

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

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

-----oo0oo-----

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).)

1 Attorney General from enforcing California Health & Safety Code §
2 25249.6's requirement that any person in the course of doing
3 business provide a clear and reasonable warning before exposing
4 any individual to glyphosate as against plaintiffs, plaintiffs'
5 members, and all persons represented by plaintiffs. (Docket No.
6 75.) In doing so, the court first found that plaintiff's First
7 Amendment challenge was ripe, because plaintiffs faced a
8 significant risk of injury based on, among other things, the
9 threat of private suits and the costs of testing their products
10 to avoid or defend such suits.

11 The court then found that a Proposition 65 warning for
12 glyphosate was not purely factual and uncontroversial under the
13 First Amendment, as required for compelled commercial speech
14 under Zauderer v. Office of Disciplinary Counsel of Supreme Court
15 of Ohio, 471 U.S. 626, 651 (1985), and CTIA-The Wireless
16 Association v. City of Berkeley, 854 F.3d 1105, 1117-19 (9th Cir.
17 2017) ("CTIA I").⁷ The court explained, among other things, that
18 Proposition 65 and its regulations required a warning stating
19 that the chemical was known to the State of California to cause
20 cancer, and this warning would be misleading to the ordinary
21 consumer because "[i]t is inherently misleading for a warning to
22

23
24 ⁷ The Ninth Circuit's 2017 decision in CTIA I was vacated
25 by the Supreme Court and remanded for further consideration in
26 light of National Institute of Family and Life Advocates v.
27 Becerra, 138 S. Ct. 2361 (2018) ("NIFLA"). 138 S. Ct. 2708
28 (2018). However, on remand, the panel issued a new decision that
once again explained that "a statement may be literally true but
nonetheless misleading and, in that sense, untrue." CTIA-The
Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 847 (9th Cir.
2019) ("CTIA II"), cert. denied, 140 S. Ct. 658 (2019).

1 state that a chemical is known to the state of California to
2 cause cancer based on the finding of one organization . . . when
3 apparently all other regulatory and governmental bodies have
4 found the opposite.” Id. at 16-17. In doing so, the court did
5 not determine, and was not required to determine, (1) whether
6 glyphosate in fact caused cancer, (2) whether a statement that
7 glyphosate was known to cause cancer would be factual and
8 uncontroversial where there was more evidence in support of the
9 chemical’s carcinogenicity, or (3) whether Proposition 65’s
10 statutory and regulatory regime was good policy.

11 The court subsequently denied defendant’s motion for
12 reconsideration under Federal Rule of Civil Procedure 59(e).
13 (Docket No. 97.) The court first held that it had not committed
14 clear error in its order granting a preliminary injunction.
15 Second, the court found that the much of the “new evidence”
16 introduced by defendant could have been presented in opposition
17 to the motion for a preliminary injunction, and the evidence
18 defendant relied on did not change the court’s conclusion that
19 the Proposition 65 warning as to glyphosate violated the First
20 Amendment. In doing so, the court rejected two alternative
21 warnings proposed by defendant because those warnings still
22 conveyed the message that glyphosate was known to cause cancer or
23 suggested that there was equal or more weight for the proposition
24 that glyphosate caused cancer than for the proposition that it
25 did not.

26 Plaintiffs now seek a permanent injunction barring
27 enforcement of the Proposition 65 warning as to glyphosate.
28 Defendant in response seeks a determination that plaintiffs’

1 First Amendment claim fails as a matter of law.⁸

2 III. Ripeness

3 Defendant continues to argue that plaintiffs' First
4 Amendment challenge is not ripe, despite the court's prior
5 determination of ripeness in granting the preliminary injunction.
6 Courts must examine whether a case is ripe because their role "is
7 neither to issue advisory opinions nor to declare rights in
8 hypothetical cases, but to adjudicate live cases or controversies
9 consistent with the powers granted the judiciary in Article III
10 of the Constitution." Thomas v. Anchorage Equal Rights Comm'n,
11 220 F.3d 1134, 1138 (9th Cir. 2000).

12 The ripeness inquiry includes both "constitutional" and
13 "prudential" components. Id. Under the constitutional component
14 of standing, courts consider "whether the plaintiffs face a
15 realistic danger of sustaining direct injury as a result of the
16 statute's operation or enforcement, or whether the alleged injury
17 is too imaginary or speculative to support jurisdiction." Id.
18 (citations and internal quotations omitted). Under the
19 prudential component, courts consider (1) the fitness of the
20 issues for judicial decision and (2) the hardship to the parties
21 of withholding court consideration. Id. at 1142. Here, the
22 court once again finds that plaintiffs' First Amendment challenge
23 is ripe under both the constitutional and prudential inquiries.

24 First, plaintiffs still face a significant risk of

25
26 ⁸ Plaintiffs do not address the other causes of action in
27 the First Amended Complaint, specifically its claims under the
28 Supremacy Clause of the U.S. Constitution and the Due Process
Clause of the Fourteenth Amendment. The court expresses no
opinion on those claims.

1 injury notwithstanding defendant's claim that no warnings are
2 required for plaintiffs' products because they likely contain
3 glyphosate levels below the "no significant risk level" ("NSRL"
4 or "safe harbor" level) that was adopted after the filing of this
5 case. The court recognizes that (1) Proposition 65 provides that
6 no warning is required for a product where an exposure poses no
7 significant risk assuming lifetime exposure at the level in
8 question, Cal. Health & Safety Code § 25249.10; (2) no warnings
9 are required if the daily exposure caused by a product is below
10 the OEHHA's safe harbor level under Cal. Code Regs. tit. 27 §
11 25705; (3) the OEHHA adopted a safe harbor level of 1,100
12 micrograms per day for glyphosate on July 1, 2018, Cal. Code
13 Regs. tit. 27, § 25705; (4) some testing of certain foods has
14 found glyphosate levels that would lead to expected daily
15 exposure levels well below that threshold (Lee Decl. ¶¶ 13-21
16 (Docket No. 129)); and (5) some evidence indicates that consumer
17 use of glyphosate from home and garden use of glyphosate would
18 lead to daily exposure levels well below that threshold (Sandy
19 Decl. ¶ 5 (Docket No. 127)).⁹

20 Nevertheless, assuming plaintiffs' products were tested
21 and found to contain concentrations of glyphosate below the safe
22 harbor level as set by Cal. Code. Regs. tit. 27 § 25705,
23 plaintiffs would still have no reasonable assurance that they
24 would not be subject to enforcement actions. Plaintiffs have
25 provided evidence that private plaintiffs have brought

26 ⁹ Plaintiffs dispute the calculations of daily and
27 lifetime exposure levels, as well as the cost and difficulty of
28 testing products, though the court does not reach this issue.

1 enforcement actions for various chemicals notwithstanding a
2 defense of compliance with the safe harbor level for those
3 chemicals, including where the California Attorney General said a
4 proposed enforcement suit had no merit.¹⁰ The fact that the
5 statute allows any person to file an enforcement suit makes the
6 threat of such suits more credible. See, e.g., Susan B. Anthony
7 List v. Driehaus, 134 S. Ct. 2334, 2345 (2014) (plaintiffs showed
8 credible risk of enforcement because, inter alia, the law at
9 issue allowed complaints from private parties who were not
10 “constrained by explicit guidelines or ethical obligations”);
11 Italian Colors Rest. v. Becerra, 878 F.3d 1165, 1173 (9th Cir.
12 2018) (party had standing because “even if the Attorney General
13 would not enforce the law” at issue, private citizens had a right
14

15 ¹⁰ (See, e.g., Norris Decl. ¶¶ 10-12 (Docket No. 117-62)
16 (discussing Physicians Comm. for Responsible Med. v. McDonald’s
17 Corp., Los Angeles Superior Court, Case No. BC383722, a lawsuit
18 lasting for 6 years brought against restaurants based on
19 allegations that their cooked chicken exposed Californians to the
20 listed carcinogen “PhIP,” despite a California Attorney General
21 determination that the level of PhIP in cooked chicken fell far
22 below the level that would require a warning under Proposition
23 65); Norris Decl. ¶¶ 30-33 (discussing Proposition 65 actions
24 brought against restaurants and food companies notwithstanding
25 safe harbor level for acrylamide set in 1990).) See also
26 Sciortino v. PepsiCo, Inc., 108 F. Supp. 3d 780 (N.D. Cal. 2015)
27 (denying motion to dismiss in Proposition 65 enforcement action
28 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., Inc. v. Moore, 159 Cal. App.
4th 262 (2d Dist. 2008) (affirming dismissal of suit seeking
declaration that private party could not initiate Proposition 65
litigation because safe harbor level was not exceeded).

1 of action to sue for damages).

2 Such suits, which can be brought notwithstanding the
3 Attorney General's finding of no merit, are enabled by the
4 statute itself, as defendants in Proposition 65 enforcement
5 actions have the burden of showing that their product's
6 glyphosate exposure falls below the no significant risk level in
7 a Proposition 65 enforcement action. Cal. Health & Safety Code §
8 25249.10(c). Thus, plaintiffs, who have stated they intend to
9 give no warning based on their constitutional right against
10 compelled speech, face a credible threat of enforcement as a
11 result of exercising such right, regardless of the enactment of
12 the safe harbor level for glyphosate.¹¹ See Susan B. Anthony
13 List, 134 S. Ct. at 2342-46 (plaintiff may bring pre-enforcement
14 suit where he has an intention to engage in a course of conduct
15 with an arguable constitutional interest but proscribed by law,
16 "and there exists a credible threat of prosecution").

17 Defendant claims that enforcement actions would be
18 unlikely in the event that a product did not exceed the safe

19
20 ¹¹ The court also rejects the Attorney General's
21 contentions, raised for the first time in his reply in support of
22 his cross motion, that plaintiffs have provided no evidence of
23 any concrete plans to violate the law and that the First
24 Amendment dispute is more appropriate for a state court
25 enforcement action. (See Docket No. 150 at 4-7.) Even assuming
26 these arguments were properly raised, (1) plaintiffs have already
27 shown and continue to credibly claim that they have no intention
28 of providing Proposition 65 warnings for glyphosate, and (2)
plaintiffs need not wait for an enforcement action to challenge a
state law on First Amendment grounds, notwithstanding the ability
to raise the challenge as a defense to the enforcement action.
Given the credible threat of enforcement, it is not necessary
that plaintiffs first expose themselves to liability before
challenging Proposition 65 on constitutional grounds. See Susan
B. Anthony List, 134 S. Ct. at 2342-46.

1 harbor level for glyphosate, citing both the steps required to
2 file suit (which require 60 days' notice and the filing of a
3 certificate of merit) and the fact that the Attorney General will
4 likely inform the private enforcer that (1) there was no
5 violation, (2) an action was not in the public interest, and (3)
6 the action would not warrant civil penalties and fees. Defendant
7 also notes that if the private enforcer refused to withdraw its
8 notice of violation, the Attorney General would then post a
9 letter on the Attorney General website stating that there was no
10 merit to the proposed enforcement action, and that plaintiffs may
11 be ordered to pay attorney's fees and costs for frivolous
12 enforcement actions under Cal. Health & Safety Code §
13 25249.7(h)(2) and Cal. Code Civ. Proc. § 128.5.

14 Notwithstanding these purported barriers, one
15 California Court of Appeal has explained that the instigation of
16 Proposition 65 enforcement actions is "easy -- and almost
17 absurdly easy at the pleading stage and pretrial stages." See
18 Consumer Def. Grp. v. Rental Hous. Indus. Members, 137 Cal. App.
19 4th 1185, 1215 (4th Dist. 2006). At best, the possible sanction
20 of attorney's fees appears to be a modest deterrence to suits, if
21 any, given that this sanction is only available if the trial
22 court "determines that there was no actual or threatened exposure
23 to a listed chemical" at any level and also finds that "there was
24 no credible factual basis for the certifier's belief that an
25 exposure to a listed chemical had occurred or was threatened." See
26 Cal. Health & Safety Code § 25249.7(h)(2). In other words, to
27 bring suit and avoid sanctions, a private plaintiff need only
28 credibly allege that that a product has some amount of the

1 chemical at issue, not that the amount of the chemical is harmful
2 or that it exceeds the safe harbor level.

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

11 The court also rejects defendant's contention that the
12 First Amendment challenge is unripe because defendants may defend
13 any enforcement action by showing their products do not pose a
14 significant cancer risk, even if their products exceed the safe
15 harbor level. Facing enforcement actions, or even the possible
16 risk of enforcement actions, are cognizable injuries, even if a
17 business can ultimately prove that its product is not a cancer
18 risk. See, e.g., Susan B. Anthony List, 134 S. Ct. 2334 at 2342-
19 46.¹²

20 Based on the foregoing, the court will deny
21 defendant's motion for summary judgment to the extent it seeks
22 dismissal based on ripeness.

23 IV. Merits

24 To determine whether the Proposition 65 requirement for
25

26 ¹² As they did in their motion for a preliminary
27 injunction, plaintiffs claim that they will lose sales if they
28 decline to provide warnings for their products. The court
expresses no opinion as to this claim in determining that
plaintiffs' First Amendment claim is ripe.

1 glyphosate violates the First Amendment, the court must first
2 determine the level of scrutiny to apply -- intermediate scrutiny
3 under Central Hudson Gas & Electric Corp. v. Public Service
4 Commission, 447 U.S. 557 (1980), or a lower level of scrutiny
5 under Zauderer v. Office of Disciplinary Counsel of Supreme Court
6 of Ohio, 471 U.S. 626 (1985).

7 Under Central Hudson, the government may restrict
8 commercial speech "that is neither misleading nor connected to
9 unlawful activity, as long as the governmental interest in
10 regulating the speech is substantial." Am. Beverage Ass'n v.
11 City & Cty. of San Francisco, 916 F.3d 749, 755 (9th Cir. 2019)
12 (quoting Central Hudson, 447 U.S. at 564). Under this
13 intermediate level of scrutiny, the law at issue "must 'directly
14 advance the governmental interest asserted' and must not be 'more
15 extensive than is necessary to serve that interest.'" Id.
16 (quoting Central Hudson, 447 U.S. at 566).

17 However, a lower standard applies to certain compelled
18 commercial speech. In Zauderer, 471 U.S. at 651, the Supreme
19 Court held that the government may require commercial speakers to
20 disclose "purely factual and uncontroversial information" about
21 commercial products or services, as long as the disclosure
22 requirements are "reasonably related" to a substantial government
23 interest and are neither "unjustified [n]or unduly burdensome."
24 See also CTIA II, 928 F.3d at 842-43 (quoting Zauderer); Am.
25 Beverage Ass'n, 916 F.3d at 755 (same).

26 The case law on the level of scrutiny for compelled
27 commercial speech is somewhat unsettled. Plaintiffs argue that
28 compelled commercial speech is subject to Central Hudson's

1 intermediate scrutiny if it cannot meet all the requirements of
2 Zauderer. In other words, according to plaintiffs, a court
3 should first examine whether the compelled commercial speech
4 meets Zauderer's lower standard, and if not, the court should
5 then proceed to examine whether it meets Central Hudson's
6 requirements.

7 However, neither the Supreme Court nor the Ninth
8 Circuit have elaborated such a rule, though they have hinted at
9 one. In NIFLA, the Supreme Court reviewed certain disclosure
10 requirements that applied to pro-choice pregnancy centers. The
11 court applied Zauderer's lower scrutiny to one required
12 disclosure and found that the state had not shown that the
13 disclosure was not unjustified or unduly burdensome. Having made
14 that determination, the court held that the disclosure violated
15 the First Amendment, without proceeding to examine whether the
16 provision also failed intermediate scrutiny. 138 S. Ct. at 2377-
17 78. At the same time, the NIFLA court examined a separate but
18 related disclosure rule under intermediate scrutiny, holding that
19 the Zauderer standard did not apply because "[t]he notice in no
20 way relates to the services that licensed clinics provide.
21 Instead, it requires these clinics to disclose information about
22 state-sponsored services -- including abortion, anything but an
23 'uncontroversial' topic." 138 S. Ct. at 2372.¹³

24
25 ¹³ In NIFLA, the court applied the Zauderer standard to a
26 provision that required unlicensed pregnancy centers to disclose
27 on-site and in all advertising that they were not licensed
28 medical providers. The court applied intermediate scrutiny to a
provision that required licensed pregnancy centers to disclose
on-site and to all clients that the State of California provided
free or low-cost family planning services, including abortion, as

1 After NIFLA was issued, the Ninth Circuit in American
2 Beverage explained that “Zauderer provides the appropriate
3 framework to analyze a First Amendment claim involving compelled
4 commercial speech.” 916 F.3d at 756. The en banc panel in
5 American Beverage reviewed the denial of a preliminary injunction
6 of an ordinance requiring warnings on advertisements for certain
7 sugar-sweetened beverages. The court held that the requirement
8 that the warning cover 20% of the advertisement imposed an undue
9 burden and thus failed Zauderer.¹⁴ Having made this
10 determination, the court reversed the denial of a preliminary
11 injunction, without proceeding to determine whether the ordinance
12 withstood intermediate scrutiny under Central Hudson. Id. at
13 756-58.

14 In light of these cases, it appears that the court
15 should proceed to examine the warning requirement for glyphosate
16 under Zauderer’s lower standard only if the requirement is purely
17 factual and uncontroversial. If “[t]he Zauderer standard does
18 not apply here” because the warning requirement is not purely
19 factual and uncontroversial, see NIFLA, 138 S. Ct. at 2372, the
20 court should then proceed to examine the warning requirement
21 under Central Hudson’s intermediate scrutiny.

22 well as a telephone number to obtain information about such
23 services. 138 S. Ct. at 2368-78.

24 ¹⁴ Finding that the warning requirement was unduly
25 burdensome, the American Beverage en banc panel declined to
26 examine whether the warning was factual and uncontroversial. 916
27 F.3d at 757. This determination follows NIFLA’s implied holding
28 that if a disclosure requirement is unjustified or unduly
burdensome, a court may assume that the Zauderer standard applies
and need not examine the disclosure requirement under
intermediate scrutiny. See NIFLA, 138 S. Ct. at 2376-77.

1 A. Does Zauderer apply?

2 Before determining whether the Proposition 65 warning
3 requirement survives under Zauderer's lower scrutiny, the court
4 must determine whether Zauderer even applies. As discussed
5 above, Zauderer applies where the government requires speakers to
6 disclose "purely factual and uncontroversial information" about
7 commercial products or services. Zauderer, 471 U.S. at 651;
8 NIFLA, 138 S. Ct. at 2372. The primary dispute in the present
9 case is whether the compelled disclosure is of purely factual and
10 uncontroversial information. The State has the burden of
11 demonstrating that a disclosure requirement is purely factual and
12 uncontroversial, not unduly burdensome, and reasonably related to
13 a substantial government interest. See Zauderer, 471 U.S. at
14 641; Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of
15 Accountancy, 512 U.S. 136, 146 (1994); Am. Beverage, 916 F.3d at
16 756

17 What "purely factual and uncontroversial" means has not
18 been completely explained by the Supreme Court or the Ninth
19 Circuit. The Ninth Circuit previously stated in this context
20 that "uncontroversial" "refers to the factual accuracy of the
21 compelled disclosure, not to its subjective impact on the
22 audience." CTIA I, 854 F.3d at 1117-18; see also Nationwide
23 Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 732 (9th Cir. 2017)
24 (quoting CTIA I). But see Nat'l Ass'n of Mfrs. v. S.E.C., 800
25 F.3d 518, 527-530 & n.28 (D.C. Cir. 2015) (stating a "purely
26 factual" proposition must also be accurate, and thus
27 controversial must mean "communicating a message that is
28 controversial for some reason other than [a] dispute about simple

1 factual accuracy”) (quoting Am. Meat Inst. v. U.S. Dep’t of
2 Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) (internal punctuation
3 omitted)). However, that decision was reversed and remanded by
4 the Supreme Court for further consideration in light of NIFLA,
5 and the panel’s opinion on remand did not repeat its prior rule
6 that “controversial” under Zauderer means factually accurate.
7 See CTIA II, 928 F.3d at 846-48.

8 In NIFLA, the Supreme Court held that a state law
9 requiring pro-life pregnancy centers to post information about
10 state-provided pregnancy services, including abortion, was
11 controversial. 138 S. Ct. at 2372. However, the Ninth Circuit
12 explained in CTIA II that NIFLA did not state “broadly that any
13 purely factual statement that can be tied in some way to a
14 controversial issue is, for that reason alone, controversial.”
15 CTIA II, 928 F.3d at 845. Rather, the compelled notice was
16 controversial under Zauderer because the disclosure, while
17 factual, “took sides in a heated political controversy, forcing
18 the clinic to convey a message fundamentally at odds with its
19 mission.” Id. The CTIA II court also explained, once again,
20 that “a statement may be literally true but nonetheless
21 misleading and, in that sense, untrue” and therefore not meet
22 Zauderer’s requirements. CTIA II, 928 F.3d at 847; CTIA I, 854
23 F.3d at 1119; see also Am. Meat Inst., 760 F.3d at 27
24 (recognizing the possibility that “some required factual
25 disclosures could be so one-sided or incomplete that they would
26 not qualify as ‘factual and uncontroversial’”) (citation
27 omitted).

28 This court has previously found that the Proposition 65

1 warning requirement for glyphosate was false and misleading given
2 the weight of authority showing that glyphosate was not known to
3 cause cancer and did not cause cancer. (Docket No. 75 at 13-17
4 (and citations therein); Docket No. 97 at 4-9.) While there have
5 been some new developments since the court granted the
6 preliminary injunction, these developments do not change the
7 court's conclusion that the Proposition 65 warning requirement
8 for glyphosate is misleading and therefore not purely factual and
9 uncontroversial.

10 First, the court continues to find that the current
11 language of the full "safe harbor" warning is false and
12 misleading when used for glyphosate. That warning would require
13 a business to state that glyphosate "is known to the state of
14 California to cause cancer." Cal. Code Regs. tit. 27, §
15 25603(a). The "short form" safe harbor warning, which requires
16 language stating "WARNING: Cancer - www.P65Warnings.ca.gov.",
17 Cal. Code Regs. tit. 27, § 25603(b), similarly conveys the
18 message glyphosate is known to cause and actually causes cancer.

19 The court's initial conclusion remains the same.
20 Notwithstanding the IARC's determination that glyphosate is a
21 "probable carcinogen," the statement that glyphosate is "known to
22 the state of California to cause cancer" is misleading. Every
23 regulator of which the court is aware, with the sole exception of
24 the IARC, has found that glyphosate does not cause cancer or that
25 there is insufficient evidence to show that it does. (See
26 Heering Decl., Exs. N, R, S, T, U, Z, AA, MM, NN, OO, PP, QQ, RR,
27 SS, WW, XX, CCC.) While it may be literally true that California
28 technically "knows" that glyphosate causes cancer as the State

1 has defined that term in the statute and regulations, the
2 required warning would nonetheless be misleading to the ordinary
3 consumer. See, e.g., CTIA-The Wireless Ass'n v. City & Cty. of
4 San Francisco, 827 F. Supp. 2d 1054, 1062-63 (N.D. Cal. 2011),
5 aff'd, 494 F. App'x 752 (9th Cir. 2012) (granting preliminary
6 injunction in part because required fact sheet was misleading
7 because it failed "to explain the limited significance of WHO
8 'possible carcinogen' classification," which implied that
9 radiofrequency energy from cell phones was "more dangerous than
10 it really is," and explaining that the fact sheet should state
11 that "RF Energy has been classified by the World Health
12 Organization as a possible carcinogen rather than as a known
13 carcinogen or a probable carcinogen and studies continue to
14 assess the potential health effects of cell phones.").

15 As the court stated in granting a preliminary
16 injunction,

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

(Docket No. 97 at 14.)

The D.C. Circuit's discussion in National Association

1 of Manufacturers v. S.E.C., 800 F.3d 518 (D.C. Cir. 2015), is
2 instructive. There, the SEC enacted a rule mandating companies
3 using certain minerals originating in the Democratic Republic of
4 Congo to disclose on their website their products have “not been
5 found to be DRC conflict free.” Id. at 530. The court explained
6 that the SEC could not rely on the statutory definition of
7 “conflict free” to prove that a disclosure was factual and
8 uncontroversial, because otherwise “there would be no end to the
9 government’s ability to skew public debate by forcing companies
10 to use the government’s preferred language.” Id. at 530.
11 Similarly, here, the State of California may not skew the public
12 debate by forcing companies to adopt the state’s determination
13 that glyphosate is a carcinogen, relying solely on the IARC’s
14 determination, when the great weight of evidence indicates that
15 glyphosate is not known to cause cancer.

16 1. New Evidence

17 The new evidence introduced by defendant on summary
18 judgment does not change this determination that the warning
19 requirement as to glyphosate is misleading. First, the fact that
20 there have been additional studies suggesting a link between
21 glyphosate and cancer, or the fact that there has been some
22 criticism of the EPA’s finding that glyphosate was not a cancer
23 risk, does not establish that California knows that glyphosate
24 causes cancer. (See Docket No. 124 at 14-25 (and citations
25 therein).) Notwithstanding this additional evidence, the fact
26 remains that every government regulator of which the court is
27 aware, with the exception of the IARC, has found that there was
28 no or insufficient evidence that glyphosate causes cancer.

1 Indeed, the EPA, which Proposition 65 relies on as one of five
2 authoritative bodies for identifying carcinogens, reaffirmed this
3 determination in 2019, noting its vigorous disagreement with the
4 IARC, and stating that a Proposition 65 warning for glyphosate
5 would be false and misleading and would violate the federal
6 herbicide labeling law, 7 U.S.C. § 136a. (Heering Decl. Exs. E,
7 WW.)

8 This court does not express an opinion as to the
9 criticisms the parties lodge against the IARC on one hand, and
10 the EPA on the other. "Once again, the court's analysis here is
11 not whether the IARC's determination is persuasive or supported
12 by competent evidence, but rather whether a warning conveying the
13 message that glyphosate causes cancer is factual and
14 uncontroversial." (Docket No. 97 at 5.)

15 Second, the California Court of Appeal's decision in
16 Monsanto v. OEHHA, 22 Cal. App. 5th 534 (5th Dist. 2018), does
17 not affect the court's analysis. Monsanto concerned the
18 placement of glyphosate on the Proposition 65 carcinogen list due
19 to the IARC classification of glyphosate as a probable
20 carcinogen. However, this court has already pointed out on the
21 motion for a preliminary injunction that it is Proposition 65's
22 warning requirement that posed First Amendment concerns, not
23 Proposition 65's list of carcinogens, which is government speech.
24 (Docket No. 75 at 11.) Also, this court already addressed the
25 Monsanto decision in its order denying defendant's motion to
26 reconsider, noting that that case did not address the First
27 Amendment and thus had no relevance as to whether the warning
28 requirement with respect to glyphosate was factual and

1 uncontroversial. (Docket No. 97 at 4-5.) This court has made no
2 finding, and need not make any, as to the general trustworthiness
3 or reliability of the IARC in order to determine that the
4 glyphosate warning requirement is misleading, in light of the
5 heavy weight of authority stating that glyphosate does not cause
6 cancer.

7 Third, the OEHHA's formal adoption of a regulation
8 setting a safe harbor level for glyphosate does not change the
9 court's analysis. As the court has already explained, the no
10 significant risk level only provides an affirmative defense for a
11 business when faced with a Proposition 65 enforcement action, and
12 it has no relevance as to whether the warning requirement is
13 factual and uncontroversial. (Docket 97 at 4-5.)

14 Fourth, the fact that there have been three jury
15 verdicts against Monsanto based on glyphosate does not render the
16 warning purely factual and uncontroversial. The juries in those
17 cases were tasked with determining whether the evidence, as
18 presented in those cases, showed that it was more likely than not
19 that glyphosate caused cancer in those plaintiffs. While those
20 juries ultimately decided that it did, whether a reasonable juror
21 could find that glyphosate causes cancer is a separate question
22 facing the court today -- whether a statement that glyphosate is
23 known to cause cancer is purely factual and uncontroversial.¹⁵
24 Given the full body of evidence before the court, such a
25 statement is at a minimum misleading and therefore not factual
26 and uncontroversial.

27 ¹⁵ Those cases are also on appeal, so it is not clear that
28 the verdicts will ultimately stand.

1 2. Alternative Warnings

2 Defendant attempts to salvage the Proposition 65
3 warning by noting that the statute only requires "clear and
4 reasonable" warnings, not the particular language of the safe
5 harbor warning. However, at the preliminary injunction hearing,
6 counsel for defendant rejected multiple alternative warnings
7 suggested by the court which would provide more context or use
8 more accurate language, claiming that the additional language
9 would "dilute" the warning. (Hr'g Tr. at 51 (Docket No. 72).)
10 Since then, the Attorney General has suggested three of his own
11 alternative warnings. Each of these warnings are deficient on
12 their own, as will be discussed below.¹⁶ More important, however,
13 is the fact that the state simply cannot put the burden on
14 commercial speakers to draft a warning that both protects their
15 right not to speak and complies with Proposition 65. Accord
16 Illinois ex rel. Madigan v. Telemktg. Assocs., Inc., 538 U.S.
17 600, 620 n.9 (2003) ("[T]o avoid chilling protected speech, the
18 government must bear the burden of proving that the speech it
19 seeks to prohibit is unprotected.") (citations omitted).

20 As this court has already stated, it appears that any
21 glyphosate warning which does not compel a business to make
22 misleading statements about glyphosate's carcinogenicity would
23 likely violate the Attorney General's own guidelines for approval
24 of Proposition 65 enforcement action settlements. (See Docket
25 No. 97 at 9 n.7 (noting that under Cal. Code Regs. tit. 11 §

26
27 ¹⁶ Although the court addressed the first two alternative
28 warnings on the motion to reconsider, the court will revisit that
discussion on summary judgment, out of an abundance of caution.

1 3202(b), certain words and phrases are per se not clear and
2 reasonable, "such as (1) use of the adverb 'may' to modify
3 whether the chemical causes cancer" and "(2) additional words or
4 phrases that contradict or obfuscate otherwise acceptable warning
5 language").)

6 At the same time, the safe harbor regulations prohibit
7 providing any additional information in the warning other than
8 the source of the exposure or "information on how to avoid or
9 reduce exposure to the identified chemical."¹⁷ Cal. Code Regs.
10 tit. 27, § 25601. Given that restriction, a business would not
11 enjoy the protection of the safe harbor warning and would still
12 face the threat of suits from private enforcers if it added, for
13 example, language discussing the debate regarding glyphosate's
14 carcinogenicity, unless the business was a party to a court order
15 approving the particular language. See Cal. Code Regs. tit. 27,
16 § 25600(e) ("A person that is a party to a court-ordered
17 settlement or final judgment establishing a warning method or
18 content is deemed to be providing a 'clear and reasonable'
19 warning for that exposure for purposes of this article, if the
20 warning complies with the order or judgment.").

21 The court cannot condone the state's approach here,
22 where it continues to argue that the warning requirement poses no
23 First Amendment concerns and then repeatedly proposes iterations
24 of alternative warnings that the state would never allow under
25 normal circumstances, absent this lawsuit. Even assuming the

26 ¹⁷ These regulations also distinguish the Proposition 65
27 warning from the regulation at issue in CTIA II, which allowed
28 retailers to add to the compelled disclosure. See 928 F.3d at
848.

1 state may continue to propose alternative warnings, as it has in
2 this case, none of them qualify as purely factual and
3 uncontroversial.

4 Defendant's first proposed warning states: "WARNING:
5 This product can expose you to glyphosate, a chemical listed as
6 causing cancer pursuant to the requirements of California law.
7 For more information go to www.P65Warnings.ca.gov." (Docket No.
8 81-1 at 10). Stating that a chemical is listed as causing cancer
9 "pursuant to the requirements of California law" conveys
10 essentially the same message to consumers as stating that a
11 chemical is known to the state of California to cause cancer, and
12 thus is misleading for the same reason as the safe harbor
13 warning. Further, California cannot remedy this warning by
14 simply pointing consumers to a website discussing the debate.

15 Defendant's second proposed warning does provide
16 additional context regarding the debate as to glyphosate's
17 carcinogenicity, stating:

18 WARNING: This product can expose you to glyphosate, a
19 chemical listed as causing cancer pursuant to the
20 requirements of California law. The listing is based
21 on a determination by the United Nations International
22 Agency for Research on Cancer that glyphosate presents
23 a cancer hazard. The U.S. Environmental Protection
24 Agency has tentatively concluded in a draft document
25 that glyphosate does not present a cancer hazard. For
26 more information go to www.P65warnings.ca.gov.

27 (Docket No. 81-1 at 12.)

28 As the court discussed on the motion for
reconsideration, this warning is deficient "because it conveys
the message that there is equal weight of authority for and
against the proposition that glyphosate causes cancer, or that

1 there is more evidence that it does . . . when the heavy weight
2 of evidence in the record is that glyphosate is not known to
3 cause cancer.” (Docket No. 97 at 9.)

4 Defendant’s third alternative warning fails for similar
5 reasons. That warning states:

6 WARNING: This product can expose you to glyphosate.
7 The State of California has determined that glyphosate
8 is known to cause cancer under Proposition 65 because
9 the International Agency for Research on Cancer has
10 classified it as a carcinogen, concluding that there
11 is sufficient evidence of carcinogenicity from studies
12 in experimental animals and limited evidence in
humans, and that it is probably carcinogenic to
humans. The EPA has concluded that glyphosate is not
likely to be carcinogenic to humans. For more
information about glyphosate and Proposition 65, see
www.P65warnings.ca.gov.

13 (Docket No. 124 at 59.) This warning does give some context to
14 the IARC’s findings, noting that there was “limited evidence in
15 humans” and that glyphosate is “probably carcinogenic.”¹⁸

16 However, it once again states that glyphosate is known to cause
17 cancer and conveys the message that there is equal weight for and
18 against the authority that glyphosate causes cancer, when the
19 weight of evidence is that glyphosate does not cause cancer.

20 Defendant relies heavily on the Ninth Circuit’s
21 decision in CTIA II, to support his contention that this third
22 warning is permissible under Zauderer, though that case is
23 distinguishable. In CTIA II, the panel majority approved a
24 warning stating:

25
26 ¹⁸ Once again, the court questions whether a nuanced
27 warning regarding glyphosate, especially one as lengthy as the
28 Attorney General’s third alternative warning, can comply with the
Proposition 65 regulations and the statute’s requirements of a
“clear and reasonable” warning.

1 To assure safety, the Federal Government requires that
2 cell phones meet radio-frequency (RF) exposure
3 guidelines. If you carry or use your phone in a pants
4 or shirt pocket or tucked into a bra when the phone is
5 ON and connected to a wireless network, you may exceed
6 the federal guidelines for exposure to RF radiation.
7 Refer to the instructions in your phone or user manual
8 for information about how to use your phone safely.

9 928 F.3d at 838. Rather than stating that cell phones are known
10 to cause cancer, or known to cause some other adverse health
11 condition, the CTIA II warning only pointed to federal guidelines
12 regarding radio-frequency guidelines, and stated that certain
13 uses of cell phones would cause the user to exceed those
14 guidelines. The disclosure did not make any claims that failure
15 to comply with those guidelines would cause any particular
16 effect, other than imply that compliance with the guidelines was
17 necessary for "safety."

18 In contrast, the original cell phone warning required
19 by San Francisco in a related cell phone warning case would have
20 stated, among other things, "ALTHOUGH STUDIES CONTINUE TO ASSESS
21 POTENTIAL HEALTH EFFECTS OF MOBILE PHONE USE, THE WORLD HEALTH
22 ORGANIZATION HAS CLASSIFIED RF ENERGY AS A POSSIBLE CARCINOGEN."
23 CTIA-The Wireless Ass'n v. City & Cty. of San Francisco, 827 F.
24 Supp. 2d 1054, 1058 (9th Cir. 2011), aff'd, 494 F. App'x 752 (9th
25 Cir. 2012). This warning, making a similar claim about an IARC
26 probable carcinogen determination, was rejected as misleading by
27 the district court, a determination that was affirmed by the
28 Ninth Circuit in a memorandum disposition. Id. at 1061-63.
Thus, the Ninth Circuit's approval of the warning in CTIA II does
not show that the third alternative warning proposed by defendant
is purely factual and uncontroversial.

1 The law does not require a warning label to disclose in
2 full the debate regarding glyphosate's carcinogenicity, and there
3 need not be complete consensus among the scientific community
4 before a warning may be required. See CTIA-The Wireless Ass'n v.
5 City of Berkeley, 139 F. Supp. 3d 1048, 1071-72 (N.D. Cal. 2015).
6 Given the evidence in the record, however, warnings which state
7 that glyphosate is known to cause cancer are not purely factual
8 and uncontroversial. Accordingly, Zauderer's lower scrutiny does
9 not apply, and the Proposition 65 warning as to glyphosate must
10 satisfy intermediate scrutiny.¹⁹

11 B. Intermediate Scrutiny

12 Having determined that Zauderer's lower standard does
13 not apply to the glyphosate warning requirement because it is not
14 purely factual and uncontroversial, the court deems it
15 appropriate to now consider whether the warning requirement
16 satisfies intermediate scrutiny. See Am. Beverage, 916 F.3d at
17 755 (citing Central Hudson, 447 U.S. at 564). Under intermediate
18 scrutiny, the law must "directly advance the governmental
19 interested asserted and must not be more extensive than is
20 necessary to serve that interest." Id. (citing Central Hudson,
21 447 U.S. at 566). The government has the burden to "demonstrate
22 that the harms it recites are real and that its restriction will
23 in fact alleviate them to a material degree." Ibanez, 512 U.S.
24 at 136.

25
26 ¹⁹ Because the court finds that Zauderer does not apply
27 because the warning is not purely factual and uncontroversial,
28 the court does not reach the question of whether the warning is
reasonably related to a substantial government interest or
imposes an undue burden.

1 Here, defendant has neither shown that Proposition 65's
2 warning requirement, as applied to glyphosate, directly advances
3 the asserted government interest, nor that it is not more
4 extensive than necessary to achieve that interest. The purpose
5 for Proposition 65 warning requirement, as stated in preamble to
6 the proposed act, was to inform the people of California "about
7 exposures to chemicals that cause cancer." (Zuckerman Decl., Ex.
8 WW (Docket No. 138-23).) See also Cal. Chamber of Commerce v.
9 Brown, 196 Cal. App. 4th 233, 258 (1st Dist. 2011) (quoting
10 Proposition 65 Section 1). The court agrees that this is a
11 substantial interest. However, misleading statements about
12 glyphosate's carcinogenicity, and the state's knowledge of that
13 purported carcinogenicity, do not directly advance that
14 interest.²⁰

15 Moreover, California has options available to inform
16 consumers of its determination that glyphosate is a carcinogen,
17 without burdening the free speech of businesses, including
18 advertising campaigns or posting information on the Internet.
19 See, e.g., NIFLA, 138 S. Ct. at 2376 (noting that even assuming
20 an advertising campaign would be less effective at broadcasting
21 California's message than mandated disclosures, the state may not
22 "co-opt" businesses "to deliver its message for it," because
23

24 ²⁰ Ironically, the Attorney General, while arguing that
25 glyphosate is a carcinogen, has argued that the likely amount of
26 glyphosate that the average consumer will be exposed to is orders
27 of magnitude lower than would be required to exceed the state's
28 no significant risk level. In other words, defendant on the one
hand proclaims the need to broadcast glyphosate's cancer risk
while at the same time declaring there is no risk for the vast
majority of consumers.

1 "[t]he First Amendment does not permit the State to sacrifice
2 speech for efficiency") (citation omitted). Accordingly,
3 Proposition 65's warning requirement as to glyphosate fails
4 intermediate scrutiny under the First Amendment, and the court
5 will grant summary judgment for plaintiffs.²¹

6 V. Permanent Injunction

7 Having determined that Proposition 65's warning
8 requirement as to glyphosate violates the First Amendment, the
9 court turns to whether a permanent injunction is appropriate. To
10 obtain a permanent injunction, a plaintiff "must demonstrate: (1)
11 that it has suffered an irreparable injury; (2) that remedies
12 available at law, such as monetary damages, are inadequate to
13 compensate for that injury; (3) that, considering the balance of
14 hardships between the plaintiff and defendant, a remedy in equity
15 is warranted; and (4) that the public interest would not be
16 disserved by a permanent injunction." eBay Inc. v. MercExchange,
17 L.L.C., 547 U.S. 388, 391 (2006). The standard for a permanent
18 injunction is essentially the same as for a preliminary
19 injunction, with the exception that the plaintiff must show
20 actual success, rather than a likelihood of success. See Amoco
21 Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987).
22 Here, the court's analysis of the permanent injunction factors
23 largely repeats its analysis from its order granting a

24
25 ²¹ The Attorney General also seeks summary judgment as to
26 whether Proposition 65' warning requirement is unconstitutionally
27 vague. However, the Amended Complaint does not assert a void for
28 vagueness claim, and defendant did not assert a counterclaim
seeking declaratory relief as to whether the warning requirement
was unconstitutionally vague. Accordingly, the court will deny
defendant's cross motion for summary judgment as to vagueness.

1 preliminary injunction.

2 Because “[t]he loss of First Amendment freedoms, for
3 even minimal periods of time, unquestionably constitutes
4 irreparable injury,” Valle Del Sol Inc. v. Whiting, 709 F.3d 808,
5 828 (9th Cir. 2013) (quoting Elrod v. Burns, 427 U.S. 347, 373
6 (1976)), and plaintiffs have prevailed on their First Amendment
7 claim, they have established that they will likely suffer
8 irreparable harm for which there are no adequate legal remedies
9 if the warning requirement is not enjoined as to glyphosate.²²

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

17 The court recognizes that the state has a significant
18 interest in protecting its citizens and informing them of
19 possible health risks, but the Ninth Circuit has “consistently
20 recognized the significant public interest in upholding First
21 Amendment principles.” Doe v. Harris, 772 F.3d 563, 583 (9th
22

23 ²² Plaintiffs also contend that the warning requirement
24 will cause several other irreparable harms, including damage to
25 the reputation and goodwill of plaintiffs and their products,
26 loss of customers, and disruption to supply chains and existing
27 business practices. Plaintiffs further claim that they have no
28 legal remedies because California is not subject to damages under
sovereign immunity. Because the court finds that plaintiffs have
shown a likelihood of irreparable harm and inadequate legal
remedies based on the infringement of their First Amendment
rights, the court need not specifically address these arguments.

1 Cir. 2014) (quoting Sammartano v. First Judicial Dist. Court, 303
2 F.3d 959, 974 (9th Cir. 2002)). Further, California “has no
3 legitimate interest in enforcing an unconstitutional” law. See
4 KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1272 (11th
5 Cir. 2006). Providing misleading or false labels to consumers
6 also undermines California’s interest in accurately informing its
7 citizens of health risks at the expense of plaintiffs’ First
8 Amendment rights. Accordingly, the balance of equities and
9 public interest weigh in favor of permanently enjoining
10 Proposition 65’s warning requirement for glyphosate.

11 As plaintiffs have prevailed on the merits of their
12 First Amendment claim, are likely to suffer irreparable harm
13 absent an injunction, and have shown that the balance of equities
14 and public interest favor an injunction, the court will grant
15 plaintiffs’ request to permanently enjoin Proposition 65’s
16 warning requirement as to glyphosate.²³

17 IT IS THEREFORE ORDERED that plaintiffs’ Motion for
18 Summary Judgment (Docket No. 117) be, and the same hereby is,

19 ²³ Plaintiffs’ Notice of Motion and proposed order also
20 request that the court permanently enjoin defendant or anyone in
21 privity with him from threatening to enforce Proposition 65’s
22 warning requirement for glyphosate. (See Notice of Mot. Summ. J.
23 at 1 (Docket No. 117); Proposed Order (Docket No. 1117-79); see
24 also Am. Compl. Prayer for Relief ¶ 4) (requesting injunction
25 against anyone enforcing or threatening to enforce the warning
26 requirement as to glyphosate.) This request may have been
27 inadvertently included, as it does not appear to have been
28 mentioned in plaintiffs’ memorandum in support of the motion or
plaintiffs’ reply. More importantly, plaintiffs provide no
support for the contention that threats of enforcement should be
enjoined, and such request raises concerns about the First
Amendment rights of defendant and those in privity with him.
Accordingly, the court’s injunction does not address threats of
enforcement of Proposition 65.

1 GRANTED. Defendant's Cross Motion for Summary Judgment (Docket
2 No. 124) is DENIED.

3 IT IS FURTHER ORDERED that plaintiffs' request for a
4 permanent injunction enjoining the warning requirement of
5 California Health & Safety Code § 25249.6 as to glyphosate is
6 GRANTED. Defendant, his agents and employees, all persons or
7 entities in privity with him, and anyone acting in concert with
8 him are hereby ENJOINED from enforcing as against plaintiffs,
9 plaintiffs' members, and all persons represented by plaintiffs,
10 California Health & Safety Code § 25249.6's requirement that any
11 person in the course of doing business provide a clear and
12 reasonable warning before exposing any individual to glyphosate.

13 Dated: June 22, 2020

14 

15 **WILLIAM B. SHUBB**
16 **UNITED STATES DISTRICT JUDGE**
17
18
19
20
21
22
23
24
25
26
27
28