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THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
8 and THE CALIFORNIA CHAMBER OF COMMERCE

9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**

11 NATIONAL ASSOCIATION OF WHEAT
12 GROWERS; NATIONAL CORN GROWERS
ASSOCIATION; UNITED STATES
13 DURUM GROWERS ASSOCIATION;
WESTERN PLANT HEALTH
14 ASSOCIATION; MISSOURI FARM
BUREAU; IOWA SOYBEAN
15 ASSOCIATION; SOUTH DAKOTA
AGRI-BUSINESS ASSOCIATION;
16 NORTH DAKOTA GRAIN GROWERS
ASSOCIATION; MISSOURI CHAMBER
17 OF COMMERCE AND INDUSTRY;
18 MONSANTO COMPANY; ASSOCIATED
INDUSTRIES OF MISSOURI; AND
19 AGRIBUSINESS ASSOCIATION OF
20 IOWA,

Civil Action No. 2:17-CV-02401-
WBS-EFB

BRIEF OF AMICI CURIAE THE
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND
THE CALIFORNIA CHAMBER OF
COMMERCE IN SUPPORT OF
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION

21 Plaintiffs,
22 v.

23 LAUREN ZEISE, IN HER OFFICIAL
CAPACITY AS DIRECTOR OF THE
24 OFFICE OF ENVIRONMENTAL HEALTH
HAZARD ASSESSMENT; AND XAVIER
25 BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL
26 OF THE STATE OF CALIFORNIA,

27 Defendants.
28

TABLE OF CONTENTS

1 INTERESTS OF *AMICI CURIAE*.....1
2 SUMMARY OF THE ARGUMENT.....2
3 ARGUMENT.....4
4 I. THE GLYPHOSATE WARNING VIOLATES THE FIRST AMENDMENT.....4
5 A. Compelled Disclosures That Are Misleading and
6 Controversial Face Heightened First Amendment
7 Scrutiny.....4
8 B. The False And Controversial Glyphosate Warning
9 Undermines Important First Amendment Interests.....8
10 II. THE NO-SIGNIFICANT-RISK-LEVEL "SAFE HARBOR" DOES NOT
11 CURE THE GLYPHOSATE WARNING'S FIRST AMENDMENT HARMS.....11
12 A. The State Bears The Burden of Justifying The Need
13 For Compelled Speech Under The First Amendment.....12
14 B. California's NSRL "Safe Harbor"
15 Unconstitutionally Inverts The First Amendment's
16 Free-Speech Presumption.....13
17 C. California's Operation Of The NSRL "Safe Harbor"
18 Unconstitutionally Burdens Businesses With A
19 Constrained Choice.....18
20 CONCLUSION.....21
21
22
23
24
25
26
27
28

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9 *Brown v. Entertainment Merchants Ass’n, 564 U.S. 786*

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13	696 F.3d 1205 (D.C. Cir. 2012)	11
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19	<i>Walker v. Tex. Div., Sons of Confederate Veterans,</i>	
20	<i>Inc.,</i>	
	135 S. Ct. 2239 (2015)	5
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24	<u>STATUTES:</u>	
25	CAL. CODE REGS. tit. 11,	
	§ 3201	15, 17
26	§ 3203(b)	15
27	§ 3203(d)	15
28	CAL. CODE REGS. tit. 27,	
	§ 25601	8

1	CAL. HEALTH & SAFETY CODE	
	§ 25249.7(b)	15
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INTERESTS OF AMICI CURIAE

1 The Chamber of Commerce of the United States of America
2 ("U.S. Chamber") is the world's largest federation of businesses
3 and associations. It represents three hundred thousand direct
4 members and indirectly represents an underlying membership of
5 more than three million U.S. businesses and professional
6 organizations of every size, in every economic sector, and from
7 every geographic region of the country. One important function
8 of the U.S. Chamber is to represent the interests of its members
9 in matters before the courts, Congress, and the Executive
10 Branch. To that end, the U.S. Chamber regularly files *amicus*
11 *curiae* briefs in cases that raise issues of concern to the
12 nation's businesses.

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

1 filing *amicus curiae* briefs and letters in cases, like this one,
2 involving issues of paramount concern to the business community.¹

3 The U.S. Chamber and California Chamber have a substantial
4 interest in the resolution of this case, which raises important
5 issues relating to fundamental free-speech rights of their
6 members. Many of the Chambers' members do business in
7 California. They have regularly been subject to Proposition
8 65's warning requirements and faced private enforcement actions
9 from so-called "bounty hunter" plaintiffs for products that pose
10 no meaningful risk of cancer. The Chambers respectfully submit
11 that their views on the implications of this case for all
12 companies doing business in California will assist the Court in
13 determining whether the preliminary injunction should be granted
14 here.

15 **SUMMARY OF THE ARGUMENT**

16 A wide range of products sold throughout the world--such as
17 raw and processed food products, textiles, and feminine hygiene
18 products--may contain trace amounts of glyphosate, one of the
19 most popular and widely studied herbicides in history.
20 California has announced that, beginning in July 2018, it will
21 require businesses that offer such products to warn consumers
22 that the herbicide is "known to the State to cause cancer." But
23 that warning is false: California "knows" no such thing; in
24 fact, its own studies--as well as a December 2017 EPA review--
25 show just the opposite. The warning is also highly misleading,

26 ¹ No party counsel authored this brief in whole or in part.
27 No one other than the U.S. Chamber, the California Chamber,
28 their members, or their counsel contributed any money to fund
its preparation or submission.

1 heavily debated, and deeply disparaging to the companies
2 compelled to declare it. It amounts to nothing more than a
3 requirement that businesses carry the State-favored subjective
4 opinion of a third party.

5 The First Amendment has long prohibited States from forcing
6 speakers to "use their private property as a *** 'billboard'" to
7 convey the government's preferred message, *Wooley v. Maynard*,
8 430 U.S. 705, 715 (1977), or to "burden the speech of others in
9 order to tilt public debate in a preferred direction," *Sorrell*
10 *v. IMS Health Inc.*, 564 U.S. 552, 578-579 (2011). Because
11 commandeering companies to carry subjective and stigmatizing
12 speech serves no legitimate government justification, but
13 instead undermines both the speakers' and the audience's well-
14 established constitutional interests, the glyphosate warning
15 cannot satisfy any level of First Amendment scrutiny.

16 That Proposition 65--the statutory and regulatory scheme
17 under which California mandates the challenged warning--may
18 allow for businesses to prove that their product falls below a
19 No Significant Risk Level (NSRL) threshold in no way cures the
20 compelled disclosure's constitutional defects. On the contrary,
21 the NSRL framework imposes *additional* legal harms. On its face,
22 it flips the free-speech presumption, forcing businesses to
23 demonstrate that the compelled message lacks justification, when
24 the First Amendment places the inverse burden squarely on the
25 State.

26 Moreover, because the costs of establishing an NSRL defense
27 in an enforcement proceeding are substantial, the regulation
28 effectively imposes on businesses an unreasonable (and

1 unconstitutional) choice: prove that the State has no justified
2 interest in compelling the challenged warning, carry a message
3 they (and nearly all regulatory bodies) vehemently dispute, or
4 throw in the towel by removing all glyphosate from their
5 products. Pressuring businesses in this way impermissibly
6 burdens their First Amendment right *not* to speak. This Court
7 should enjoin the warning requirement pending its review of the
8 important free-speech issues raised in this case.

9 **ARGUMENT**

10 **I. THE GLYPHOSATE WARNING VIOLATES THE FIRST AMENDMENT**

11 **A. Compelled Disclosures That Are Misleading and**
12 **Controversial Face Heightened First Amendment Scrutiny**

13 In the commercial marketplace, as in the marketplace of
14 ideas, the State may not burden speech "in order to tilt public
15 debate in a preferred direction." *Sorrell*, 564 U.S. at 578-579.
16 That is because "[t]he commercial marketplace, like other
17 spheres of our social and cultural life, provides a forum where
18 ideas and information flourish." *Id.* at 579 (quoting *Edenfield*
19 *v. Fane*, 507 U.S. 761, 767 (1993)); see also *Dex Media W., Inc.*
20 *v. City of Seattle*, 696 F.3d 952, 964 (9th Cir. 2012) (noting
21 that the pursuit of profit by corporations "does not make them
22 any less entitled to protection under the First Amendment").

23 Just as governments may not restrict speech without
24 triggering First Amendment scrutiny, they may not compel speech,
25 either. "For corporations as for individuals, the choice to
26 speak includes within it the choice of what not to say," *Pacific*
27 *Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986)
28 ("PG&E") (plurality opinion), and courts therefore must be

1 vigilant of any government attempt to "compel a private party to
2 express a view with which the private party disagrees," *Walker*
3 *v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct.
4 2239, 2253 (2015); see *American Beverage Ass'n v. City & Cty. of*
5 *San Francisco*, 871 F.3d 884, 894 (9th Cir. 2017) ("A compelled
6 disclosure that requires [commercial] speakers 'to use their own
7 property to convey an antagonistic ideological message,' *** or
8 'to be publicly identified or associated with another's
9 message,' cannot withstand First Amendment scrutiny.") (quoting
10 *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471 (1997)).

11 Although government regulations compelling speech in the
12 commercial context are ordinarily subject to heightened
13 scrutiny, see *Milavetz, Gallop & Milavetz, P.A. v. United*
14 *States*, 559 U.S. 229, 249 (2010) (citing *Central Hudson Gas &*
15 *Electric Corp. v. Public Service Commission of New York*, 447
16 U.S. 557, 566 (1980)), the Supreme Court carved out an exception
17 for compelled commercial disclosures that are "purely factual
18 and uncontroversial" and not "unjustified or unduly burdensome,"
19 *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651
20 (1985). Courts have interpreted this exception narrowly,
21 however, to prevent it from swallowing the rule. Thus, a "key
22 inquiry" for applying *Zauderer* is whether there "is any
23 controversy regarding the factual accuracy of the disclosure."
24 *American Beverage Ass'n*, 871 F.3d at 892-94. That is because
25 the justification for the lesser scrutiny is "that an
26 advertiser's First Amendment interest in not providing 'purely
27 factual and uncontroversial information' [is] low." *Id.* at 892-
28 893; see, e.g., *CTIA-The Wireless Ass'n v. City of Berkeley*, 854

1 F.3d 1105, 1117-1120 (9th Cir. 2017) (upholding disclosure of
2 "purely factual" FCC guidance); *American Meat Inst. V. United*
3 *States Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014)
4 (upholding disclosure of country of origin); *National Elec.*
5 *Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001)
6 (upholding disclosure of mercury content).

7 By contrast, no commensurate First Amendment justification
8 exists for compelling speakers to convey the government's *false,*
9 *misleading, or factually controversial* messages: "The State has
10 no legitimate reason to force retailers to affix false
11 information on their products." *Video Software Dealers Ass'n v.*
12 *Schwarzenegger*, 556 F.3d 950, 966-967 (9th Cir. 2009), *aff'd sub*
13 *nom. Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011)
14 (striking video-game labeling requirement because it did not
15 convey "purely factual and uncontroversial information").
16 Outside the context of providing true, factual information to
17 consumers, "[n]othing in *Zauderer* suggests *** that the State is
18 equally free to require corporations to carry the messages of
19 third parties, where the messages themselves are biased against
20 or are expressly contrary to the corporation's views." *PG&E,*
21 475 U.S. at 15 n.12. When the government compels disclosure of
22 false or factually controversial messages, the value to
23 consumers of such speech is negative, and the forced disclosure
24 itself a constitutional and commercial harm. See *Borgner v.*
25 *Florida Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas and
26 Ginsburg, JJ., dissenting from denial of certiorari) ("If the
27 disclaimer creates confusion, rather than eliminating it, the
28 only possible constitutional justification for this speech

1 regulation is defeated.”). That is why, when “[t]here are
2 divergent views regarding” an issue of public debate, “‘the
3 general rule is that the speaker and the audience, not the
4 government, assess the value of the information’” available,
5 *Sorrell*, 564 U.S. at 578 (quoting *Edenfield*, 507 U.S. at 767).

6 The rationale for skeptically reviewing government
7 regulations that compel private speech is obvious. Affording
8 the government broad powers to force individuals to convey
9 messages with which they disagree can become “a subterfuge for
10 favoring certain private speakers over others.” *Pleasant Grove*
11 *City v. Summum*, 555 U.S. 460, 473 (2009) (noting this risk as a
12 “legitimate concern” in the related government speech doctrine
13 context). Activist regulators or overzealous legislatures can
14 use compelled speech requirements to pick winners and losers in
15 the commercial marketplace--and in the public debate more
16 broadly. After all, governments would have little incentive to
17 spend their own resources to advocate for issues that are
18 important to them if they could more easily and effectively
19 coerce companies into subsidizing the communication of the
20 government’s policy positions--including its views on which
21 products and services consumers should buy. But while
22 “[r]equiring a company to publicly condemn itself is undoubtedly
23 a more ‘effective’ way for the government to stigmatize and
24 shape behavior than for the government to have to convey its
25 views itself, *** that makes the requirement more
26 constitutionally offensive, not less so.” *National Ass’n of*
27 *Mfrs. V. S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2015); see also
28 *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001)

1 (recognizing that "those whose business and livelihood depend in
2 some way upon the product involved no doubt [correctly] deem
3 First Amendment protection to be just as important for them as
4 it is for" noncommercial actors).

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

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

18 Under the foregoing principles, this is an exceptionally
19 easy case. The glyphosate warning forces businesses to provide
20 a message to their own consumers that is not only misleading and
21 factually controversial, but actually false on multiple levels.

22 California, through the Office of Environmental Health
23 Assessment ("OEHHA"), has required businesses to warn consumers
24 that glyphosate--a herbicide found in countless products
25 manufactured or sold in California--is "known to the state to
26 cause cancer." CAL. CODE REGS. tit. 27, § 25601 (emphasis added).
27 That statement is false. The mandated warning derives from an
28 International Agency for Research on Cancer ("IARC") finding

1 that California has never independently evaluated (and, under
2 current regulations, *will* never evaluate). Yet OEHHA itself--
3 *i.e.*, the same entity that now mandates the warning--earlier
4 conducted its own research and concluded that "glyphosate is
5 judged *unlikely* to pose a cancer hazard to humans." Ex. H to
6 Decl. of Andrew D. Prins ("Prins Decl.") at 1, Dec. 6, 2017, ECF
7 No. 29-11 (OEHHA, Public Health Goal for Chemicals in Drinking
8 Water: Glyphosate (June 2007)) (emphasis added). California has
9 thus asked corporations to report as true something that
10 contradicts research from its own expert agency.²

11 The warning is also highly misleading and factually
12 controversial: IARC's "probably carcinogenic" finding stands
13 alone and in opposition to the overwhelming body of evidence
14 from well-respected regulators in California, within the federal
15 government, and around the globe. See Am. Compl. ¶¶ 36-48, Dec.
16 5, 2017, ECF No. 23; Plfs' Mem. in Support of Mot. for Prelim.
17 Inj. ("Plfs' Mem.") 7-13, Dec. 6, 2017, ECF No. 29-1. In fact,
18 earlier this month the Environmental Protection Agency--
19 following a rigorous review of "extensive" data, including the
20 studies evaluated by IARC--reaffirmed its prior conclusion that
21 glyphosate "is not likely to be carcinogenic to humans." EPA,

22
23 ² The state-mandated warning is false--or at a minimum,
24 highly misleading--for the additional reason that not even IARC
25 "knows" that glyphosate causes cancer. Rather, IARC concluded
26 merely that "[g]lyphosate is *probably carcinogenic to humans*," a
27 finding further qualified by the admission that it is based on
28 "limited evidence" and may be due to "chance, bias and
confounding." Ex. N to Prins Decl. at 27, 398, Dec. 6, 2017,
ECF No. 29-17 (IARC, WHO, Some Organophosphate Insecticides and
Herbicides, IARC Monographs Vol. 112 (2017)).

1 *Revised Glyphosate Issue Paper: Evaluation of Carcinogenic*
2 *Potential*, 13, 144 (Dec. 12, 2017).³

3 Making matters worse, by misidentifying the State (rather
4 than the non-regulatory, unaccountable entity IARC) as the
5 source of the supposed "knowledge," California has lent a
6 deceptive imprimatur of legitimacy to the warning, giving it
7 more weight than if California consumers knew the truth about
8 IARC's outlier finding. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1758
9 (2017) ("If private speech could be passed off as government
10 speech by simply affixing a government seal of approval,
11 government could silence or muffle the expression of disfavored
12 viewpoints.").

13 When historically confronted with similarly false,
14 misleading, and factually controversial compelled statements,
15 the Ninth Circuit has not hesitated to strike them down. *See,*
16 *e.g., American Beverage Ass'n*, 871 F.3d at 896 ("In short,
17 rather than being 'purely factual and uncontroversial,' the
18 [sweetened-beverage] warning requires the Associations to convey
19 San Francisco's disputed policy views."); *Video Software*
20 *Dealers*, 556 F.3d at 953 (finding that warning-label regulation
21 "unconstitutionally compel[s] speech under the First Amendment"
22 because, instead of "requir[ing] the disclosure of purely
23 factual information[,] [it] compels the carrying of the State's
24 controversial opinion"). As *American Beverage Association* makes
25 clear, the Ninth Circuit and other courts have found warnings

26
27 ³ Available at https://www.epa.gov/sites/production/files/2017-12/documents/revised_glyphosate_issue_paper_evaluation_of_carcinogenic_potential.pdf.
28

1 unconstitutional that are false or misleading even in the face
2 of government arguments that the warnings reflected "a clear
3 scientific consensus." *American Bev. Ass'n*, 871 F.3d at 895;
4 *see also, e.g., R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*,
5 696 F.3d 1205, 1209 (D.C. Cir. 2012). Here, the government
6 could not even argue *that*, as the sole basis for the glyphosate
7 warning is IARC's tentative outlier finding that directly
8 conflicts with both California's own prior finding, and the
9 global scientific and regulatory consensus.

10 California is, of course, free to "advance its own side of
11 [the] debate" over whether glyphosate is carcinogenic "through
12 its own speech." *Sorrell*, 564 U.S. at 579-580. "But [its]
13 failure to persuade" even its own regulators "does not allow it
14 to hamstring the opposition." *Id.* at 578. The false,
15 misleading, and controversial--and therefore unconstitutional--
16 glyphosate warning should never be allowed to go into effect.

17 **II. THE NO-SIGNIFICANT-RISK-LEVEL "SAFE HARBOR" DOES NOT CURE**
18 **THE GLYPHOSATE WARNING'S FIRST AMENDMENT HARMS**

19 Under Proposition 65's regulatory scheme, a business
20 selling a glyphosate-containing product is required to provide,
21 under threat of civil penalties, a warning to consumers *unless*
22 it can demonstrate that the product "poses no significant risk
23 assuming lifetime exposure at the level in question"--a standard
24 often defined by a regulatory determination called a "No
25 Significant Risk Level" (NSRL). CAL. HEALTH & SAFETY CODE
26 § 25249.10(c). Far from curing the harms imposed by the
27 glyphosate warning, however, the NSRL "safe harbor" scheme
28 exacerbates the regulation's defects.

1 **A. The State Bears The Burden of Justifying The Need For**
2 **Compelled Speech Under The First Amendment**

3 Hornbook law declares that "it is *the State's burden* to
4 justify its content-based law as consistent with the First
5 Amendment" in all circumstances, even "[u]nder a commercial
6 speech inquiry." *Sorrell*, 564 U.S. at 571-72 (emphasis added).
7 Because laws stifling (or mandating) particular speech based on
8 its content "are presumptively invalid" under Supreme Court
9 precedent, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992),
10 "*the State must show* at least that the [regulation] directly
11 advances a substantial governmental interest and that the
12 measure is drawn to achieve that interest," *Sorrell*, 564 U.S. at
13 572 (emphasis added). In the compelled disclosure context, this
14 means "[t]he government must carry the burden of demonstrating
15 that its disclosure requirement is purely factual and
16 uncontroversial." *American Beverage Ass'n*, 871 F.3d at 895
17 (emphasis added). That is because "the free flow of commercial
18 information is valuable enough to justify imposing on would-be
19 regulators the costs of distinguishing the truthful from the
20 false, the helpful from the misleading, and the harmless from
21 the harmful." *Zauderer*, 471 U.S. at 646.

22 Any other allocation of the burden would threaten to
23 undermine and chill protected speech. For example, the First
24 Amendment prohibits a State from "skew[ing] public debate" by
25 requiring manufacturers to disclose factually controversial,
26 policy-driven messages that their products have "not been found
27 to be 'DRC conflict free,'" "environmentally sustainable," or
28 "fair trade." *National Ass'n of Mfrs.*, 800 F.3d at 529-530.
Such regulations clearly are not saved simply because some of

1 the regulated speakers might ultimately prove to the
2 government's satisfaction (and at the speakers' own expense)
3 that their products *do* fall within the government's conception
4 of what is "conflict free," "sustainable," or "fair."⁴

5 In short, a regulatory mechanism that presumes a content-
6 based speech burden is justified and forces the speaker to prove
7 otherwise cannot be considered "narrowly crafted" to avoid
8 constitutional harm, regardless of the legitimate--even
9 laudable--purposes for the warning. *Zauderer*, 471 U.S. at 644.

10 **B. California's NSRL "Safe Harbor" Unconstitutionally**
11 **Inverts The First Amendment's Free-Speech Presumption**

12 California's Proposition 65 regime turns this deeply
13 enshrined constitutional principle on its head. Instead of
14 forcing regulators to justify the necessity of compelled speech,
15 businesses must justify why they should be allowed to remain
16 *silent*. Specifically, because proving that a product fits
17 within an established NSRL "safe harbor" is an *affirmative*
18 *defense* under California law, Cal. Health & Safety Code
19 § 25249.10(c), the burden falls on businesses to demonstrate
20 that their speech--including their "choice of what not to say,"
21 *PG&E*, 475 U.S. at 16--is worthy of protection. The NSRL
22 mechanism thereby inverts the ordinary burden by rendering
23 compelled speech *presumptively valid*--no matter how weak or
24 nonexistent the State's justification for the speech. And when

25 ⁴ The same would be true of a regulation requiring that only
26 large-scale farmers label their meat products, under penalty of
27 civil fines of up to \$2,500 per day, "NOT CRUELTY FREE"--
28 regardless of whether the regulation permitted those farmers to
prove, as an affirmative defense, that their livestock were
well-treated.

1 a state-mandated disclosure is as blatantly misleading and
2 controversial as the glyphosate warning, the NSRL's presumption-
3 flipping system effectively replaces the *constitutional* safe
4 harbor that the First Amendment extends to all speakers with a
5 *statutory* safe harbor that speakers can only access after first
6 suffering significant risk and expense.

7 This is not an abstract or academic concern. Plaintiffs'
8 Memorandum, together with the many declarations and exhibits
9 attached to it, detail the economic hardship threatened by
10 application of the Proposition 65 regime in this case. See,
11 e.g., Plfs.' Mem. 19-22, 37-41 (discussing lost sales, expensive
12 testing and segregation of glyphosate-treated products, and
13 costly certification procedures, with attendant ripple effects
14 on upstream suppliers).

15 Many of the harms stem from the Proposition 65 framework,
16 under which California actively encourages a multiplicity of
17 "bounty hunter" enforcement actions. In addition to various
18 government representatives, *any* person--even one who has not
19 suffered, and is unlikely to suffer, any injury--can bring a
20 private enforcement action on behalf of the public. CAL. HEALTH &
21 SAFETY CODE § 25249.7(c), (d). Because "the Act does not have a
22 standing requirement[,], a plaintiff need not allege or prove
23 damages to maintain an action under Proposition 65." *DiPirro v.*
24 *Bondo Corp.*, 62 Cal. Rptr. 3d 722, 748 (Cal. Ct. App. 2007); see
25 also *National Paint & Coatings Ass'n v. State*, 68 Cal. Rptr. 2d
26 360, 365 (Cal. Ct. App. 1997) (stating that California's
27 Constitution, unlike the U.S. Constitution, "contains no 'case
28 or controversy' requirement").

1 Under the regulation's perverse incentive structure,
2 California encourages enforcement actions with promises of a
3 hefty bounty to successful plaintiffs, see CAL. HEALTH & SAFETY CODE
4 § 25249.7(b), and lucrative fees to their attorneys, see CAL. CODE
5 REGS. tit. 11, § 3201. These potential rewards--25% of up to
6 \$2,500 *per violation, per day*, see CAL. HEALTH & SAFETY CODE
7 § 25249.7(b); CAL. CODE REGS. tit. 11, § 3203(b), (d)--have made
8 opportunistic enforcement of Proposition 65 "a gold mine for
9 activists and lawyers exploiting" the lax standard for imposing
10 these presumptively valid warnings. Richard Berman, *Thanks To A*
11 *Poorly-Designed Law, California Classifies Soft Drinks As A*
12 *Cancer Risk*, FORBES, Feb. 20, 2014.⁵

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

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27 ⁵ 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/#7274b616b8c1>.

1 to obtain it," settled with the "bounty hunter lawyers" for over
2 half a million dollars--"which is what the whole thing was
3 obviously about in the first place." *Id.* at 834-835; *see id.* at
4 856 (noting the "shake down process" and observing that "instead
5 of \$540,000, this legal work merited an award closer to a dollar
6 ninety-eight"). Although the Attorney General stepped in to
7 object to the settlement, *see id.* at 1189, that case reveals the
8 tactics induced by California's scheme.

9 Unfortunately, the profit these bounty hunters stand to
10 gain from a Proposition 65 suit is matched only by the "absurd[
11 eas[e]" of bringing it. David B. Fischer, *Proposition 65*
12 *Warnings at 30—Time For A Different Approach*, 11 J. BUS. & TECH.
13 L. 131, 148 (2016) (quoting *Consumer Def. Grp.*, 40 Cal. Rptr. 3d
14 at 853). Suing under Proposition 65 "is as easy as shooting the
15 side of a barn, drawing circles around the bullet holes and then
16 claiming you hit the bull's eye." *Consumer Def. Grp.*, 40 Cal.
17 Rptr. 3d at 857. Before filing suit, a plaintiff need only
18 search out businesses that provide items containing substances
19 listed under Proposition 65, find any person "with relevant and
20 appropriate experience or expertise" to agree that there is a
21 "reasonable" basis for a suit, and send off a boilerplate notice
22 and demand letter. CAL. HEALTH & SAFETY CODE § 25249.7(d)(1)
23 (outlining the minimal certification standard); *see also*
24 *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853-854 (explaining
25 "just how simple it is for a hypothetical unemployed lawyer ***
26 to extract money from businesses using the initiative").

27 Against this ripe opportunity to "cash in on Proposition
28 65," the regulatory scheme effectively shields plaintiffs from

1 any downside risk. *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 854.
2 Notwithstanding the First Amendment harms meted out by
3 Proposition 65, California courts have ruled that free-speech
4 principles *prohibit* a business that receives a Proposition 65
5 notice from fighting back with a lawsuit against an abusive
6 private enforcer. *Equilon Enters., LLC v. Consumer Cause, Inc.*,
7 102 Cal. Rptr. 2d 371, 378 (Cal. Ct. App. 2000) (holding that
8 “[t]he chilling effect of a rule allowing Proposition 65 private
9 enforcers to be sued before they themselves decide to bring suit
10 [but after they serve a notice] would seriously undermine the
11 goals of the state initiative,” and that the affirmative
12 defenses the business could raise if the private enforcer does
13 pursue litigation constitute “an adequate remedy”), *aff’d*, 29
14 Cal. 4th 53 (2002). And unlike plaintiffs--who stand to receive
15 attorneys’ fees for successful bounty hunter suits, see CAL. CODE
16 REGS. tit. 11, § 3201--the *defendants* who manage to prevail are
17 generally not entitled to reimbursement for their own fees. See
18 *DiPirro*, 62 Cal. Rptr. 3d at 761 (affirming denial of “public
19 interest” attorneys’ fees to successful Proposition 65 defendant
20 because the “essence and fundamental outcome of its defense was
21 the advancement of its own economic interests”). Given the huge
22 potential for profit and the absence of significant drawbacks,
23 serial bounty hunters are already threatening to bring new suits
24 regarding glyphosate, even though the warning requirement is not
25 set to go into effect until July 2018. See Plfs.’ Mem. 19.

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1 **C. California's Operation Of The NSRL "Safe Harbor"**
2 **Unconstitutionally Burdens Businesses With A**
3 **Constrained Choice**

4 In stark contrast to how cheaply and easily enforcement
5 actions may be initiated by plaintiffs, establishing the NSRL
6 affirmative defense comes at substantial expense to defendants--
7 to such an extent that absent an injunction many companies will
8 be forced to capitulate and simply deliver the State's outlier,
9 controversial message rather than fight the First Amendment
10 affront.

11 As the California Court of Appeal has recognized, "the
12 burden shifting provisions [of Proposition 65] make it virtually
13 *** short of actual trial." *Consumer Def. Grp.*, 40 Cal. Rptr.
14 3d at 853. Even at trial, moreover, it is not enough to
15 demonstrate a long history of safe use or longstanding approval
16 by well-respected regulatory bodies. *See, e.g., Consumer Cause,*
17 *Inc. v. SmileCare*, 110 Cal. Rptr. 2d 627, 636 (Cal. Ct. App.
18 2001) (holding that evidence that a dental filling had been
19 approved by the American Dental Association and used safely for
20 150 years was irrelevant because it did not meet the relevant
21 Proposition 65 standard). Instead, even in a case where a
22 product poses a "negligible, even microscopic exposure," proving
23 that the associated risk falls within the NSRL safe harbor (or
24 litigating lifetime exposure risk if the State does not
25 predetermine an NSRL) usually requires hiring experts,
26 commissioning "full scale scientific stud[ies]," and paying
27 attorneys to accomplish what should in the first instance be the
28 State's duty. *Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853; *see*

1 also, e.g., *DiPirro*, 62 Cal. Rptr. 3d at 732-734 (explaining
2 that the "focus of the trial was upon studies, tests, and
3 surveys concerning the nature and level of exposure," conducted
4 by experts according to "[a] hierarchy of accepted methodologies
5 *** established by the [State]").

6 Given these asymmetric burdens, it is little wonder that
7 the Proposition 65 regime is considered, in the words of one
8 California judge, "a form of judicial extortion" that places
9 immense pressure on businesses to "[s]ettle with the plaintiff,"
10 "[s]ave the cost of the assessment," "[s]ave the legal fees,"
11 and "[g]et rid of the case"--regardless of how strong one's NSRL
12 defense may be. *SmileCare*, 110 Cal. Rptr. 2d at 645-646 (Vogel,
13 J., dissenting); see also *Consumer Def. Grp.*, 40 Cal. Rptr. 3d
14 at 854. Because of the "impossible burden of proof" on
15 companies, many determine that "the most prudent business
16 decision is to pay any demanded attorney fees and penalties to
17 the bounty hunter rather than contest[] the case in court."
18 Anthony T. Caso, *Bounty Hunters and the Public Interest—A Study*
19 *of California Proposition 65*, 13 J. FEDERALIST SOC'Y PRAC. GROUPS 68,
20 69 (2012).

21 In 2016 alone, businesses paid over \$30 million in
22 settlement payments to avoid Proposition 65 enforcement actions
23 across 760 cases, with over \$21 million going to plaintiffs'
24 attorneys' fees and costs. See California Attorney General,
25 *Proposition 65 Settlement Executive Summary 2016*.⁶ And these

27 ⁶ Available at [https://oag.ca.gov/sites/all/files/
28 agweb/pdfs/prop65/2016-summary-settlements.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/2016-summary-settlements.pdf).

1 figures do not account for expenses that are likely much greater
2 but for which data is harder to come by, such as the legal fees
3 and costs of cases that proceeded to trial, and the expenses
4 businesses have undergone to reformulate their products to avoid
5 trial. See Mike Lee, *State Law on Toxins Has Effects Worldwide;*
6 *Companies Have Changed Thousands of Products to Avoid the*
7 *Warnings Prop. 65 Requires*, SAN DIEGO UNION TRIBUNE, July 31, 2011,
8 p. A-1 (estimating that, as of 2011, more than \$1.24 billion had
9 been spent to reformulate products under Proposition 65).

10 Even if a business is willing to risk the daunting NSRL
11 process, its downstream retailers or upstream suppliers, who
12 also are at risk under the law and may not be willing or able to
13 bear the same threats, may deprive the business of that option
14 and force it to reformulate its products. See, e.g., Plfs.'
15 Mem. 20 (stating that major retailers already have informed
16 businesses they will remove from their shelves products covered
17 by the regulation that lack a warning). While the immense
18 expense and practical challenges of restructuring supply chains
19 may be a tremendous "regulatory headache" for "large businesses
20 operating in multiple states," for "local, family-owned
21 businesses," these burdens "can mean bankruptcy." Mark Snyder,
22 *Proposition 65 Can Spell Bankruptcy for Many California Small*
23 *Businesses*, SACRAMENTO BEE, Nov. 17, 2014.⁷ The evidence submitted
24 in connection with Plaintiffs' preliminary injunction motion
25 confirms these legitimate threats of disruption to longstanding

27 ⁷ Available at <http://www.sacbee.com/opinion/op->
28 [ed/soapbox/article3941246.html](http://www.sacbee.com/opinion/op-ed/soapbox/article3941246.html).

1 business practices. Plfs.' Mem. 19-22. In turn, this
2 disruption imposes great costs to them, downstream retailers,
3 upstream suppliers, and ultimately consumers subjected to the
4 twin indignities of paying higher prices for products bearing
5 false warnings. See *id.* at 39-41.

6 It is no answer that businesses can attempt to counteract
7 the compelled warning with their own speech. Placing "[t]his
8 pressure to respond" on businesses that would "prefer to remain
9 silent" "is [as] antithetical to the *** First Amendment" as if
10 the State were to forbid them from speaking outright. *PG&E*, 475
11 U.S. at 15-16, 18. The First Amendment prohibits California
12 from mandating false and controversial speech, and then asking
13 businesses to pick up the costs of either complying, avoiding
14 the regulatory burden, or disputing the compelled message.
15 Instead, the solution to the constitutional infirmity the NSRL
16 mechanism introduces at the back end of this scheme is to
17 prevent California from compelling businesses to disclose false
18 speech, like the glyphosate warning, at the front end.

19 **CONCLUSION**

20 For the reasons set forth above and in Plaintiffs'
21 memorandum of points and authorities, the Court should grant
22 Plaintiffs' motion and issue the requested preliminary
23 injunction.
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1 DATED: January 3, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

1 I, Pratik A. Shah, declare under penalty of perjury that on
2 January 3, 2018, I caused the foregoing documents to be
3 electronically filed with the Court's CM/ECF Filing System,
4 which will send a Notice of Electronic Filing to all parties of
5 record who are registered with CM/ECF.
6

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