

# California Proposition 65

- Passed by voter initiative in California in 1986
- Prop. 65 agency (OEHHA) can add chemicals to the list based on animal studies, not just human studies
  - *AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425 (1989)
- A knowing and intentional exposure to a listed chemical requires a warning, unless defenses apply
- Defendants carry a heavy burden of proof in Prop. 65 cases, essentially having to prove themselves innocent



# California Proposition 65 and Free Speech

- 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
- It therefore implicates speech, and the First Amendment applies
- Case law has developed over last 35 years

# First Amendment

- First Amendment prohibits compelled commercial speech that is false or misleading.
- Supreme Court requires a compelled warning to be:
  - (i) purely factual and uncontroversial,
  - (ii) reasonably related to a substantial government interest,
  - and
  - (iii) neither unjustified nor unduly burdensome.

*Zauderer (1985)*



# First Amendment

- “A statement may be literally true but nonetheless misleading and, in that sense, untrue.” *CTIA – The Wireless Assoc. v. City of Berkeley* (9<sup>th</sup> Cir. 2019)
- The burden of proof is on the government to “justify the restriction” on speech. *Nat’l Inst. of Family & Life Advocates v. Becerra* (2018)

# First Amendment in Prop. 65 litigation

- First Amendment *as an affirmative defense* in Proposition 65 litigation:
  - Frequently raised, but rarely litigated
  - Came close to succeeding in *People v. Frito-Lay* (2008)
  - Rejected in *CERT v. Starbucks* (2018)
- Two affirmative suits (both E.D. Cal.):
  - *National Ass'n of Wheat Growers v. Becerra* (glyphosate)
  - *CalChamber v. Becerra* (acrylamide)

# Wheat Growers lawsuit: glyphosate

- **Glyphosate** is added to the Prop. 65 list as a carcinogen (July 2017) based on determination by IARC
  - In 2015, IARC classifies glyphosate as “probably carcinogenic” to humans
    - Based on “sufficient evidence” that it causes cancer in animals (four rodent studies) and “limited evidence” that it causes cancer in humans
- **Highly controversial:** Numerous other regulatory and scientific bodies have found that glyphosate is not carcinogenic
- Wheat Growers, Monsanto, and other trade associations sue AG Becerra in 2017

International Agency  
Research on Cancer



# Wheat Growers lawsuit

- First Amendment lawsuit challenging warnings for glyphosate  
*Nat'l Assn. of Wheat Growers v. Zeise*, No. 2:17-cv-02401 (E.D. Cal.)
- Court finds trade groups have a likelihood of success on the merits and grants preliminary injunction (Feb. 26, 2018):
  - Court finds that a valid Prop. 65 warning must state that a chemical is “known to the state to cause cancer”
  - Warning conveys a message that glyphosate’s carcinogenicity is an undisputed fact when “the heavy weight of the evidence in the record is that glyphosate is not known to cause cancer.”
  - Therefore, state fails to meet its burden to show that the warning is purely factual and uncontroversial under *Zauderer*

# Wheat Growers lawsuit

- Court allows *listing* – as opposed to *warning requirement* – to stand
  - Court finds that listing itself does not compel any speech – no First Amendment component
- Court grants summary judgment to Plaintiffs (June 2020)
- AG appeals to Ninth Circuit



# CalChamber lawsuit: acrylamide

- Added to the Prop. 65 list in 1990 with a “safe harbor” NSRL of 0.2 mcg/day based on laboratory animal studies
- Acrylamide also formed as a normal byproduct of cooking a wide range of foods
  - Dietary source of acrylamide not discovered until 2002
- First wave of acrylamide litigation brought by CERT, ELF, EWW, and AG in 2005
- Targeted about a *dozen* major companies on snack foods and fries
  - Cases resulted in settlements in 2008-2009 around warnings or a reformulation standard

# CalChamber lawsuit: acrylamide

- Coffee notices in 2012
- Cereal notices in 2013-14
- Huge wave of acrylamide litigation began in 2015
  - 794 notices on acrylamide in food since 2015
  - A dozen or so private plaintiffs
- Oct. 7, 2019: CalChamber files declaratory relief lawsuit

*California Chamber of Commerce v. Becerra*,  
No. 2:19-cv-02019-KJM-EFB (E.D. Cal.)

- 297 notices on acrylamide in food since this filing

# CalChamber First Amendment lawsuit

## Key allegations:

- Numerous epidemiological studies demonstrate that dietary acrylamide does not increase cancer risk in humans
  - e.g., 2012 meta-analysis published in *European Journal of Cancer Prevention*
- Proposition 65 cancer warnings for dietary acrylamide are misleading because they convey a message to consumers that the food will increase their cancer risk

# *CalChamber* First Amendment lawsuit

- CERT (coffee case plaintiff) intervened
- Court granted AG's first motion to dismiss based on Anti-Injunction Act
- Court denied AG's second motion to dismiss based on abstention doctrines
- Preliminary injunction briefing to resume in fall 2020