURO) where
27 NHF is publicly acknowledged by the chairman for its
28

1 passionate representation of consumer interests.

- 2
- 3 • **October 2014 in Rome, Italy:** NHF aggressively argued at
4 the Codex Committee on Food Labeling against the
5 continued erosion of organic standards.

6 The National Health Federation has a continuing interest, as
7 reflected in its extensive work at Codex and other venues, in
8 protecting the health of its members and the general public. The
9 current issue before this Court is of deep and abiding interest to
10 NHF and its members.

11

12 **B. Moms Across America**

13 MAAM is a nonprofit organization of thousands of moms who
14 raise awareness regarding toxic exposures in consumer products.
15 MAAM routinely educates its members about glyphosate, including
16 for example sharing published scientific resources cataloguing the
17 health dangers of glyphosate, and publishing laboratory test
18 results of glyphosate contamination in drinking water and breast
19 milk. MAAM and its members have a substantial interest in ensuring
20 the consumer protections of Prop 65 are applied to glyphosate as a
21 proven and known carcinogen.

22 MAAM consistently reaches over 1.5 million supporters per
23 month on Facebook and millions more through news, TV, articles,
24 radio and other social media platforms. The 600+ leaders of MAAM
25 have created nearly 1000 local events to raise awareness about GMOs
26 and glyphosate in less than 5 years. MAAM leadership has spoken
27 in several countries around the world, at the Dow, Dupont and
28

1 Monsanto shareholder meetings and MAAM has initiated nationwide
2 groups to march in 4th of July parades to reach thousands locally
3 and millions nationally in a single day.

4 **Conclusion**

5 For the foregoing reasons, the NHF and MAAM respectfully
6 request this Court grant this request for leave to file this *amici*
7 *curiae* brief in opposition to Plaintiff's motion.

8 DATED: January 26, 2018

Respectfully submitted,

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18 *Federation and Moms Across America*
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CERTIFICATE OF SERVICE

I, Scott C. Tips, declare under penalty of perjury that on January 26, 2018, I caused the foregoing document 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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Federation and Moms Across America*

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11 NATIONAL ASSOCIATION OF WHEAT
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22 OF COMMERCE AND INDUSTRY;
23 MONSANTO COMPANY; ASSOCIATED
24 INDUSTRIES OF MISSOURI; AND
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26 IOWA,

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28 v.

LAUREN ZEISE, IN HER OFFICIAL
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BECERRA, IN HIS OFFICIAL
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OF THE STATE OF CALIFORNIA,

Defendants.

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

**BRIEF OF THE NATIONAL HEALTH
FEDERATION AND MOMS ACROSS
AMERICA AS AMICI CURIAE IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

The Honorable William B. Shubb

Case Filed: Nov. 15, 2017

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1 to its toxicity in multiple U.S. cities and many countries around
2 the world.¹

3 Because Plaintiffs are functionally aligned with Monsanto,
4 Plaintiffs are attempting to circumvent the fact that Monsanto has
5 unclean hands -- worldwide, consumers and public officials have
6 witnessed Monsanto's game exposed publicly is: widespread
7 falsification of test results and influence peddling among public-
8 policy makers, legislators, and government regulators.²

9 Here in California, Monsanto and its aligned-amici (Chambers
10 of Commerce) attempt to flash a false veil of safety, behind which
11 they throw wordy but ultimately half-baked, factually-devoid
12 constitutional arguments at the wall to see what might stick. For
13 example, Monsanto-aligned amici attempts to convince this Court
14 that California may not use standard product label warnings to
15 protect its citizenry from independently verified increased risks
16 of cancer *because* (Monsanto-aligned interests suggest) the standard
17 label could *potentially* diminish some other State's 'right' [sic]
18 to a corporation's private marketshare. Even if such a novel and
19 dangerous argument were entertained by this Court, the different

20
21 ¹ See e.g., The Guardian (US Edition), *Glyphosate is a 'probably carcinogenic'*
22 *herbicide. Why do cities still use it?* (April 21, 2015), accessed on January
25, 2018, at [https://www.theguardian.com/cities/2015/apr/21/glyphosate-
probably-carcinogenic-pesticide-why-cities-use-it](https://www.theguardian.com/cities/2015/apr/21/glyphosate-probably-carcinogenic-pesticide-why-cities-use-it).

23 ² See e.g., Gillam, C. *White Wash: The Story of a Weedkiller, Cancer, and the*
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25 *Poisoning the Planet?* (Oct 2017), Sierra Club Magazine ("Gillam assembles
26 independent research, internal Monsanto communications, and case studies of
27 cancer victims into a comprehensive, disturbing report on the suspected health
28 and environmental impacts of glyphosate exposure. Equally astonishing are the
serial revelations of how Monsanto conscripted scientists, professors, and
regulators to aid in its defense. The EPA emerges as the key accomplice here:
For decades, the agency overlooked concerns that glyphosate was carcinogenic.
The World Health Organization announced in March 2015 that glyphosate was a
probable human carcinogen.") [https://www.sierraclub.org/sierra/2017-6-
november-december/books/roundup-poisoning-planet](https://www.sierraclub.org/sierra/2017-6-november-december/books/roundup-poisoning-planet)

1 cases cited by Monsanto-aligned amici for this proposition are
2 factually inapposite. While it is true that Courts do not permit
3 States to engage in unlawful gamesmanship for leverage in
4 interstate trade (such as tariff wars between States), such
5 uniquely specific legal precedents are factually irrelevant to the
6 Prop 65 case at hand.³

7 Nor is any State required to participate in Monsanto-aligned
8 amici's veiled notion that California be somehow required to join
9 a regulatory 'race to the bottom' with other States vying for
10 corporate marketshare.

11 Indeed, Prop 65 has withstood multiple challenges and has
12 never been found unconstitutional in either a facial or as applied
13 challenge.⁴ The initiative power behind Prop 65 is rooted in
14 California's Constitution, Art. II, Sec. 8. This voter-approved
15 law has stood for decades as a reasonable and scientifically-sound
16 consumer protection that allows California to hold its own status
17 quo that is not based in any corporation's marketshare, but in
18 everyone's health.

19 Both State experts and independent experts, as set forth in
20 detail below, have proven that glyphosate is a known carcinogen.
21 Contrary to the arguments made by Monsanto-aligned interests,

22 ³ Indeed, it is a red flag that Monsanto and its aligned amicus briefs fail to
23 state in any detail the actual facts of the constitutional cases they are
citing.

24 ⁴ See e.g., Funderburk, W. et al, *Defense Strategies in Proposition 65*
25 *Litigation*, A Publication of the Environmental Law Section of the State Bar of
26 California, Vol. 9, No. 2, Spring 2000 ("Despite the obvious legislative
27 obstacles, the regulated community has mounted numerous constitutional
28 challenges to Prop. 65, based on separation of powers and due process, since
the law's inception. In all, at least twelve actions have facially challenged
Prop. 65. None has succeeded. Recently, the California Court of Appeal
affirmed that private citizen enforcement of Prop. 65 is constitutional.")

1 commercial speech rights do not encompass the right to harm the
2 public. They never have. Our constitutional law upholds consumer
3 warning labels as *integral* to commercial speech. Throughout
4 American history, the most logical, effective, and lawful method
5 for warning a consumer about a product's danger is quite literally
6 *on that product itself*.⁵

7 Monsanto-aligned interests are only hoping to use this case
8 to attempt to hedge their marketshare of the status quo, propped
9 up by a 4.76 billion-dollar-a-year glyphosate trade.⁶ This Court
10 should also be aware of the risk that Monsanto-aligned interests
11 are only using this Court to obtain a court order that Monsanto-
12 aligned interests can leverage in international trade regulatory
13 tribunals (i.e., World Trade Organization), which Monsanto-aligned
14 interests perceive to be more likely to strip away consumer
15 protections with a broad brush. If such a risk were to materialize,
16 it would undermine the sovereignty of all 50-States.

17 Regardless, for Californians, Prop 65 is about health and
18 science, not the status quo of private marketshare. This Court
19 should not indulge Monsanto-aligned interests in their attempts to
20 avoid expert scrutiny.

21 **ARGUMENT**

22 Prop 65 provides transparency about glyphosate because experts

23 ⁵ Webb, T., *Helping Consumers Get the Picture: The Constitutionality of*
24 *Requiring Graphic Labels on Cigarette Packaging* (December 3, 2012). Accessed
on January 25, 2018, at <https://ssrn.com/abstract=2184335>.

25 ⁶ See e.g., United States Securities and Exchange Commission, *Form 10-K*
26 *(Fiscal Year ending August 31, 2015), Monsanto Company*. Accessed on January
27 [https://www.sec.gov/Archives/edgar/data/1110783/000111078315000230/mon-
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1 have confirmed repeatedly, as set forth in detail below, that
2 glyphosate is carcinogenic. Monsanto-aligned interests may claim
3 that their commercial free-speech rights are being infringed, but
4 the People of California have the sovereign right to these voter-
5 approved product label warnings.

6 **A. The Science Backs Defendants' Position.**

7 Monsanto-aligned interests challenge Defendants' reliance
8 upon the glyphosate assessment of the International Agency for
9 Research on Cancer (IARC).⁷ Yet, IARC is one "of the most well-
10 respected and prestigious scientific bodies," whose assessments of
11 carcinogenicity of chemicals "are generally recognized as
12 authoritative[.]" Federal Judicial Center's Reference Manual on
13 Scientific Evidence (3rd. Ed.) (Reference Manual) at 20, 565. And,
14 for good reason. Unlike regulatory bodies that often have ties to
15 industry and are shackled with earlier regulatory decisions, IARC
16 is independent. Scientists from around the World, who are renowned
17 and respected experts in their field, systematically reviewed the
18 published and peer-reviewed data and concluded, based on sound,
19 reliable evidence, that glyphosate is a probable human carcinogen.⁸

20 The State of California reviewed the IARC classification and
21 similarly concluded that glyphosate is a substance known to the

22 _____
23 ⁷ The content from page 10, line 9 through page 11, line 11 is provided
24 primarily from another case of public record against Monsanto (U.S. Dist. Ct.,
(Nor. Cal.) In Re: Roundup Products Liability Litigation, MDL#2741, Case No.
16-md-02741-VC). It is provided here with the consent of the original author.

25 ⁸ See Reference Manual at 91 ("It appears that many of the most well-respected
26 and prestigious scientific bodies (such as the International Agency for
27 Research on Cancer (IARC), the Institute of Medicine, the National Research
28 Council, and the National Institute for Environmental Health Sciences)
consider all the relevant available scientific evidence, taken as a whole, to
determine which conclusion or hypothesis regarding a causal claim is best
supported by the body of evidence.").

1 State of California to cause cancer as of July 7, 2017.⁹ Echoing
2 decisions by IARC and the State of California, on October 19, 2017,
3 European Parliament's Environment Committee ("EPEC") voted in favor
4 of an immediate and complete ban on household use of glyphosate-
5 based formulations and a full ban on such by December 2020.¹⁰ And
6 on October 24, 2017, European Parliament representatives
7 overwhelmingly voted in favor of a non-binding resolution banning
8 glyphosate in the 28 European Union member states by 2022, again
9 with an immediate ban on household use.¹¹ The EPEC is not alone;
10 several governmental bodies outside of the United States have
11 instituted similar glyphosate bans.¹²

12 Despite the best efforts of Monsanto to ignore, bury, and
13 prolong studies on glyphosate toxicity, the evidence of that
14 toxicity and carcinogenicity can no longer be ignored or hidden.
15 The research is so substantial¹³ that it has become public knowledge
16 that Monsanto's glyphosate is not only carcinogenic, but immensely
17 dangerous in other ways to humans and our environments.¹⁴ Providing

18 ⁹ OEHHA, *Glyphosate Listed Effective July 7, 2017, as Known to the State of*
19 *California to Cause Cancer*, June 26, 2017; Accessed on January 25, 2018, at
20 <https://oehha.ca.gov/proposition-65/cnr/glyphosate-listed-effective-july-7-2017-known-state-california-cause-cancer>

21 ¹⁰ European Parliament News, *MEPs propose glyphosate phase-out, with full ban*
22 *by end 2020*, October 19, 2017, Accessed on January 25, 2018 at
23 <http://www.europarl.europa.eu/news/en/press-room/20171019IPR86411/meps-propose-glyphosate-phase-out-with-full-ban-by-end-2020>

24 ¹¹ *Id.*

25 ¹² Pesticide Action Network (UK), *Glyphosate restrictions and bans around the*
26 *world*, accessed on January 25, 2018, at http://claregalway.info/wp-content/uploads/2016/09/535_Glyphosate-and-pesticide-bans-around-the-world-as-of-July-20161.pdf

27 ¹³ See e.g., Gillam, *supra*, at pp. 255-293.

28 ¹⁴ See e.g., Green Med Info, *Glyphosate*, Accessed on January 25, 2018, at
<http://www.greenmedinfo.com/toxic-ingredient/glyphosate> (publishing research

1 Proposition-65 warnings of glyphosate's carcinogenicity is the
2 absolute least that California voters can do with the toxin
3 glyphosate; as many other jurisdictions have learned, banning it
4 outright is far more intelligent and appropriate.

5 In 2013, researchers from the Indian Institute of Toxicology
6 Research confirmed the carcinogenic potential of Roundup
7 herbicide by exposing human skin cells to extremely low
8 concentrations of glyphosate.

9 The same researchers had previously discovered and reported
10 on glyphosate's tumor-promoting potential in a two-stage mouse skin
11 carcinogenesis model through its disruption of proteins that
12 regulate calcium (Ca^{2+}) signaling and oxidative stress (SOD 1),
13 but they were unable then to identify the exact molecular
14 mechanisms behind how glyphosate contributes to tumor promotion.¹⁵

15 Perhaps the most damning piece of scientific evidence showing
16 harm from genetically modified organisms (GMO) was published in
17 September 2012 in the journal *Food and Chemical Toxicology*
18 (*FCT*). Now called The Seralini Study,¹⁶ it documented liver and
19 kidney toxicity, hormonal disturbances, and an increasing trend of
20 tumor formation in rats fed GMO corn treated with Roundup. The
21 study was a deathblow not only to Monsanto, but also to the entire
22 agrochemical sector that employs this herbicide.

23 Typically, Monsanto has alleged that glyphosate has no effect

24 studies documenting that the United States and the rest of the World face a
25 genuine health and environmental crisis from glyphosate poisoning.)

26 ¹⁵ Jasmine George, Sahdeo Prasad, Zafar Mahmood, Yogeshwer Shukla, "Studies on
27 glyphosate-induced carcinogenicity in mouse skin: a proteomic approach." *J*
Proteomics, 2010 Mar 10;73(5):951-64. Epub 2010 Jan 4. PMID: 20045496.

28 ¹⁶ GMOSeralini, Accessed on January 25, 2018, at
<https://www.gmoseralini.org/en/>

1 on mammalian cells, which is a half-truth and half-lie. Forgotten,
2 or simply ignored, is the basic biological fact that our human and
3 animal intestinal tracts are full of billions of very beneficial
4 *non-mammalian* bacteria, vital to our existence. Glyphosate affects
5 the shikimate pathway in these bacteria, killing them and all of
6 the health benefits that would normally flow from them.

7 Glyphosate is an amino acid that resembles glycine and can
8 take the place of glycine in proteins and accumulate in the
9 body. Testimony will show that this can suppress the enzyme EPSPS
10 in the shikimate pathway (in the intestinal tract)
11 effecting: lipase (obesity), insulin receptor (diabetes); amyloid
12 beta plaque (Alzheimer's); **OGG1 (cancer)**, lipocain (kidney
13 failure); ACTH (adrenal insufficiency); Cytochrome C Oxidase
14 (Mitochondrial Disease); Alpha Synuclein (Parkinson's
15 Disease); and TDP-43 (ALS). As is actually well known, and can be
16 attested to, "Glyphosate insertion by mistake in place of glycine
17 during protein synthesis can easily explain the alarming
18 correlations between glyphosate usage on core crops and a long list
19 of debilitating chronic diseases."¹⁷

20 **B. Monsanto's Unclean Hands.**

21 During the 1990s, independent scientists published new studies
22 concluding that GBFs were genotoxic and induced oxidative stress.¹⁸

23 ¹⁷ Samsel & Seneff, "Glyphosate Pathways to Modern Diseases VI: Prions,
24 amyloidosis and autoimmune neurological diseases," *JBPC*, Vol. 17, p. 25SA16A
25 *et seq.* (2017); See also Dr. Seneff "Monsanto Makes Poison - Deep Science
26 w/Dr. Seneff (MIT) - SuspiciousObservers", accessed on January 25, 2018, at
27 <https://youtu.be/uDum7GGuOTA> (minute 34:39). Dr. Seneff also explains this in
a slide presentation given at a U.S. Congressional hearing on glyphosate. *U.S.*
Congressional Hearing on Glyphosate, June 14, 2016, Accessed on January 26,
2018 at https://people.csail.mit.edu/seneff/DC_congressional_hearing.html.

28 ¹⁸ The content in page 13, line 21 through page 16, line 7 is provided
primarily from another case of public record against Monsanto (U.S. Dist. Ct.,

1 To combat these studies, Monsanto hired Dr. James Parry who "was
2 at the forefront of studies in genetic toxicology and the founding
3 father of much of this discipline within the UK."¹⁹ Based on
4 published literature and Monsanto's unpublished in-house
5 genotoxicity studies, Dr. Parry provided Monsanto a draft report
6 that concluded "glyphosate is a potential clastogenic²⁰ in vitro"
7 and the "clastogenic activity may be reproduced in vivo in somatic
8 cells."²¹ Dr. Parry recommended that Monsanto conduct several tests
9 to determine glyphosate's safety, which Monsanto never conducted.
10 Further, Monsanto did not provide the Parry report to EPA, as it
11 was required to do under 40 CFR 159.158. See *Am. Crop Prot. Ass'n*
12 *v. U.S. E.P.A.*, 182 F. Supp. 2d 89 (D.D.C. 2002).

13 Recognizing that Dr. Parry's report would not aid Monsanto's
14 messaging, it elected to publish a ghostwritten article ostensibly
15 by Gary Williams, concluding that "Roundup herbicide does not pose
16 a health risk to humans,"²² despite its own scientists admitting
17 internally, "[t]he terms glyphosate and Roundup cannot be used
18 interchangeablyFor example you cannot say that Roundup is not

19
20 (Nor. Cal.) *In Re: Roundup Products Liability Litigation*, MDL#2741, Case No.
21 16-md-02741-VC). It is provided here with the consent of the original author.

21 ¹⁹ Waters, et al. James M. Parry (1940-2010) *Mutagenesis* (2011) 26 (1): 1-2.

22 ²⁰ A clastogen is a mutagenic agent giving rise to or inducing disruption or
23 breakages of chromosomes, leading to sections of the chromosome being deleted,
added, or rearranged.

24 ²¹ Parry Report p. 12. Moreover, Dr. Parry's conclusions demonstrate that
25 Plaintiffs' mechanistic opinions enjoy general acceptance. MONGLY01314233

26 ²² Williams, et al., *Safety Evaluation and Risk Assessment of the Herbicide*
27 *Roundup and Its Active Ingredient, Glyphosate, for Humans. Regulatory*
28 *Toxicology and Pharmacology*, 31, 117-165 (2000); MONGLY00977264 ("we ghost-
write the *Exposure Tox & Genetox* sections...we would be keeping the cost down
by us doing the writing and they would just edit & sign their names so to
speak. Recall that is how we handled Williams Kroes & Munro, 2000.").

1 a carcinogen...we have not done the necessary testing on the
2 formulation to make that statement."²³ Dr. William Heydens, current
3 Regulatory Product Safety Assessment Lead at Monsanto, admitted he
4 ghostwrote and made final edits to the article.²⁴ Monsanto noted in
5 December 2010 that Williams (2000) was "an invaluable asset" for
6 its "responses to agencies; Scientific Affairs rebuttals; and
7 Regulator reviews;" and while Williams "has served us well in
8 toxicology over the last decade...we need a stronger arsenal of
9 robust scientific papers to support the safe use of our products
10 as we face the next set of chemistry registration reviews across
11 the globe."²⁵

12 The next EPA registration prompted another round of
13 ghostwritten articles, including the Kier and Kirkland study²⁶
14 originally written by Monsanto's David Saltmiras.²⁷ In requesting
15 funding for the manuscript, Saltmiras stated that it "will be a
16 valuable resource in future product defense against claims that
17 glyphosate is mutagenic or genotoxic."²⁸ However, after drafting
18 the manuscript, Monsanto concluded that "the manuscript turned into
19 such a *large mess of studies reporting genotoxic effects*, that the
20

21 ²³ 11/24/2003 email from Donna Farmer. MONGLY00922458.

22 ²⁴ 6/21/1999 email from Bill Heydens stating "And Dougie [Cantox] thinks I
23 would actually leave the final editing to him unsupervised...";
MONGLY03751016; See also Ex. 29. MONGLY02598454, Glyphosate Publications
Recommendations for Process.

24 ²⁵ 12/8/2010, email from Heydens and attachment. MONGLY02067858, pp 12, 16.

25 ²⁶ Kier & Kirkland, "Review of genotoxicity studies of glyphosate and
26 glyphosate-based formulations," *Crit Rev Toxicol*, 2013 Apr;43(4):283-315.

27 ²⁷ Kier & Saltmiras, Draft Manuscript. MONGLY01691608.

28 ²⁸ 2/29/2012, manuscript clearance form. MONGLY02117800.

1 story as written stretched the limits of credibility among less
2 sophisticated audiences."²⁹ (emphasis added). Monsanto decided it
3 needed to "enhance credibility" of the manuscript by giving the
4 impression that the study was independent and thus replaced
5 Saltmiras as an author with Dr. David Kirkland, a renowned
6 genotoxicity specialist.³⁰ Essentially, Monsanto could not let the
7 data speak for itself, because the data shows, as the experts
8 explain, that glyphosate is genotoxic.

9 Unfortunately, though, Monsanto's influence is not just
10 limited to generating ghostwritten articles in support of its
11 poison. Monsanto also has influenced and compromised the Agency
12 for Toxic Substances and Disease Registry (ATSDR), a Federal
13 public-health agency of the Department of Health and Human
14 Services.

15 Two years ago, ATSDR announced that it was going to publish a
16 "toxicological profile" on glyphosate, to become available in
17 October 2015. Amazingly, the information that ATSDR said would
18 become available has yet to appear. Yet documents that have been
19 uncovered reveal this was no accident, or bureaucratic delay, but
20 instead the result of a collaborative effort between Monsanto and
21 a group of high-ranking EPA officials. Jess Rowland, a deputy
22 division director at the EPA, had promised Monsanto that he would
23 try and "shoot down" that review, but these documents show those
24 helping hands at the EPA went even higher up the ladder than

25 ²⁹ 7/19/2012 Email re: Genotox Review: your approval requested!
26 MONGLY02145917.

27 ³⁰ Saltmiras noted that Kier & Kirkland was "the fifth such Glyphosate related
28 manuscript I have been involved with over the past few years without co--
authorship." MONGLY04086537.

1 Rowland. Still, even though that ATSDR report was buried in the
2 EPA's basement, other research has come out showing the dangers of
3 dangerous glyphosate.

4 In addition, as Séralini and his team had their study
5 published, emails show³¹ that Monsanto offered the *Food and*
6 *Chemical Toxicology* (FCT) Editor-in-Chief A. Wallace Hayes a
7 payment for "consulting services." By early 2013, Hayes announced
8 that he had appointed former Monsanto scientist Richard E. Goodman
9 to be in charge of the Journal's biotechnology publications.
10 Another Monsanto scientist, David Saltmiras, was then shown to be
11 involved³² in coordinating the "third party" expert letter-to-the-
12 editor campaign to get the Séralini study retracted.³³

13 In November 2013, the corporate mainstream media headlined
14 the news of Hayes' official announcement that the Séralini study
15 was retracted from FCT. Although the study was published by another
16 journal in 2015, the reputation of Séralini, his team, and their
17 research findings had already been wrongly discredited in the
18 mainstream public mind, a story that Monsanto pushes to this very
19 day.

20 As cited above, books have been written about the corruption
21 that has been sown in the scientific and regulatory communities by

22 ³¹ See e.g., Authorization Letter to Consulting Agreement dated August 21,
23 2012, between Prof. A. Wallace Hayes and Monsanto Company, Accessed on January
24 25, 2018, at <https://usrtk.org/wp-content/uploads/2017/08/10-Monsanto-Consulting-Agreement-with-Food-and-Chemical-Toxicology-Editor.pdf>.

25 ³² Internal Record FY2013 re Saltmiras, David Anthony, Accessed on January 25,
26 2018, at <http://baumhedlundlaw.com/pdf/monsanto-documents/8-Monsanto-Scientist-Admits-to-Leveraging-Relationship-with-Food-and-Chemical-Toxicology-Journal.pdf>.

27 ³³ See e.g., Emails re Seralini, Accessed on January 25, 2018, at
28 <https://usrtk.org/wp-content/uploads/2017/08/14-Monsanto-Emails-Confirming-Undisclosed-Involvement-in-Successful-Retracton-of-Serlani-Study.pdf>.

1 Monsanto. And the evidence is much more prolific than anyone
2 suspected. This page-limited brief cannot provide all of the
3 details that support NHF's and MAAM's position that Monsanto has
4 substantially unclean hands.

5
6 **C. Monsanto-Aligned Amici Briefs Present Half-Baked,
Factually Devoid Arguments.**

7
8 **1. Amici Chambers of Commerce Falsely Claim that
California is Mandating Third Party Speech.**

9 Prop 65 does not force anyone's science or speech upon the
10 State of California. The State is free to either accept or
11 reject the research of third parties in its reasonable
12 discretion. And yet, Monsanto-aligned Amici attempt to misdirect
13 this Court with an inapposite argument:

14 "[n]othing in Zauderer suggests *** that the State is
15 equally free to require corporations to carry the messages
16 of third parties, where the messages themselves are biased
17 against or are expressly contrary to the corporation's
views.' PG&E, 475 U.S. at 15 n.12."
Amici Chambers of Commerce, MPA ISO MSJ, p. 6.

18 That PG&E case involved forced *political* speech on electric
19 bill mailings, which were layman's *viewpoints in general public*
20 *discourse*. By contrast, the instant case involves scientific
21 findings recognized by California regulators pursuant to their
22 authority and discretion under Prop 65. It is proper to first
23 analyze the instant case under the great body of law upholding
24 consumer warning labels rather than the small body of law
25 regarding forced political speech. Indeed, it only undermines the
26 credibility of Monsanto-aligned Amici to rely on such inapposite
27 facts.

28 Monsanto-aligned Amici then double-down in their brief by

1 further citing the PG&E case with the following inapplicable
2 argument:

3
4 "The government has its own powerful megaphone to spread its
5 preferred policy positions, including positions that are
6 critical of commercial products. But one thing the
7 government cannot due [sic] is coopt the messages of
8 commercial speakers and force them to disparage their own
9 products. Such coercion not only forces speakers to speak
10 when they would rather remain silent, but deters them "from
11 speaking out in the first instance." PG&E, 475 U.S. at 10.
12 That result "reduc[es] the free flow of information and
13 ideas that the First Amendment seeks to promote," id. at 14,
14 to the detriment of companies and the public alike."

15 Amici Chambers of Commerce, MPA ISO MSJ, p. 8.

16 But again, the instant case is a *consumer warning label case*
17 -- throughout American history, the most logical, effective, and
18 lawful method for warning a consumer about a product's danger is
19 literally *on that product itself*.³⁴ So, once again we see the
20 credibility of Monsanto-aligned Amici undermined by their
21 reliance upon inapposite case law.

22 Monsanto-aligned Amici's rant about 'impossibility of legal
23 compliance' across State lines is nothing new in the field of
24 consumer warning law, and courts have routinely denied such
25 complaints rather than upset the entirety of jurisprudence in
26 this area. Indeed, a harmful actor's rant about 'impossibility'
27 is routinely just a veil for the harmful actor's failure to
28 select from multiple real-world possibilities it deems less
profitable. See e.g.,

³⁴ Webb, T., *supra*, *Helping Consumers Get the Picture: The Constitutionality of Requiring Graphic Labels on Cigarette Packaging* (December 3, 2012). Jones MM, Benrubi ID, "Poison Politics: A Contentious History of Consumer Protection Against Dangerous Household Chemicals in the United States," *American Journal of Public Health*, 2013;103(5):801-812. doi:10.2105/AJPH.2012.301066.

1
2 "A traditional axiom of products liability law is that a
3 manufacturer or supplier of goods has a duty to warn of any
4 danger from the intended or unintended but reasonably
5 foreseeable use of its products... Under current products
6 liability law, a determination of adequacy is a highly
7 subjective and fact-intensive evaluation. As such, defining
8 a step-by-step procedure for creating unassailably adequate
9 warning labels is impossible."³⁵

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18 **2. Amici Chambers of Commerce Hypocritically Claim
19 Plaintiff Lawyers Have Profit Motives.**

20 California voters included an attorney's fee provision in
21 Prop 65 in order to ensure its enforcement. And indeed, abundant
22 law reviews support the legality and effectiveness of Prop 65 to
23 promote health and product innovation.³⁶

24 Even the Amici Chambers of Commerce could not help but cite
25 this known effect in their own brief:

26 "SAN DIEGO UNION TRIBUNE, July 31, 2011, p. A-1 (estimating
27 that, as of 2011, more than \$1.24 billion had been spent to
28 reformulate products under Proposition 65)."

Amici Chambers of Commerce, MPA ISO MSJ, p. 20.

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18 **3. Monsanto-Aligned Amici Falsely Portray The Status
19 Quo of Monsanto's Carcinogenic Marketshare As Some Kind
20 Of Protected Legality.**

21 A sizeable amount of the Monsanto-aligned amici argument
22 suggests the status quo of Monsanto's marketshare with its

23 _____
24 ³⁵ Ross, K., et al., *Legally Adequate Warning Labels: A Conundrum for Every
25 Manufacturer*, Product Liability Prevention (October 1998), Accessed on January
26 25, 2018 at [http://productliabilityprevention.com/images/6-
27 LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf](http://productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf)

28 ³⁶ See e.g., Rechtschaffen, C, "The Warning Game: Evaluating Warnings Under
California's Proposition 65," *Ecology Law Quarterly*, Vol 23, Issue 2, March
1996 ("...in the consumer marketplace, where substitute chemicals are available,
Proposition 65 has encouraged significant product reformulation. The Act has
also helped to reduce toxic air emissions and other environmental exposures,
the result of increased industry scrutiny of its processes and concern about
negative publicity.")

1 carcinogen is 'good' for America, and therefore the marketshare
2 status quo should somehow be legally mandated. To prop up such a
3 novel argument, Amici Chambers of Commerce again rely on
4 inapposite facts:

5
6 "Consumer Cause, Inc. v. SmileCare, 110 Cal. Rptr. 2d 627,
7 636 (Cal. Ct. App. 2001) (holding that evidence that a
8 dental filling had been approved by the American Dental
9 Association and used safely for 150 years was irrelevant
10 because it did not meet the relevant Proposition 65
11 standard)."

12 Amici Chambers of Commerce, MPA ISO MSJ, p. 18.

13 The reality of science is that regulators are constantly
14 learning new information about consumer products. Often
15 regulators learn that otherwise common materials are now, and
16 have been historically, highly carcinogenic to humans. Indeed, it
17 is often the dosage that is the determining factor in exposing
18 the toxin, so as usage increases, so too the evidence of
19 carcinogenicity.³⁷ Monsanto-aligned amici's attempt to enshrine
20 the status quo of the widespread use of Monsanto's carcinogenic
21 product is ultimately against good science.

22 **4. Monsanto-aligned Amici Falsely Concoct A Conflict of**
23 **Laws Argument.**

24 The Amici brief from "11 States" is at odds with the law of
25 the 50-States of this Union, because each State must respect the
26 sovereignty of one another, and because there cannot be a
27 conflict-of-laws argument where a California consumer warning
28 label *explicitly* specifies the warning is specific to California.

³⁷ See e.g., the case cited by Monsanto-aligned amici: Consumer Cause v. SmileCare, 110 Cal.Rptr.2d 627, 632, 634 (2001) (stating that dental providers can be found liable if they use an amalgam above the levels prohibited in Proposition 65).

1 Consumer warning law has always asked whether a “reasonable
2 anticipated user” would understand the warning label.³⁸ And courts
3 defer to the expertise of governmental bodies in whether the
4 warning is adequate and comprehensible to a reasonable
5 anticipated user. See e.g., *Ramirez v. Plough, Inc.*, 6 Cal.4th
6 539, 25 Cal.Rptr.2d 97, 107 (1993).

7 For over 30-years, every reasonable person has understood
8 that Prop 65 warnings apply to California because the label
9 explicitly states the warning applies to California. Monsanto-
10 aligned amici offers no factually similar case law to support
11 their novel position that this causes conflict or confusion.
12 Indeed, here is a representative example of case law in this
13 area, where a reasonable person actually could not understand the
14 warning label: In *General Chemical Corp. v. De La Lastra*, 815
15 S.W.2d 750 (Tex.App.1991), two shrimpers died from sulphur
16 dioxide poisoning while processing shrimp with defendant’s
17 chemical. The defendant’s warning noted that the product
18 “[r]eacts with acids and water, releasing toxic sulfur dioxide
19 gas.” The court affirmed the lower court’s verdict that this
20 warning did not adequately emphasize that the product could
21 potentially produce a deadly gas. Thus, where a product’s use or
22 reasonably foreseeable misuse can cause death, the magnitude of
23 that harm should be conveyed.”

24 With legal precedents like this, Monsanto-aligned Amici are
25 faced with an unwinnable battle, so they have actually attempted

26 ³⁸ See e.g., Ross, K., et al., *Legally Adequate Warning Labels: A Conundrum for*
27 *Every Manufacturer*, Product Liability Prevention (October 1998), Accessed on
28 January 25, 2018, at [http://productliabilityprevention.com/images/6-](http://productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf)
[LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf](http://productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf) (citing Am.Law
Prod.Liab.3d §33:10).

1 to state California law falsely to gain some foothold:

2
3 "Yet California's regulation compels businesses to issue
4 false and misleading statements about their own products."

5
6 Amici 11 States, MPA ISO MSJ, p. 8.

7
8 California law compels no such thing, and so the above quote
9 from Monsanto-aligned Amici is not a foothold. It is nothing more
10 than a poorly written rant based on junk science.

11
12 Second, Monsanto-aligned Amici try to push the infamously
13 discredited 'race to the bottom' that still plagues many
14 developing and impoverished nations today, where sensible
15 environmental health regulations are pushed aside by special
16 interests to promote some transient trade agenda.³⁹ Indeed, it is
17 standard practice for American law schools to actively caution
18 their environmental law students to both identify and prevent
19 special interests from legally mandating any race-to-the bottom.
20 So, to conceal its advocacy for a 'race to the bottom' in this
21 case today, Monsanto-aligned Amici write cunningly:

22
23 The mandate thus frustrates the purpose of state consumer-
24 protection statutes, which are designed to facilitate honest
25 commerce, not to cause businesses to forgo economic
26 opportunities.

27
28 Amici 11 States, MPA ISO MSJ, p. 1.

29
30 This too is no foothold. Monsanto-aligned Amici's argument
31 ignores that a key function of California's Prop 65 is to avoid
32 the 'race to the bottom.' Legal scholars have even confirmed

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39 Klepetar, D, *Technology-Forcing and Law-Forcing: The California Effect in Environmental Regulatory Policy*, Western Political Science Association, March 22, 2012. Accessed on January 25, 2018, at <https://wpsa.research.pdx.edu/meet/2012/klepetar.pdf>.

1 that Prop 65 has helped elevate the entire Nation.⁴⁰

2
3 **5. Monsanto-aligned Amici Falsely Regurgitate Arguments**
4 **From the Same Old Playbook For Big Tobacco.**

5 Severely undermining the credibility of the Amici brief from
6 11 States, the following statement is found:

7 "Even though no study has identified a definite link between
8 glyphosate and cancer, the regulation at issue here requires
9 businesses that sell products containing glyphosate to
10 declare that glyphosate is 'known' to cause cancer."

11 Amici 11 States, MPA ISO MSJ, p. 2.

12 Denying even *the existence* of studies was the hallmark of
13 Big Tobacco in the last century (recall Big Tobacco's infamous
14 memo "doubt is our product"); and that denial strategy worked
15 historically in some courts, but ultimately it was exposed as
16 junk science, which is precisely where it stands today.

17 While it is not surprising to see such a denial tactic
18 employed by Monsanto's lawyers, it is surprising and dismaying to
19 see such a false statement in the Amici Brief for 11 States.
20 Indeed, if the 11 States were to actively broadcast their false
21 statement to the Citizens of their respective States, their own
22 scientists and Citizens would gladly share with them many of the
23 studies cited in this brief by the NHF and MAAM. So it only
24 undermines the credibility of the 11 States brief for them to
25 show such a blatant disregard for scientific studies recognized
26 and respected throughout the United States and the world.

27 ⁴⁰ See e.g., Rechtschaffen, C., *supra*, "The Warning Game: Evaluating Warnings
28 Under California's Proposition 65," *Ecology Law Quarterly*, Vol 23, Issue 2,
March 1996.

1 **6. Monsanto-aligned Amici Falsely Claim That Poor**
2 **Citizens Are Adversely Harmed By Science-Based Consumer**
3 **Protections Designed To Protect Them.**

4 At present, more than 90% of American consumers have tested
5 positive for glyphosate contamination, which is now found even in
6 *organic* California wines and honey.⁴¹

7 And yet the Amici Brief of 11 States argues that price
8 fluctuations in Monsanto's carcinogen are more detrimental to
9 consumers than the carcinogen itself:

10 "Needless to say, such price jolts in the market for
11 critical food staples will hit low-income Americans the
12 hardest, including the poorest citizens of the Amici
13 States."

14 Amici 11 States, MPA ISO MSJ, p. 13.

15 The reality is that glyphosate presents the largest risk to
16 uninformed (often poor) consumers. Prop 65 labelling is a public
17 service to all Americans, as it helps spotlight carcinogens
18 carried throughout all sectors of society. Fortunately here,
19 independent experts are well prepared to address the specific
20 carcinogenic dangers of glyphosate at trial on the merits.

21 **CONCLUSION**

22 For the foregoing reasons, Amici NHF and MAAM respectfully
23 ask this Court to deny Monsanto's Motion for Preliminary
24 Injunction.

25 //

26 //

27

28 ⁴¹ Gillam, C, *supra*, *White Wash: The Story of a Weedkiller, Cancer, and the Corruption of Science*, Island Press, 320 pages (Oct 2017) ("Most of us are Guinea pigs in this horrendous toxic experiment.")

1 DATED: January 26, 2018

Respectfully submitted,

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