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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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NATIONAL ASSOCIATION OF WHEAT
GROWERS; NATIONAL CORN GROWERS
ASSOCIATION; UNITED STATES DURUM
GROWERS ASSOCIATION; WESTERN
PLANT HEALTH ASSOCIATION; 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; and AGRICULTURAL
RETAILERS ASSOCIATION,

Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Attorney General of
the State of California,

Defendant.

No. 2:17-cv-2401 WBS EFB

MEMORANDUM AND ORDER RE:
CROSS MOTIONS FOR SUMMARY
JUDGMENT

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This case concerns California's Proposition 65, which,

1 among other things, requires warning labels for products
2 containing chemicals known to the state of California to cause
3 cancer, as determined by certain outside entities. The parties
4 have filed cross motions for summary judgment on plaintiffs'
5 claim that the warning requirement, as applied to the chemical
6 glyphosate,¹ violates the First Amendment of the United States
7 Constitution.² (Docket Nos. 117, 124.)

8 I. Background

9 Under Proposition 65, the Safe Drinking Water and Toxic
10 Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.5-
11 25249.14 ("Proposition 65"), the Governor of California is
12 required to publish a list of chemicals (the "Proposition 65
13 list") known to the State to cause cancer, as determined by,
14 inter alia, certain outside entities, including the United States
15 Environmental Protection Agency ("EPA"), the United States Food
16 and Drug Administration ("FDA"), and the International Agency for
17 Research on Cancer ("IARC").³ AFL-CIO v. Deukmejian, 212 Cal.

18 ¹ Glyphosate is an herbicide widely used to control
19 weeds in various settings and is an active ingredient in
20 defendant Monsanto Company's ("Monsanto") product Roundup.
21 Plaintiffs or their members sell glyphosate-based herbicides, use
22 glyphosate in their cultivation of crops that are incorporated
23 into food products sold in California, or process such crops into
24 food products sold in California. (Am. Compl. ¶¶ 9-22 (Docket
25 No. 23).)

26 ² Lauren Zeise, director of the Office of Environmental
27 Health Hazard Assessment, was initially named in the complaint
28 and included in the court's preliminary injunction, though per
the parties' stipulation, she was dismissed from the case and the
injunction was amended to refer specifically to the Attorney
General. (Docket No. 93.)

³ The IARC was founded in 1965 as the cancer
research arm of the United Nations' World Health Organization and

1 App. 3d 425, 431-34 (3d Dist. 1989) (citing, inter alia, Cal.
2 Labor Code 6382(b)(1)); see also Cal. Code Regs. tit. 27 §§
3 25306(m), 25904(b)⁴ (“A chemical or substance shall be included
4 on the list [of chemicals known to the state to cause cancer] if
5 it is classified by the International Agency for Research on
6 Cancer” as “carcinogenic to humans” or “[p]robably carcinogenic
7 to humans” and there is “sufficient evidence of carcinogenicity
8 in experimental animals.”).⁵

9 Proposition 65 also prohibits any person in the course
10 of doing business from knowingly and intentionally exposing
11 anyone to the listed chemicals without a prior “clear and
12 reasonable” warning, with this prohibition taking effect 12
13 months after the chemical has been listed. Cal. Health & Safety
14 Code §§ 25249.6, 25249.10(b); Deukmejian, 212 Cal. App. 3d at

15
16 exists to “promote international collaboration in cancer
17 research.” (Zuckerman Decl. (Docket No. 130), Ex. C at 5-6
18 (Docket No. 133-2).) The United States was a founding member of
19 the IARC and remains a member. (Zuckerman Decl., Ex. C at 27.)
20 The IARC publishes, in the form of “Monographs,” “critical
21 reviews and evaluations of evidence on the carcinogenicity of a
22 wide range of human exposures.” (Zuckerman Decl., Ex. A at 10
23 (Docket No. 134-1).)

24 The other two outside entities named under the
25 Proposition 65 regulations are the National Institute for
26 Occupational Safety and Health, which is part of the Centers for
27 Disease Control, and the National Toxicology Program, which is
28 part of the National Institutes of Health. Cal. Code Regs. tit.
27 § 25306(m).

⁴ Several new versions of the Proposition 65
implementing regulations took effect on August 30, 2018, after
this case was filed. This opinion refers to the current versions
of the regulations unless otherwise noted.

⁵ California’s Office of Environmental Health Hazard
Assessment (“OEHHA”) is the agency responsible for implementing
Proposition 65. Cal. Code Regs. tit. 27 div. 4 ch. 1 Preamble.

1 431-34. While the statute does not explain what constitutes a
2 clear and reasonable warning, OEHHA regulations provide two "safe
3 harbor" warnings which are per se clear and reasonable. The
4 first safe harbor warning contains a black exclamation point in a
5 yellow triangle with the words "WARNING: This product can expose
6 you to chemicals including [name of one or more chemicals], which
7 is [are] known to the State of California to cause cancer. For
8 more information go to www.P65Warnings.ca.gov." Cal. Code Regs.
9 tit. 27, § 25603(a). The second safe harbor warning, the "short
10 form" warning, includes a black exclamation point in a yellow
11 triangle and the words "WARNING: Cancer -
12 www.P65Warnings.ca.gov." Cal. Code Regs. tit. 27, § 25603(b).

13 Failure to comply with Proposition 65 may result in
14 penalties up to \$2,500 per day for each failure to provide an
15 adequate warning, and enforcement actions may be brought by the
16 California Attorney General, district attorneys, certain city
17 attorneys and city prosecutors, or private citizens, who may
18 recover attorney's fees. Cal. Health & Safety Code § 25249.7;
19 Cal. Code Regs. tit. 11 § 3201.

20 In 2015, the IARC classified glyphosate as "probably
21 carcinogenic" to humans based on "sufficient evidence" that it
22 caused cancer in experimental animals and "limited evidence" that
23 it could cause cancer in humans. (Zuckerman Decl., Ex. A, at
24 361-99 (Docket No. 134-4, 134-5).) However, several other
25 organizations, including the EPA, other agencies within the World
26 Health Organization, and government regulators from multiple
27 countries, have concluded that there is insufficient or no
28

1 evidence that glyphosate causes cancer.⁶ (Heering Decl. (Docket
2 No. 117-4), Exs. N, R, S, T, U, Z, AA, MM, NN, OO, PP, QQ, RR,
3 SS, WW, XX, CCC (Docket Nos. 117-18, 117-22 to 117-25, 117-31,
4 117-32, 117-44 to 117-50, 117-54, 117-55, 117-60) (reports or
5 findings from, inter alia, the EPA, European Commission Health &
6 Consumer Protection Directorate-General, WHO Int'l Programme on
7 Chem. Safety, Germany, U.N. Food & Agric. Org., Canada, European
8 Chems. Agency, Australia, New Zealand, Japan, and South Korea).
9 The EPA reaffirmed its determination in April 2019, and then in
10 August 2019, stated that it would not approve herbicide labels
11 with a Proposition 65 warning, as such labels would be false and
12 misleading and "misbranded" under the federal herbicide labeling
13 law, 7 U.S.C. § 136a. (Heering Decl. Exs. E, WW (Docket Nos.
14 117-9, 1117-54).)

15 As a result of the IARC's classification of glyphosate
16 as probably carcinogenic, the OEHHA listed glyphosate as a
17 chemical known to the state of California to cause cancer on July
18 7, 2017, and thus the attendant warning requirement was to take
19 effect on July 7, 2018. (See Heering Decl., Ex. II (Docket No.
20 117-40).) This court preliminarily enjoined the warning
21 requirement on February 26, 2018 (Docket No. 75), and thus at no
22 time have plaintiffs been required to post glyphosate Proposition
23 65 warnings for their products.

24 II. Procedural History

25 After a hearing, the court preliminarily enjoined the
26

27 ⁶ Notably, the OEHHA had previously determined that there
28 was insufficient evidence of glyphosate's carcinogenicity. (See
Heering Decl., Exs. P, Q (Docket Nos. 117-20, 117-21).)

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