No. 20-16758

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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; AGRIBUSINESS ASSOCIATION OF IOWA; CROPLIFE AMERICA; AGRICULTURAL RETAILERS ASSOCIATION,
Plaintiffs-Appellees,
v.
ROB BONTA,* IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant-Appellant,
and
LAUREN ZEISE, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT,
Defendant.

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

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFFS-APPELLEES

Tara S. Morrissey
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Erika C. Frank
Heather Wallace
CALIFORNIA CHAMBER OF COMMERCE
1215 K Street, Suite 1400
Sacramento, CA 95814

Pratik A. Shah
James E. Tysse
Lide E. Paterno
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street N.W.
Washington, D.C. 20006
(202) 887-4000
pshah@akingump.com

Counsel for Amici Curiae

* Following Defendant Xavier Becerra's confirmation as HHS Secretary, Rob Bonta was confirmed as the Attorney General of California on April 22, 2021. *See* Fed. R. App. P. 43(c)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), each of the Chamber of Commerce of the United States of America and the California Chamber of Commerce states that it is not a publicly traded corporation; it has no parent corporation; and there is no public corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The California Chamber of Commerce ("California Chamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the State of California. For over 100 years, the California Chamber has been the voice of California business. While it represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. The California Chamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues. The California Chamber often advocates before federal and state courts by filing

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

The U.S. Chamber and California Chamber (collectively, "the Chambers") have a substantial interest in the resolution of this appeal, which concerns the scope of government power to compel speech by businesses. Many of the Chambers' members do business in California. They have regularly been subject to Proposition 65's warning requirements and have faced private enforcement actions from so-called "bounty hunter" plaintiffs for products that pose no meaningful risk of cancer. As a result, the Chambers have a strong interest in the First Amendment implications of this case for companies doing business in California. This Court should uphold the First Amendment rights of companies against misleading warning requirements and affirm the district court's judgment.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

A wide range of products sold throughout the world—such as raw and processed food products, textiles, and feminine hygiene products—may contain trace amounts of glyphosate, one of the most popular and widely studied herbicides in history. If the district court's judgment is reversed, California will require

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

businesses that offer such products to warn consumers that the herbicide is "known to the State to cause cancer." But that warning is false: California "knows" no such thing; in fact, multiple reviews by the EPA and other national regulators show just the opposite. That warning—along with the variants California has since offered because of this suit—are also highly misleading, heavily debated, and deeply disparaging to the companies compelled to declare it. They amount to nothing more than a requirement that businesses carry a State-favored subjective opinion.

The First Amendment has long prohibited States from forcing speakers to "use their private property as a *** 'billboard'" to convey the government's preferred message. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Animating that proscription is the fundamental truth that "the people lose when the government is the one deciding which ideas should prevail." *National Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2375 (2018). Because commandeering companies to carry subjective and stigmatizing speech serves no legitimate government justification, but instead undermines both the speakers' and the audience's well-established constitutional interests, the glyphosate warning cannot satisfy any level of First Amendment scrutiny.

The State's proffered solutions to this constitutional harm—so-called "safe harbors" that a company can access either by proving that exposure to glyphosate from its product falls below a No Significant Risk Level (NSRL) threshold, or by

supplementing the State's disclosure with the company's own language—only compound the warning requirement's defects. Far from protecting companies, these features of Proposition 65 underscore that the challenged warning is "unjustified and unduly burdensome." *NIFLA*, 138 S. Ct. at 2378.

On its face, Proposition 65 flips the free-speech presumption. Whereas the First Amendment squarely places on *the State* the burden to justify compelled speech, Proposition 65 improperly forces *businesses* to demonstrate that the mandated warning lacks justification or to add their own speech to correct the misleading disclosure. This concern has significant practical consequences for businesses. Foisting on companies the duty to prove that their products do not exceed the NSRL threshold, or to establish a clear and reasonable alternative to the State's incorrect and controversial disclosure, leaves them vulnerable to the flood of opportunistic lawsuits that have resulted from Proposition 65's lax and lucrative private-enforcement standards—even when the State acknowledges that the products pose no meaningful risk of cancer. In these private-plaintiff suits, the deck is stacked against businesses: There is no standing requirement for private plaintiffs to bring an action, *see DiPirro v. Bondo Corp.*, 62 Cal. Rptr. 3d 722, 748 (Cal. Ct. App. 2007); no mechanism outside of costly litigation for a company to prove that its products meet the NSRL threshold; and no ability for an unfairly targeted business to sue the "bounty hunter" plaintiffs or recoup legal fees. As a result,

settlement is often the only recourse for companies faced with burdensome private litigation. In 2018-2019 alone, companies had to settle more than 1,700 private Proposition 65 enforcement suits, to the tune of $65 million—over 75% of which represents plaintiffs' attorneys' fees and costs.

Moreover, because settling one private enforcement action provides no assurance against future suits, Proposition 65 effectively imposes on businesses an unreasonable (and unconstitutional) choice. Businesses must prove, at great expense, that the State has no justified interest in compelling the challenged warning; carry a message they (and nearly all regulatory bodies) vehemently dispute; or throw in the towel by removing all glyphosate from their products. In practice, that decision is further constrained by a direct conflict between California's glyphosate warning requirement and the federal government's refusal to register products that adopt the State's warning, and by the potentially devastating ripple effects of upstream and downstream reactions of business partners to the decision to include (or not include) a warning.

This Court should affirm the district court's well-reasoned judgment enjoining the State from unconstitutionally mandating the glyphosate disclosure.

ARGUMENT

I. THE GLYPHOSATE WARNING VIOLATES THE FIRST AMENDMENT

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

In the commercial marketplace, as in the marketplace of ideas, the State may not burden speech "in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-579 (2011). That is because "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Id.* at 579 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (recognizing that "those whose business and livelihood depend in some way upon the product involved no doubt [correctly] deem First Amendment protection to be just as important for them as it is for" noncommercial actors); *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 964 (9th Cir. 2012) (noting that the pursuit of profit by corporations "does not make them any less entitled to protection under the First Amendment").

Just as governments may not restrict speech without triggering First Amendment scrutiny, they may not compel speech without scrutiny, either. *See American Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 755 & n.2 (9th Cir. 2019) (en banc) ("[N]o one disputes" that a law that "compels certain disclosures" by commercial speakers "requir[es] a First Amendment analysis.").

"For corporations as for individuals, the choice to speak includes within it the choice of what not to say," *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n* (*PG&E*), 475 U.S. 1, 16 (1986) (plurality opinion), and courts therefore must be vigilant of any government attempt to "compel a private party to express a view with which the private party disagrees," *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015).

Although government regulations compelling speech in the commercial context are ordinarily subject to heightened review, *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)), the Supreme Court carved out an exception for compelled commercial disclosures that are "purely factual and uncontroversial" and not "unjustified or unduly burdensome," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The Court explained that this relaxed standard is warranted because a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* (upholding "a requirement that [a lawyer] include in his advertising purely factual and uncontroversial information about the terms under which his services will be available"); *see, e.g.*, *CTIA-The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 846-848 (9th Cir. 2019) (upholding disclosure of "purely factual" FCC guidance); *American Meat Inst. v. United States*

Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (upholding disclosure of country of origin); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001) (upholding disclosure of mercury content).

The Court has interpreted this exception narrowly, however, to prevent it from swallowing the rule. *See NIFLA*, 138 S. Ct. at 2372 (emphasizing that "*Zauderer* does not apply outside of these circumstances" and holding that *Zauderer* did not justify California law requiring clinics "to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic"). *CTIA-The Wireless Ass'n*, 928 F.3d at 845 ("*NIFLA* thus stands for the proposition that the *Zauderer* standard applies only if the compelled disclosure involves 'purely factual and uncontroversial' information."). No First Amendment justification exists for compelling speakers to convey the government's *false, misleading,* or *factually controversial* messages: "[T]he State has no legitimate reason to force retailers to affix false information on their products." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-967 (9th Cir. 2009), *aff'd sub nom. Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786 (2011) (striking video-game labeling requirement because it did not convey "purely factual and uncontroversial information").

Compelled disclosure of false, misleading, or factually controversial messages improperly stifles unpopular ideas and distorts public discourse. The

Supreme Court has explained that "Government action *** that requires the utterance of a particular message favored by the Government" poses "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *see also NIFLA*, 138 S. Ct. at 2374 (similar). After all, governments would have little incentive to spend their own resources to advocate for issues that are important to them if they could more easily and effectively coerce companies into subsidizing their subjective policy views on which products and services consumers should buy. Although "[r]equiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, *** that makes the requirement more constitutionally offensive, not less so." *National Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2015) (alteration in original). "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *NIFLA*, 138 S. Ct. at 2376 (alteration in original) (quoting *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

The government has its own powerful megaphone to spread its preferred policy positions, including positions that are critical of commercial products. But one thing the government cannot do is "co-opt" commercial speakers "to deliver its

message for it." *NIFLA*, 138 S. Ct. at 2376. Such coercion not only forces businesses to speak when they would rather remain silent, but deters them "from speaking out in the first instance." *PG&E*, 475 U.S. at 10. That result "reduc[es] the free flow of information and ideas that the First Amendment seeks to promote," *id.* at 14, to the detriment of companies and the public alike.

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

Under the foregoing principles, this is an easy case. The glyphosate warning required by California forces businesses to provide a message to their own consumers that is false, misleading, and factually controversial.

California, through the Office of Environmental Health Assessment ("OEHHA"), requires businesses to warn consumers that glyphosate—a chemical compound found in countless products manufactured or sold in California—is "*known to the State* *** to cause cancer." CAL. CODE REGS. tit. 27, § 25603(a) (emphasis added). That statement is false. The mandated warning derives solely from an International Agency for Research on Cancer ("IARC") finding. *See* Cal. Opening Br. 24. Indeed, not even IARC "knows" that glyphosate causes cancer. IARC concluded merely that glyphosate is "*probably* carcinogenic to humans," a finding further qualified by the admission that it is based on "limited evidence" and may be due to "chance, bias or confounding." 4-ER-764, 767 (some emphasis omitted). What is more, OEHHA itself earlier conducted its own research and

concluded that "glyphosate is judged *unlikely* to pose a cancer hazard to humans." SER372 (emphasis added); *see also* SER359 ("evidence of no carcinogenic effects" from glyphosate).

The warning is also highly misleading and factually controversial. IARC's "probably carcinogenic" finding stands alone and in opposition to the overwhelming body of evidence from well-respected regulators in California, within the federal government, and around the globe. *See* 1-ER-7 (discussing various findings). In fact, the EPA—following a rigorous review of "extensive" data, including the studies evaluated by IARC—has consistently reaffirmed its conclusion that glyphosate "is not likely to be carcinogenic to humans." SER23 (January 2020); 7-ER-1412-1413, 1424-1425 (April 2019); SER779, 905, 910 (December 2017).

Courts have held unconstitutional warnings that are not "patently false," but that nonetheless "do not impart purely factual, accurate, and uncontroversial information to consumers"—even in the face of government arguments that the warnings reflected a "strong worldwide consensus." *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1209, 1217 (D.C. Cir. 2012). Here, the State does not (and cannot) argue that there is any such consensus. The sole basis for the glyphosate warning is IARC's qualified, outlier finding that conflicts directly with the global scientific and regulatory consensus.

C. The State's Newly Crafted Alternative Warnings Do Not Fix The First Amendment Problem

The State now relies on alternatives to the statutorily specified warning, offered only as a result of this suit. *See* Cal. Opening Br. 50 & n.79, 54-56. But those alternatives are no less offensive to the First Amendment. The alternatives either rephrase the same direct message—that glyphosate is known to California to cause cancer—or, at best, imply the same conclusion. Allowing a company to tack on additional context does not transform a misleading and controversial message into a purely factual and uncontroversial one. On the contrary, it can make matters worse. *Cf. Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas and Ginsburg, JJ., dissenting from denial of certiorari) ("If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated.").

The State's alternative warnings engender such confusion. While purporting to provide more factual context for the compelled disclosure, the State's various proposals instead indicate that the view that glyphosate is carcinogenic is at least in equipoise with the contrary findings. That message is misleading: The IARC's outlier position is substantially outweighed by the opposite consensus of other regulatory and scientific bodies. *See CTIA-The Wireless Ass'n*, 928 F.3d at 847 ("Of course, *** a statement may be literally true but nonetheless misleading, and in that sense, untrue."). And each of the State's proposals lends a deceptive imprimatur of

legitimacy to the warning, giving it more credence than if California consumers knew the truth about IARC's standalone (and tentative) conclusion. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) ("If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.").

That "[t]he state of science is always evolving" and "disagreements are common," as the NRDC *amici* urge (at 19, 27), is *more* reason, not less, for First Amendment protection against the government's singular ability to elevate (and thereby cement) a controversial view by forcing private speakers to express it. Contrary to the NRDC's arguments, applying the settled *Zauderer* standard does not require courts to "decide complex scientific questions," "second-guess agencies' interpretation of data," assess whether an agency's finding is "unsound," or determine "which hazards are significant enough to merit warnings." NRDC Br. 2, 21-27. It merely requires this Court to determine whether a compelled disclosure that glyphosate is "known to the State to cause cancer" is purely factual and uncontroversial. If anything, it is the NRDC's position that would require courts to serve as arbiters of truth over matters of genuine scientific controversy in litigation to enforce Proposition 65, forcing judges to "evaluate the scientific evidence on toxicity and exposure to glyphosate" to determine whether certain chemicals are sufficiently carcinogenic to warrant a compelled warning. *Id.* at 26.

California is, of course, free to "advance its own side of [the] debate" over whether glyphosate is carcinogenic "through its own speech." *Sorrell*, 564 U.S. at 578-580. And nothing in the district court's opinion prevents the State from doing so. California might, for example, include glyphosate on its own list of "known" carcinogens and broadcast that decision using its own ample resources. "But [the] State's failure to persuade" even its own regulators "does not allow it to hamstring the opposition" by forcing companies to express disparaging statements about their own products. *Id.* at 578. The district court correctly enjoined the false, misleading, and controversial—and therefore unconstitutional—glyphosate warning requirement from going into effect.

II. PROPOSITION 65'S "SAFE HARBOR" SCHEME UNDERSCORES THAT THE GLYPHOSATE WARNING REQUIREMENT IS UNJUSTIFIED AND UNDULY BURDENSOME

Throughout this litigation, the State has pointed to two "safe harbor" features of the Proposition 65 regime that purportedly mitigate the risk of First Amendment harm. First, the State emphasizes that "Proposition 65 does not require a business to provide a warning where it can demonstrate that the exposure does not pose a significant risk of cancer." Cal. Opening Br. 70 (citing CAL. HEALTH & SAFETY CODE § 25249.10(c)). Second, the State insists that "[a] business may use any other warning method or content that is clear and reasonable," and thus may "include

additional clarifying information" alongside the State's prescribed disclosure. Cal. Opening Br. 14-15.

Far from curing the harms imposed by the glyphosate warning, however, both features underscore that the warning requirement is "unjustified or unduly burdensome." *NIFLA*, 138 S. Ct. at 2377 (quoting *Zauderer*, 471 U.S. at 651). In particular, a company's supposed option to invoke the NSRL "safe harbor" or to supplement the content of the State's disclosure exacerbates the glyphosate warning's First Amendment defects by (1) inverting the proper free-speech presumption, and (2) forcing companies to make an impossibly constrained choice.

A. Proposition 65 Unconstitutionally Inverts The First Amendment's Free-Speech Presumption

Hornbook law declares that "it is *the State's burden* to justify its content-based law as consistent with the First Amendment" in all circumstances, including "[u]nder a commercial speech inquiry." *Sorrell*, 564 U.S. at 571-572 (emphasis added). Because laws stifling (or mandating) particular speech based on its content "are presumptively invalid" under Supreme Court precedent, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), "*the State must show* at least that the [regulation] directly advances a substantial governmental interest and that the measure is drawn to achieve that interest," *Sorrell*, 564 U.S. at 572 (emphasis added).

In the compelled disclosure context, this means *the government* must carry the burden of demonstrating that its disclosure requirement is purely factual and

uncontroversial. That is because "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646. Any other allocation of the burden would "risk 'chilling' protected speech." *NIFLA*, 138 S. Ct. at 2377; *accord Illinois ex rel. Madigan v. Telemktg. Assocs., Inc.*, 538 U.S. 600, 620 n.9 (2003) ("[T]o avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected.").

California's Proposition 65 regime turns this enshrined constitutional principle on its head. Instead of forcing regulators to justify the necessity of compelled speech, the NSRL "safe harbor" scheme forces businesses to justify why they should be allowed to remain silent. Specifically, because proving that a product does not exceed an established NSRL threshold is an affirmative defense under California law, CAL. HEALTH & SAFETY CODE § 25249.10(c), the burden falls on businesses to demonstrate that their speech—including their "choice of what not to say," *PG&E*, 475 U.S. at 16—is worthy of protection. The NSRL mechanism thereby inverts the ordinary burden by rendering compelled speech presumptively valid. This presumption-flipping framework attempts to replace the *constitutional* safe harbor that the First Amendment extends to all speakers with a *statutory* safe harbor that speakers can access only after first suffering significant risk and expense.

The loss of First Amendment protection is not an abstract or academic concern. The record details the economic hardship threatened by application of the Proposition 65 regime in this case. *See, e.g.*, Pls.' Mem. of Points & Auth. in Supp. of Mot. for Summ. J. at 36-39 (Sept. 25, 2019), ECF No. 117-1 (discussing risk of lost sales, expensive testing and segregation of glyphosate-treated products, and costly certification procedures, with attendant ripple effects on upstream suppliers).

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

California promises a hefty bounty to successful plaintiffs, *see* CAL. HEALTH & SAFETY CODE § 25249.7(b), and lucrative fees to their attorneys, *see* CAL. CODE REGS. tit. 11, § 3201. And private plaintiffs' pursuit of these potential rewards—

25% of up to $2,500 *per violation*, *per day*, *see* CAL. HEALTH & SAFETY CODE § 25249.7(b); CAL. CODE REGS. tit. 11, § 3203(b), (d)—is "[un]constrained by explicit guidelines or ethical obligations," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). As a result, opportunistic enforcement of Proposition 65 has become "a gold mine for activists and lawyers exploiting" the lax standard for imposing the State's presumptively valid warnings. Richard Berman, *Thanks To A Poorly-Designed Law, California Classifies Soft Drinks As A Cancer Risk*, FORBES, Feb. 20, 2014.[2]

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

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

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

Unfortunately, the profit these bounty hunters stand to gain from a Proposition 65 action is matched only by the "absurd[] eas[e]" of bringing it. David B. Fischer, *Proposition 65 Warnings at 30—Time For A Different Approach*, 11 J. BUS. & TECH. L. 131, 148 (2016) (quoting *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853). Suing under Proposition 65 "is as easy as shooting the side of a barn, drawing circles around the bullet holes and then claiming you hit the bull's eye." *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 857.

Before filing suit, a plaintiff need only search out businesses that provide items containing substances listed under Proposition 65, find any person "with relevant and appropriate experience or expertise" to agree that there is a "reasonable" basis for a suit, and send off a boilerplate notice and demand letter. CAL. HEALTH & SAFETY CODE § 25249.7(d)(1) (outlining the minimal certification standard); *see also Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853-854 (explaining "just how simple it is for a hypothetical unemployed lawyer *** to extract money from businesses

using the initiative"). Plaintiffs are not hampered in any way from bringing an action even if the Attorney General agrees with a business that its product's risk of exposure is nonexistent or far below the established NSRL threshold; on the contrary, Proposition 65 expressly channels private plaintiffs to suits that the Attorney General and other local officials elect *not* to bring. CAL. HEALTH & SAFETY CODE § 25249.7(d); *see* 1-ER-14 n.10 (discussing cases).

Against this ripe opportunity to "cash in on Proposition 65," the regulatory scheme effectively shields plaintiffs from any downside risk. *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 854. Despite the First Amendment burdens imposed by Proposition 65, California courts have ruled that free-speech principles *prohibit* a business that receives a Proposition 65 notice from fighting back with a lawsuit against an abusive private enforcer. *Equilon Enters., LLC v. Consumer Cause, Inc.*, 102 Cal. Rptr. 2d 371, 378 (Cal. Ct. App. 2000) (holding that "[t]he chilling effect of a rule allowing Proposition 65 private enforcers to be sued before they themselves decide to bring suit [but after they serve a notice] would seriously undermine the goals of the state initiative," and that the affirmative defenses the business could raise if the private enforcer does pursue litigation constitute "an adequate remedy"), *aff'd*, 29 Cal. 4th 53 (2002); *see also, e.g.*, *CKE Rests., Inc. v. Moore*, 70 Cal. Rptr. 3d 921 (Cal. Ct. App. 2008) (similar). And unlike plaintiffs—who stand to receive attorneys' fees for successful bounty hunter suits, *see* CAL. CODE REGS. tit. 11,

§ 3201—*defendants* who manage to prevail are generally not entitled to reimbursement for their own fees. *See DiPirro*, 62 Cal. Rptr. 3d at 761 (affirming denial of "public interest" attorneys' fees to successful Proposition 65 defendant because the "essence and fundamental outcome of its defense was the advancement of its own economic interests"). Given the huge potential for profit and the absence of significant drawbacks, serial bounty hunters are already threatening to bring new suits regarding glyphosate if the warning requirement is permitted to go into effect. *See* SER252-253 (¶ 52).

It is no answer that a company could avoid these harms by simply using a warning in which it counteracts the State's misleading disclosure with its own speech. *Contra* Cal. Opening Br. 14-15. Placing "[t]his pressure to respond" on businesses that would "prefer to remain silent" "is [as] antithetical to the *** First Amendment" as if the State were to forbid them from speaking outright. *PG&E*, 475 U.S. at 15-16, 18. "'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (internal citation omitted) (quoting *PG&E*, 475 U.S. at 11, 16). By forcing companies to add speech to remedy the compelled warning's factually incorrect and

controversial statements, Proposition 65 unconstitutionally foists on private parties the State's burden to ensure that compelled disclosures are not misleading.

Compounding that defect is the limited prospect that a company actually *could* supplement the State's warning to render it purely factual and uncontroversial. Notwithstanding the assurances in the State's brief, California law severely constrains a business's ability to "tailor its warning to include additional clarifying information." Cal. Opening Br. 15. "The warning content may contain information that is supplemental to the [prescribed glyphosate warning] *only to the extent* that it identifies the source of the exposure or provides information on how to avoid or reduce exposure[.]" CAL. CODE REGS. tit. 27 § 25601(e) (emphasis added). Moreover, the Attorney General's own regulations insist that "[c]ertain phrases or statements in warnings are not clear and reasonable, such as (1) use of the adverb 'may' to modify whether the chemical causes cancer *** [and] (2) additional words or phrases that contradict or obfuscate otherwise acceptable warning language"—and thus could not be approved even by a court. CAL. CODE REGS. tit. 11 § 3202(b). Given these practical hurdles, there is little comfort in the State's highly qualified consolation that "[a] business *may* use any other warning method or content," "[i]n certain circumstances," as "determined on a case-by-case basis," "*if* the circumstances warrant." Cal. Opening Br. 14-15 (emphases added).

Even if a company could craft a compliant warning, doing so would provide no guarantee that the company would avoid the harassment of private enforcement proceedings. Any deviation from the State-specified content would leave the business vulnerable to a "bounty hunter" suit, regardless of whether the Attorney General "believes there is no merit to the action." CAL. HEALTH & SAFETY CODE § 25249.7(d), (e)(1)(A). Because there is no pre-clearance mechanism, the only way for a company to have any assurance that its tailored warning complies with Proposition 65 would be to obtain a "court-ordered settlement or final judgment establishing a warning method or content is deemed to be providing a 'clear and reasonable' warning"—*i.e.*, *after* a suit has been brought and concluded at considerable expense to the company. CAL. CODE REGS. tit. 27 § 25600(e).

B. Proposition 65 Unconstitutionally Burdens Businesses With A Constrained Choice

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

As the California Court of Appeal has recognized, "the burden shifting provisions [of Proposition 65] make it virtually impossible for a private defendant to defend a warning action *** short of actual trial." *Consumer Def. Grp.*, 40 Cal.

Rptr. 3d at 853 (internal citation omitted); *see, e.g.*, *Sciortino v. PepsiCo, Inc.*, 108 F. Supp. 3d 780 (N.D. Cal. 2015) (denying motion to dismiss where parties disputed whether defendant's products exceeded NSRL threshold). Even at trial, moreover, it is not enough to demonstrate a long history of safe use or longstanding approval by well-respected regulatory bodies. *See, e.g.*, *Consumer Cause, Inc. v. SmileCare*, 110 Cal. Rptr. 2d 627, 636 (Cal. Ct. App. 2001) (holding that evidence that a dental filling had been approved by the American Dental Association and used safely for 150 years was irrelevant because it did not meet the relevant Proposition 65 standard). Instead, even in a case where a product poses a "negligible, even microscopic exposure," proving that the associated risk falls within the NSRL safe harbor (or litigating lifetime exposure risk if the State does not predetermine an NSRL threshold) usually requires hiring experts, commissioning "full scale scientific stud[ies]," and paying attorneys to accomplish what should in the first instance be the State's duty. *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853 (internal quotation marks omitted); *see also, e.g.*, *DiPirro*, 62 Cal. Rptr. 3d at 732-734 (explaining that the "focus of the trial was upon studies, tests and surveys concerning the nature and level of exposure," conducted by experts according to "[a] hierarchy of accepted methodologies *** established by the [State]").

Given these asymmetric burdens, it is little wonder that the Proposition 65 regime is considered, in the words of one California judge, "a form of judicial

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

In 2018-2019 alone, businesses paid $65 million in settlement payments to avoid private Proposition 65 enforcement actions across more than 1,700 cases, with $50 million going to plaintiffs' attorneys' fees and costs. *See* California Attorney General, Annual Reports of Settlements.[3] And these figures do not account for expenses that are likely much greater but for which data is harder to come by, such as the legal fees and costs of cases that proceeded to trial, and the expenses businesses have undergone to reformulate their products to avoid trial. *See* Mike Lee, *State Law on Toxins Has Effects Worldwide; Companies Have Changed Thousands of Products to Avoid the Warnings Prop. 65 Requires*, SAN DIEGO UNION

[3] *Available at* https://oag.ca.gov/prop65/annual-settlement-reports.

TRIBUNE, July 31, 2011, at A-1 (estimating that, as of 2011, more than $1.24 billion had been spent to reformulate products under Proposition 65).

Fending off one case through settlement, moreover, would not necessarily shield the same company from other extortionate actions—unless the company were to adopt the State's warning verbatim or to secure a court order approving an alternative disclosure. CAL. CODE REGS. tit. 27 § 25600(e). As discussed above, however, the Attorney General's own regulations curtail the parties' ability to meaningfully deviate from the State's prescribed language. *See* CAL. CODE REGS. tit. 11 § 3202(b). And to exacerbate the problem, a court may refuse to approve a warning absent "sufficient proof that the product causes exposure to a listed chemical to enable a finding that the [proposed] warning would be truthful." *Id.* § 3202(a). Thus, a company is left with an unpalatable "trilemma" if it wants to seek reasonable assurance against future suits: expend considerable resources to prove the NSRL threshold through a trial; embrace the State's misleading and disparaging disclosure wholesale; or perversely concede that its product causes exposure to obtain court approval of a tailored warning that still indicts the product, given the limits on the parties' and the court's discretion to propose and approve alternative disclosure language.

Of course, with respect to glyphosate, the latter two options have been foreclosed by the federal government. Because the EPA "considers the Proposition

65 warning language based on the chemical glyphosate to constitute a false and misleading statement[,] *** pesticide products bearing the Proposition 65 warning statement due to the presence of glyphosate are misbranded" under federal law. SER315. Accordingly, the EPA has announced that it "will no longer approve labeling that includes the Proposition 65 warning statement for glyphosate-containing products," and has directed that "[t]he warning statement must also be removed from all product labels where the only basis for the warning is glyphosate." SER316. In practice, therefore, Proposition 65 does not offer a "safe harbor" choice at all.

The "safe harbor" provisions are illusory for another reason. Even if a business were willing to risk the daunting NSRL process, its downstream retailers or upstream suppliers—who also are subject to the law and may not be willing or able to bear the same litigation threats—may deprive the business of that option and force it to reformulate its products. *See, e.g.*, SER249-251 (¶¶ 45-48) (stating that major retailers already informed businesses they will remove from their shelves products covered by the regulation that lack a warning if warning requirement imposed). The immense expense and practical challenges of restructuring supply chains may be a tremendous "regulatory headache" for "large businesses operating in multiple states," but for "local, family-owned businesses," these burdens "can mean bankruptcy." Mark Snyder, *Proposition 65 Can Spell Bankruptcy for Many*

California Small Businesses, SACRAMENTO BEE, Nov. 16, 2014.[4] The evidence submitted before the district court confirms these legitimate threats of disruption to longstanding business practices. *See, e.g.*, SER249-251 (¶¶ 45-49); SER1027-1028 (¶¶ 25-28). In turn, this disruption imposes great costs to producers, downstream retailers, upstream suppliers, and ultimately consumers subjected to the twin injuries of paying higher prices for products bearing false warnings. *See* SER247-248 (¶¶ 39-41). In short, there is no way for a company that disagrees with the glyphosate warning to avoid the "unjustified" and "unduly burdensome" harm imposed by Proposition 65. *NIFLA*, 138 S. Ct. at 2377.

CONCLUSION

For the reasons set forth above and in Appellees' brief, the Court should affirm the district court's judgment enjoining the State from imposing the unconstitutional glyphosate warning requirement.

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

Dated: May 19, 2021

Respectfully submitted,

/s/ Pratik A. Shah

Pratik A. Shah
James E. Tysse
Lide E. Paterno
AKIN GUMP STRAUSS HAUER & FELD LLP

Tara S. Morrissey
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER

Erika C. Frank
Heather Wallace
CALIFORNIA CHAMBER OF COMMERCE

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-1 FOR CASE NUMBER 20-16758

I certify that this brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 32-1. The brief is 6,426 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Ninth Circuit Rule 32-1(c). The brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) and Ninth Circuit Rule 32-1(d).

Dated: May 19, 2021

/s/ Pratik A. Shah
Pratik A. Shah