

# States Support Plaintiffs Lawsuit that Prop 65 Warning for Products Containing Glyphosate Violates First Amendment

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On January 2, 2018, State Attorneys General from eleven states (Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, North Dakota, Oklahoma, South Dakota, and Wisconsin) (collectively the States) filed a friend of the court brief in *Nat'l Ass'n of Wheat Growers v. Zeise*, E.D. Cal. (No. 2:17-cv-02401) (Brief), a case challenging California Office of Environmental Health Hazard Assessment's (OEHHA) decision to list glyphosate as a carcinogen under Proposition 65 (Prop 65).

OEHHA listed glyphosate under Prop 65 on March 28, 2017, but the effective date of the listing was delayed until July 7, 2017, following a decision from the Fifth District Court of Appeals that denied Monsanto's request for a stay of such listing. OEHHA stated that its listing was required under its Labor Code listing mechanism, which OEHHA states requires it to list under Prop 65 certain substances identified by the International Agency for Research on Cancer (IARC) as known to cause cancer. Information about Monsanto's earlier challenge is available in our blog item [California Court Tentatively Dismisses Monsanto's Lawsuit Against OEHHA to Block Addition of Glyphosate to Proposition 65 List](#).

## Background

On November 15, 2017, a nationwide coalition of agricultural producers and business entities (including Monsanto) filed a Complaint against OEHHA on the grounds that its listing of glyphosate as a carcinogen and the Prop 65 warning requirement triggered by that listing: (1) violate the First Amendment of the U.S. Constitution by compelling Plaintiffs and other entities to make false, misleading, and highly controversial statements about their products; and (2) violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution because OEHHA's actions are not rationally related to any legitimate state interest; and (3) violate the Supremacy Clause of the U.S. Constitution by conflicting with, and being preempted by, the Federal Food, Drug, and Cosmetic Act (FFDCA). Plaintiffs filed an amended Complaint on December 5, 2017.

On December 6, 2017, Plaintiffs also filed a motion for preliminary injunction (Motion), arguing that they are likely to succeed on the merits of their claim that the Prop 65 listing violates the First Amendment. The Motion argues that the warning will fail under any level of constitutional scrutiny,

whether it is considered under “laws regulating commercial speech that generally receive at least intermediate scrutiny, *i.e.*, they are prohibited if they do not directly and materially advance the government’s interest, or are more extensive than necessary,” or laws that require disclosure of information in connection with commercial transactions, which “are permissible only if the compelled disclosure is of information that is purely factual, uncontroversially accurate, reasonably related to a substantial government purpose, and not unduly burdensome or chilling. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).” Motion at 23-36; Complaint at 26-28.

In agreeing with Plaintiffs that OEHHA’s Prop 65 listing of glyphosate forces businesses to issue “false and misleading” statements about their products and asking the court to grant the Plaintiffs’ motion for a temporary restraining order and preliminary injunction, the Attorneys General state in their Brief:

- The First Amendment injuries identified by Plaintiffs are heightened because they adversely impact the sovereign interests of other States in at least two ways. First, by *requiring* false or misleading statements about glyphosate products, California’s speech mandate imposes confusing and potentially inconsistent obligations on nonresident businesses that are bound by other States’ consumer-protection laws *not* to make false and misleading statements about their own products. Second, the speech mandate impairs consumer-protection efforts of the States that require sensible health-and-safety disclosures by contributing to the well-known phenomenon of disclosure fatigue.

Brief at 4-5 (emphasis in original).

The States also argue that while there may be a presumption to California’s favor that its enforcement of its duly enacted laws reflects the public interest, the Court also “should weigh heavily the fact that California’s mandate interferes with federalism and the sovereign interests of other States when assessing the public interest factor.” Brief at 10.

## Discussion

This case raises significant constitutional and preemption arguments in a factual context that many in industry believe compelling. It will be closely monitored.

OEHHA answered Plaintiff’s First Amended Complaint on January 9, 2018. It is expected to file its opposition to Plaintiff’s Motion for a Preliminary Injunction by **January 22, 2018**, and file its response to the two amicus curiae briefs filed on behalf of Plaintiffs by **January 26, 2018**. Following deadlines for Plaintiffs to file any reply in support of their motion for a preliminary injunction and any responses to amicus curiae briefs in support of Defendants, a hearing on Plaintiff’s motion will be held on **February 20, 2018**.

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National Law Review, Volumess VIII, Number 17

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