CalChamber.
CALIFORNIA CHAMBER OF COMMERCE

September 9, 2020

The Honorable Chief Justice Tani Gorre Cantil-Sakauye
& Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

**Re: *American Chemistry Council v. Office of Environmental Health Hazard Assessment, et al.*, Supreme Court Case No. S263931**
**Amicus Curiae Letter in Support of Petition for Review (CRC Rule 8.500(g))**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The California Chamber of Commerce ("CalChamber") and the Chamber of Commerce of the United States ("U.S. Chamber") urge you to accept the petition for review in the above-captioned case. The court below erroneously applied deference to the non-technical judgements of a technical committee. This error not only threatens to disrupt settled principles of administrative law and deference, but it harms the public and business community by aggravating existing flaws in Proposition 65's implementation.

As the petition shows, respondent Office of Environmental Health Hazard Assessment ("OEHHA") erroneously added diisononyl phthalate ("DINP") to the Proposition 65 list based on the flawed recommendation of its Carcinogen Identification Committee. This error was aggravated when the Court of Appeals wrongly deferred to the Committee's misapplication of the guidelines, which involved the Chairman's non-technical recommendation for how the Committee should understand its guidelines for listing, not an application of the Committee's technical skills.

The lower court's error and the proper application of deference are well addressed by the petition. We write separately to explain some of the unintended consequences of Proposition 65 listing, which help emphasize the importance of requiring the Committee to strictly follow the listing guidelines and ensure safe substances are not listed.



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The laudable goal of Proposition 65 is to protect Californians from exposure to substances that the State of California believes may be toxic. Proposition 65 seeks to achieve this objective, in part, by requiring companies to warn the public of substances that the State has found might be toxic. However, the listing of a substance under Proposition 65 has wide-ranging and serious consequences. Businesses must comply with its warning requirements, and the statute's private enforcement mechanism has overly incentivized costly litigation, resulting in a cottage industry of "bounty hunter" suits yielding unfair settlements, with most of the recovery diverted to attorney's fees. This leads to, among other things, over warning and consumer exhaustion, which erodes Proposition 65's very purpose. For these and other reasons, it is crucial that the court enforce sensible guideposts on the listing of chemicals as hazardous, so that the list of substances that California believes to be toxic does not include safe materials and consumers can trust warning labels.

## Interest of Amici

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber participates as *amicus curiae* only in cases, like this one, that have a significant impact on California businesses.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 members directly and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every industry sector, and from every region of the country. The U.S. Chamber often represents its members' interests by filing amicus curiae briefs in cases involving issues of concern to the business community.

## Argument in Support of Petition for Review

### 1. Proposition 65's Enforcement Mechanism Incentivizes Litigation Over Other Goals

The Safe Drinking Water and Toxic Enforcement Act, better known as Proposition 65, was passed to protect Californians from exposure to carcinogens and reproductive toxins. It does so primarily by prohibiting companies from discharging toxic substances into rivers, lakes, and other "sources of drinking water." (See *Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 238-239.) But it also requires companies to warn the public of purportedly toxic chemicals that they might come in contact with. (Health & Saf. Code § 25249.6.) In theory, Proposition 65 would allow citizens to make informed choices about chemical risks. Unfortunately, however, it has led to a profusion of litigation and warnings that have, as one reporter put it, "subverted Proposition 65 and left Californians, and increasingly anyone who

shops online, overwarned, underinformed, and potentially unprotected." (Mohan, *You see the warnings everywhere. But does Prop. 65 really protect you?*, THE LOS ANGELES TIMES (July 23, 2020) (hereafter "Mohan".)

This is, in large part, because, overinclusion of chemicals on the list carries unintended consequences that fail to help consumers. More specifically, Proposition's 65's enforcement mechanism incentivizes litigation over its other goals. Penalties for violating Proposition 65 are steep, including fines up to $2,500 per violation per day. (*Id.*, § 25249.7, subd. (b).) The statute includes a public prosecution provision, meaning that it can be enforced by "any person in the public interest." (Cal. Health & Saf. Code, § 25249.7, subds. (c), (d).) In private enforcement cases, 25 percent of the fines go to the private party. (*Id.*, § 25192, subd. (a).) The private party also may recover its attorneys' fees and costs under Code of Civil Procedure section 1021.5, which authorizes fee awards to private plaintiffs for "enforcement of a right affecting the public interest." Thus, Proposition 65's enforcement mechanism created a profit motive for bringing litigation and has led Proposition 65 plaintiffs to be dubbed "bounty hunters." (*See* Caso, *Bounty Hunters and the Public Interest—A Study of California Proposition 65* (2012) 13 Engage: J. Federalist Society Prac. Groups 30, 31 (hereafter Caso).) As described below, this is a booming industry that primarily benefits lawyers, not the public that Proposition 65 is supposed to protect.

**2. Listing Chemicals That Do Not Harm Humans Spurs Costly Litigation That Doesn't Benefit the Public**

By design, Proposition 65 cases are easy to bring and hard to defend. The result has been an unrelenting stream of private litigation concerning listed chemicals, with the bulk of financial recovery going to attorneys' fees. The ease of enforcement and prospect of significant financial penalties on the *back-end* underscore the importance of ensuring that a substance is listed properly at the *front-end*. And that, in turn, highlights the importance of adhering to the procedural safeguards in the listing process. The immense social costs that result from a decision to list are unjustifiable if the listing decision itself was improper.

As courts have recognized, "bringing Proposition 65 litigation is … absurdly easy." (*Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1217 (*Consumer Defense Group*).) A plaintiff need only create a boilerplate demand letter, search out businesses whose premises or products allegedly contain substances listed under Proposition 65, including commonplace products like furniture or paint, and then bring suit if no warning is present or sufficiently prominent. (See *ibid.*)

Once the plaintiff brings suit, the defendant bears the burden of proving that any exposure to a chemical identified on the list as a carcinogen poses "no significant risk"—defined as a theoretical risk of one excess case of cancer in a population of 100,000 assuming exposure over a lifetime. (Cal. Health & Saf. Code, § 25249.10; Cal. Code Regs., tit. 27, § 12703(b); *Consumer Defense Group*, *supra*, 137 Cal.App.4th at pp. 1214-1215.) And a business charged with exposing Californians to a chemical on the Proposition 65 list without warning cannot

defend itself by showing a long history of safe use. (See Caso, *supra*, at p. 31.) For example, evidence that a dental filling had been approved by the American Dental Association and used safely for 150 years was held to be irrelevant because it did not meet the statutory exception for reproductive toxins—exposure at 1,000 times below the no observable effect level. (*Consumer Cause v. SmileCare* (2001) 91 Cal.App.4th 454, 466.)

Because Proposition 65 claims are cheap to initiate and very costly to defend, bounty hunter suits impose enormous pressure on defendants to settle. (See *Consumer Defense Group*, *supra*, 137 Cal.App.4th at pp. 1216-1217 & fn. 22 [noting that small businesses are vulnerable to "shakedowns"].) Authors of demand letters typically price settlement below the cost of what it would cost the business to defend the lawsuit. (See Caso, *supra*, at p. 31.) If a business elects to defend itself instead of settle, there is little risk that the plaintiff would end up being on the hook for the business's attorneys' fees. (See *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 199 [affirming denial of "public interest" attorney's fees to successful Proposition 65 defendant because defendant's principal objective was to protect is own economic interests].)

Given these dynamics, it is not surprising that Proposition 65 litigation has been lucrative for plaintiffs and their counsel—and, by the same token, very costly for businesses. As discussed earlier, a bounty hunter can recover 25 percent of any eventual recovery. The average settlement has been estimated at about $60,000. (Scott, *Another View: To Fix Prop. 65, End Lawsuit Abuse*, Sacramento Bee (Dec. 9, 2014).) Since 2000, California "Proposition 65 enforcement has cost businesses more than $370 million in settlements." (Mohan, *supra*)

That does not even include the cost of cases that went to trial or other costs such as reformulating a product, which are likely greater than the cost of settlement but for which data is less readily available. (See *id.*; Lee, *State Law on Toxins Has Effects Worldwide; Companies Have Changed Thousands of Products to Avoid the Warnings Prop. 65 Requires*, San Diego Union Tribune (July 31, 2011) p. A-1 [estimating that more than $1.24 billion had been spent to reformulate products under Prop. 65].) "New labeling requirements alone are expected to cost California companies between $410 million and $818 million over the next decade." (Mohan, *supra.*)

Notably, the *vast* majority of settlement payments in private party actions have gone to attorneys' fees. (*See, e.g.*, Caso, *supra*, at p. 32.) Professor Caso analyzed data from the Attorney General's website between 2000 and 2010 and found that defendants paid more than $142 million to settle suits brought under Proposition 65 during that time. (Caso, *supra*, at p. 32.) About $88.8 million of the $142 million collected (62.4 percent) in those actions went to attorneys' fees. (*Ibid.*) Civil penalties, by contrast, accounted for only 14.5 percent. (*Ibid.*) The remaining 23.1 percent—nearly a quarter of all the money collected—is listed as "other"—payments made directly to the organization that brought the suit or some other organization it designates. (*Ibid.*) By way of comparison, during the same time period the Attorney General collected only around $21.4 million in its Proposition 65 cases—around 15 percent of the total collected from Proposition 65 settlements in private litigation. (Caso,

*supra*, at p. 33.) Of that $21.4 million, only 25.5 percent was collected as attorney fees. (*Ibid.*) And 43.4 percent of all money collected by the Attorney General was designated as civil penalties. (*Ibid.*) The remainder of the money, about $6 million, was presumably paid to private organizations that helped identify the problem that led to the litigation. (*Ibid.*)

Sadly, these types of lawsuits are now routine in California. According to the Attorney General's website, California businesses entered into *829* settlements in 2018, the most recent year for which data is available. (Proposition 65 Settlement Executive Summary 2018, https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/2018-summary-settlements.pdf.) These settlements cost businesses over *$35 million*. (*Ibid.*) Of this amount, a staggering $27 million went to attorneys' fees, while only $6 million went to civil penalties. (*Ibid.*)

It is no surprise, then, that the listing of DINP already has spawned litigation. Since the listing, there have been over 1,400 60-day notice letters served. (See *60-Day Notice Search: diisononyl phthalate (DINP)*, State of California Department of Justice Office of the Attorney General, available at https://goo.gl/ncmcwX.) This all underscores the need to ensure, at a minimum, that the correct standards and procedures were rigorously followed during the listing process, so that society and businesses are not saddled with exorbitant litigation costs for no good reason. Because OEHHA manifestly failed to abide by those standards and procedures, its decision to list DINP was arbitrary and capricious, and should be vacated.

### 3. Erroneous Listings Contribute to the Overwarning Problem

The Proposition 65 listing process must be applied and scrutinized with great care for an additional reason: unnecessary listings contribute to the growing "over-warning" problem. The proliferation of warnings threatens to frustrate and confuse the public, resulting in disregard for important and meaningful warnings. Indeed, warnings are now provided for almost everything consumers see, touch, and consume on a daily basis: from alcoholic beverages to lawn mowers and everything in between. (*See, e.g.*, Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer* (1994) 11 Yale J. on Reg. 293, 295 (hereafter Noah).) Often multiple warnings appear on the labels of these products. (See *ibid.*) Proposition 65 listings have undoubtedly contributed to this trend. There are now more than *900* substances listed under Proposition 65, all of which require scores of warnings. (Caso, *supra*, at p. 30.)

When everything carries a warning label, the label loses meaning, diluting the impact of warnings for more serious harms. (*See, e.g.*, Morain, *The Conversation: State-Ordered Warnings Generate Mixed Results*, Sacramento Bee (Apr. 29, 2012) p. 1.) Dilution occurs when additional warnings about relatively inconsequential hazards cause consumers to become less attentive to labels in general, including some important aspects of labeling like directions for proper use. (*See, e.g., ibid.* ["American consumers are being inundated with warnings. Hazard statements on product labels have become so commonplace that many consumers no longer notice their presence."].) Excessive warnings "'are likely to confuse people or raise

their anxiety level, without providing much information relevant to decision making.'" (Noah, *supra,* at p. 381, fn. 440.)

Indeed, the Food and Drug Administration has long acknowledged the problems of information overload and warning dilution. (See, e.g., *Food Labeling; Declaration of Ingredients*, 56 Fed.Reg. 28592, 28615 (1991) [explaining that an additional warning "would overexpose consumers to warnings," and that "consumers may ignore, and become inattentive to, all such statements"]; *Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices*, 73 Fed.Reg. 49603, 49605-49606 (2008) [explaining that an amendment was intended, among other things, "to prevent overwarning, which may deter appropriate use of medical products, or overshadow more important warnings].) The FDA's former Commissioner cautioned specifically with respect to warnings about carcinogens:

> We are greatly concerned that a requirement for placing warning labels on all such products will lead to consumer confusion and actually diminish the effect of the labeling that is now required .... Messages warning of product ingredients that actually pose no risk will prompt consumers not to read labeling at all. Indeed, for products that now contain necessary warning labels, those warnings might be overlooked entirely, to the detriment of those citizens for which they were intended.

(Noah, *supra* at pp. 384-385 [quoting Frank E. Young, M.D., Statement before the Science Advisory Board of the California Health and Welfare Agency (Dec. 11, 1987) p. 16].)

Congress, courts, and commentators have expressed similar concerns. (See, e.g., H.R.Rep. No. 86-1861, p. 6 (1960) [House Commerce Committee report providing the following reasons for limiting a bill's warning requirements only to "substantial" hazards: "If labeling were required to caution against the risk of even the most trifling indisposition, there would hardly be any substance going into the household which would not have to bear cautionary labeling, so that consumers would tend more and more to disregard label warnings, thus inviting indifference to cautionary statements on packages of substances presenting a real hazard of substantial injury or illness."]; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 932 ["Against the benefits that may be gained by a warning must be balanced the dangers of overwarning and of less meaningful warnings crowding out necessary warnings, the problems of remote risks, and the seriousness of the possible harm to the consumer."]; *Cotton v. Buckeye Gas Products Co.* (D.C. Cir. 1988) 840 F.2d 935, 938 ["The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print."]; *Mason v. SmithKline Beecham Corp.* (7th Cir. 2010) 596 F.3d 387, 392 [explaining that "it is important for a manufacturer to warn of potential side effects" but that "it is equally important that it not overwarn because overwarning can deter potentially beneficial uses of the drug by making it seem riskier than warranted and can dilute the effectiveness of valid warnings"]; cf. Rest. 3d Torts: Products Liability, § 2, com. f, pp. 24-25 (Tentative Draft No. 1, 1994) ["Courts should be cautious to avoid imposing a duty to provide

overly numerous or too detailed warnings. Such warnings are likely to be ignored and thus ineffective."].)

Listing a substance under Proposition 65, then, does not come without costs to consumer welfare and public safety. The risk of warning dilution and consumer overreaction highlights the need to rigorously apply the operative standards and procedures during the listing process and ensure that only appropriate substances are listed.

## Conclusion

For the foregoing reasons, the CalChamber and the U.S. Chamber of Commerce urge the Court to grant the petition for review.

Respectfully submitted,

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