



Council for Responsible Nutrition – International Trade & Market Development Committee: Glyphosate and Proposition 65

Peg Carew Toledo

July 22, 2021

Glyphosate Listed As A Proposition 65 Carcinogen

Background

- **Glyphosate** added to Prop. 65 list as a carcinogen (July 2017)
 - 2015: IARC classification as “probably carcinogenic” to humans
 - “Sufficient evidence” that it causes cancer in animals (4 rodent studies)
 - “Limited evidence” that it causes cancer in humans
- Highly controversial: almost all other agencies and scientific bodies disagreed with IARC

Human Health

EPA scientists performed an independent evaluation of available data for glyphosate and found:

- **No risks of concern to human health from current uses of glyphosate.** Glyphosate products used according to label directions do not result in risks to children or adults.

National Association of Wheat Growers v. Becerra et al.

Nat'l Assn. of Wheat Growers v. Zeise

- First Amendment lawsuit challenging warnings for glyphosate
- Feb. 26, 2018: ED Cal. grants preliminary injunction
 - “As applied to glyphosate, the required warnings are false and misleading.”
- June 22, 2020: ED Cal. grants permanent injunction
- Cal. Attorney General has appealed to Ninth Circuit

Case 2:17-cv-02401-WBS-EFB Document 155 Filed 06/22/20 Page 33 of 34

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

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

17 IT IS THEREFORE ORDERED that plaintiffs’ Motion for
18 Summary Judgment (Docket No. 117) be, and the same hereby is,
19

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

33

and public interest favor an injunction, the court will grant
plaintiffs’ request to permanently enjoin Proposition 65’s
warning requirement as to glyphosate.²³

First Amendment Supreme Court Precedents

Zauderer v. Office of Disc. Counsel

- First Amendment prohibits compelled commercial speech that is false or misleading
- Compelled warnings must be:
 - i. **purely factual and uncontroversial**
 - ii. **reasonably related to a substantial government interest**
 - iii. neither unjustified nor unduly burdensome

Nat'l Inst. Of Family & Life Advocates v. Becerra

- By compelling individuals to speak a particular message, the government “alters the content of” and restricts their speech
- Burden of proof is **on the government** to “justify the restriction” on speech

First Amendment and California Proposition 65

- Proposition 65 “safe harbor” warning for foods:

WARNING: Consuming this product can expose you to [name of chemical], which is known to the State of California to cause cancer. For more information, go to [*www.P65.ca.gov/food*](http://www.P65.ca.gov/food)

- Proposition 65 warning requirement compels a message about exposure to a carcinogen or reproductive toxicant
- It therefore implicates speech, and the First Amendment applies

Questions?



Peg Carew Toledo
Counsel | San Francisco
Tel: +1 415.471.3110
peg.toledo@arnoldporter.com