

The First Amendment and Proposition 65

A Discussion of the *Wheat Growers Case*

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Attorney General's Arguments in Opposition – Not Ripe

- **NO “Actual Controversy” and NO “Credible Threat of Enforcement”**
 - No evidence yet exposure will exceed No Significant Risk Level (NSRL).
 - The mere possibility that Plaintiffs will face meritless Proposition 65 enforcement actions does not establish a Credible Threat of prosecution.
 - Glyphosate levels in food products are unlikely to require warnings.
 - Unlikely that consumers’ private use of glyphosate will exceed the NSRL.
 - Occupational exposures do not require warnings where companies comply with OSHA requirements and Plaintiffs provide no evidence of past or future violations in this regard.

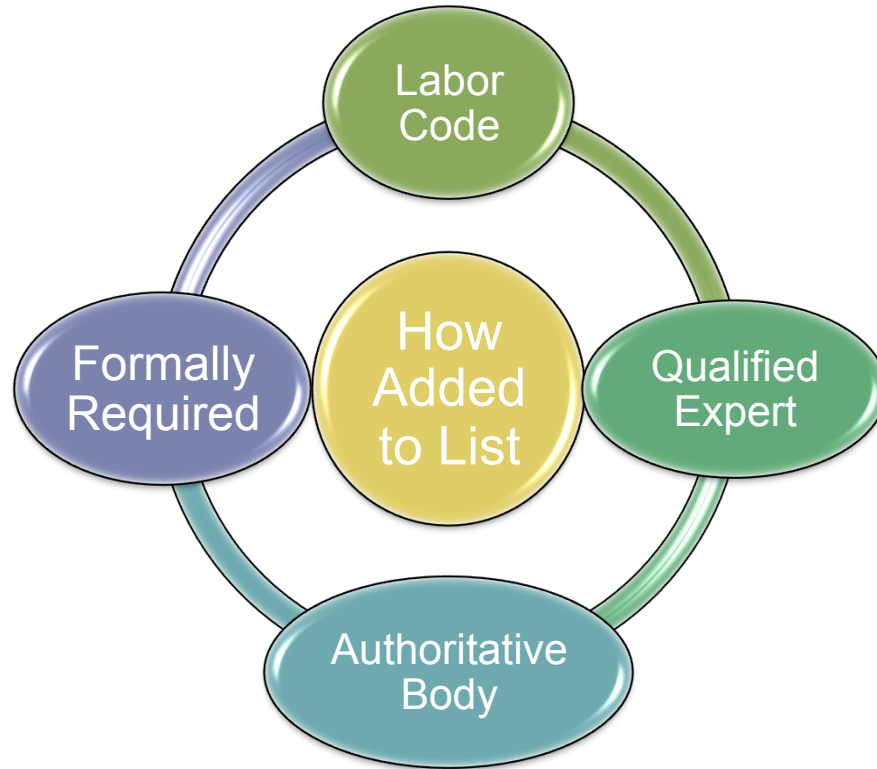
AG's Arguments in Opposition – Glyphosate Warning Subject to Reduced Scrutiny

- **Intermediate v. Lower Level** of scrutiny for compelled commercial speech?
- **Lower Level applies**
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).
Purely Factual and Uncontroversial test.
- Prop 65 is a “disclosure requirement,” which receives reduced scrutiny.
- Recent Supreme Court and Ninth Circuit cases regarding government-mandated warnings **support lower level scrutiny**
(CTIA-The Wireless Ass’n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019) (CTIA II) (cellular telephone radiation); *American Beverage Ass’n v. City and County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (sugary sodas)

AG's Arguments in Opposition – Warning “Factual and Uncontroversial”

- **Language of the glyphosate warning is entirely factual** – State determined the chemical is known to cause cancer **by listing it** on the Prop 65 list. Health & Safety Code § 25249.8(a).
- International Agency for Research on Cancer (IARC) – is an authoritative body part of WHO that determined glyphosate a carcinogen in animal studies, and probable carcinogen to humans. That is a fact.
- Setting a safe harbor NSRL is purely factual.
- **Warning is uncontroversial because cancer itself is not controversial** and warning about it is not at odds with a company's mission. Such a warning also conveys information important to public health.

How Chemicals Get Added to the List



“Labor Code” Listing Mechanism

- **Chemical can be listed based on “possibility” it can cause cancer**
- Can be listed even if U.S. EPA and state agencies conclude no risk
- Chemicals identified by reference in California Labor Code **presumes** listings of chemicals by certain organizations and agencies to be **potentially** hazardous.
- Including substances identified by the **International Agency for Research on Cancer (“IARC”)**, and other organizations, even if only proven to cause cancer in animals.
- (Health & Safety Code § 25249.8(a); *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425.)

Listing Takeaway:

A chemical can be listed on the Proposition 65 list where there is no evidence it causes cancer or reproductive harm in humans.

It can listed when no U.S. government agency lists it as a carcinogen or reproductive toxicant.



AG's Arguments in Opposition – Not Unduly Burdensome

- First Amendment does not protect companies from warning requirements merely because they might be bad for business. **Prop 65 warning does not “interfere with advertising or threaten to drown out messaging”**. Citing *CTIA II* 928 F.3d at 849.
- Prop 65 warning need only be “prominently displayed” and “understood by an ordinary individual...” (27 CCR 25601(c)).
- Alternative warnings offered survive lower level of scrutiny
Cancer is not controversial.
Warning language is purely factual – merely providing information about IARC’s classification of glyphosate as a carcinogen is reasonably related to state’s substantial interests in health and not unduly burdensome.

AG's Arguments in Opposition – Alternative Warning Language

- A **“more nuanced” warning** than is found in the safe harbor language can be sufficient in certain circumstances. AG proposed multiple alternative warnings for glyphosate.
- **As long as core information is conveyed - “the state of California has determined that glyphosate is known to cause cancer under Proposition 65” it can provide additional context.**
- AG has allowed nuanced warnings in other instances:

Coordinated Proceeding Proposition 65 Fish Cases, JCCP No. 4319

(presence of mercury in fish – “fish and shellfish are important part of healthy diet”)

CERT v. McDonald’s Corp. – warning regarding fried and baked goods containing acrylamide (“The FDA has not advised people to stop eating baked or fried potatoes.”)