

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALIFORNIA CHAMBER OF
COMMERCE,

Plaintiff-Appellee,

v.

COUNCIL FOR EDUCATION AND
RESEARCH ON TOXICS, a California
public benefit corporation,

Intervenor-Defendant-Appellant.

No. 21-15745

D.C. No.
2:19-cv-02019-
KJM-JDP

OPINION

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted January 12, 2022
San Francisco, California

Filed March 17, 2022

Before: Ronald M. Gould, Mark J. Bennett, and
Ryan D. Nelson, Circuit Judges.

Opinion by Judge Bennett

SUMMARY*

Civil Rights

In an action brought pursuant to 42 U.S.C. § 1983, the panel affirmed the district court’s order granting California Chamber of Commerce’s motion for a preliminary injunction that prohibited the Attorney General and his officers, employees, or agents, and all those in privity or acting in concert with those entities or individuals, including private enforcers from filing or prosecuting new lawsuits to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products.

Proposition 65 or, Prop. 65, provides that “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer . . . without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.” Cal. Health & Safety Code § 25249.6.

California Chamber of Commerce (“CalChamber”) filed suit for declaratory and injunctive relief against the Attorney General of California, seeking to halt acrylamide litigation brought under Prop. 65. It sought to vindicate its members’ First Amendment rights to not be compelled to place false and misleading acrylamide warnings on their food products. The Council for Education and Research on Toxics (“CERT”) intervened as a defendant and argued that, as a private enforcer of Prop. 65, an injunction would impose an

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

unconstitutional prior restraint on its First Amendment rights. CERT is the sole appellant challenging the preliminary injunction on appeal.

The panel held that intervenor CERT had standing because it suffered an invasion of a legally protected interest when the district court enjoined it from filing Prop. 65 lawsuits as to acrylamide in food and beverage products.

Applying *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the panel addressed whether CalChamber was likely to succeed on the merits of its compelled speech First Amendment claim. The panel held that given the robust disagreement by reputable scientific sources over whether acrylamide in food causes cancer in humans, the district court did not abuse its discretion in concluding that the warning was controversial. The district court similarly did not abuse its discretion in finding the warning was misleading. Finally, the record supported the district court's finding that Prop. 65's enforcement regime created a heavy litigation burden on manufacturers who use alternative warnings rather than the approved safe harbor warning set forth in California's Health and Safety Regulations. Because California and CERT did not meet their burden to show the warning requirement was lawful under *Zauderer*, the district court did not abuse its discretion when it concluded that CalChamber was likely to succeed on the merits of its First Amendment claim.

The panel rejected CERT's argument that the district court's injunction was a prior restraint that violated its First Amendment right to petition. The serious constitutional issue raised by CalChamber gave the district court sufficient reason to enjoin Prop. 65 acrylamide litigation until the case was finally decided on the merits. The panel held that a

preliminary injunction against likely unconstitutional litigation is not an unconstitutional or otherwise impermissible prior restraint.

The panel concluded that there was no abuse of discretion in the district court's analysis of the remaining preliminary injunction factors. The district court correctly found that CalChambers had established irreparable harm, which is relatively easy to establish in a First Amendment case. The panel further found that the scope of the injunction was not impermissible; that the balance of hardships weighed in CalChamber's favor; and that the injunction would be in the public interest.

COUNSEL

Raphael Metzger (argued) and Scott Brust, Metzger Law Group, A Professional Law Corporation, Long Beach, California, for Intervenor-Defendant-Appellant.

Trenton H. Norris (argued), S. Zachary Fayne, and David M. Barnes, Arnold & Porter Kaye Scholer LLP, San Francisco, California, for Plaintiff-Appellee.

Jeffrey B. Margulies and Andy Guo, Norton Rose Fulbright US LLP, Los Angeles, California, for Amici Curiae of Consumer Brands Association, American Bakers Association, American Beverage Association, California Grain and Feed Association, California League of Food Producers, California Grocers Association, California Retailers Association, California Seed Association, National Confectioners Association, Plant California Alliance, and SNAC International.

Rob Bonta, Attorney General of California; Edward H. Ochoa, Senior Assistant Attorney General; Laura J. Zuckerman, Supervising Deputy Attorney General; Megan K. Hey and Rafael J. Hurtado, Deputy Attorneys General; Office of the California Attorney General, Los Angeles, California; for Amicus Curiae Rob Bonta.

OPINION

BENNETT, Circuit Judge:

California Chamber of Commerce (“CalChamber”) filed suit for declaratory and injunctive relief against the Attorney General of California, seeking to halt acrylamide litigation brought under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, better known as Proposition 65 or Prop. 65.¹ CalChamber argued that Prop. 65’s warning requirement violates the First Amendment of the U.S. Constitution on its face and as applied to acrylamide in food products. The district court granted CalChamber’s motion for a preliminary injunction, prohibiting “the Attorney General and his officers, employees, or agents, and all those in privity or acting in concert with those entities or individuals, including private enforcers” from filing or prosecuting “new lawsuit[s] to enforce the Proposition 65

¹ In its First Amended complaint, CalChamber named only the Attorney General as a defendant and sought to “enjoin [the Attorney General] and those in privity with and acting in concert with [him] from enforcing in the future a requirement to provide a false, misleading, and highly controversial cancer warning for food and beverage products . . . that contain the chemical acrylamide.” CalChamber claimed that those in privity and acting in concert with the Attorney General included “private enforcers of Proposition 65 under Cal. Health & Safety Code § 25249.7(d).”

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