XAVIER BECERRA
Attorney General of California
SUSAN S. FIERING, State Bar No. 121621
Supervising Deputy Attorney General
DENNIS A. RAGEN, State Bar No. 106468
LAURA J. ZUCKERMAN, State Bar No. 161896
HEATHER C. LESLIE, State Bar No. 305095
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1299
Fax: (510) 622-2270
E-mail: Laura.Zuckerman@doj.ca.gov
Attorneys for Defendants Dr. Lauren Zeise, Director, Office of Environmental Health Hazard Assessment, and Xavier Becerra, Attorney General of the State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF WHEAT GROWERS ET AL.,

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.

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

DEFENDANTS' RESPONSE TO BRIEF OF 11 STATES AS AMICI CURIAE

Date:	February 20, 2017
Time:	1:30 p.m.
Courtroom:	5
Judge:	The Honorable William B. Shubb
Trial Date:	None set.
Action Filed:	November 15, 2017

INTRODUCTION

Eleven States ("Amici States") have filed an Amici Curiae Brief urging this Court to rule that California's warning regulations as applied to potential exposures to glyphosate, a chemical listed pursuant to state law as known to cause cancer, are unlawful because they allegedly infringe on their sovereignty. These claims utterly lack merit, as the warning requirements of the Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.5 – 25249.14 ("Proposition 65"), apply only to products sold in California, and have no impact on products sold in other States. Further, Amici States' arguments were not raised by the Plaintiffs in this action and are thus not properly before this Court, and California's requirements do not undermine Amici States' consumer protection laws. In short, Amici States have failed to raise any colorable claims against California's validly-promulgated warning requirements.

ARGUMENT

I. AMICI STATES CANNOT ASSERT NEW CLAIMS IN THIS FIRST AMENDMENT CASE

Amici States claim that California's warning requirement as it applies to potential exposures to glyphosate "imposes confusing and contradictory obligations on businesses and interferes with the ability of other sovereign States to craft rational and consistent consumer-protection policies." Brief for 11 States as Amici Curiae ("Amici States' Brief") at 1-2. Amici States further claim that California's warning requirement "risks creating 'zones' of commerce antithetical to a national economy." *Id*. With these allegations, Amici States attempt to insert new claims into this First Amendment case. However, Amici States may not do so, and their brief should be disregarded in its entirety.

Amici generally cannot raise issues that have not been raised by the parties, particularly when, as here, those issues amount to new causes of action. *See, e.g., Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2776 (2014) ("We do not generally entertain arguments that…are not advanced in this Court by any party…"); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F.Supp.2d 1207, 1216 (D. Nev. 2006) (quoting 4 Am.Jur.2d *Amicus Curiae* § 7 (2006) for the proposition "that an *amicus* brief 'ordinarily cannot inject new issues into a case which have not been presented by the parties'"); *Knox v. U.S. Dep't of Interior*, No. 4:09-CV-

162-BLW, 2011 WL 2837219, at *2 (D. Idaho July 9, 2011) (citing *Gen. Electric Corp. v. Virgin Islands Water & Power Auth.,* 805 F.2d 88, 92 n.5 (3d Cir. 1986) for the proposition that "[g]enerally, new issues by an amicus are not properly before the court"). Plaintiffs here allege violations of the First Amendment, Supremacy Clause, and Due Process Clause of the Fourteenth Amendment, and their preliminary injunction motion is based solely on the First Amendment. Amici States' core argument—that California's regulation raises federalism issues—is entirely premised on dormant Commerce Clause cases. Amici States' Brief at 8, 11-14. Amici States cannot transform this action into a dormant Commerce Clause case.

II. STATES CAN REGULATE THEIR OWN MARKETS

While claiming that their sovereignty has been intruded upon, Amici States actually seek to intrude on California's sovereignty, arguing that the policy judgments of their States should control California's regulation of its own market. However, Amici States fail to cite a single case supporting their position that one State can be prohibited from regulating to protect the health and safety of its citizens simply because another State disagrees with its methods for, or approach to, doing so. No such case exists, and case law confirms the opposite—that States may regulate products sold in their markets in order to protect their consumers from risks the State perceives, even if other States do not regulate those risks or regulate differently.

Amici States' arguments contravene the well-established principle that state regulation of products sold in the State's own market are within that State's authority and do not infringe on other States' sovereignty. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) (affirming validity of California regulation that "regulates only the California market"); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013).[1] Indeed, courts have repeatedly affirmed the constitutionality of in-state labeling requirements against similar allegations. *E.g., Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 647 (6th Cir. 2010) (upholding Ohio dairy labeling requirements because "how the Processors

[1] Indeed, state product regulations have been held to be extraterritorial regulations under the dormant Commerce Clause only when they control activities occurring *entirely* in other States' markets. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (invalidating Connecticut law that had the practical effect of controlling commerce wholly outside of Connecticut).

label their products in Ohio has no bearing on how they are required to label their products in other States (or vice versa)"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2d Cir. 2001) (upholding Vermont requirements for labeling of light bulbs containing mercury); *see also Rocky Mountain Farmers Union,* 730 F.3d at 1105 (9th Cir. 2013) (observing that "proliferation of organic labeling standards did not threaten our economic union…").

Decisions upholding regulations that apply only to products sold within the regulating State—even if they differ from the regulatory choices of other States—are legion. *See, e.g., Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1043-44 (9th Cir. 2014) (affirming Alameda County regulation applicable to in-county pharmaceutical sales, although it was unique among counties at the time); *Rocky Mountain Farmers Union*, 730 F.3d at 1101-1106 (affirming California's regulation of fuels sold in the State, although it was unique among States at the time); *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 372-74 (3d Cir. 2012) (affirming New Jersey's regulation of travelers checks sold in that State, despite differences with other States' regulations); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 192-94 (2d Cir. 2007) (affirming Connecticut's regulation of gift cards sold in that State, despite differences with other States' regulations); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (affirming Minnesota-only prohibition against sales of petroleum-based sweeping compounds).

A state law like Proposition 65, which only regulates the products sold in the regulating State, does not exceed the State's authority or infringe on the authority of other States. Amici States' claims of infringement on their sovereignty thus fail as a matter of law, based on well-established precedent demonstrating that requirements like those imposed by Proposition 65 pass Constitutional muster. Amici States' arguments should therefore be disregarded by the Court.

III. CALIFORNIA'S REQUIREMENTS DO NOT CONFLICT WITH CONSUMER PROTECTION LAWS.

In addition to lacking a valid legal premise for their arguments, Amici States have entirely failed to show that any potential warning for glyphosate under Proposition 65 would conflict with any state consumer protection laws. Critically, Proposition 65 does not require manufacturers to

apply labels to products sold outside of California. Indeed, businesses need not "brand[ ] their products" with warnings before they leave their State of origin, Amici States' Brief at 14, since warnings can be "provided on a posted sign, shelf tag, or shelf sign, for the consumer product at each point of display of the product," Cal. Code Regs. tit. 27, § 25602. Amici States' unsubstantiated claim that businesses will label products for distribution outside of California is likewise irrelevant, since Amici States have provided no evidence that businesses will do so, or that "additional disclosures in States outside California [would] decrease[] the efficacy of disclosures already required by those States."[2] *See* Amici States' Brief at 9. Indeed, this situation need not arise since the warning requirement can be satisfied using shelf signs at retail locations, which will only be seen by consumers in California. In other words, Proposition 65's warning requirements do not mandate conduct of any kind to take place outside of California.

Amici States take issue in particular with any compelled use of the statement that "glyphosate is 'known' to California to cause cancer." Amici States' Brief at 3. However, as discussed in Defendants' Opposition to Motion for Preliminary Injunction ("PI Opp."), this argument is a straw man. While the "safe harbor" warning regulations contain the phrase "known to the state to cause cancer," that warning is not required, and businesses are free to craft alternative warning language that does not use the terms "known to the state to cause cancer" or even "known to cause cancer." PI Opp. at 6-9. The warning need only be "clear and reasonable." Cal. Health & Safety Code § 25249.6.

Thus, contrary to Amici States' contention, Proposition 65's warning requirements for significant exposures to glyphosate do not require companies to make "misleading" statements to California consumers. A "clear and reasonable" Proposition 65 warning will be factual, truthful and absolutely consistent with the requirements set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017).

[2] Plaintiffs have not provided the Court with evidence that products grown or manufactured in the Amici States, or anywhere else for that matter, will contain concentrations of glyphosate that are high enough to require a warning under Proposition 65. PI Opp. at 22-24.

Thus, California's warning requirements cannot compel any businesses in Amici States to violate any consumer protection law.

IV. AMICI STATES' POLICY ARGUMENT IS IRRELEVANT

Finally, Amici States claim that Proposition 65 causes "disclosure fatigue." Amici States' Brief at 8. However, in so doing, Amici undermine their own sovereignty arguments by suggesting that their judgments on the appropriate amount of disclosure should control in California. Whether or not the amount of disclosure required under Proposition 65 leads to "disclosure fatigue" is a policy decision properly made by the State of California. *See Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 731 F.3d 843, 850 (9th Cir. 2013) (stating that courts should not second-guess States' legislative judgments regarding health and safety). As Amici States themselves point out, each State is charged in its sovereign capacity with protecting the interests of its residents. *See* Amici States' Brief at 1. California has done so by fulfilling the wishes of California voters to be warned of significant exposures to chemicals identified as carcinogens by specific expert entities, except where the business causing the exposure can show that it does not pose a significant risk of cancer. Amici States cannot prevent California from fulfilling that mandate.

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CONCLUSION

Because California's warning requirement does not interfere with the sovereign interests of other States, the Court should not consider the arguments of Amici States, and should deny Plaintiffs' motion for a preliminary injunction.

Dated: January 26, 2018

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
SUSAN S. FIERING
Supervising Deputy Attorney General
DENNIS A. RAGEN
HEATHER C. LESLIE
Deputy Attorneys General

/s/ Laura J. Zuckerman
LAURA J. ZUCKERMAN
Deputy Attorney General
Attorneys for Defendants Dr. Lauren Zeise, Director, Office of Environmental Health Hazard Assessment, and Xavier Becerra, Attorney General of the State of California