

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 26 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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

Eastern District of California,
Sacramento

ORDER

Before: GOULD, BENNETT, and R. NELSON, Circuit Judges.

Order;
Statement Respecting Denial by Judge Berzon

SUMMARY*

Civil Rights

The panel denied on behalf of the court a petition for rehearing en banc in an action brought pursuant to 42 U.S.C. § 1983 in which the panel had 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.

Respecting the denial of rehearing en banc, Judge Berzon, joined by judges Wardlaw, Watford, Koh and Sanchez, stated that in this opinion, without basis in law or precedent, the Court narrowed the fundamental right to access the courts. The panel opinion closes the courtroom doors to *all* those seeking to enforce provisions of California's Proposition 65 with respect to a chemical present in a wide range of food products—on pain of contempt. In doing so, the panel opinion expands the so-called “illegal objective” exception, originating from a footnote in a labor lawsuit, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 737 n.5 (1983), far beyond any prior decision of the Supreme Court or the appellate courts: it allows a single judge to enjoin potential plaintiffs from filing any sort of lawsuit if the judge predicts that the lawsuits will fail upon a defense grounded in a federal right. The labor-specific “illegal objective” exception does not countenance such an injunction for non-labor lawsuits.

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

Judges Gould, Bennett, and Nelson have voted to deny Appellant's petition for rehearing *en banc*.

The full court has been advised of the petition for rehearing *en banc*. An active judge requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of votes of the non-recused active judges in favor of *en banc* consideration. *See* Fed. R. App. P. 35.

The petition for rehearing *en banc* is **DENIED**.

OCT 26 2022

*California Chamber of Commerce v. Council for Education and Research on
Toxics*, No. 21-15745

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BERZON, Circuit Judge, with whom WARDLAW, WATFORD, KOH, and SANCHEZ, Circuit Judges, join, respecting the denial of rehearing en banc:

The right to access the courts is one of “the most precious of the liberties safeguarded by the Bill of Rights.” *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967). But in this opinion, without basis in law or precedent, this Court narrows that fundamental right. The panel opinion closes the courtroom doors to *all* those seeking to enforce provisions of California’s Proposition 65 with respect to a chemical present in a wide range of food products—on pain of contempt. In doing so, the panel opinion expands the so-called “illegal objective” exception far beyond any prior decision of the Supreme Court or the appellate courts: it allows a single judge to enjoin potential plaintiffs from filing any sort of lawsuit if the judge predicts that the lawsuits will fail upon a defense grounded in a federal right. I object to the panel’s unjustified curtailment of the First Amendment’s protections and of litigation norms and respectfully disagree with this Court’s refusal to reconsider the panel opinion en banc.

I.

Enacted by the voters of California in 1986, Proposition 65 is a “landmark” statute aimed at protecting the public from exposure to toxic chemicals. *People ex rel. Lungren v. Superior Ct.*, 14 Cal. 4th 294, 315 (1996) (Baxter, J., dissenting).

The statute 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 or reproductive toxicity without first giving clear and reasonable warning.” Cal. Health & Safety Code § 25249.6. Certain government officials (such as the California Attorney General) and private litigants are both statutorily authorized to bring actions to enforce Proposition 65’s guarantees. Cal. Health & Safety Code § 25249.7(c), (d).

In this case, the California Chamber of Commerce (“CalChamber”) filed a complaint and motion for preliminary injunction asking the district court to bar “the Attorney General and all those in privity with him from filing and/or prosecuting new lawsuits to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food products.” The Council for Education and Research on Toxics (“CERT”), a non-profit with expertise in acrylamide warnings, intervened in the lawsuit as a defendant. Rejecting CERT’s argument that an injunction would constitute an unlawful prior restraint in violation of its First Amendment rights, the district court granted a preliminary injunction, providing that the injunction applied to the Attorney General, his agents, and all “private enforcers” of Proposition 65. After a motions panel of this Court granted a stay of the injunction pending appeal, the merits panel affirmed the injunction as to CERT, holding that CERT had standing and that the district court did not err in granting

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