

## **Ninth Circuit Finds Glyphosate Prop 65 Warning Unconstitutional**

Article By:

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On November 7, 2023, the Ninth Circuit affirmed the District Court for the Eastern District of California's (District Court) June 22, 2020, decision granting summary judgment in favor of Plaintiffs. The Ninth Circuit entered a permanent injunction enjoining the California Attorney General from enforcing Proposition 65's (Prop 65) carcinogen warning requirement for the herbicide glyphosate. *National Ass'n of Wheat Growers et al. v. Bonta* ([Opinion](#)). The Ninth Circuit found that requiring the warning was unconstitutional as a violation of First Amendment free speech rights.

Glyphosate was listed under Prop 65, to be effective July 7, 2017, based on the International Agency for Research on Cancer's (IARC) identification of glyphosate as "probably carcinogenic" to humans. The listing was challenged by a coalition of agricultural producers and business entities (Plaintiffs) that argued, in part, that the Prop 65 warning violated their First Amendment rights to be free from compelled speech. On February 26, 2018, the District Court issued a preliminary injunction preventing the California Attorney General from enforcing Prop 65 warning requirements for glyphosate. On June 22, 2020, the District Court issued a permanent injunction in favor of the Plaintiffs.

In reviewing the District Court's decision, the Ninth Circuit stated that

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there are two levels of scrutiny regarding compelled commercial speech. The first is “intermediate” scrutiny that requires the government to “directly advance” a “substantial” governmental interest, and the means chosen must not be “more extensive than necessary.” Opinion at 27 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 577 (1980)). The second is a lower standard, referred to as an exception for compelled speech, that requires the compelled speech be “reasonably related” to a substantial government interest and not be “unjustified or unduly burdensome.” *Id.* (citing *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626 (1985)). This exception or lower scrutiny standard is applicable only when the compelled commercial speech is “purely factual and uncontroversial.”

The Ninth Circuit affirmed the District Court’s determination that the appropriate level of scrutiny was higher in this case because the compelled commercial speech was not “purely factual and uncontroversial.” Even after considering a **glyphosate-specific safe harbor Prop 65 warning** that the California Office of Environmental Health Hazard Assessment (OEHHA) issued in September 2022 in an attempt to address the District Court’s concerns, the Ninth Circuit found the warning remained “false and misleading” and controversial. That September 2022 warning would have required “**CALIFORNIA PROPOSITION 65 WARNING**” in capital letters and bold print, and the following:

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The Ninth Circuit’s Opinion states that even though this warning omits the language that glyphosate is “known to the state of California to cause cancer” and even though OEHHA attempted to address the District Court’s concerns that the previous warnings improperly conveyed an equal consensus among scientific regulators, the resulting warning does not “alter the overall message.” Opinion at 39. Specifically, the Ninth Circuit found use of the term “risk” to be

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“factually misleading because a reasonable person reading it would understand this to mean that glyphosate poses a *risk* not a *hazard*.” *Id.* at 39-40. The Ninth Circuit states:

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*Id.* at 13-14. The Prop 65 warning also was controversial “because (1) of the unresolved scientific debate over glyphosate’s carcinogenicity, and (2) it still requires Plaintiffs to alter their desired message for the State’s preferred message that glyphosate presents a health risk.” *Id.* at 40.

Under the higher “intermediate” level of scrutiny, the Ninth Circuit stated the standard is that the government may compel a disclosure of commercial speech “only if (1) it directly advances a substantial governmental interest, and (2) the restriction is not more extensive than necessary to serve that interest.” *Id.* at 42. In its Opinion, while acknowledging California’s interest to preserve the health of its citizens, the Ninth Circuit found that “compelling sellers to warn consumers of a potential ‘risk’ never confirmed by any regulatory body—or of a hazard not ‘known’ to more than a small subset of the scientific community—does not directly advance that interest.” *Id.* In addition, there were other means for OEHHA to promote its views such as “post[ing] information about glyphosate on its own website or conduct[ing] an advertising campaign.” *Id.*

The Ninth Circuit also denied OEHHA’s request for a remand to the District Court for consideration of the adequacy of its Prop 65 warning, finding remand unnecessary since the Ninth Circuit was able to review the entire record and the issues had been fully briefed and understood. *Id.* at 40.

This is not the only case successfully challenging Prop 65 warnings on First Amendment grounds, as courts also have found that warnings related to acrylamide in food and beverage products violate First

Amendment rights. See *California Chamber of Commerce v. Council for Educ. and Research on Toxics*, No. 21-15745 (9th Cir. Mar. 17, 2022). These are important cases with implications for companies facing Prop 65 warning requirements for other substances where the underlying scientific basis for listing also may be unclear and controversial.

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