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The National Health Federation
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF WHEAT GROWERS; NATIONAL CORN GROWERS ASSOCIATION; UNITED STATES DURUM GROWERS ASSOCIATION; WESTERN PLANT HEALTH ASSOCIATION; MISSOURI FARM BUREAU; IOWA SOYBEAN ASSOCIATION; SOUTH DAKOTA AGRI-BUSINESS ASSOCIATION; NORTH DAKOTA GRAIN GROWERS ASSOCIATION; MISSOURI CHAMBER OF COMMERCE AND INDUSTRY; MONSANTO COMPANY; ASSOCIATED INDUSTRIES OF MISSOURI; AND AGRIBUSINESS ASSOCIATION OF IOWA,

Plaintiffs,

v.

LAUREN ZEISE, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT; AND XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Defendants.

No. 2:17-cv-02401-WBS-EFB

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL HEALTH FEDERATION AND MOMS ACROSS AMERICA AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: February 5, 2018
Time: 1:30 p.m.
Judge: Hon. William B. Shubb

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 5, 2018, at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable William B. Shubb, in Courtroom 5 of the above titled Court, located in the United States Courthouse at 501 I Street, Sacramento, CA 95814, proposed *amici curiae* The National Health Federation ("The NHF") and Moms Across America ("MAAM") will and do move this Court for leave to file a brief as *amici curiae* in opposition to Plaintiffs' motion for a preliminary injunction in the above-captioned case. Pursuant to Local Rule 230(g), the parties agree that the motion shall be submitted upon the record and briefs on file without the need for oral argument.

As set forth in the attached memorandum of points and authorities, the Court should grant leave to file the *proposed amici curiae* brief because NHF and MAAM have a substantial interest in this case and will assist the Court in resolving the issues raised by Plaintiffs' motion for a preliminary injunction. This motion is based upon this notice, the memorandum of points and authorities in support thereof, and the proposed *amici curiae* brief attached hereto. Counsel for NHF and MAAM conferred with counsel for the parties before filing this motion. All parties have provided their consent to the filing of this motion.

DATED: January 26, 2018

Respectfully submitted,

By: /s/ Scott C. Tips

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MEMORANDUM OF POINTS AND AUTHORITIES

A. The National Health Federation

Established in 1955, the NHF is the oldest health-freedom nonprofit organization in the world. Based in California, the NHF works to protect and enhance the health and health freedoms of individuals in California and around the world. The NHF has long warned public officials, scientists, and the general public, about the extreme health dangers of glyphosate, a Monsanto product banned due to its toxicity in multiple cities and countries throughout the globe. The NHF and its members have a substantial interest in ensuring the consumer protections of Prop 65 are applied to glyphosate as a proven and known carcinogen.

The NHF routinely monitors and participates in rulemaking processes governing consumer products and their labelling. For example, the NHF is recognized as the only nonprofit health-freedom organization able to speak, submit scientific research, and actively shape global policy at international meetings of the United Nations' Codex Alimentarius Commission and its committees. The NHF has been attending Codex meetings since approximately 1997, and has been accredited by Codex since 2002 as a participating International Nongovernmental Organization (INGO) at those meetings. Here is an example of just one year's work worldwide by The NHF in such regard to protect consumers:

- **February 2014 in Bergen, Norway:** NHF argued against the continued inclusion of aluminum in fish batter at the Codex Committee on Fish and Fishery Products. Aluminum was removed.

- **March 2014 in the United States:** NHF was the first to notice and point out that the FDA, with its new proposed food-labeling guidelines, was actually attempting to harmonize vitamin-and-mineral Daily Allowances down to low Codex levels.
- **March 2014 in Hong Kong, China:** NHF continued its work in removing aluminum from food additives at the Codex Committee on Food Additives, and argued that aspartame is a dangerous and harmful artificial sweetener.
- **March-April 2014 in The Hague, Netherlands:** NHF argued for lower permissible arsenic and lead levels in foods at the Codex Committee on Contaminants in Foods meeting. The debate continues with NHF persistently pushing its views for safer foods.
- **April 2014 in Paris, France:** NHF participates at the Codex Committee on General Principles meeting where changes in the Codex Procedural Manual are being proposed.
- **July 2014 in Geneva, Switzerland:** NHF actively participates in the Codex Alimentarius Commission meeting, where it argues strenuously for decreasing the amount of lead permitted in infant formulas, the levels of arsenic in rice, and against any continued use of aluminum as a food additive.
- **September 2014 in The Hague, Netherlands:** NHF attends the Codex European regional meeting (styled CCEURO) where NHF is publicly acknowledged by the chairman for its

passionate representation of consumer interests.

- **October 2014 in Rome, Italy:** NHF aggressively argued at the Codex Committee on Food Labeling against the continued erosion of organic standards.

The National Health Federation has a continuing interest, as reflected in its extensive work at Codex and other venues, in protecting the health of its members and the general public. The current issue before this Court is of deep and abiding interest to NHF and its members.

B. Moms Across America

MAAM is a nonprofit organization of thousands of moms who raise awareness regarding toxic exposures in consumer products. MAAM routinely educates its members about glyphosate, including for example sharing published scientific resources cataloguing the health dangers of glyphosate, and publishing laboratory test results of glyphosate contamination in drinking water and breast milk. MAAM and its members have a substantial interest in ensuring the consumer protections of Prop 65 are applied to glyphosate as a proven and known carcinogen.

MAAM consistently reaches over 1.5 million supporters per month on Facebook and millions more through news, TV, articles, radio and other social media platforms. The 600+ leaders of MAAM have created nearly 1000 local events to raise awareness about GMOs and glyphosate in less than 5 years. MAAM leadership has spoken in several countries around the world, at the Dow, Dupont and

Monsanto shareholder meetings and MAAM has initiated nationwide groups to march in 4th of July parades to reach thousands locally and millions nationally in a single day.

Conclusion

For the foregoing reasons, the NHF and MAAM respectfully request this Court grant this request for leave to file this *amici curiae* brief in opposition to Plaintiff's motion.

DATED: January 26, 2018

Respectfully submitted,

By: /s/ Scott C. Tips

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CERTIFICATE OF SERVICE

I, Scott C. Tips, declare under penalty of perjury that on January 26, 2018, I caused the foregoing document to be electronically filed with the Court's CM/ECF Filing System, which will send a Notice of Electronic Filing to all parties of record who are registered with CM/ECF.

/s/ Scott C. Tips

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ATTACHMENT

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF WHEAT GROWERS; NATIONAL CORN GROWERS ASSOCIATION; UNITED STATES DURUM GROWERS ASSOCIATION; WESTERN PLANT HEALTH ASSOCIATION; MISSOURI FARM BUREAU; IOWA SOYBEAN ASSOCIATION; SOUTH DAKOTA AGRI-BUSINESS ASSOCIATION; NORTH DAKOTA GRAIN GROWERS ASSOCIATION; MISSOURI CHAMBER OF COMMERCE AND INDUSTRY; MONSANTO COMPANY; ASSOCIATED INDUSTRIES OF MISSOURI; AND AGRIBUSINESS ASSOCIATION OF IOWA,

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LAUREN ZEISE, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT; AND XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Defendants.

No. 2:17-cv-02401-WBS-EFB

BRIEF OF THE NATIONAL HEALTH FEDERATION AND MOMS ACROSS AMERICA AS AMICI CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Honorable William B. Shubb

Case Filed: Nov. 15, 2017

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Health Federation (the NHF) and Moms Across America (MAAM) respectfully submit this *amici curiae* brief in opposition to Plaintiffs' Motion for Preliminary Injunction.

Established in 1955, the NHF is the oldest health-freedom nonprofit organization in the world. Based in California, the NHF works to protect and enhance the health and health freedoms of individuals in California and around the world. The NHF has long warned public officials, scientists, and the general public, about the extreme health dangers of glyphosate, a Monsanto product banned due to its toxicity in multiple cities and countries throughout the globe. The NHF and its members have a substantial interest in ensuring the consumer protections of Prop 65 are applied to glyphosate as a proven and known carcinogen.

Moms Across America is a nonprofit organization of thousands of moms who raise awareness regarding toxic exposures in consumer products. MAAM routinely educates its members about glyphosate, including for example sharing published scientific resources cataloguing the health dangers of glyphosate, and publishing laboratory test results of glyphosate contamination in drinking water and breast milk. MAAM and its members have a substantial interest in ensuring the consumer protections of Prop 65 are applied to glyphosate as a proven and known carcinogen.

INTRODUCTION

Prop 65 was passed by an overwhelming majority of voters to ensure reasonable standards for notifying consumers when products contain known carcinogens. Monsanto is a corporate entity that is currently selling the carcinogen glyphosate, a product banned due

to its toxicity in multiple U.S. cities and many countries around the world.[1]

Because Plaintiffs are functionally aligned with Monsanto, Plaintiffs are attempting to circumvent the fact that Monsanto has unclean hands -- worldwide, consumers and public officials have witnessed Monsanto's game exposed publicly is: widespread falsification of test results and influence peddling among public-policy makers, legislators, and government regulators.[2]

Here in California, Monsanto and its aligned-amici (Chambers of Commerce) attempt to flash a false veil of safety, behind which they throw wordy but ultimately half-baked, factually-devoid constitutional arguments at the wall to see what might stick. For example, Monsanto-aligned amici attempts to convince this Court that California may not use standard product label warnings to protect its citizenry from independently verified increased risks of cancer *because* (Monsanto-aligned interests suggest) the standard label could *potentially* diminish some other State's 'right' [sic] to a corporation's private marketshare. Even if such a novel and dangerous argument were entertained by this Court, the different

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[1] *See e.g.*, The Guardian (US Edition), *Glyphosate is a 'probably carcinogenic' herbicide. Why do cities still use it?* (April 21, 2015), accessed on January 25, 2018, at https://www.theguardian.com/cities/2015/apr/21/glyphosate-probably-carcinogenic-pesticide-why-cities-use-it.

[2] *See e.g.*, Gillam, C. *White Wash: The Story of a Weedkiller, Cancer, and the Corruption of Science,* Island Press, 320 pages (Oct 2017); Hahn, J. *Is Roundup Poisoning the Planet?* (Oct 2017), Sierra Club Magazine ("Gillam assembles independent research, internal Monsanto communications, and case studies of cancer victims into a comprehensive, disturbing report on the suspected health and environmental impacts of glyphosate exposure. Equally astonishing are the serial revelations of how Monsanto conscripted scientists, professors, and regulators to aid in its defense. The EPA emerges as the key accomplice here: For decades, the agency overlooked concerns that glyphosate was carcinogenic. The World Health Organization announced in March 2015 that glyphosate was a probable human carcinogen.") https://www.sierraclub.org/sierra/2017-6-november-december/books/roundup-poisoning-planet

cases cited by Monsanto-aligned amici for this proposition are factually inapposite. While it is true that Courts do not permit States to engage in unlawful gamesmanship for leverage in interstate trade (such as tariff wars between States), such uniquely specific legal precedents are factually irrelevant to the Prop 65 case at hand.[3]

Nor is any State required to participate in Monsanto-aligned amici's veiled notion that California be somehow required to join a regulatory 'race to the bottom' with other States vying for corporate marketshare.

Indeed, Prop 65 has withstood multiple challenges and has never been found unconstitutional in either a facial or as applied challenge.[4] The initiative power behind Prop 65 is rooted in California's Constitution, Art. II, Sec. 8. This voter-approved law has stood for decades as a reasonable and scientifically-sound consumer protection that allows California to hold its own status quo that is not based in any corporation's marketshare, but in everyone's health.

Both State experts and independent experts, as set forth in detail below, have proven that glyphosate is a known carcinogen. Contrary to the arguments made by Monsanto-aligned interests,

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[3] Indeed, it is a red flag that Monsanto and its aligned amicus briefs fail to state in any detail the actual facts of the constitutional cases they are citing.

[4] *See e.g.*, Funderburk, W. *et al*, *Defense Strategies in Proposition 65 Litigation,* A Publication of the Environmental Law Section of the State Bar of California, Vol. 9, No. 2, Spring 2000 ("Despite the obvious legislative obstacles, the regulated community has mounted numerous constitutional challenges to Prop. 65, based on separation of powers and due process, since the law's inception. In all, at least twelve actions have facially challenged Prop. 65. None has succeeded. Recently, the California Court of Appeal affirmed that private citizen enforcement of Prop. 65 is constitutional.")

commercial speech rights do not encompass the right to harm the public. They never have. Our constitutional law upholds consumer warning labels as *integral* to commercial speech. Throughout American history, the most logical, effective, and lawful method for warning a consumer about a product's danger is quite literally *on that product itself*.[5]

Monsanto-aligned interests are only hoping to use this case to attempt to hedge their marketshare of the status quo, propped up by a 4.76 billion-dollar-a-year glyphosate trade.[6] This Court should also be aware of the risk that Monsanto-aligned interests are only using this Court to obtain a court order that Monsanto-aligned interests can leverage in international trade regulatory tribunals (i.e., World Trade Organization), which Monsanto-aligned interests perceive to be more likely to strip away consumer protections with a broad brush. If such a risk were to materialize, it would undermine the sovereignty of all 50-States.

Regardless, for Californians, Prop 65 is about health and science, not the status quo of private marketshare. This Court should not indulge Monsanto-aligned interests in their attempts to avoid expert scrutiny.

ARGUMENT

Prop 65 provides transparency about glyphosate because experts

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[5] Webb, T., *Helping Consumers Get the Picture: The Constitutionality of Requiring Graphic Labels on Cigarette Packaging* (December 3, 2012). Accessed on January 25, 2018, at https://ssrn.com/abstract=2184335.

[6] *See e.g.,* United States Securities and Exchange Commission, *Form 10-K (Fiscal Year ending August 31, 2015), Monsanto Company. Accessed on January 23, 2018, at* https://www.sec.gov/Archives/edgar/data/1110783/000111078315000230/mon-20150831x10k.htm.

have confirmed repeatedly, as set forth in detail below, that glyphosate is carcinogenic. Monsanto-aligned interests may claim that their commercial free-speech rights are being infringed, but the People of California have the sovereign right to these voter-approved product label warnings.

A. The Science Backs Defendants' Position.

Monsanto-aligned interests challenge Defendants' reliance upon the glyphosate assessment of the International Agency for Research on Cancer (IARC).[7] Yet, IARC is one "of the most well-respected and prestigious scientific bodies," whose assessments of carcinogenicity of chemicals "are generally recognized as authoritative[.]" Federal Judicial Center's Reference Manual on Scientific Evidence (3rd. Ed.) (Reference Manual) at 20, 565. And, for good reason. Unlike regulatory bodies that often have ties to industry and are shackled with earlier regulatory decisions, IARC is independent. Scientists from around the World, who are renowned and respected experts in their field, systematically reviewed the published and peer-reviewed data and concluded, based on sound, reliable evidence, that glyphosate is a probable human carcinogen.[8]

The State of California reviewed the IARC classification and similarly concluded that glyphosate is a substance known to the

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[7] *The content from page 10, line 9 through page 11, line 11 is provided primarily from another case of public record against Monsanto (U.S. Dist. Ct., (Nor. Cal.) In Re: Roundup Products Liability Litigation, MDL#2741, Case No. 16-md-02741-VC). It is provided here with the consent of the original author.*

[8] *See* Reference Manual at 91 ("It appears that many of the most well-respected and prestigious scientific bodies (such as the International Agency for Research on Cancer (IARC), the Institute of Medicine, the National Research Council, and the National Institute for Environmental Health Sciences) consider all the relevant available scientific evidence, taken as a whole, to determine which conclusion or hypothesis regarding a causal claim is best supported by the body of evidence.").

State of California to cause cancer as of July 7, 2017.[9] Echoing decisions by IARC and the State of California, on October 19, 2017, European Parliament's Environment Committee ("EPEC") voted in favor of an immediate and complete ban on household use of glyphosate-based formulations and a full ban on such by December 2020.[10] And on October 24, 2017, European Parliament representatives overwhelmingly voted in favor of a non-binding resolution banning glyphosate in the 28 European Union member states by 2022, again with an immediate ban on household use.[11] The EPEC is not alone; several governmental bodies outside of the United States have instituted similar glyphosate bans.[12]

Despite the best efforts of Monsanto to ignore, bury, and prolong studies on glyphosate toxicity, the evidence of that toxicity and carcinogenicity can no longer be ignored or hidden. The research is so substantial[13] that it has become public knowledge that Monsanto's glyphosate is not only carcinogenic, but immensely dangerous in other ways to humans and our environments.[14] Providing

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[9] OEHHA, *Glyphosate Listed Effective July 7, 2017, as Known to the State of California to Cause Cancer,* June 26, 2017; Accessed on January 25, 2018, at https://oehha.ca.gov/proposition-65/crnr/glyphosate-listed-effective-july-7-2017-known-state-california-cause-cancer

[10] European Parliament News, *MEPs propose glyphosate phase-out, with full ban by end 2020*, October 19, 2017, Accessed on January 25, 2018 at http://www.europarl.europa.eu/news/en/press-room/20171019IPR86411/meps-propose-glyphosate-phase-out-with-full-ban-by-end-2020

[11] Id.

[12] Pesticide Action Network (UK), *Glyphosate restrictions and bans around the world,* accessed on January 25, 2018, at http://claregalway.info/wp-content/uploads/2016/09/535_Glyphosate-and-pesticide-bans-around-the-world-as-of-July-20161.pdf

[13] *See e.g.*, Gillam, *supra*, at pp. 255-293.

[14] *See e.g.*, Green Med Info, *Glyphosate*, Accessed on January 25, 2018, at http://www.greenmedinfo.com/toxic-ingredient/glyphosate (publishing research

Proposition-65 warnings of glyphosate's carcinogenicity is the absolute least that California voters can do with the toxin glyphosate; as many other jurisdictions have learned, banning it outright is far more intelligent and appropriate.

In 2013, researchers from the Indian Institute of Toxicology Research confirmed the carcinogenic potential of Roundup herbicide by exposing human skin cells to extremely low concentrations of glyphosate.

The same researchers had previously discovered and reported on glyphosate's tumor-promoting potential in a two-stage mouse skin carcinogenesis model through its disruption of proteins that regulate calcium (Ca^{2+-}) signaling and oxidative stress (SOD 1), but they were unable then to identify the exact molecular mechanisms behind how glyphosate contributes to tumor promotion.[15]

Perhaps the most damning piece of scientific evidence showing harm from genetically modified organisms (GMO) was published in September 2012 in the journal *Food and Chemical Toxicology (FCT)*. Now called The Séralini Study,[16] it documented liver and kidney toxicity, hormonal disturbances, and an increasing trend of tumor formation in rats fed GMO corn treated with Roundup. The study was a deathblow not only to Monsanto, but also to the entire agrochemical sector that employs this herbicide.

Typically, Monsanto has alleged that glyphosate has no effect

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studies documenting that the United States and the rest of the World face a genuine health and environmental crisis from glyphosate poisoning.)

[15] Jasmine George, Sahdeo Prasad, Zafar Mahmood, Yogeshwer Shukla, "Studies on glyphosate-induced carcinogenicity in mouse skin: a proteomic approach." *J Proteomics*, 2010 Mar 10;73(5):951-64. Epub 2010 Jan 4. PMID: 20045496.

[16] GMOSeralini, Accessed on January 25, 2018, at https://www.gmoseralini.org/en/

on mammalian cells, which is a half-truth and half-lie. Forgotten, or simply ignored, is the basic biological fact that our human and animal intestinal tracts are full of billions of very beneficial *non-mammalian* bacteria, vital to our existence. Glyphosate affects the shikimate pathway in these bacteria, killing them and all of the health benefits that would normally flow from them.

Glyphosate is an amino acid that resembles glycine and can take the place of glycine in proteins and accumulate in the body. Testimony will show that this can suppress the enzyme EPSPS in the shikimate pathway (in the intestinal tract) effecting: lipase (obesity), insulin receptor (diabetes); amyloid beta plaque (Alzheimer's); **OGG1 (cancer)**, lipocain (kidney failure); ACTH (adrenal insufficiency); Cytochrome C Oxidase (Mitochondrial Disease); Alpha Synuclein (Parkinson's Disease); and TDP-43 (ALS). As is actually well known, and can be attested to, "Glyphosate insertion by mistake in place of glycine during protein synthesis can easily explain the alarming correlations between glyphosate usage on core crops and a long list of debilitating chronic diseases."[17]

B. Monsanto's Unclean Hands.

During the 1990s, independent scientists published new studies concluding that GBFs were genotoxic and induced oxidative stress.[18]

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[17] Samsel & Seneff, "Glyphosate Pathways to Modern Diseases VI: Prions, amyloidosis and autoimmune neurological diseases," *JBPC*, Vol. 17, p. 25SA16A *et seq*. (2017); *See also* Dr. Seneff "Monsanto Makes Poison - Deep Science w/Dr. Seneff (MIT) – SuspiciousObservers", accessed on January 25, 2018, at https://youtu.be/uDum7GGuOTA (minute 34:39). Dr. Seneff also explains this in a slide presentation given at a U.S. Congressional hearing on glyphosate. *U.S. Congressional Hearing on Glyphosate*, June 14, 2016, Accessed on January 26, 2018 at https://people.csail.mit.edu/seneff/DC_congressional_hearing.html.

[18] *The content in page 13, line 21 through page 16, line 7 is provided primarily from another case of public record against Monsanto (U.S. Dist. Ct.,*

To combat these studies, Monsanto hired Dr. James Parry who "was at the forefront of studies in genetic toxicology and the founding father of much of this discipline within the UK."[19] Based on published literature and Monsanto's unpublished in-house genotoxicity studies, Dr. Parry provided Monsanto a draft report that concluded "glyphosate is a potential clastogenic[20] in vitro" and the "clastogenic activity may be reproduced in vivo in somatic cells."[21] Dr. Parry recommended that Monsanto conduct several tests to determine glyphosate's safety, which Monsanto never conducted. Further, Monsanto did not provide the Parry report to EPA, as it was required to do under 40 CFR 159.158. *See Am. Crop Prot. Ass'n v. U.S. E.P.A.*, 182 F. Supp. 2d 89 (D.D.C. 2002).

Recognizing that Dr. Parry's report would not aid Monsanto's messaging, it elected to publish a ghostwritten article ostensibly by Gary Williams, concluding that "Roundup herbicide does not pose a health risk to humans,"[22] despite its own scientists admitting internally, "[t]he terms glyphosate and Roundup cannot be used interchangeably ....For example you cannot say that Roundup is not

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(Nor. Cal.) In Re: Roundup Products Liability Litigation, MDL#2741, Case No. 16-md-02741-VC). It is provided here with the consent of the original author.

[19] Waters, *et al*. James M. Parry (1940–2010) Mutagenesis (2011) 26 (1): 1-2.

[20] A clastogen is a mutagenic agent giving rise to or inducing disruption or breakages of chromosomes, leading to sections of the chromosome being deleted, added, or rearranged.

[21] Parry Report p. 12. Moreover, Dr. Parry's conclusions demonstrate that Plaintiffs' mechanistic opinions enjoy general acceptance. MONGLY01314233

[22] Williams, *et al*., Safety Evaluation and Risk Assessment of the Herbicide Roundup and Its Active Ingredient, Glyphosate, for Humans. Regulatory Toxicology and Pharmacology, 31, 117-165 (2000); MONGLY00977264 ("we ghost-write the *Exposure Tox & Genetox* sections...we would be keeping the cost down by us doing the writing and they would just edit & sign their names so to speak. Recall that is how we handled Williams Kroes & Munro, 2000.").

a carcinogen...we have not done the necessary testing on the formulation to make that statement."[23] Dr. William Heydens, current Regulatory Product Safety Assessment Lead at Monsanto, admitted he ghostwrote and made final edits to the article.[24] Monsanto noted in December 2010 that Williams (2000) was "an invaluable asset" for its "responses to agencies; Scientific Affairs rebuttals; and Regulator reviews;" and while Williams "has served us well in toxicology over the last decade...we need a stronger arsenal of robust scientific papers to support the safe use of our products as we face the next set of chemistry registration reviews across the globe."[25]

The next EPA registration prompted another round of ghostwritten articles, including the Kier and Kirkland study[26] originally written by Monsanto's David Saltmiras.[27] In requesting funding for the manuscript, Saltmiras stated that it "will be a valuable resource in future product defense against claims that glyphosate is mutagenic or genotoxic."[28] However, after drafting the manuscript, Monsanto concluded that "the manuscript turned into such *a large mess of studies reporting genotoxic effects,* that the

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[23] 11/24/2003 email from Donna Farmer. MONGLY00922458.

[24] 6/21/1999 email from Bill Heydens stating "And Dougie [Cantox] thinks I would actually leave the final editing to him unsupervised..."; MONGLY03751016; *See also* Ex. 29. MONGLY02598454, Glyphosate Publications Recommendations for Process.

[25] 12/8/2010, email from Heydens and attachment. MONGLY02067858, pp 12, 16.

[26] Kier & Kirkland, "Review of genotoxicity studies of glyphosate and glyphosate-based formulations," *Crit Rev Toxicol*, 2013 Apr;43(4):283-315.

[27] Kier & Saltmiras, Draft Manuscript. MONGLY01691608.

[28] 2/29/2012, manuscript clearance form. MONGLY02117800.

story as written stretched the limits of credibility among less sophisticated audiences."[29] (emphasis added). Monsanto decided it needed to "enhance credibility" of the manuscript by giving the impression that the study was independent and thus replaced Saltmiras as an author with Dr. David Kirkland, a renowned genotoxicity specialist.[30] Essentially, Monsanto could not let the data speak for itself, because the data shows, as the experts explain, that glyphosate is genotoxic.

Unfortunately, though, Monsanto's influence is not just limited to generating ghostwritten articles in support of its poison. Monsanto also has influenced and compromised the Agency for Toxic Substances and Disease Registry (ATSDR), a Federal public-health agency of the Department of Health and Human Services.

Two years ago, ATSDR announced that it was going to publish a "toxicological profile" on glyphosate, to become available in October 2015. Amazingly, the information that ATSDR said would become available has yet to appear. Yet documents that have been uncovered reveal this was no accident, or bureaucratic delay, but instead the result of a collaborative effort between Monsanto and a group of high-ranking EPA officials. Jess Rowland, a deputy division director at the EPA, had promised Monsanto that he would try and "shoot down" that review, but these documents show those helping hands at the EPA went even higher up the ladder than

[29] 7/19/2012 Email re: Genotox Review: your approval requested! MONGLY02145917.

[30] Saltmiras noted that Kier & Kirkland was "the fifth such Glyphosate related manuscript I have been involved with over the past few years without co--authorship." MONGLY04086537.

Rowland. Still, even though that ATSDR report was buried in the EPA's basement, other research has come out showing the dangers of dangerous glyphosate.

In addition, as Séralini and his team had their study published, emails show[31] that Monsanto offered the *Food and Chemical Toxicology* (FCT) Editor-in-Chief A. Wallace Hayes a payment for "consulting services." By early 2013, Hayes announced that he had appointed former Monsanto scientist Richard E. Goodman to be in charge of the Journal's biotechnology publications. Another Monsanto scientist, David Saltmiras, was then shown to be involved[32] in coordinating the "third party" expert letter-to-the-editor campaign to get the Séralini study retracted.[33]

In November 2013, the corporate mainstream media headlined the news of Hayes' official announcement that the Séralini study was retracted from FCT. Although the study was published by another journal in 2015, the reputation of Séralini, his team, and their research findings had already been wrongly discredited in the mainstream public mind, a story that Monsanto pushes to this very day.

As cited above, books have been written about the corruption that has been sown in the scientific and regulatory communities by

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[31] *See e.g.*, Authorization Letter to Consulting Agreement dated August 21, 2012, between Prof. A. Wallace Hayes and Monsanto Company, Accessed on January 25, 2018, at https://usrtk.org/wp-content/uploads/2017/08/10-Monsanto-Consulting-Agreement-with-Food-and-Chemical-Toxicology-Editor.pdf.

[32] Internal Record FY2013 re Saltmiras, David Anthony, Accessed on January 25, 2018, at http://baumhedlundlaw.com/pdf/monsanto-documents/8-Monsanto-Scientist-Admits-to-Leveraging-Relationship-with-Food-and-Chemical-Toxicology-Journal.pdf.

[33] *See e.g.*, Emails re Seralini, Accessed on January 25, 2018, at https://usrtk.org/wp-content/uploads/2017/08/14-Monsanto-Emails-Confirming-Undisclosed-Involvement-in-Successful-Retraction-of-Serlani-Study.pdf.

Monsanto. And the evidence is much more prolific than anyone suspected. This page-limited brief cannot provide all of the details that support NHF's and MAAM's position that Monsanto has substantially unclean hands.

C. Monsanto-Aligned Amici Briefs Present Half-Baked, Factually Devoid Arguments.

1. Amici Chambers of Commerce Falsely Claim that California is Mandating Third Party Speech.

Prop 65 does not force anyone's science or speech upon the State of California. The State is free to either accept or reject the research of third parties in its reasonable discretion. And yet, Monsanto-aligned Amici attempt to misdirect this Court with an inapposite argument:

> "'[n]othing in Zauderer suggests *** that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.' PG&E, 475 U.S. at 15 n.12."
> Amici Chambers of Commerce, MPA ISO MSJ, p. 6.

That PG&E case involved forced *political* speech on electric bill mailings, which were layman's *viewpoints in general public discourse*. By contrast, the instant case involves scientific findings recognized by California regulators pursuant to their authority and discretion under Prop 65. It is proper to first analyze the instant case under the great body of law upholding consumer warning labels rather than the small body of law regarding forced political speech. Indeed, it only undermines the credibility of Monsanto-aligned Amici to rely on such inapposite facts.

Monsanto-aligned Amici then double-down in their brief by

further citing the PG&E case with the following inapplicable argument:

> "The government has its own powerful megaphone to spread its preferred policy positions, including positions that are critical of commercial products. But one thing the government cannot due [sic] is coopt the messages of commercial speakers and force them to disparage their own products. Such coercion not only forces speakers to speak when they would rather remain silent, but deters them "from speaking out in the first instance." PG&E, 475 U.S. at 10. That result "reduc[es] the free flow of information and ideas that the First Amendment seeks to promote," id. at 14, to the detriment of companies and the public alike."
>
> Amici Chambers of Commerce, MPA ISO MSJ, p. 8.

But again, the instant case is a *consumer warning label case* -- throughout American history, the most logical, effective, and lawful method for warning a consumer about a product's danger is literally *on that product itself*.[34] So, once again we see the credibility of Monsanto-aligned Amici undermined by their reliance upon inapposite case law.

Monsanto-aligned Amici's rant about 'impossibility of legal compliance' across State lines is nothing new in the field of consumer warning law, and courts have routinely denied such complaints rather than upset the entirety of jurisprudence in this area. Indeed, a harmful actor's rant about 'impossibility' is routinely just a veil for the harmful actor's failure to select from multiple real-world possibilities it deems less profitable. See e.g.,

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[34] Webb, T., *supra*, *Helping Consumers Get the Picture: The Constitutionality of Requiring Graphic Labels on Cigarette Packaging* (December 3, 2012). Jones MM, Benrubi ID, "*Poison Politics: A Contentious History of Consumer Protection Against Dangerous Household Chemicals in the United States*," *American Journal of Public Health*, 2013;103(5):801-812. doi:10.2105/AJPH.2012.301066.

"A traditional axiom of products liability law is that a manufacturer or supplier of goods has a duty to warn of any danger from the intended or unintended but reasonably foreseeable use of its products…. Under current products liability law, a determination of adequacy is a highly subjective and fact-intensive evaluation. As such, defining a step-by-step procedure for creating unassailably adequate warning labels is impossible."[35]

2. Amici Chambers of Commerce Hypocritically Claim Plaintiff Lawyers Have Profit Motives.

California voters included an attorney's fee provision in Prop 65 in order to ensure its enforcement. And indeed, abundant law reviews support the legality and effectiveness of Prop 65 to promote health and product innovation.[36]

Even the Amici Chambers of Commerce could not help but cite this known effect in their own brief:

"SAN DIEGO UNION TRIBUNE, July 31, 2011, p. A-1 (estimating that, as of 2011, more than $1.24 billion had been spent to reformulate products under Proposition 65)."

Amici Chambers of Commerce, MPA ISO MSJ, p. 20.

3. Monsanto-Aligned Amici Falsely Portray The Status Quo of Monsanto's Carcinogenic Marketshare As Some Kind Of Protected Legality.

A sizeable amount of the Monsanto-aligned amici argument suggests the status quo of Monsanto's marketshare with its

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[35] Ross, K., *et al.*, *Legally Adequate Warning Labels: A Conundrum for Every Manufacturer*, Product Liability Prevention (October 1998), Accessed on January 25, 2018 at http://productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf

[36] *See e.g.*, Rechtschaffen, C, "The Warning Game: Evaluating Warnings Under California's Proposition 65," *Ecology Law Quarterly*, Vol 23, Issue 2, March 1996 ("…in the consumer marketplace, where substitute chemicals are available, Proposition 65 has encouraged significant product reformulation. The Act has also helped to reduce toxic air emissions and other environmental exposures, the result of increased industry scrutiny of its processes and concern about negative publicity.")

carcinogen is 'good' for America, and therefore the marketshare status quo should somehow be legally mandated. To prop up such a novel argument, Amici Chambers of Commerce again rely on inapposite facts:

> "Consumer Cause, Inc. v. SmileCare, 110 Cal. Rptr. 2d 627, 636 (Cal. Ct. App. 2001) (holding that evidence that a dental filling had been approved by the American Dental Association and used safely for 150 years was irrelevant because it did not meet the relevant Proposition 65 standard)."
>
> Amici Chambers of Commerce, MPA ISO MSJ, p. 18.

The reality of science is that regulators are constantly learning new information about consumer products. Often regulators learn that otherwise common materials are now, and have been historically, highly carcinogenic to humans. Indeed, it is often the dosage that is the determining factor in exposing the toxin, so as usage increases, so too the evidence of carcinogenicity.[37] Monsanto-aligned amici's attempt to enshrine the status quo of the widespread use of Monsanto's carcinogenic product is ultimately against good science.

4. Monsanto-aligned Amici Falsely Concoct A Conflict of Laws Argument.

The Amici brief from "11 States" is at odds with the law of the 50-States of this Union, because each State must respect the sovereignty of one another, and because there cannot be a conflict-of-laws argument where a California consumer warning label *explicitly* specifies the warning is specific to California.

[37] *See e.g.*, the case cited by Monsanto-aligned amici: Consumer Cause v. SmileCare, 110 Cal.Rptr.2d 627, 632, 634 (2001) (stating that dental providers can be found liable if they use an amalgam above the levels prohibited in Proposition 65).

Consumer warning law has always asked whether a "reasonable anticipated user" would understand the warning label.[38] And courts defer to the expertise of governmental bodies in whether the warning is adequate and comprehensible to a reasonable anticipated user. See e.g., Ramirez v. Plough, Inc., 6 Cal.4th 539, 25 Cal.Rptr.2d 97, 107 (1993).

For over 30-years, every reasonable person has understood that Prop 65 warnings apply to California because the label explicitly states the warning applies to California. Monsanto-aligned amici offers no factually similar case law to support their novel position that this causes conflict or confusion. Indeed, here is a representative example of case law in this area, where a reasonable person actually could not understand the warning label: In *General Chemical Corp. v. De La Lastra*, 815 S.W.2d 750 (Tex.App.1991), two shrimpers died from sulphur dioxide poisoning while processing shrimp with defendant's chemical. The defendant's warning noted that the product "[r]eacts with acids and water, releasing toxic sulfur dioxide gas." The court affirmed the lower court's verdict that this warning did not adequately emphasize that the product could potentially produce a deadly gas. Thus, where a product's use or reasonably foreseeable misuse can cause death, the magnitude of that harm should be conveyed."

With legal precedents like this, Monsanto-aligned Amici are faced with an unwinnable battle, so they have actually attempted

[38] *See e.g.*, Ross, K., *et al.*, *Legally Adequate Warning Labels: A Conundrum for Every Manufacturer*, Product Liability Prevention (October 1998), Accessed on January 25, 2018, at http://productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf (citing Am.Law Prod.Liab.3d §33:10).

to state California law falsely to gain some foothold:

> "Yet California's regulation compels businesses to issue false and misleading statements about their own products."
>
> Amici 11 States, MPA ISO MSJ, p. 8.

California law compels no such thing, and so the above quote from Monsanto-aligned Amici is not a foothold. It is nothing more than a poorly written rant based on junk science.

Second, Monsanto-aligned Amici try to push the infamously discredited 'race to the bottom' that still plagues many developing and impoverished nations today, where sensible environmental health regulations are pushed aside by special interests to promote some transient trade agenda.[39] Indeed, it is standard practice for American law schools to actively caution their environmental law students to both identify and prevent special interests from legally mandating any race-to-the bottom. So, to conceal its advocacy for a 'race to the bottom' in this case today, Monsanto-aligned Amici write cunningly:

> The mandate thus frustrates the purpose of state consumer-protection statutes, which are designed to facilitate honest commerce, not to cause businesses to forgo economic opportunities.
>
> Amici 11 States, MPA ISO MSJ, p. 1.

This too is no foothold. Monsanto-aligned Amici's argument ignores that a key function of California's Prop 65 is to avoid the 'race to the bottom.' Legal scholars have even confirmed

[39] Klepetar, D, *Technology-Forcing and Law-Forcing: The California Effect in Environmental Regulatory Policy*, Western Political Science Association, March 22, 2012. Accessed on January 25, 2018, at https://wpsa.research.pdx.edu/meet/2012/klepetar.pdf.

that Prop 65 has helped elevate the entire Nation.[40]

5. Monsanto-aligned Amici Falsely Regurgitate Arguments From the Same Old Playbook For Big Tobacco.

Severely undermining the credibility of the Amici brief from 11 States, the following statement is found:

> "Even though no study has identified a definite link between glyphosate and cancer, the regulation at issue here requires businesses that sell products containing glyphosate to declare that glyphosate is 'known' to cause cancer."
>
> Amici 11 States, MPA ISO MSJ, p. 2.

Denying even *the existence* of studies was the hallmark of Big Tobacco in the last century (recall Big Tobacco's infamous memo "doubt is our product"); and that denial strategy worked historically in some courts, but ultimately it was exposed as junk science, which is precisely where it stands today.

While it is not surprising to see such a denial tactic employed by Monsanto's lawyers, it is surprising and dismaying to see such a false statement in the Amici Brief for 11 States. Indeed, if the 11 States were to actively broadcast their false statement to the Citizens of their respective States, their own scientists and Citizens would gladly share with them many of the studies cited in this brief by the NHF and MAAM. So it only undermines the credibility of the 11 States brief for them to show such a blatant disregard for scientific studies recognized and respected throughout the United States and the world.

[40] See e.g., Rechtschaffen, C., *supra*, "The Warning Game: Evaluating Warnings Under California's Proposition 65," *Ecology Law Quarterly*, Vol 23, Issue 2, March 1996.

6. Monsanto-aligned Amici Falsely Claim That Poor Citizens Are Adversely Harmed By Science-Based Consumer Protections Designed To Protect Them.

At present, more than 90% of American consumers have tested positive for glyphosate contamination, which is now found even in *organic* California wines and honey.[41]

And yet the Amici Brief of 11 States argues that price fluctuations in Monsanto's carcinogen are more detrimental to consumers than the carcinogen itself:

> "Needless to say, such price jolts in the market for critical food staples will hit low-income Americans the hardest, including the poorest citizens of the Amici States."

Amici 11 States, MPA ISO MSJ, p. 13.

The reality is that glyphosate presents the largest risk to uninformed (often poor) consumers. Prop 65 labelling is a public service to all Americans, as it helps spotlight carcinogens carried throughout all sectors of society. Fortunately here, independent experts are well prepared to address the specific carcinogenic dangers of glyphosate at trial on the merits.

CONCLUSION

For the foregoing reasons, Amici NHF and MAAM respectfully ask this Court to deny Monsanto's Motion for Preliminary Injunction.

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[41] Gillam, C, *supra*, *White Wash: The Story of a Weedkiller, Cancer, and the Corruption of Science*, Island Press, 320 pages (Oct 2017) ("Most of us are Guinea pigs in this horrendous toxic experiment.")

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott C. Tips, declare under penalty of perjury that on January 26, 2018, I caused the foregoing document to be electronically filed with the Court's CM/ECF Filing System, which will send a Notice of Electronic Filing to all parties of record who are registered with CM/ECF.

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