

## First Amendment Constraints on Proposition 65

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*The Safe Drinking Water and Toxic Enforcement Act of 1986, better known as Proposition 65, requires businesses to warn individuals before exposing them to chemicals that are “known to the State of California” to cause cancer or reproductive harm. The law endured for more than three decades without any successful free speech challenges to its compelled warnings. However, the legal landscape fundamentally changed in 2018 when the Supreme Court seemingly expanded First Amendment protections for professional speech in National Institute of Family and Life Advocates v. Becerra. Justice Thomas’s majority opinion made clear that laws compelling commercial speech are subject to heightened scrutiny unless the compelled speech is purely factual, noncontroversial, and not unduly burdensome.*

*Business groups, eternally opposed to placing cancer warnings on their products, seized upon the new legal framework and successfully challenged the warning requirements for two of Proposition 65’s most controversial listed chemicals—acrylamide and glyphosate. This Note examines the fate of Proposition 65 in the aftermath of California Chamber of Commerce v. Council for Education & Research on Toxics, a 2022 Ninth Circuit case that affirmed a preliminary injunction against enforcement of the acrylamide cancer warning. While future First Amendment challenges may lead to injunctions against some existing warnings and restrict Proposition 65’s ability to respond to chemicals of emerging concern, this Note concludes that the voter-enacted law will continue to play a significant role in safeguarding public health.*

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## INTRODUCTION

Proponents of environmental health have long championed the precautionary principle in law and public policy.<sup>1</sup> The precautionary principle suggests that the government should act in situations of uncertainty where there is potential risk of irreversible or catastrophic harm.<sup>2</sup> For instance, even if a chemical's risk of causing cancer is ambiguous, public health advocates urge the government to nonetheless limit the public's exposure.

Whatever public health value the precautionary principle may provide, the First Amendment restricts its application in laws that compel businesses to

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1. See, e.g., CAROLYN RAFFENSPERGER & JOEL A. TICKNER, PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE 4 (1999) (tracing the history of the precautionary principle to early 1970s West Germany as a basis for water protection law).

2. See Daniel A. Farber, *Uncertainty*, 99 GEO. L.J. 901, 914 (2011).

provide warnings. Recent challenges to acrylamide<sup>3</sup> and glyphosate<sup>4</sup> warnings under California’s Proposition 65<sup>5</sup> make clear that where there is substantial scientific uncertainty regarding the harmful nature of a chemical, the government cannot force a business to voice one side of the debate, even for a legitimate public health purpose.<sup>6</sup>

While the evidence supporting acrylamide and glyphosate warnings is particularly controversial,<sup>7</sup> uncertainty in science is often a matter of degree—more complicated than mere presence or absence. Consequently, there is tension between the uncertainty inherent in science and the constitutional requirement that compelled commercial speech be purely factual and noncontroversial (or else survive heightened scrutiny).<sup>8</sup> Where courts draw the line could have important ramifications for Proposition 65. If compelled exposure warnings require proof of harm in humans, Proposition 65’s ability to respond to chemicals of emerging concern will be restricted and some existing warnings may be enjoined.<sup>9</sup>

This Note examines the fate of Proposition 65 in the wake of *California Chamber of Commerce v. Council for Education and Research on Toxics*,<sup>10</sup> a 2022 Ninth Circuit case that affirmed a preliminary injunction against enforcement of the acrylamide cancer warning.<sup>11</sup> The Ninth Circuit’s decision

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3. *Acrylamide Questions and Answers*, FDA, <https://www.fda.gov/food/process-contaminants-food/acrylamide-questions-and-answers> (last visited Feb. 24, 2023); *Acrylamide*, CAL. OFF. OF ENV’T HEALTH HAZARD ASSESSMENT, <https://www.p65warnings.ca.gov/chemicals/acrylamide> (last visited Feb. 24, 2023) (Acrylamide is a chemical that forms naturally in certain plant-based foods during cooking or heating processes. It was added to the Proposition 65 list as causing cancer in 1990, twelve years before it was discovered to be widely present in cooked foods.).

4. *Glyphosate*, EPA, <https://www.p65warnings.ca.gov/fact-sheets/glyphosate> (last visited Feb. 24, 2023) (Glyphosate is a widely used herbicide in both agricultural and non-agricultural settings.). *Glyphosate*, CAL. OFF. OF ENV’T. HEALTH HAZARD ASSESSMENT, <https://www.p65warnings.ca.gov/chemicals/glyphosate> (last visited Feb. 24, 2023) (Glyphosate was added to the Proposition 65 list for causing cancer in 2017.).

5. Proposition 65 is formally titled “The Safe Drinking Water and Toxic Enforcement Act of 1986.”

6. See *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 477–80 (9th Cir. 2022); *Nat’l Ass’n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1259–64 (E.D. Cal. 2020).

7. Acrylamide has been shown to cause cancer in animals at high doses, however there is little epidemiological evidence linking dietary acrylamide to cancer in humans. *Acrylamide*, FDA, <https://www.fda.gov/food/process-contaminants-food/acrylamide> (last visited Feb. 24, 2023). Likewise, EPA has found that there is “no evidence” that glyphosate causes cancer in humans. EPA, *supra* note 4.

8. See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (noting the Supreme Court has applied deferential review only to compelled commercial speech laws that “require professionals to disclose factual, noncontroversial information”).

9. See *infra* Subparts II.A & II.B (describing how changes in the law may make it more difficult for Proposition 65 to address chemicals of emerging concern and withstand challenges to certain existing warnings).

10. *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468 (9th Cir. 2022).

11. *Id.* at 472.

came less than two years after a district court enjoined the glyphosate warning requirement.<sup>12</sup> Part I outlines the existing legal framework surrounding Proposition 65 and compelled warnings, including the fundamental characteristics of the law, key cases on compelled commercial speech, and state agency efforts to address First Amendment issues through regulation. In Part II, I discuss the likely effects of First Amendment challenges on Proposition 65's reach and public health impact. I conclude by noting that even if First Amendment challenges weaken Proposition 65's warning provision, the law will remain a powerful public health tool.

## I. PROPOSITION 65 AND COMPELLED SPEECH

### A. *Proposition 65 Mechanics*

Proposition 65 is perhaps best known for requiring businesses to warn individuals before exposing them to chemicals “known to the state” to cause cancer or reproductive toxicity.<sup>13</sup> Whether a chemical is “known to the state” to cause cancer or reproductive harm depends on a complex, four-part legal definition. A chemical is added to the Proposition 65 list if (1) the chemical is referenced in California Labor Code §§ 6382(b)(1) & (d), which include human or animal carcinogens identified by the International Agency for Research on Cancer (IARC) and substances within the scope of the federal Hazard Communication Standard;<sup>14</sup> (2) the state's qualified experts find that the chemical has been clearly shown—through scientifically valid testing, according to generally accepted principles—to cause cancer or reproductive toxicity; (3) an authoritative body recognized by the state's qualified experts has formally identified the chemical as causing cancer or reproductive toxicity; or (4) a state or federal government agency has formally required the chemical to be labeled or identified as causing cancer or reproductive toxicity.<sup>15</sup>

Businesses must provide warnings only where exposures exceed a certain level of risk,<sup>16</sup> known as the “safe harbor level.” For listed carcinogens, the no significant risk level is generally one excess cancer case per an exposed population of 100,000.<sup>17</sup> For reproductive toxicants, the maximum allowable dose level is one one-thousandth of the no observable effect level.<sup>18</sup> The Office of Environmental Health Hazard Assessment (OEHHA), the state agency

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12. *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1265–66 (E.D. Cal. 2020) (holding Proposition 65's warning requirement as to glyphosate violated the First Amendment).

13. CAL. HEALTH & SAFETY CODE § 25249.6 (West 2023).

14. *Id.* § 25249.8(a); CAL. LAB. CODE §§ 6382(b)(1) & (d) (West 2023).

15. CAL. HEALTH & SAFETY CODE § 25249.8(b) (West 2023).

16. *See id.* § 25249.10(c).

17. CAL. CODE REGS. tit. 27 § 25703(b) (2023). The no observable effect level is defined as “the maximum level of exposure at which a chemical has no observable reproductive effect.” *Id.* § 25801(c).

18. CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 2023).

responsible for implementing Proposition 65,<sup>19</sup> develops safe harbor levels for some—but not all—listed chemicals.<sup>20</sup> Consistent with other features of Proposition 65 that empower plaintiffs,<sup>21</sup> the law places the burden of showing that an exposure is below the safe harbor level on the defendant business.<sup>22</sup>

Proposition 65 is backed by a powerful enforcement scheme. Any citizen can sue to enforce Proposition 65 “in the public interest,” so long as the alleged violation is not already being prosecuted by the California Attorney General, a district attorney, a city attorney, or a prosecutor.<sup>23</sup> Private plaintiffs are eligible to receive a quarter of any civil penalties awarded.<sup>24</sup> These penalties can amount to a substantial bounty as each individual unit of a consumer product lacking a required warning may constitute a separate violation,<sup>25</sup> with penalties as high as \$2,500 per violation per day.<sup>26</sup> Although the warnings and safe harbor levels promulgated by OEHHA are technically non-mandatory, the law’s citizen suit provision effectively deters businesses from deviating from the “guidance.”<sup>27</sup>

Less visible (and less litigated) is Proposition 65’s additional provision prohibiting the discharge of listed chemicals into drinking water sources.<sup>28</sup> Violations under this provision are generally harder to prove and less lucrative for plaintiffs.<sup>29</sup> The inclusion of the drinking water provision in Proposition 65 may have stemmed from a political strategy to increase support for the ballot measure. David Roe, a primary author of Proposition 65, advised using the words

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19. *What We Do*, CAL. OFF. OF ENV’T HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/about/what-we-do> (last visited Feb. 24, 2023).

20. *See, e.g. The Proposition 65 List*, CAL. OFF. OF ENV’T HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/proposition-65-list> (last visited Feb. 24, 2023). Where OEHHA has not established a safe harbor level, businesses are required to demonstrate that exposures are below significant risk levels or else provide a warning. *What if there is no safe harbor level?*, CAL. OFF. OF ENV’T. HEALTH HAZARD ASSESSMENT, <https://www.p65warnings.ca.gov/faq/businesses/what-if-there-no-safe-harbor-level> (last visited Feb. 24, 2023).

21. *See* Claudia Polsky & Megan Schwarzman, *The Hidden Success of a Conspicuous Law: Proposition 65 and the Reduction of Toxic Chemical Exposures*, 47 *ECOLOGY L.Q.* 823, 833 (2020) (observing that Proposition 65 empowers plaintiffs by “broadly deputizing citizens to sue for violations” and financially incentivizing them with attorneys’ fees and 25 percent of the penalty amount).

22. *See* CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 2023).

23. *Id.* § 25249.7(d)(2).

24. *Id.* § 25249.7(k)(II)(B)(ii).

25. Polsky & Schwarzman, *supra* note 21, at 849.

26. CAL. HEALTH & SAFETY CODE § 25249.7(b)(1) (West 2023).

27. *See* Polsky & Schwarzman, *supra* note 21, at n.21 (noting that those who deviate from the standard warning language are likely to be challenged by “bounty hunters”).

28. CAL. HEALTH & SAFETY CODE § 25249.5 (West 2023). *See* Polsky & Schwarzman, *supra* note 21, at 849–50.

29. *See* Polsky & Schwarzman, *supra* note 21, at 849–50 (noting that because Proposition 65 specifies a \$2,500 maximum penalty per violation, “[a] full day of toxic discharge to drinking water from a facility may constitute only a single violation,” whereas the failure to warn for exposures from consumer products may constitute violations for each individual product).

“drinking water” or “children” “[i]f you want to get the public to pay attention to an issue.”<sup>30</sup>

Regardless of its origins, nonprofit organizations have strategically invoked the discharge prohibition to advance public health goals. For instance, in 2008, the Center for Environmental Health sued four major manufacturers of lead wheel weights under the theory that lead from these products eventually migrated into surface waters at concentrations exceeding the safe harbor level.<sup>31</sup> The resulting consent judgment not only prompted major industry players to phase out lead in wheel weights but also helped trigger legislation to restrict the use of lead statewide.<sup>32</sup> While Proposition 65’s discharge prohibition has unquestionably had some public health success, the law’s warning provision has had an even further-reaching impact on Californians’ exposure to listed chemicals.

### B. Public Health Impact of the Proposition 65 Warning Provision

As a right-to-know law, Proposition 65’s most obvious effect is to inform consumers about potential exposures to carcinogens and reproductive toxicants.<sup>33</sup> Much of the criticism directed at Proposition 65 focuses on this feature.<sup>34</sup> Detractors claim that Californians are desensitized to pervasive warnings,<sup>35</sup> which appear everywhere from grocery stores to parking garages. Moreover, individuals who may be swayed by the warnings may not have the time or financial resources to avoid exposures. However valid these critiques may be, focusing solely on desensitization and consumer choice issues tends to obscure other powerful mechanisms through which Proposition 65 reduces the public’s exposure to listed chemicals.

Many companies reformulate their products to remove Proposition 65 listed chemicals and avoid warnings altogether.<sup>36</sup> Even if some portion of California consumers disregards Proposition 65 warnings, no business “want[s] to bear the particularized risk that a warning on its own product might prove damaging and

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30. *Id.* at 848.

31. *Id.* at 850–52.

32. *Id.* at 851–52.

33. According to OEHHA, Proposition 65 warnings “enable[] Californians to make informed decisions about their exposures to [listed] chemicals.” *About Proposition 65*, CAL. OFF. OF ENV’T HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/about-proposition-65> (last visited Feb. 24, 2023).

34. See Michael Barsa, *California’s Proposition 65 and the Limits of Information Economics*, 49 STAN. L. REV. 1223, 1226 (1997) (“Critics have strongly attacked Proposition 65 for failing to provide accurate and understandable warnings. If judged purely from an information economics standpoint, much of this criticism is warranted.”)

35. See e.g., *Should I worry about Prop 65 Warnings on Products?*, BETTER GOODS (Apr. 2023), <https://bettergoods.org/prop-65-warning-should-i-worry> (last visited Mar. 25, 2023) (noting “[t]he widespread use of the label has created something of a ‘boy who cried wolf’ scenario . . . [I]t can cause you to just ignore [the warnings] altogether”).

36. See Polsky & Schwarzman, *supra* note 21, at 870–78.

lead to market deselection.”<sup>37</sup> Many businesses incorporate the Proposition 65 list into “restricted substances lists” (RSLs) as part of their internal operating procedures.<sup>38</sup> RSLs typically prohibit or limit the use of potentially harmful chemicals in products, except where no safer alternatives are available.<sup>39</sup> Thus, Proposition 65 indirectly reduces the public’s exposure to listed chemicals even before the consumer is presented with a choice. Although largely invisible and challenging to measure, business decisions—sparked by fear of litigation and the stigma of cancer warnings—to reduce or eliminate Proposition 65 chemicals may represent some of the law’s most effective accomplishments.

Proposition 65 also places tremendous financial pressure on businesses to understand what chemicals are in their products and ensure that they provide adequate warnings. As mentioned, failing to warn can result in penalties of up to \$2,500 per violation per day.<sup>40</sup> This forces businesses to communicate with their supply chains to determine whether Proposition 65 chemicals are present in their products. Suppliers who fail to identify Proposition 65 chemicals risk losing their contracts, particularly with major industry players.<sup>41</sup>

In addition to its influence on supply chains and commerce, Proposition 65 has served as the basis for new chemicals regulation, and its list has been incorporated into other regulatory regimes. For instance, the California State Legislature codified lead limits included in a Proposition 65 consent judgment as part of the Lead-Containing Jewelry Law of 2006.<sup>42</sup> Furthermore, four California laws consult the Proposition 65 list, including the California Safe Cosmetics Act of 2005, the Safer Consumer Products Law of 2008, the Cleaning Product Right to Know Act of 2017, and the Cosmetic and Fragrance Ingredient Right to Know Act of 2020.<sup>43</sup> Likewise, programs regulating chemicals in children’s toys in Washington, Maine, Minnesota, Oregon, and New York all reference the Proposition 65 list.<sup>44</sup>

Finally, public health groups and the California Attorney General have used Proposition 65 litigation to enter settlements and consent judgments with violators to improve environmental health. For instance, consent judgments

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37. *Id.* at 871.

38. *See id.*, at 874–78.

39. *See e.g.*, 2017 SUSTAINABILITY REPORT, SC JOHNSON 1, 13 (2017), <https://corp-uc1.azureedge.net/-/media/sc-johnson/our-purpose/sustainability-reports/2017/scjohnson2017sustainabilityreport.pdf> (last visited Mar. 25, 2023) (noting that “SC Johnson maintains a list of ingredients that are not allowed or are only allowed at a very low level in products” as part of their Greenlist™ program).

40. CAL. HEALTH & SAFETY CODE § 25249.7(b)(1) (West 2023).

41. *See* Polsky & Schwarzman, *supra* note 21, at 874.

42. *Id.* at 842–44.

43. *Id.* at 862–67.

44. *Id.* at 867–70.

arising from Proposition 65 litigation have included terms aimed at reducing diesel emissions from school buses,<sup>45</sup> operations at the Ports of Los Angeles and Long Beach,<sup>46</sup> and trucks operated by three major grocery store chains.<sup>47</sup>

While Proposition 65 has reduced Californians' exposure to listed chemicals in many instances, recent First Amendment challenges to Proposition 65 warnings threaten to reduce its public health impact.

### C. *Legal Standard for Compelled Commercial Speech*

The First Amendment, applied to the States through the Fourteenth Amendment, declares that "Congress shall make no law . . . abridging the freedom of speech."<sup>48</sup> In general, content-based speech regulations<sup>49</sup> survive constitutional challenges only if they meet strict scrutiny, meaning they must be narrowly tailored to serve a compelling government interest.<sup>50</sup> Until the Supreme Court's 2018 decision in *National Institute of Family & Life Advocates (NIFLA) v. Becerra*, some courts carved out exceptions to this strict scrutiny standard for "professional speech."<sup>51</sup> In his majority opinion, Justice Thomas made clear that the government was prohibited from imposing content-based regulations on speech without "persuasive evidence . . . of a long (if heretofore unrecognized) tradition."<sup>52</sup> Professional speech, according to the Court, was not a part of this tradition.<sup>53</sup>

On the other hand, *NIFLA* noted that laws compelling "commercial speech" would be upheld if the required disclosure met the standard articulated in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.<sup>54</sup> Under the *Zauderer* standard as applied in *NIFLA*, compelled commercial speech survives First Amendment challenge if it is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.<sup>55</sup>

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45. See Stipulated Judgment at 3–4, *Env't L. Found. v. Atlantic Express of L.A.*, No. BC401484 (Cal. Super. Ct. May 29, 2009) (requiring school bus operators in Los Angeles and Long Beach to retrofit or replace their existing fleet of pre-2003 model year diesel-fueled school buses).

46. See Consent Judgment at 4–10, *People v. APM Terminals Pac., Ltd.*, No. BC464497 (Cal. Super. Ct. June 29, 2011) (requiring defendants to implement supplemental environmental projects designed to reduce diesel exposures and make payments to the Clean Trucks Program).

47. See Consent Judgment at 11–12, *People v. Lucky Stores, Inc.*, No. BC190079 (Cal. Super. Ct. Apr. 27, 2000) (requiring defendants to adopt a rule that all diesel-powered vehicles at or visiting their facilities not idle for more than three minutes).

48. U.S. CONST. amend. I.

49. Content-based laws are "those that target speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

50. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

51. *Id.*

52. *Id.* at 2372 (quoting *U.S. v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion)).

53. *Id.*

54. See *id.*; *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626 (1985).

55. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. at 2372.



Where compelled commercial speech fails the *Zauderer* test, the Ninth Circuit has left open the possibility that “the government could get a ‘second bite at the apple’ by showing that even if controversial, the compelled speech passe[s] *Central Hudson*’s intermediate scrutiny hurdle.”<sup>56</sup> However, in a footnote that seems irreconcilable with this “second bite” assertion, the Ninth Circuit acknowledged that it previously found “[the Supreme] Court held that *Central Hudson*’s intermediate scrutiny test does not apply to compelled, as distinct from restricted or prohibited, commercial speech.”<sup>57</sup>

Although it remains unsettled whether *Central Hudson*’s intermediate scrutiny standard ever applies to compelled commercial speech, only in rare circumstances would compelled speech fail the more relaxed *Zauderer* standard but satisfy *Central Hudson*’s heightened standard. Under *Central Hudson*, the government’s action must “directly advance the state interest involved” and cannot survive “if the governmental interest could be served as well by a more limited restriction on commercial speech.”<sup>58</sup> Conceivably, compelled speech could fail the *Zauderer* test as factually accurate but controversial yet still satisfy the *Central Hudson* test as no more extensive than necessary to directly advance a substantial government interest. Whether compelled speech of this nature is constitutional is “[a] question for another day,” according to the Ninth Circuit.<sup>59</sup>

The constitutional framework that emerges from *NIFLA*, *Zauderer*, and (to some degree) *Central Hudson* underlies the courts’ analyses in compelled commercial speech cases, including challenges to Proposition 65 warnings.

#### D. First Amendment Challenge to Proposition 65 Warnings

Business groups have succeeded in enjoining Proposition 65 warnings on First Amendment grounds only in the past few years. In March 2022, the Ninth Circuit upheld a preliminary injunction barring enforcement of the acrylamide warning.<sup>60</sup> About a year and a half earlier, a federal district court held that the warning requirement for glyphosate violated the First Amendment.<sup>61</sup> So far, acrylamide and glyphosate are the only Proposition 65 chemicals with warnings deemed impermissible under the First Amendment.

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56. Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics, 29 F.4th 468, 480 (9th Cir. 2022).

57. See *id.* at n.14.

58. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 564 (1980).

59. Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics, 29 F.4th at 480, n.14.

60. *Id.* at 472.

61. Nat’l Ass’n of Wheat Growers v. Becerra, 468 F. Supp. 3d 1247, 1265 (E.D. Cal. 2020).

### 1. First Amendment Challenge to the Acrylamide Warning

Acrylamide is recognized as one of the most controversial Proposition 65 listings. In contrast to chemicals intentionally added to foods or consumer products, acrylamide forms naturally during cooking and heating processes.<sup>62</sup> It is famously abundant in coffee.<sup>63</sup> Although listed as a Proposition 65 known carcinogen, evidence linking dietary acrylamide to cancer is mixed.<sup>64</sup> The scientific debate on acrylamide carcinogenicity made the chemical a prime target for business groups, which argued that the cancer warnings for acrylamide were unconstitutional compelled speech.

In *California Chamber of Commerce v. Council for Education and Research on Toxics (CalChamber)*,<sup>65</sup> the California Chamber of Commerce (CalChamber), a nonprofit business association, filed a complaint against the California Attorney General arguing that the Proposition 65 warning requirement for acrylamide violated its members' First Amendment right "to not be compelled to place false and misleading acrylamide warnings on their food products."<sup>66</sup> Expert declarations submitted to the court highlighted the lack of "consistent or reliable evidence that acrylamide increases the risk of any type of cancer in humans" and further contended that toxicological studies on experimental animals were "not relevant to humans at real-world levels of exposure."<sup>67</sup> CalChamber argued that by forcing businesses to convey the controversial message that dietary acrylamide exposure increases the risk of cancer, Proposition 65 infringed on the First Amendment rights of businesses.<sup>68</sup>

This argument was convincing to the district court, which granted a preliminary injunction barring anyone from "fil[ing] or prosecut[ing] a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products."<sup>69</sup> The district court reasoned that CalChamber was likely to succeed on the merits because the State of California and the Council for Education and Research on Toxics, which intervened in the

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62. See *Acrylamide Fact Sheet*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/biomonitoring/Acrylamide\\_FactSheet.html](https://www.cdc.gov/biomonitoring/Acrylamide_FactSheet.html) (last visited Mar. 25, 2023) (explaining that acrylamide "form[s] when people cook carbohydrates (starchy foods) at very high temperatures").

63. In 2019, OEHHA promulgated a regulation exempting coffee from acrylamide warnings: "Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer." CAL. CODE REGS. tit. 27, § 25704 (West 2023).

64. See discussion *supra* note 7.

65. Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics, 29 F.4th 468, 474 (9th Cir. 2022).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

case, had failed to show that the Proposition 65 acrylamide warning was “purely factual and uncontroversial” under *Zauderer*.<sup>70</sup>

Following an appeal by defendant intervenor, the Council for Education and Research on Toxics (but not by the California Attorney General), the Ninth Circuit affirmed the district court’s preliminary injunction.<sup>71</sup> The Ninth Circuit held that the record supported the district court’s findings: dozens of epidemiological studies failed to link cancer in humans to acrylamide exposure through food.<sup>72</sup> Thus, the safe harbor warning was controversial “because of the scientific debate over whether acrylamide in food causes cancer in humans.”<sup>73</sup>

Likewise, the court found that the lower court did not abuse its discretion in finding the acrylamide warning “misleading” and, therefore, untrue.<sup>74</sup> Critically, the court found that the phrase “known to the State of California to cause cancer” was misleading because a reasonable interpretation of the warning would be that exposure to acrylamide is known to the state to increase one’s cancer risk.<sup>75</sup> However, the word “known” in the context of Proposition 65 “carries a complex legal meaning that consumers would not glean from the warning without context.”<sup>76</sup> Consequently, the wording of the warning was misleading.<sup>77</sup>

Finally, the Ninth Circuit upheld the conclusion that Proposition 65’s enforcement regime unduly burdened manufacturers who used alternative warnings.<sup>78</sup> The court found that Proposition 65’s warning requirement for acrylamide failed to satisfy the “not unduly burdensome” prong of the *Zauderer* test because it imposed a high risk of costly litigation and civil penalties for businesses that opted to provide their own interpretation of the warnings and because it placed the burden of proof on defendant businesses to show that exposures were below safe harbor levels.<sup>79</sup>

The Ninth Circuit could have upheld the district court’s preliminary injunction even if only one of the prongs of the *Zauderer* test was not satisfied. Here, however, the court found that the acrylamide warning regulation failed all three.<sup>80</sup>

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70. *Id.*

71. *Id.* at 472.

72. *Id.* at 478.

73. *Id.*

74. *Id.* at 479.

75. *Id.*

76. *Id.* Once a chemical is added to the Proposition 65 list through any of four listing mechanisms, it is deemed “known” to the state to cause the health harm associated with its listing. *See infra* Subpart I.A (describing each of the four listing mechanisms).

77. Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics, 29 F.4th at 479.

78. *Id.* at 479–80.

79. *Id.* at 470–80.

80. *Id.* at 477–80.

## 2. First Amendment Challenge to the Glyphosate Warning

Like acrylamide, glyphosate is an economically significant chemical with debatable links to cancer in humans.<sup>81</sup> As one of the most widely used herbicides in the United States,<sup>82</sup> glyphosate's success on the market translates to relatively broad exposures for workers and consumers.<sup>83</sup> Thus, the stakes are high for businesses with financial interests in glyphosate and for public health advocates who urge caution in the face of uncertainty.

In *National Association of Wheat Growers v. Becerra*, agricultural trade associations argued successfully that California's warning requirement for glyphosate violated their First Amendment rights.<sup>84</sup> In granting a permanent injunction enjoining the glyphosate warning requirement, the district court noted that "[e]very regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does."<sup>85</sup> Thus, the court held that California was barred from forcing companies to voice the state's view, based solely on IARC's determination that glyphosate causes cancer "when the great weight of evidence indicates that glyphosate is not known to cause cancer."<sup>86</sup>

The court rejected the state's defense that the compelled warning was constitutional because it was literally true as defined by California law.<sup>87</sup> While acknowledging that glyphosate may have satisfied California's technical listing requirements for known carcinogens as defined in the Proposition 65 statute and regulations, the court found that the warning "would nonetheless be misleading to the ordinary consumer" and, therefore, was not purely factual and uncontroversial.<sup>88</sup>

The Attorney General attempted to address the district court's First Amendment concerns by proposing three alternative glyphosate warnings.<sup>89</sup> However, the court found each deficient.<sup>90</sup>

The first proposed alternative warning attempted to address the argument that referring to glyphosate as a "known" carcinogen was "misleading." Rather than referring to glyphosate as a "known" carcinogen, the warning instead

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81. See discussion *supra* note 7.

82. EPA, *supra* note 4.

83. See Christina Gillezeau et al., *The Evidence of Human Exposure to Glyphosate: a Review*, 18 ENV'T HEALTH 1, 1 (2019) (suggesting that "[i]ndividuals may be exposed to glyphosate through various routes such as food and drinking water, both in the occupational and environmental settings" and that "[g]lyphosate has also been found in dust within non-agricultural homes").

84. Nat'l Ass'n of Wheat Growers v. Becerra, 468 F. Supp. 3d 1247, 1250–51, 64–65 (E.D. Cal. 2020).

85. *Id.* at 1259.

86. *Id.* at 1260.

87. *Id.* at 1259.

88. *Id.*

89. *Id.* at 1261.

90. *Id.*

specified that glyphosate was “listed as causing cancer pursuant to the requirements of California law.”<sup>91</sup> The court rejected this warning, finding that it conveyed essentially the same message as the old warning—that glyphosate was known to California to cause cancer—and was thus misleading.<sup>92</sup>

The state’s second proposal attempted to improve the accuracy of the glyphosate warning by informing consumers about the scientific debate on glyphosate’s carcinogenicity.<sup>93</sup> The warning stated:

WARNING: This product can expose you to glyphosate, a chemical listed as causing cancer pursuant to the requirements of California law. The listing is based on a determination by the United Nations International Agency for Research on Cancer that glyphosate presents a cancer hazard. The U.S. Environmental Protection Agency [EPA] has tentatively concluded in a draft document that glyphosate does not present a cancer hazard. For more information go to [www.P65warnings.ca.gov](http://www.P65warnings.ca.gov).<sup>94</sup>

Although this warning conveyed that glyphosate’s carcinogenicity was under debate, the court found that it improperly gave “equal weight of authority for and against the proposition that glyphosate causes cancer . . . when the heavy weight of evidence in the record is that glyphosate is not known to cause cancer.”<sup>95</sup>

Finally, the court rejected the state’s third proposal, which differed from the prior proposal in two important ways. First, the new warning explained how IARC reached its conclusion that glyphosate is a carcinogen.<sup>96</sup> Second, language on EPA’s tentative draft conclusion was replaced with a stronger declaration that the agency did not find glyphosate to be carcinogenic to humans.<sup>97</sup> Despite these new details, the court found that the message inappropriately conveyed that there was equal weight for and against the authority that glyphosate causes cancer.<sup>98</sup> The proposed warning stated:

WARNING: This product can expose you to glyphosate. The State of California has determined that glyphosate is known to cause cancer under Proposition 65 because the International Agency for Research on Cancer has classified it as a carcinogen, concluding that there is sufficient evidence of carcinogenicity from studies 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

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91. *Id.* at 1262.

92. *Id.*

93. *Id.* at 1262–1263.

94. *Id.*

95. *Id.* at 1263.

96. *Id.*

97. *See id.*

98. *Id.*

more information about glyphosate and Proposition 65, see [www.P65warnings.ca.gov](http://www.P65warnings.ca.gov).<sup>99</sup>

Although the warning acknowledged that IARC's determination was based on "limited evidence in humans," the court found that the warning still failed to adequately reflect the weight of evidence against causal links between glyphosate and cancer.<sup>100</sup>

After finding that the glyphosate warning requirement failed to meet *Zauderer's* "purely factual and uncontroversial" standard, the court analyzed the warning requirement under the *Central Hudson* intermediate scrutiny standard.<sup>101</sup> To survive intermediate scrutiny, a law must "directly advance the governmental interest asserted and must not be more extensive than is necessary to serve that interest."<sup>102</sup> Here, the state's interest was to inform Californians about exposures to chemicals that cause cancer.<sup>103</sup> The court held that "misleading statements about glyphosate's carcinogenicity" did not directly advance this interest.<sup>104</sup> In addition, the court found that California had less restrictive ways of informing consumers about glyphosate's potential carcinogenicity "without burdening the free speech of businesses."<sup>105</sup>

#### E. First Amendment Challenges to City Ordinances Requiring Warnings

Outside of Proposition 65, business groups have had mixed success challenging compelled warning ordinances in San Francisco and Berkeley, California. In *American Beverage Association v. City and County of San Francisco*, the Ninth Circuit held that business associations were likely to prevail on the merits of a First Amendment challenge to a San Francisco ordinance requiring health warnings on advertisements for certain sugar-sweetened beverages.<sup>106</sup> Conversely, in *CTIA - The Wireless Association v. City of Berkeley*, the Ninth Circuit held constitutional a city ordinance requiring cell phone retailers to inform consumers that carrying a cell phone could cause them to exceed federal guidelines for radio-frequency radiation.<sup>107</sup> These Ninth Circuit cases, decided after the Supreme Court's 2018 *NIFLA* decision, shed light on the constitutional parameters of compelled commercial speech in the modern era of First Amendment jurisprudence.

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99. *Id.*

100. *Id.*

101. *Id.* at 1264.

102. *Id.* (quoting *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 755 (9th Cir. 2019)).

103. *Id.*

104. *Id.*

105. *Id.* at 1264–65.

106. 916 F.3d 749, 753 (9th Cir. 2019) (reversing the district court's denial of a preliminary injunction).

107. *CTIA - The Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 836 (9th Cir. 2019).

*1. First Amendment Challenge to San Francisco Sweetened Beverage Ordinance*

In *American Beverage Association v. City and County of San Francisco*,<sup>108</sup> business associations from the beverage, retail, and advertising industries challenged a San Francisco ordinance requiring health warnings on certain advertisements for sugar-sweetened beverages.<sup>109</sup> The ordinance required advertisements to contain the following statement:

WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.<sup>110</sup>

Subject to exceptions, the warning requirement applied to advertisements “(a) on paper, poster, or a billboard; (b) in or on a stadium, arena, transit shelter, or any other structure; (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material.”<sup>111</sup> It did not apply to newspapers, magazines, beverage containers and packages, menus, vehicles operated by individuals in the beverage industry, logos occupying an area less than thirty-six square inches, and shelf tags or labels.<sup>112</sup> The ordinance required the warning to be enclosed in a rectangular border and occupy at least 20 percent of the advertisement.<sup>113</sup> San Francisco’s stated purpose in requiring the warnings was to inform the public about added sugars, help consumers reduce their caloric intake, and improve diet and health.<sup>114</sup>

In an en banc panel of the Ninth Circuit, the majority held that the warning ordinance offended businesses’ First Amendment rights because it failed the “not unduly burdensome” prong of the *Zauderer* test as applied in *NIFLA*.<sup>115</sup> The court rejected San Francisco’s argument that the border and 20 percent size requirement “adhere[d] to the best practices for health and safety warnings.”<sup>116</sup> Instead, the court pointed to a study offered by San Francisco’s own expert that indicated a smaller warning would accomplish the same public health goals.<sup>117</sup> Because San Francisco failed to show that the 20 percent size requirement “[did] not drown[ ] out Plaintiffs’ messages and effectively rule[ ] out the possibility of

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108. 916 F.3d at 753.

109. *Id.*

110. *Id.*

111. City & Cnty. of S.F., Cal., Health Code art. 42, div. I, § 4202 (2015).

112. *Id.*

113. *Id.* § 4203(b).

114. *Id.* § 4201.

115. *Am. Beverage Ass’n v. City & Cnty. of San Francisco*, 916 F.3d at 757.

116. *Id.*

117. *Id.*

having [an advertisement] in the first place,”<sup>118</sup> the court held that the warning requirement was unduly burdensome on protected speech.<sup>119</sup>

The majority ended its analysis here, noting that under *NIFLA*, “a government-compelled disclosure that imposes an undue burden fails for that reason alone.”<sup>120</sup> Consequently, the opinion did not examine whether the compelled warning would survive the “purely factual” and “noncontroversial” prongs of the *Zauderer* test.<sup>121</sup>

However, in a concurrence joined by Chief Judge Thomas, Judge Christen argued that where factual accuracy is at issue, the “purely factual” prong of *Zauderer*’s test should be assessed first because evaluating the truth of compelled speech offers “a much more objective basis” for disqualification than the inquiry into “undue burden.”<sup>122</sup> Judge Christen proceeded to find that San Francisco’s ordinance was not “purely factual” because the message that consuming sugar contributes to type 1 diabetes was “devoid of scientific support.”<sup>123</sup> While acknowledging that research linked sugar-sweetened beverages to the development of type 2 diabetes, the concurrence argued that the warning must be read literally to include type 1 and type 2 diabetes “[b]ecause the message would be conveyed to sophisticated and unsophisticated consumers.”<sup>124</sup> Further, Judge Christen found that the compelled warning falsely implied that sugar-sweetened beverages are always dangerous for diabetics, when in fact, sugary drinks may be medically beneficial under certain circumstances.<sup>125</sup> Thus, while reaching the same result as the majority, Judge Christen would have held the ordinance unconstitutional because of its lack of factual accuracy.<sup>126</sup>

## 2. First Amendment Challenge to Berkeley Ordinance on Cell Phone Radiation

In contrast to *American Beverage Association*, which found that San Francisco’s sugar-sweetened drinks ordinance likely violated the First Amendment rights of beverage advertisers,<sup>127</sup> the Ninth Circuit in *CTIA - The Wireless Association v. City of Berkeley* upheld a compelled speech ordinance enacted just across the Bay.<sup>128</sup> The Berkeley ordinance required cell phone retailers to warn prospective consumers about exposures to radio frequency using the following language:

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118. *Id.* (internal quotation marks omitted).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Am. Beverage Ass’n v. City & Cnty. of San Francisco*, 916 F.3d at 765–66 (concurring in part and concurring in the judgment).

123. *Id.* at 766.

124. *Id.* at 767.

125. *Id.* at 766–67.

126. *Id.* at 767.

127. *Id.* at 753.

128. *CTIA - The Wireless Ass’n v. City of Berkeley, Cal.*, 928 F.3d 832, 836 (9th Cir. 2019).



The City of Berkeley requires that you be provided the following notice:

To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.<sup>129</sup>

The ordinance allowed retailers the choice of (1) prominently displaying the notice at the point of sale in at least a twenty-eight-point font size on a minimum eight-and-a-half by eleven-inch poster or (2) providing the notice to customers in at least an eighteen-point font size on paper no less than five by eight inches.<sup>130</sup> In addition, retailers were free to add additional information to the paper containing the notice so long as the information was distinct from the notice.<sup>131</sup>

CTIA, a trade association comprised of cell phone retailers, challenged the ordinance, claiming that the compelled disclosure was unconstitutional under *Zauderer* because it was not “purely factual.”<sup>132</sup> The court rejected this argument after dissecting the compelled disclosure sentence by sentence and finding that each part was literally true.<sup>133</sup> CTIA further argued that even if the disclosure was literally true, taken as a whole, the warning was misleading and therefore not “purely factual.”<sup>134</sup> CTIA believed that the ordinance was misleading because “it use[d] the inflammatory term ‘radiation,’ which is fraught with negative associations, in order to stoke consumer anxiety.”<sup>135</sup>

The court was unconvinced. It found the reference to “RF exposure guidelines” in the first sentence of the compelled disclosure more comforting than inflammatory because it reassured customers that the cell phones met Federal Communications Commission (FCC) safety guidelines.<sup>136</sup> Similarly, the court found that the reference to “RF radiation” in the second sentence merely “provided in summary form information that the FCC has concluded that consumers should know in order to ensure their safety.”<sup>137</sup> “RF radiation” was also the same term the FCC used in its communications since at least 1996.<sup>138</sup>

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129. Berkeley Mun. Code § 9.96.030(A) (2015).

130. *Id.* § 9.96.030(B).

131. *Id.*

132. CTIA - The Wireless Ass’n v. City of Berkeley, 928 F.3d at 846.

133. *Id.*

134. *Id.* at 847.

135. *Id.* (internal quotation marks omitted).

136. *Id.*

137. *Id.*

138. *Id.*

Thus, according to the court, Berkeley's compelled disclosure was hardly misleading or inflammatory.<sup>139</sup>

CTIA also claimed that the compelled disclosure was controversial because "it [was] misleading rather than factual."<sup>140</sup> The court emphasized that under *NIFLA*, compelled speech is controversial if it requires a business to "take sides in a heated political controversy."<sup>141</sup> Here, Berkeley's compelled disclosure was essentially a summary of FCC warnings already required in cell phone user manuals—it did not force retailers to take sides in any heated controversy.<sup>142</sup> Thus, the court held that the required disclosure was not controversial.<sup>143</sup>

Lastly, CTIA argued that the compelled disclosure was "unduly burdensome" under *Zauderer*.<sup>144</sup> This too was rejected by the court.<sup>145</sup> The ordinance allowed retailers the choice of posting an eight-and-a-half by eleven-inch notice or providing five by eight-inch handouts to customers.<sup>146</sup> In addition, retailers were free to add information so long as the information was distinct from the notice.<sup>147</sup> Thus, the court found that the ordinance presented only a "minimal requirement" that did not interfere with the ability of retailers to advertise or promote messaging.<sup>148</sup>

#### F. OEHHA's Efforts to Address Compelled Speech Issues through Regulation

In response to First Amendment challenges to the acrylamide and glyphosate warnings, OEHHA proposed new warnings aimed at satisfying *Zauderer*'s "purely factual and noncontroversial" requirement. *CalChamber* and *Wheat Growers* made clear that compelling businesses to warn consumers that an exposure is "known to the State of California to cause cancer" is unconstitutional when in fact the exposure's link to cancer is a matter of serious scientific debate.<sup>149</sup> OEHHA's new warnings for acrylamide and glyphosate

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139. *Id.* at 847–48

140. *Id.* at 848.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 849.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See* *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022) (holding that the district court did not abuse its discretion in finding the acrylamide warning controversial "given [the] robust disagreement by reputable scientific sources"); *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1264 (E.D. Cal. 2020) (explaining that while "there need not be complete consensus among the scientific community" for a warning to withstand First Amendment challenges, "warnings which state that glyphosate is known to cause cancer are not purely factual and uncontroversial").

abandon Proposition 65's classic "known to the State" language and replace it with more accurate information.

### 1. Acrylamide Warnings

On October 26, 2022, the California Office of Administrative Law approved OEHHA's new warning regulation for exposures to acrylamide in food set to take effect at the start of 2023.<sup>150</sup> In developing the regulation, OEHHA stated that it "considered the concerns expressed in the District Court's preliminary injunction order," which was appealed to the Ninth Circuit in *CalChamber*.<sup>151</sup>

The new warning appears to acknowledge the scientific uncertainty underlying the link between dietary acrylamide and cancer:

**CALIFORNIA WARNING:** Consuming this product can expose you to acrylamide, a *probable human carcinogen* formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see [www.P65Warnings.ca.gov/acrylamide](http://www.P65Warnings.ca.gov/acrylamide).<sup>152</sup>

According to Merriam-Webster, the word "probable" means "supported by evidence strong enough to establish presumption but not proof."<sup>153</sup> Thus, by referring to acrylamide as a "probable human carcinogen," the new warning conveys a degree of certainty less than knowledge. This "probable human carcinogen" language is also literally or technically true because the EPA has classified acrylamide as a "Group B2, probable human carcinogen."<sup>154</sup>

In addition, the new warning informs consumers that acrylamide forms naturally in certain foods at certain temperatures.<sup>155</sup> This seems to address at least two of the court's concerns. First, unlike the old warning, the new version

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150. OEHHA, *Safe Harbor Warning Regulation for Exposures to Acrylamide from Food* (Nov. 1, 2022), <https://oehha.ca.gov/proposition-65/cnr/safe-harbor-warning-regulation-exposures-acrylamide-food>.

151. OEHHA, PROPOSITION 65, INITIAL STATEMENT OF REASONS, TITLE 27, CALIFORNIA CODE OF REGULATIONS, PROPOSED AMENDMENTS TO ARTICLE 6: SAFE HARBOR CLEAR AND REASONABLE WARNINGS FOR ACRYLAMIDE EXPOSURES FROM FOOD, NEW SUBSECTION 25607.2(B) (2021) <https://oehha.ca.gov/media/downloads/cnr/isoracrylamide091721.pdf>.

152. Cal. Code Regs. tit. 27, § 25607.2(b)(2) (emphasis added).

153. *Probable*, MERRIAM-WEBSTER.COM DICTIONARY, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/probable>.

154. Nat'l Serv. Ctr. for Env't Publ'n's, *Acrylamide* (Jan. 2000), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100ZKZT.PDF?Dockey=P100ZKZT.PDF>. Group B2 includes chemicals with sufficient evidence of a causal relationship to cancer from animal data, but with little or no human data. See EPA, *Risk Assessment for Carcinogenic Effects* (Nov. 14, 2023), <https://www.epa.gov/fera/risk-assessment-carcinogenic-effects>.

155. See Cal. Code Regs. tit. 27, § 25607.2(b)(2).

no longer “implies incorrectly that acrylamide is an additive or ingredient.”<sup>156</sup> Second, the new warning indicates that a variety of factors affect acrylamide exposure and cancer risk, including the type of food consumed and the temperature at which it is cooked.<sup>157</sup> This clause, along with the second sentence of the warning noting that other factors affect one’s cancer risk, helps to correct the old warning’s constitutionally problematic implication that consuming foods containing acrylamide will necessarily increase one’s personal risk of cancer.<sup>158</sup>

## 2. Glyphosate Warnings

Like the acrylamide warning, the new glyphosate warning was designed to address the district court’s concerns expressed in *Wheat Growers* that the old warning was false and misleading.<sup>159</sup> The new warning reads:

### **CALIFORNIA PROPOSITION 65 WARNING**

Using this product can expose you to glyphosate. The International Agency for Research on Cancer classified glyphosate as probably carcinogenic to humans. US EPA has determined that glyphosate is not likely to be carcinogenic to humans; other authorities have made similar determinations. A wide variety of factors affect your potential risk, including the level and duration of exposure to the chemical. For more information, including ways to reduce your exposure, go to [www.P65Warnings.ca.gov/glyphosate](http://www.P65Warnings.ca.gov/glyphosate).<sup>160</sup>

The new warning is remarkable in both its length and content. It parses out contradicting determinations from IARC, EPA, and “other authorities.”<sup>161</sup> By pitting IARC on one side and EPA and vague “other authorities” on the other, the warning appears to suggest that most authoritative bodies believe that exposure to glyphosate is benign, at least concerning cancer. This directly addresses the district court’s concern that it was misleading to imply an equal weight for and against the proposition that glyphosate causes cancer.<sup>162</sup>

In a sentence that largely mirrors part of the acrylamide warning, the new glyphosate warning also notes that various factors affect one’s cancer risk.

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156. Cal. Chamber of Com. v. Becerra, 529 F. Supp. 3d 1099, 1117 (E.D. Cal. 2021), *aff’d sub nom.* Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics, 29 F.4th 468, 478 (9th Cir. 2022). OEHHHA, *Notice on Glyphosate Regulation* (Sep. 8, 2022), <https://oehha.ca.gov/proposition-65/cnrn/safe-harbor-warning-regulation-exposures-glyphosate-consumer-products> (The glyphosate warning was approved by the California Office of Administrative Law on September 1, 2022 and became effective on January 1, 2023.).

157. See Cal. Code Regs. tit. 27, § 25607.2(b).

158. See Cal. Chamber of Com. v. Becerra, 529 F. Supp. 3d at 1117.

159. See OEHHHA, INITIAL STATEMENT OF REASONS, TITLE 27, CALIFORNIA CODE OF REGULATIONS, PROPOSED AMENDMENTS TO ARTICLE 6, CLEAR AND REASONABLE WARNINGS, NEW SUBSECTIONS 25607.48 AND 25607.49, WARNINGS FOR EXPOSURES TO GLYPHOSATE FROM CONSUMER PRODUCTS (2021), <https://oehha.ca.gov/media/downloads/cnrn/glyphosateisor071921.pdf>.

160. Cal. Code Regs. tit. 27, § 25607.49(a).

161. See *id.*

162. See Nat’l Ass’n of Wheat Growers v. Becerra, 468 F. Supp. 3d 1247, 1263 (E.D. Cal. 2020).

Again, this helps clarify that exposure to glyphosate does not necessarily increase one's personal risk of developing cancer.

OEHHA explained the reasoning behind its update to the glyphosate warning in its "Initial Statement of Reasons":

[The proposed glyphosate warning] presents a balanced description of the conflict between IARC's conclusion and those of other regulatory agencies, including US EPA. It also provides the clear message that an individual's personal risk of cancer from use of these products is a function of level and duration of exposure to the chemical. In other words, not everyone who uses the product is in danger of contracting cancer. Each of the statements in the proposed warning is factual.<sup>163</sup>

At the time this Note was submitted for publication, *Wheat Growers* was on appeal at the Ninth Circuit.<sup>164</sup> In a brief submitted by California Attorney General Rob Bonta on November 1, 2022, the state argued that the new warning "complies with the standard for compelled commercial speech set forth in *Zauderer*."<sup>165</sup> The state backed this claim in part by contending that the new warning "avoids the suggestion that there is a consensus view about glyphosate's toxicity, or that there is an equal split of opinion."<sup>166</sup>

On the other side, plaintiffs-appellees, comprised of agricultural trade groups, argued that the new glyphosate warning is still controversial and not purely factual.<sup>167</sup> Using arguments similar to those that convinced the court to reject glyphosate's predecessor warnings, the trade groups contended that the new warning improperly conveys that glyphosate probably causes cancer or that there is an even split in opinion among authoritative bodies regarding glyphosate's carcinogenicity.<sup>168</sup> In particular, they asserted that the warning's reference to "other authorities" does not capture the "unanimous consensus of regulators from the European Union to Canada, Australia, New Zealand, Japan, and South Korea" who have concluded that glyphosate is not likely carcinogenic.<sup>169</sup> Additionally, they argued that the warning falsely implies that IARC has found glyphosate to be probably carcinogenic at real-world exposure levels when in fact "IARC made only a 'hazard' finding."<sup>170</sup> Finally, the

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163. OEHHA, *supra* note 159.

164. Nat'l Ass'n of Wheat Growers v. Bonta, No. 20-16758 (9th Cir. 2020).

165. Supplemental Brief of Defendants-Appellants at 6, Nat'l Ass'n of Wheat Growers v. Bonta (2022) (No. 20-16758).

166. *Id.* at 7.

167. Supplemental Brief of Plaintiffs-Appellees at 2, Nat'l Ass'n of Wheat Growers v. Bonta (2022) (No. 20-16758).

168. *Id.* at 4.

169. *Id.*

170. *Id.* (A hazard finding means only that a chemical has been determined capable of causing cancer, even if the risk cancer will occur at common exposure levels is minimal.). See INTERNATIONAL AGENCY FOR RESEARCH ON CANCER, WORLD HEALTH ORGANIZATION, PREAMBLE TO MONOGRAPHS ON THE

agricultural trade groups emphasized that the new warning is not uncontroversial “because it forces Plaintiffs to proclaim the existence of a debate over glyphosate’s carcinogenicity and present viewpoints with which they strongly disagree.”<sup>171</sup>

While both sides offer powerful arguments, the new glyphosate warning continues to present the same type of First Amendment concerns regarding factual accuracy and controversy that plagued the prior warnings, albeit to a reduced degree. Thus, it is questionable whether the court will find substantial reason to distinguish this warning from its failed predecessors.<sup>172</sup>

## II. THE IMPACT OF FIRST AMENDMENT CHALLENGES ON PROPOSITION 65

The successful First Amendment challenges to Proposition 65 acrylamide and glyphosate warnings in *CalChamber* and *Wheat Growers* usher in a new era of constitutional constraints on Proposition 65. While it continues to be the case that a chemical agent will be added to the Proposition 65 list “even if it is known to be carcinogenic or a reproductive toxin only in animals,”<sup>173</sup> federal courts have increasingly articulated a compelled commercial speech standard that leaves little room for scientific uncertainty.<sup>174</sup> This may limit the reach of Proposition 65’s most important feature—its warning provision. Nevertheless, even if some warnings are constitutionally barred, listed chemicals will still be subject to the drinking water discharge prohibition<sup>175</sup> and will likely continue to be incorporated into other regulatory regimes, restricted substances lists, and hazard screens.<sup>176</sup> Through these underappreciated but critical mechanisms, Proposition 65 will remain a powerful public health tool even where warnings are restricted by the courts.

### A. *Reduced Ability to Respond to Chemicals of Emerging Concern*

First Amendment challenges may encumber Proposition 65’s ability to respond to newly discovered chemical threats. Under *Zauderer*, compelled commercial speech must be “purely factual and uncontroversial.”<sup>177</sup> If a

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IDENTIFICATION OF CARCINOGENIC HAZARDS TO HUMANS, 1, 2 (2019), <https://monographs.iarc.who.int/wp-content/uploads/2019/07/Preamble-2019.pdf>.

171. *Supplemental Brief of Plaintiffs-Appellees*, *supra* note 167, at 5.

172. As this Note was undergoing publication, the Ninth Circuit issued a decision affirming the lower court’s ruling. *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1266 (9th Cir. 2023) (concluding “the Prop 65 warning as applied to glyphosate—in any form that has been presented to this Court—is not purely factual and uncontroversial, and thus is subject to intermediate scrutiny”).

173. *Am. Chemistry Council v. Off. of Env’t Health Hazard Assessment*, 270 Cal. Rptr. 3d 379, 402 (2020), *as modified* (Nov. 10, 2020), *review denied* (Jan. 27, 2021).

174. *See supra* Subparts I.D.1 & I.D.2 (discussing successful First Amendment challenges to the acrylamide and glyphosate warnings).

175. Cal. Health & Safety Code § 25249.5.

176. *See supra* Subpart I.B (describing the indirect effects of Proposition 65).

177. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

Proposition 65 warning requires clear evidence of harm *in humans*, OEHHA may be limited in its ability to act until there is evidence of harm already done. Because it is generally undesirable to purposely expose humans to harmful chemicals, animal and toxicological models are often the best available means to assess whether a chemical causes negative health outcomes.<sup>178</sup> Still, these models are laden with uncertainty.<sup>179</sup> Animals may absorb and metabolize chemicals differently than humans and thus may be more (or less) sensitive to them.<sup>180</sup> Where uncertainty of this nature exists, courts will likely enjoin state and private enforcers from compelling businesses to warn that a chemical is “known” to cause cancer or reproductive harm.

Proposition 65 achieves its public health goals largely by incentivizing businesses to reformulate products that would otherwise require a warning.<sup>181</sup> Some businesses even report that they reformulate their products in anticipation of chemicals that they believe will be added to the Proposition 65 list.<sup>182</sup> Without the warning requirement and the threat of citizen suits, these incentives disappear.

#### B. Existing Warnings May Fail First Amendment Scrutiny

Like acrylamide and glyphosate, many other listed chemicals are arguably unsupported by evidence of harm in humans.<sup>183</sup> Compelled warnings stating that these chemicals are “known” to cause cancer or reproductive harm would likely fail to satisfy the *Zauderer* “purely factual and noncontroversial” requirement. Moreover, *Wheat Growers* indicates that a permissible warning would have to reflect the true weight of evidence.

Of course, only challenged warnings would be enjoined. Business groups have incentive to sue only where they have sufficient stake in the matter. Warnings for chemicals that are easily substitutable or not widely present in foods or consumer products may be spared from First Amendment challenges.

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178. The EPA explains that while “[s]tatistically controlled clinical studies on humans provide the best evidence” linking a chemical exposure to a negative health outcome, “such studies are frequently not available since there are significant ethical concerns associated with human testing of environmental hazards.” *Conducting a Human Health Risk Assessment*, EPA, <https://www.epa.gov/risk/conducting-human-health-risk-assessment> (last accessed Mar. 25, 2022).

179. See generally Aysha Akhtar, *The flaws and human harms of animal experimentation*, 24(4) *CAMB Q HEALTHC ETHICS* 407–19 (Oct. 2015).

180. See *Cal. Chamber of Com. v. Becerra*, 529 F. Supp. 3d 1099, 1105 (E.D. Cal. 2021), *aff’d sub nom.* *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468 (9th Cir. 2022).

181. See Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California’s Proposition 65*, 23 *ECOLOGY L.Q.* 303, 342–48 (1996).

182. See Polsky & Schwarzman, *supra* note 21 at 874.

183. In fact, California law requires that the Proposition 65 list include “at a minimum” substances classified as animal (or human) carcinogens by IARC. CAL. HEALTH & SAFETY CODE § 25249.8(a).

Notably, acrylamide forms naturally in many plant-based foods during cooking processes,<sup>184</sup> and glyphosate is one of the most widely used herbicides in the United States.<sup>185</sup> As these chemicals hold tremendous economic import, it is unsurprising that industry groups have attacked their health warnings.

Warnings for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) have been identified by the Proposition 65 defense bar as potential future targets.<sup>186</sup> Like glyphosate and acrylamide, PFOA and PFOS are ubiquitous chemicals that play an important economic role. Among other uses, they function in consumer products to repel oil, stains, grease, and water.<sup>187</sup> Unfortunately, the same traits that make PFOA and PFOS beneficial in consumer products also make them a potentially alarming threat—PFOA and PFOS are extremely persistent in the environment.<sup>188</sup>

Following the Ninth Circuit's ruling in *CalChamber* upholding a preliminary injunction against enforcement of the acrylamide warning, an attorney from Alston and Bird LLP's Environment, Land Use & Natural Resources Group told Bloomberg Law News that Proposition 65 warnings linking PFOA and PFOS to cancer or developmental harm could similarly be challenged.<sup>189</sup> The attorney noted that the evidence linking PFOA and PFOS to cancer and developmental harm “comes largely from animal studies that aren't always predictive of effects chemicals have on people.”<sup>190</sup> If a court agrees with this argument, the PFOA and PFOS warnings would be unlikely to survive the “purely factual and noncontroversial” prong of *Zauderer*.

Proposition 65 phthalate warnings also appear to be under attack. In September 2022, Enchanté Accessories, Inc. filed a complaint against Consumer Advocacy Group, Inc. (CAG) in federal district court, asking the court to enjoin CAG from “enforcing a requirement to provide false, misleading, and highly controversial cancer and reproductive toxicity warnings for certain consumer products manufactured[] and distributed by Enchanté that contain the chemical Di-2-ethylhexyl phthalate (DEHP) in violation of Enchanté's, and its distributors['] and retailers['], First Amendment rights.”<sup>191</sup> DEHP is listed under Proposition 65 as causing cancer and reproductive and developmental

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184. See CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 62.

185. EPA, *supra* note 4

186. Pat Rizzuto & Zach Bright, *California Chamber's Prop 65 Win Seen to Spur More Challenges*, BLOOMBERG LAW NEWS (March 23, 2022), [https://www.bloomberglaw.com/bloomberglawnews/environment-and-energy/X9P0QPBG000000?bna\\_news\\_filter=environment-and-energy#jcite](https://www.bloomberglaw.com/bloomberglawnews/environment-and-energy/X9P0QPBG000000?bna_news_filter=environment-and-energy#jcite).

187. Centers for Disease Control and Prevention, *Per- and Polyfluorinated Substances (PFAS)* (May 2, 2022), [https://www.cdc.gov/biomonitoring/PFAS\\_FactSheet.html](https://www.cdc.gov/biomonitoring/PFAS_FactSheet.html).

188. *Id.*

189. Rizzuto & Bright, *supra* note 186.

190. *Id.*

191. Complaint for Declaratory and Injunctive Relief, *Enchanté Accessories, Inc. v. Consumer Advoc. Group, Inc.*, 4:22CV05035 (N.D. Cal. Sept. 2, 2022) at ¶ 1.



toxicity.<sup>192</sup> The chemical is used predominantly to make polyvinyl chloride (known as PVC) and vinyl chloride resins.<sup>193</sup> Enchanté argued that Proposition 65 DEHP warnings were not “purely factual and uncontroversial” because the warnings:

gravely overstate the nature of the risk posed by the exposure. The yellow triangle symbolizes immediate grave harm, as similar symbols are used to alert consumers that they must take immediate action to avoid serious harm, injury or even death. The bold all caps action word WARNING, especially in the entire context, denotes extreme seriousness. Moreover, the warning advises that the exposure is “known to the state of California” and links to the State’s website, which further lends gravitas to the warning.<sup>194</sup>

Enchanté’s First Amendment challenge to the DEHP warning is surprising in some ways. First, unlike acrylamide and glyphosate, DEHP has readily available substitutes on the market.<sup>195</sup> Thus, this lawsuit runs counter to the prediction of a partner at Bick Law LLP, who stated that she did not believe the “desire to fight [following the Ninth Circuit’s ruling in *CalChamber*] is likely to spread to other chemicals, such as phthalates, where the chemicals can be eliminated from the products and are not consumed.”<sup>196</sup> Whether this case is an anomaly or foreshadows future challenges to phthalate warnings remains to be seen.

Second, Enchanté faces major procedural hurdles not present in *CalChamber* or *Wheat Growers*. Because Enchanté’s complaint names a private Proposition 65 enforcer rather than the government,<sup>197</sup> CAG has several powerful arguments based on its right to petition that would bar the plaintiff’s claims. Indeed, in its motion to dismiss, CAG raised the *Noerr-Pennington* doctrine, California Litigation Privilege, and California’s Anti-SLAPP statute.<sup>198</sup> Although the mechanics of these protective laws and doctrines are beyond the scope of this Note, each may insulate private Proposition 65 enforcers from viable First Amendment challenges.

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192. OEHHA, *Di(2-ethylhexyl)phthalate (DEHP)*, <https://oehha.ca.gov/proposition-65/chemicals/di2-ethylhexylphthalate-dehp>.

193. EPA, *Bis(2-ethylhexyl) phthalate (DEHP)* (Jan. 2000), <https://www.epa.gov/sites/default/files/2016-09/documents/bis-2-ethylhexyl-phthalate.pdf>.

194. Complaint for Declaratory and Injunctive Relief, *Enchanté Accessories, Inc. v. Consumer Advocacy Group, Inc.*, 4:22CV05035 (N.D. Cal. Sept. 2, 2022) at ¶ 30.

195. See, e.g., E. Van Vliet et al., *A review of alternatives to di (2-ethylhexyl) phthalate-containing medical devices in the neonatal intensive care unit*, 32 J. PERINATOL 551 (2011).

196. Rizzuto & Bright, *supra* note 186.

197. Complaint for Declaratory and Injunctive Relief, *Enchanté Accessories, Inc. v. Consumer Advocacy Group, Inc.*, 4:22CV05035 (N.D. Cal. Sept. 2, 2022).

198. Memorandum of Points and Authorities in Support of Defendant Consumer Advocacy Group’s Motion to Dismiss Complaint, *Enchanté Accessories, Inc. v. Consumer Advocacy Group, Inc.*, 4:22CV05035 (N.D. Cal. Oct. 28, 2022)

*C. Changes to Public Health Messaging*

OEHHA responded to the First Amendment concerns raised in *CalChamber* and *Wheat Growers* by proposing more detailed warnings for acrylamide and glyphosate.<sup>199</sup> In doing so, the warnings necessarily became longer and more complicated. Rather than presenting a clear public health message that a chemical causes cancer, the warnings notified consumers that acrylamide is a probable human carcinogen and that many factors affect cancer risk.<sup>200</sup> For glyphosate, the new warning is even more complicated. The consumer is warned that IARC believes glyphosate is “probably carcinogenic to humans” but that EPA and other authorities believe it is not likely to be carcinogenic and that a variety of factors affect one’s cancer risk.<sup>201</sup>

Efforts to revise warnings in ways that satisfy the “purely factual and noncontroversial” requirement of *Zauderer* come at a cost. Expanded warnings dilute the public health message and potentially confuse consumers.<sup>202</sup> If that were the only cost, Proposition 65’s public health impact would be mostly unaffected. Virtually no business wants to include a warning on their product with the word “cancer,” no matter how qualified the statement may be. Thus, the pressure to communicate with supply chains and reformulate products containing Proposition 65 chemicals would likely remain intact.<sup>203</sup> Precisely because of this, business groups will likely continue to challenge “controversial” Proposition 65 warnings regardless of the wording of the warning. And, as warnings become longer, business groups will more easily be able to argue that such warnings are “unduly burdensome.”<sup>204</sup>

In addition, business groups will likely argue that the mere presence of a warning implies that a product is dangerous. Thus, even where the content of a warning is literally true, business groups will continue to claim that they are unconstitutionally compelled to convey a controversial message. After OEHHA proposed the new acrylamide warning characterizing the chemical as a “probable human carcinogen,” a coalition of business groups attacked the warning on these very grounds:

OEHHA’s proposed warning seeks to evade the science and force businesses who make and sell food products to take one side in the controversy over whether acrylamide in foods and beverages causes cancer in humans. The

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199. See discussion *supra* Subparts I.F.0 & I.F.0.

200. See Cal. Code Regs. tit. 27, § 25607.2(b).

201. See *id.* § 25607.49(a).

202. See Lauren L. Sherman, *A Warning for Environmental Warnings: Regulatory Uncertainty in the Face of First Amendment Litigation*, 27 N.Y.U. ENV’T L.J. 240, 296 (2019).

203. See Polsky & Schwarzman, *supra* note 21, at 870–78.

204. See *Am. Beverage Ass’n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (holding that San Francisco’s warning ordinance for sugar sweetened beverages was unduly burdensome because smaller warnings would achieve the same public health goals).

warning set forth in the Proposed Rulemaking will also fail to comply with the First Amendment's requirements.<sup>205</sup>

It is not hard to imagine that business groups will use similar rhetoric to attack future tailored warnings, irrespective of OEHHA's thoughtfulness or accuracy. Where the science behind a Proposition 65 listing is seriously debated, courts appear increasingly likely to strike down warnings that convey a risk of harm, no matter how well the uncertainty is explained.<sup>206</sup>

Among proponents of Proposition 65, the prospect of First Amendment challenges to controversial warnings may seem definitively bad. After all, if a chemical is suspected of causing cancer, it makes sense to implement policies that limit the public's exposure. However valid this notion may be, the public is likely to question the legitimacy of a warning system that contains *too much* uncertainty. Thus, in some way, First Amendment challenges could actually strengthen Proposition 65 by eliminating the most controversial warnings and assuring consumers that warnings indeed have public health relevance. Consumers are more likely to adhere to warnings if they believe them to be true.<sup>207</sup>

#### CONCLUSION

Successful First Amendment challenges to the Proposition 65 acrylamide and glyphosate warnings demonstrate the Ninth Circuit's increasing willingness to enjoin consumer warnings that are (1) not purely factual, (2) not uncontroversial, or (3) unduly burdensome.<sup>208</sup> As OEHHA promulgates new warnings with expanded detail and nuance to address constitutional concerns,<sup>209</sup> business groups will likely continue to argue that the warnings are unduly burdensome and compel them to convey the message that their product is unsafe even though the science is uncertain.

This development in compelled commercial speech legal battles may hinder Proposition 65's capacity to respond to chemicals of emerging concern and could

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205. Curt Barry, *Industry Says New Prop. 65 Acrylamide Order Aims to 'Evade' Court Order*, 28 INSIDE EPA'S RISK POLICY REPORT 1, 1 (2021).

206. See, e.g., *supra* Subpart I.D.2 (describing how the court rejected proposed glyphosate warnings, including one that explained that the IARC cancer finding was based on limited evidence in humans).

207. I do not mean to suggest that First Amendment challenges to Proposition 65 warnings improve public health, but rather that First Amendment challenges could, at least in one way, improve the public's confidence in the law.

208. See *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478–80 (9th Cir. 2022) (holding that the district court did not abuse its discretion in finding the acrylamide warning misleading, controversial, and unduly burdensome); *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1266 (E.D. Cal. 2020) (granting the plaintiffs' motion to "permanently enjoin Proposition 65's warning requirement as to glyphosate").

209. See discussion *supra* Subparts I.F.1 & I.F.2.

lead to injunctions against some existing warnings. While this may constrain the reach of Proposition 65's warning provision, the listings themselves will likely remain in place. Thus, even where warnings are barred due to scientific uncertainty, Proposition 65 will continue to advance its public health goals through its direct and indirect effects. Listed chemicals will still be subject to the drinking water discharge prohibition and may continue to be incorporated into other regulatory programs, hazard screens, and restricted substances lists.<sup>210</sup>

California legislators or drafters of ballot initiatives may consider proposing new laws to fill the gap where Proposition 65's capacity to reduce the public's exposure to certain chemicals is constrained by the First Amendment. While free speech doctrine limits the implementation of the precautionary principle in compulsory warnings, other laws may not face such restrictions. Market-based solutions that incentivize chemical producers to investigate health hazards, disclose their data, and develop green chemistries could lead to safer products that obviate the need for warnings in the first place.<sup>211</sup> Moreover, if the state is concerned about the public's exposure to a particular chemical, legislators are free to regulate its use directly. So long as the solution does not require businesses to take a stance on an unsettled debate, the First Amendment presents no obstacle.

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210. See discussion *supra* Subpart I.B.

211. See Michael P. Wilson & Megan R. Schwarzman, *Toward a new US chemicals policy: rebuilding the foundation to advance new science, green chemistry, and environmental health*, 117 ENV'T HEALTH PERSP. 1202, 1202–1209 (2009).

**We welcome responses to this Note. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**