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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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.

LAUREN ZEISE, IN HER OFFICIAL
CAPACITY AS DIRECTOR OF THE
OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT; and
XAVIER BECERRA, in his
official capacity as Attorney
General of the State of
California,

Defendants.

CIV. NO. 2:17-2401 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
FOR PRELIMINARY INJUNCTION

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1
2 Before the court is plaintiffs' Motion for Preliminary
3 Injunction. (Docket No. 29.) The court held a hearing on the
4 motion on February 20, 2018.

5 I. Factual and Procedural History

6 This case concerns a challenge to California's listing
7 of glyphosate¹ as a chemical known to the State of California to
8 cause cancer, as well as a challenge to California's warning
9 requirements that accompany that listing. Plaintiffs claim,
10 among other things, that the listing and warning requirements
11 violate the First Amendment by compelling them to make false,
12 misleading, and highly controversial statements about their
13 products, and they seek a preliminary injunction on this basis.²

14 Under Proposition 65, the Safe Drinking Water and Toxic
15 Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.5-
16 25249.14 ("Proposition 65"), the Governor of California is
17 required to publish a list of chemicals known to the State to
18 cause cancer, as determined by, inter alia, certain outside
19 entities, including the United States Environmental Protection

20 ¹ Glyphosate is a widely-used herbicide used to control
21 weeds in various settings and is an active ingredient in
22 defendant Monsanto Company's ("Monsanto") product Roundup.
23 Plaintiffs or their members sell glyphosate-based herbicides, use
24 glyphosate in their cultivation of crops that are incorporated
25 into food products sold in California, or process such crops into
26 food products sold in California. (Am. Compl. ¶¶ 9-22.)

25 ² Plaintiffs also claim that (1) the listing and warning
26 requirements conflict with the Federal Food, Drug, and Cosmetic
27 Act, 21 U.S.C. §§ 343(a) and 346a(n) ("FDCA"), and are thus
28 preempted by federal law, and (2) these requirements violate the
Due Process Clause of the Fourteenth Amendment, though they do
not seek a preliminary injunction on these other grounds, and the
court expresses no opinion as to those allegations.

1 Agency ("EPA"), the United States Food and Drug Administration
2 ("FDA"), and the International Agency for Research on Cancer
3 ("IARC").³ AFL-CIO v. Deukmejian, 212 Cal. App. 3d 425, 431-34
4 (3d Dist. 1989) (citing, inter alia, Cal. Labor Code 6382(b)(1));
5 see also Cal. Code Regs. tit. 27 §§ 25306(m), 25904(b)⁴ ("A
6 chemical or substance shall be included on the list [of chemicals
7 known to the state to cause cancer] if it is classified by the
8 International Agency for Research on Cancer" as "carcinogenic to
9 humans" or "[p]robably carcinogenic to humans" and there is
10 "sufficient evidence of carcinogenicity in experimental
11 animals.").⁵

12 Proposition 65 also prohibits any person in the course
13 of doing business from knowingly and intentionally exposing
14 anyone to the listed chemicals without a prior "clear and
15

16 ³ The IARC was founded in 1965 as the cancer research arm
17 of the United Nations' World Health Organization, and exists to
18 "promote international collaboration in cancer research."
19 (Zuckerman Decl., Ex. G at 5-6 (Docket No. 49-7).) The United
20 States was a founding member of the IARC and remains a member.
21 (Id. at 27.) The IARC publishes, in the form of "Monographs,"
22 "critical reviews and evaluations of evidence on the
23 carcinogenicity of a wide range of human exposures." (Zuckerman
24 Decl., Ex. H at 10 (Docket No. 49-8).)

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

⁴ Several new regulations implementing Proposition 65
take effect August 30, 2018. This opinion refers to the current
versions of the regulations unless otherwise noted.

⁵ The 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 reasonable" warning, with this prohibition taking effect 12
2 months after the chemical has been listed. Cal. Health & Safety
3 Code § 25249.6; Deukmejian, 212 Cal. App. 3d at 431-34. Failure
4 to comply may result in penalties up to \$2,500 per day for each
5 failure to provide an adequate warning, and enforcement actions
6 may be brought by the California Attorney General, district
7 attorneys, certain city attorneys and city prosecutors, and
8 private citizens who may recover attorney's fees. Cal. Health &
9 Safety Code § 25249.7(b), Cal. Code Regs. tit. 11 § 3201.

10 In 2015, the IARC classified glyphosate as "probably
11 carcinogenic" to humans based on evidence that it caused cancer
12 in experimental animals and limited evidence that it could cause
13 cancer in humans. (Zuckerman Decl. (Docket No. 49), Ex. H,
14 Preamble (Docket No. 49-8), and Ex. O, IARC Glyphosate, from
15 Monograph 112 (Docket No. 49-15).) However, several other
16 organizations, including the EPA and other agencies within the
17 World Health Organization, have concluded that there is no
18 evidence that glyphosate causes cancer. (Prins Decl., Exs. E-L
19 (Docket Nos. 29-8 through 29-15).)⁶ As a result of the IARC's
20 classification of glyphosate as probably carcinogenic, the OEHHA
21

22 ⁶ Although defendants do not object to plaintiffs'
23 attachment of several glyphosate studies, defendants object to
24 several declarations provided by plaintiffs, arguing that they
25 are speculative and/or contain inadmissible hearsay. (Defs.'
26 Objs. (Docket No. 46).) However, as defendants concede, evidence
27 in support of a preliminary injunction application need not meet
28 normal evidentiary standards, and the court may consider and give
weight to inadmissible evidence in considering preliminary
relief. See Heideman v. S. Salt Lake City, 348 F.3d 1182, 1188
(10th Cir. 2003); Johnson v. Couturier, 572 F.3d 1067, 1083 (9th
Cir. 2009). The court therefore OVERRULES defendants'
objections.

1 issued a Notice of Intent to List Glyphosate in November 2015.
2 (Zuckerman Decl., Ex. Q (Docket No. 49-17).)

3 The OEHHA listed glyphosate as a chemical known to the
4 state of California to cause cancer on July 7, 2017, and thus the
5 attendant warning requirement takes effect on July 7, 2018.

6 (Zuckerman Decl., Ex. T, OEHHA Chemicals Known to the State to
7 Cause Cancer or Reproductive Toxicity List (December 28, 2017)
8 (Docket No. 49-20).)

9 II. Discussion

10 Injunctive relief is "an extraordinary and drastic
11 remedy, one that should not be granted unless the movant, by a
12 clear showing, carries the burden of persuasion." Mazurek v.
13 Armstrong, 520 U.S. 968, 972 (1997) (citation omitted). In order
14 to obtain a preliminary injunction, the moving party must
15 establish (1) it is likely to succeed on the merits, (2) it is
16 likely to suffer irreparable harm in the absence of preliminary
17 relief, (3) the balance of equities tips in its favor, and (4) an
18 injunction is in the public interest. Winter v. Nat. Res. Def.
19 Council, Inc., 555 U.S. 7, 20 (2008).

20 A. Ripeness

21 Before the court examines the merits of plaintiffs'
22 First Amendment claim, the court will consider whether this claim
23 is ripe. "Ripeness is peculiarly a question of timing, designed
24 to prevent the courts, through avoidance of premature
25 adjudication, from entangling themselves in abstract
26 disagreements." Thomas v. Anchorage Equal Rights Comm'n, 220
27 F.3d 1134, 1138 (9th Cir. 2000) (citations and internal
28 punctuation omitted). Courts must examine whether a case is ripe

1 because their role "is neither to issue advisory opinions nor to
2 declare rights in hypothetical cases, but to adjudicate live
3 cases or controversies consistent with the powers granted the
4 judiciary in Article III of the Constitution." Id.

5 The ripeness inquiry includes both "constitutional" and
6 "prudential" components. Id. Under the constitutional component
7 of standing, courts consider "whether the plaintiffs face a
8 realistic danger of sustaining direct injury as a result of the
9 statute's operation or enforcement, or whether the alleged injury
10 is too imaginary or speculative to support jurisdiction." Id.

11 (citations and internal quotations omitted). Under the
12 prudential component, courts consider (1) the fitness of the
13 issues for judicial decision and (2) the hardship to the parties
14 of withholding court consideration. Id. at 1142. For the
15 reasons discussed below, the court finds that plaintiffs' First
16 Amendment challenge is ripe under both the constitutional and
17 prudential inquiries.

18 First, defendants argue that plaintiffs' First
19 Amendment challenge is unripe because plaintiffs may not have to
20 provide any warning if their products' glyphosate levels are
21 below the "safe harbor" level that will likely be adopted by the
22 State before the warnings are required. However, regardless of
23 the State's possible enactment of a safe harbor level, plaintiffs
24 still face a significant risk of injury. The court recognizes
25 that (1) Proposition 65 provides that no warning is required for
26 a product where an exposure poses no significant risk assuming
27 lifetime exposure at the level in question, Cal. Health & Safety
28 Code § 25249.10; (2) the OEHHA has set specific safe harbor

1 levels for several chemicals, and no warnings are required if the
2 daily exposure caused by a product is below that safe harbor
3 level, Cal. Code Regs. tit. 27 § 25705; and (3) the OEHHA has
4 proposed a safe harbor level of 1,100 micrograms per day for
5 glyphosate, and the corresponding regulation setting that level
6 is expected to be completed by July 1, 2018, (Fernandez Decl. ¶ 9
7 (Docket No. 48)).

8 Nevertheless, assuming plaintiffs' products were tested
9 and found to contain concentrations of glyphosate below the safe
10 harbor level as set by Cal. Code. Regs. tit. 27 § 25705,
11 plaintiffs would still have no reasonable assurance that they
12 would not be subject to enforcement action. Plaintiffs have
13 provided evidence that private plaintiffs have brought
14 enforcement actions for various chemicals notwithstanding a
15 defense of compliance with the safe harbor level for those
16 chemicals, including where the California Attorney General said a
17 proposed enforcement suit had no merit.⁷ Thus, plaintiffs, who

18 ⁷ (See, e.g., Norris Decl. ¶¶ 8-10 (Docket No. 66-7)
19 (discussing lawsuit lasting for 6 years brought against
20 McDonald's Corporation and other restaurants based on allegations
21 that their cooked chicken exposed Californians to the listed
22 carcinogen "PHIP," despite a California Attorney General
23 determination that the level of PHIP in cooked chicken fell far
24 below the level that would require a warning under Proposition
25 65); Norris Decl. ¶¶ 28-31 (discussing Proposition 65 actions
26 brought against restaurants and food companies notwithstanding
27 safe harbor level for acrylamide set in 1990).) See also
28 Sciortino v. PepsiCo, Inc., 108 F. Supp. 3d 780, 786 (N.D. Cal.
2015) (denying motion to dismiss where parties disputed whether
defendant's products exceeded the safe harbor level); Envtl. Law
Found. v. Beech-Nut Nutrition Corp., 235 Cal. App. 4th 307, 314
(1st Dist. 2015) (discussing Proposition 65 enforcement action
where safe harbor defense was litigated at trial and noting that
defendants had the burden of showing that the level of chemicals
in their products did not exceed the safe harbor); CKE Rests.,

1 have stated they intend to give no warning based on their
2 constitutional right against compelled speech, face a credible
3 threat of enforcement as a result of exercising such right,
4 regardless of the possible enactment of a safe harbor level for
5 glyphosate.⁸

6 Defendants claim that enforcement actions would be
7 unlikely in the event that a product did not exceed the safe
8 harbor level for glyphosate, citing both the steps required to
9 file suit (which require 60 days' notice and the filing of a
10 certificate of merit) and the fact that the Attorney General will
11 likely inform the private enforcer that (1) there was no
12 violation, (2) an action was not in the public interest, and (3)
13 the action would not warrant civil penalties and fees.

14 Defendants also note that if the private enforcer refused to
15 withdraw its notice of violation, the Attorney General would then
16 post a letter on the Attorney General website stating that there

17 Inc. v. Moore, 159 Cal. App. 4th 262, 265 (2d Dist. 2008)
18 (dismissing suit seeking declaration that private party could not
19 initiate Proposition 65 litigation because safe harbor level was
not exceeded).

20 ⁸ Plaintiffs have also provided evidence of likely lost
21 sales if they do not provide Proposition 65 warnings on their
22 products, regardless of whether the state establishes a safe
23 harbor level for glyphosate. At least one major retailer has
24 explained that it will no longer carry glyphosate-based
25 herbicides without any Proposition 65 warning and will remove
26 these herbicides by July 8, 2018, regardless of any safe harbor
27 level that may be set by California. (Martin Decl. ¶ 3 (Docket
28 No. 66-15).) Businesses who wish to comply with Proposition 65's
warning requirement are also faced with the costs of compliance
in advance of the July 7, 2018 deadline in the event that a safe
harbor level is not established by that deadline. See, e.g.,
Core-Mark Int'l v. Mont. Bd. of Livestock, 701 F. App'x 568, 571
(9th Cir. 2017) (cost to separately package, label, and inventory
milk destined for sale in Montana were concrete injuries).

1 was no merit to the proposed enforcement action. Notwithstanding
2 these purported barriers, one California Court of Appeal has
3 explained that the instigation of Proposition 65 enforcement
4 actions is "easy - and almost absurdly easy at the pleading stage
5 and pretrial stages." See Consumer Def. Grp. v. Rental Hous.
6 Indus. Members, 137 Cal. App. 4th 1185, 1215 (4th Dist. 2006).

7 Further, in order to take advantage of the safe harbor,
8 plaintiffs would be required to test their products to determine
9 whether their products exceeded the safe harbor level, incurring
10 the attendant costs, which in itself is a cognizable injury.
11 See, e.g., Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139,
12 154-55 (2010) (farmers seeking injunctive relief had standing
13 based on, inter alia, the cost of testing crops that would be
14 required if injunction was not granted).⁹

15 Second, defendants argue that plaintiffs' First
16 Amendment challenge is unripe because even if their products
17

18 ⁹ (See also Inman Decl. ¶¶ 7-9; Novak Decl. ¶¶ 4-6; Hurst
19 Decl. ¶¶ 5-7; Mehan Decl. ¶¶ 4-6; Stoner Decl. ¶¶ 6-9; Kessel
20 Decl. ¶ 4; Jackson Decl. ¶¶ 5-10; McCarty Decl. ¶¶ 11-13;
21 Brinkmeyer Decl. ¶¶ 5-6; Martinson Decl. ¶¶ 5-9; Heering Decl. ¶¶
22 37, 39-41; and Wogsland Decl. ¶¶ 5-9 (Docket Nos. 29-52 through
23 29-59 and 29-61 through 29-63) (explaining that testing
24 requirement or change in production to avoid testing requirements
25 would cause significant changes to farmers' operations, increase
26 costs, and put them at a competitive disadvantage); Supp. Stoner
27 Decl. ¶¶ 7-8; Supp. Jackson Decl. ¶6; Supp. Hurst Decl. ¶¶ 5-7;
28 and Supp. Inman Decl. ¶¶ 7-9 (Docket No. 66-12 through 66-16)
(farmers stating that they do not test their crops for glyphosate
and were not required to do so by the EPA); Heering Decl. ¶ 10
(Docket No. 66-6) (explaining that farmers do not have to
separately test crops for herbicide residue under federal law
because herbicide labeling laws already require that herbicides,
if used according to the labeling instructions, will not result
in an exposure that exceeds the EPA's tolerance for a given
crop).)

1 exceed the safe harbor level plaintiffs may defend any
2 enforcement action by showing their products do not pose a
3 significant cancer risk. However, that would merely be an
4 affirmative defense which plaintiffs would have to assert once
5 the enforcement action is brought against them,¹⁰ and facing
6 enforcement actions, or even the possible risk of enforcement
7 actions, are cognizable injuries. See, e.g., Italian Colors
8 Rest. v. Becerra, 878 F.3d 1165, 1173 (9th Cir. 2018) (party had
9 standing because "even if the Attorney General would not enforce
10 the law, [the statute under review] gives private citizens a
11 right of action to sue for damages").

12 Third, defendants argue that plaintiffs' First
13 Amendment challenge is unripe because it has not been determined
14 what any required warning would have to say. However, as
15 discussed in detail below in the court's discussion of the
16 likelihood of success on the merits, any warning which plaintiffs
17 might be able to devise consistent with defendants' demands under
18 the regulations interpreting Proposition 65 would be inconsistent
19 with plaintiffs' First Amendment rights.

20 ¹⁰ See, e.g., Consumer Def. Grp., 137 Cal. App. 4th at
21 1214 (explaining that the burden shifting provisions of
22 Proposition 65 "make it virtually impossible for a private
23 defendant to defend a warning action on the theory that the
24 amount of carcinogenic exposure is so low as to pose 'no
25 significant risk' short of actual trial") (citing Cal. Health &
26 Safety Code § 25349.10(c)) (warning requirement shall not apply
27 to "[a]n exposure for which the person responsible can show that
28 the exposure poses no significant risk assuming lifetime exposure
at the level in question . . . based on evidence and standards of
comparable scientific validity to the evidence and standards
which form the scientific basis for the listing of such
chemical," and "[i]n any action brought to enforce [the warning
requirement], the burden of showing that an exposure meets the
criteria of this subdivision shall be on the defendant.").

1 B. Likelihood of Success on the Merits

2 As in initial matter, plaintiffs have not shown a
3 likelihood of success on the merits of their claim that the
4 listing of glyphosate violates the First Amendment, because the
5 listing is government speech, not private speech. "The Free
6 Speech Clause restricts government regulation of private speech;
7 it does not regulate government speech." Pleasant Grove City v.
8 Summum, 555 U.S. 460, 467 (2009). California's listing of
9 chemicals it purportedly knows to cause cancer is neither a
10 restriction of private speech nor government-compelled private
11 speech. The fact that the listing triggers Proposition 65's
12 warning requirement does not transform the listing itself into
13 government-compelled speech. Indeed, glyphosate has been listed
14 by California since July 2017, and plaintiffs have not been
15 required to provide any warnings. It is only the upcoming July
16 2018 deadline for providing the Proposition 65 warning that
17 compels private speech. Thus, plaintiffs have not shown a
18 likelihood of success on the merits of their claim that the
19 listing of glyphosate violates the First Amendment.

20 Similarly, plaintiffs have not shown a likelihood of
21 irreparable harm should the court fail to enjoin the listing of
22 glyphosate, because any harm that plaintiffs might suffer is
23 caused by the warning requirements of Proposition 65, rather than
24 the listing itself. Notably, plaintiffs do not claim that they
25 have already suffered any injury as a result of the listing, but
26 only allege that they will suffer injury as the warning
27 requirement deadline approaches and takes effect. In other
28 words, any alleged irreparable injury could be prevented directly

1 by enjoining the warning requirement. Accordingly, the court
2 will deny a preliminary injunction based on plaintiffs' claim
3 that the glyphosate listing violates the First Amendment.

4 A different analysis is required for the warning
5 requirement, as it compels commercial speech. In Zauderer v.
6 Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S.
7 626, 651 (1985), the Supreme Court held that the government may
8 require commercial speakers to disclose "purely factual and
9 uncontroversial information" about commercial products or
10 services, as long as the "disclosure requirements are reasonably
11 related" to a substantial government interest and are neither
12 "unjustified [n]or unduly burdensome." See also CTIA-The
13 Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1118 (9th Cir.
14 2017).

15 The State has the burden of demonstrating that a
16 disclosure requirement is purely factual and uncontroversial, not
17 unduly burdensome, and reasonably related to a substantial
18 government interest. See Zauderer, 471 U.S. at 658-59; Ibanez v.
19 Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512
20 U.S. 136, 146 (1994). The dispute in the present case is over
21 whether the compelled disclosure is of purely factual and
22 uncontroversial information. In this context, "uncontroversial"
23 "refers to the factual accuracy of the compelled disclosure, not
24 to its subjective impact on the audience." CTIA, 854 F.3d at
25 1117-18. Further, "a statement may be literally true but
26 nonetheless misleading and, in that sense, untrue" and therefore
27 unconstitutionally compelled private speech under Zauderer. Id.
28 at 1119; see also Am. Meat Inst. v. U.S. Dep't of Agric., 760

1 F.3d 18, 27 (D.C. Cir. 2014) (recognizing possibility that
2 required factual disclosures "could be so one-sided or incomplete
3 that they would not qualify as 'factual and uncontroversial'")
4 (citation omitted).

5 Defendants argue that any warning for glyphosate that
6 incorporates the current safe-harbor warning language "known to
7 the state of California to cause cancer" or ("known to cause
8 cancer") will be truthful and not misleading because Proposition
9 65 and its implementing regulations state that chemicals are
10 "known" to the State to cause cancer when, inter alia, they are
11 classified by the IARC as "[p]robably carcinogenic to humans" and
12 there is "sufficient evidence of carcinogenicity in experimental
13 animals." See Cal. Code Regs. tit. 27 § 25904(b). Because the
14 IARC classified glyphosate as a probable carcinogen and there was
15 sufficient evidence of carcinogenicity in animals, defendants
16 argue that California does in fact "know" that glyphosate causes
17 cancer under the applicable regulations, and its warning is
18 factually accurate.

19 While it may be literally true that California "knows"
20 that glyphosate causes cancer as the State has defined that term
21 in the statute and regulations, the required warning would
22 nonetheless be misleading to the ordinary consumer. See, e.g.,
23 CTIA-The Wireless Ass'n v. City and County of San Francisco, 827
24 F. Supp. 2d 1054, 1062-63 (9th Cir. 2011), aff'd, 494 F. App'x
25 752 (9th Cir. 2012) (granting preliminary injunction in part
26 because required fact sheet was misleading because it failed "to
27 explain the limited significance of the WHO 'possible carcinogen'
28 classification," which implied that radiofrequency energy from

1 cell phones was "more dangerous than it really is," and
2 explaining that the fact sheet should state that "RF Energy has
3 been classified by the World Health Organization as a possible
4 carcinogen rather than as a known carcinogen or a probable
5 carcinogen and studies continue to assess the potential health
6 effects of cell phones.").

7 Ordinary consumers do not interpret warnings in
8 accordance with a complex web of statutes, regulations, and court
9 decisions, and the most obvious reading of the Proposition 65
10 cancer warning is that exposure to glyphosate in fact causes
11 cancer. A reasonable consumer may understand that if the warning
12 says "known to cause cancer," there could be a small minority of
13 studies or experts disputing whether the substance in fact causes
14 cancer. However, a reasonable consumer would not understand that
15 a substance is "known to cause cancer" where only one health
16 organization had found that the substance in question causes
17 cancer and virtually all other government agencies and health
18 organizations that have reviewed studies on the chemical had
19 found there was no evidence that it caused cancer. Under these
20 facts, the message that glyphosate is known to cause cancer is
21 misleading at best.

22 The court also rejects defendants' arguments that the
23 warning requirement is permissible under Zauderer because (1)
24 Proposition 65 does not require plaintiffs to use the language
25 "known to the state of California to cause cancer," and (2)
26 plaintiffs may not have to provide warnings if their products
27 fall below the safe harbor level that will likely be adopted.
28 Under the applicable regulations, in order for a warning to be

1 per se clear and reasonable, the warning must state that the
2 chemical is *known* to cause cancer. California regulations also
3 discourage, if not outright prohibit, language that calls into
4 doubt California's knowledge that a chemical causes cancer.¹¹
5 Notably, defendants provide no example of a more detailed warning
6 explaining the debate regarding glyphosate's carcinogenicity that
7 would pass muster under Proposition 65 and the applicable
8 regulations; and at oral argument, defense counsel repeatedly
9 rejected various alternative warnings proposed by the court which
10 would provide more context or use more accurate language.
11 Defendants have the burden of showing that the speech they wish
12 to compel is factually accurate and uncontroversial. See
13 Zauderer, 471 U.S. at 658-59; Ibanez, 512 U.S. at 146.¹²

14 On the evidence before the court, the required warning
15 for glyphosate does not appear to be factually accurate and
16 uncontroversial because it conveys the message that glyphosate's
17 carcinogenicity is an undisputed fact, when almost all other
18 regulators have concluded that there is insufficient evidence
19 that glyphosate causes cancer. For example, the EPA has reviewed
20 studies regarding the carcinogenicity of glyphosate multiple

21 ¹¹ See Cal. Health & Safety Code § 25249.6; Cal. Code
22 Regs. tit. 27 §§ 25601 and 25603.2; Cal. Code Regs. tit. 11 §
23 3202(b).

24 ¹² Indeed, it is not clear that there is any warning which
25 would provide the necessary context regarding glyphosate's
26 possible cancer risk, given that California's regulations appear
27 to make it impossible for plaintiffs to explain in the warning
28 that the IARC's determination is contrary to that reached by
other organizations, or that the IARC did not find that
glyphosate causes cancer in humans, but that it found that
glyphosate was probably carcinogenic based on sufficient evidence
in experimental animals and limited evidence in humans.

1 times and has determined each time that there was no or
2 insufficient evidence that glyphosate causes cancer, most
3 recently in September 2016.¹³ Several international agencies have
4 likewise concluded that there is insufficient evidence that
5 glyphosate causes cancer, including the European Commission's
6 Health and Consumer Protection Directorate-General, multiple
7 divisions of the World Health Organization besides the IARC, and
8 Germany's lead consumer health and safety regulator. (Prins
9 Decl., Exs. I, J, K, L (Docket Nos. 29-12, 29-13, 29-14, 29-
10 15).)¹⁴

11 It is inherently misleading for a warning to state that
12 a chemical is known to the state of California to cause cancer
13 based on the finding of one organization (which as noted above,
14 only found that substance is probably carcinogenic), when
15 apparently all other regulatory and governmental bodies have
16 found the opposite, including the EPA, which is one of the bodies
17

18 ¹³ (See Prins Decl., Ex. E (Docket No. 29-8) (EPA renewal
19 of glyphosate registration under the Federal Insecticide,
20 Fungicide, and Rodenticide Act); Prins Decl., Ex. F (Docket No.
21 29-9) (2014 EPA review of more than 55 epidemiological studies
22 concluding that "that this body of research does not provide
23 evidence to show that glyphosate causes cancer, and it does not
24 warrant any change in EPA's cancer classification for
25 glyphosate."); (Prins Decl., Ex. P (Docket No. 29-20) (EPA's
Office of Pesticide Programs 228-page paper considered "23
epidemiological studies, 15 animal carcinogenicity studies, and
nearly 90 genotoxicity studies for the active ingredient
glyphosate" and concluded that "[t]he available data at this time
do no[t] support a carcinogenic process for glyphosate").)

26 ¹⁴ Notably, in 1997 and 2007, California's own OEHHA
27 examined studies of glyphosate to set public health goals for
28 drinking water, both times determining that glyphosate did not
pose a cancer risk. (Prins. Decl., Exs. G, H (Docket Nos. 29-10,
29-11).)

1 California law expressly relies on in determining whether a
2 chemical causes cancer. The court expresses no opinion as to
3 whether a statement that a chemical is known to cause cancer is
4 factually accurate and uncontroversial where there is stronger
5 evidence in support of the chemical's carcinogenicity. However,
6 here, given the heavy weight of evidence in the record that
7 glyphosate is not in fact known to cause cancer, the required
8 warning is factually inaccurate and controversial. See CTIA, 854
9 F.3d at 1119; Am. Meat Inst., 760 F.3d at 27.

10 The court's First Amendment inquiry here boils down to
11 what the state of California can compel businesses to say.
12 Whether Proposition 65's statutory and regulatory scheme is good
13 policy is not at issue. However, where California seeks to
14 compel businesses to provide cancer warnings, the warnings must
15 be factually accurate and not misleading. As applied to
16 glyphosate, the required warnings are false and misleading.
17 Plaintiffs have thus established a likelihood of success on the
18 merits of their claim that the warning requirement violates their
19 First Amendment rights.¹⁵

20 C. Irreparable Harm

21 The Ninth Circuit has explained that "[i]rreparable
22 harm is relatively easy to establish in a First Amendment Case."
23 CTIA, 854 F.3d at 1123. "[A] party seeking preliminary
24 injunctive relief in a First Amendment context can establish

25
26 ¹⁵ Because the court finds that warning requirement
27 violates plaintiffs' First Amendment rights on this ground, the
28 court does not reach the issue of whether the warning is
reasonably related to a substantial government interest or
imposes an undue burden.

1 irreparable injury . . . by demonstrating the existence of a
2 colorable First Amendment claim.” Id. (quoting Sammartano v.
3 First Judicial Dist. Court, 303 F.3d 959, 973 (9th Cir. 2002)).
4 Moreover, “[t]he loss of First Amendment freedoms, for even
5 minimal periods of time, unquestionably constitutes irreparable
6 injury.” Valle Del Sol Inc. v. Whiting, 709 F.3d 808, 828 (9th
7 Cir. 2013) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).
8 Here, because plaintiffs have established that they are likely to
9 succeed on their First Amendment claim as to Proposition 65’s
10 warning requirement, they have also established that they will
11 likely suffer irreparable harm if the warning requirement is not
12 enjoined as to glyphosate.¹⁶

13 D. Balance of Equities and Public Interest

14 When the government is a party, the balance of equities
15 and public interest factors merge. Drakes Bay Oyster Co. v.
16 Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing Nken v.
17 Holder, 556 U.S. 418, 435 (2009)). To determine the balance of
18 equities, the court must “balance the interests of all parties
19 and weigh the damage to each.” Stormans, Inc. v. Selecky, 586
20 F.3d 1109, 1138 (9th Cir. 2009) (citation omitted).

21 While the court recognizes that the state has a
22 significant interest in protecting its citizens and informing

23 ¹⁶ Plaintiffs also claim that the warning requirement will
24 cause several other harms including damage to the reputation and
25 goodwill of plaintiffs and their products, loss of customers, the
26 cost and burden of testing, and disruption to supply chains and
27 existing business practices. Because the court finds that
28 plaintiffs have shown a likelihood of irreparable harm based on
the likely infringement of their First Amendment rights, the
court expresses no opinion as to the likelihood of these other
injuries or whether any such alleged harms are irreparable.

1 them of possible health risks, the Ninth Circuit has consistently
2 “recognized the significant public interest in upholding First
3 Amendment principles.” Doe v. Harris, 772 F.3d 563, 583 (9th
4 Cir. 2014) (quoting Sammartano, 303 F.3d at 974). Further,
5 California “has no legitimate interest in enforcing an
6 unconstitutional” law. See KH Outdoor, LLC v. City of
7 Trussville, 458 F.3d 1261, 1272 (11th Cir. 2006). Providing
8 misleading or false labels to consumers also undermines
9 California’s interest in accurately informing its citizens of
10 health risks at the expense of plaintiffs’ First Amendment
11 rights. Accordingly, the balance of equities and public interest
12 weigh in favor of enjoining Proposition 65’s warning requirement
13 for glyphosate.

14 As plaintiffs have shown that they are likely to
15 succeed on the merits of their First Amendment claim, are likely
16 to suffer irreparable harm absent an injunction, and that the
17 balance of equities and public interest favor an injunction, the
18 court will grant plaintiffs’ request to enjoin Proposition 65’s
19 warning requirement for glyphosate.

20 IT IS THEREFORE ORDERED that plaintiffs’ Motion for a
21 Preliminary Injunction (Docket No. 29) be, and the same hereby
22 is, GRANTED IN PART. Plaintiffs’ request for a preliminary
23 injunction enjoining defendants from listing glyphosate as a
24 chemical known to the State of California to cause cancer under
25 California Health & Safety Code § 25249.8 is DENIED. Plaintiffs’
26 request for a preliminary injunction enjoining the warning
27 requirement of California Health & Safety Code § 25249.6 as to
28 glyphosate is GRANTED. Pending final resolution of this action,

1 defendants, their agents and employees, all persons or entities
2 in privity with them, and anyone acting in concert with them are
3 hereby ENJOINED from enforcing as against plaintiffs, plaintiffs'
4 members, and all persons represented by plaintiffs, California
5 Health & Safety Code § 25249.6's requirement that any person in
6 the course of doing business provide a clear and reasonable
7 warning before exposing any individual to glyphosate.

8 Dated: February 26, 2018



9 **WILLIAM B. SHUBB**
10 **UNITED STATES DISTRICT JUDGE**

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