

OEHHA's Glyphosate Warning Violates First Amendment, 9th Circuit Rules

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The 9th U.S. Circuit Court of Appeals has ruled that the Office of Environmental Health Hazard Assessment's (OEHHA's) requirement that the herbicide glyphosate be labeled with a Proposition 65 cancer warning is unconstitutional.

In a 2-1 ruling, the court concluded, in *National Association of Wheat Growers v. Zeise*, that because there is an active debate over whether glyphosate is a human carcinogen, requiring businesses to place a Prop. 65 warning on products containing glyphosate violates the First Amendment's limits on compelled speech.

The ruling upholds a district court determination that granted a summary judgment motion and permanent injunction in favor of a slew of agricultural and business interests that sued OEHHA after it listed glyphosate as a carcinogen in 2017 [see [Federal Judge Bans Prop. 65 Warning for Glyphosate](#), June 25, 2020].

This is the second ruling out of the 9th Circuit touching on the First Amendment and Prop. 65 warnings. In 2022, the 9th Circuit upheld a preliminary injunction which blocked the filing of any Prop. 65 lawsuits regarding acrylamide in food [see [9th Circuit Initially Sides with CalChamber in Prop. 65 First Amendment Case](#), July 5, 2022 and [Split 9th Circuit Denies En Banc Review of Injunction Prohibiting Acrylamide Suits](#), November 22, 2022].

As with the glyphosate case, the plaintiffs in the acrylamide case argue there is disagreement on acrylamide's carcinogenicity in food and they are being forced to make untrue statements in violation of the First Amendment.

Both the acrylamide and glyphosate cases hinge on two standards for interpreting whether government compelled commercial speech passes muster under the First Amendment. The 1980 U.S. Supreme Court ruling *Central Hudson & Electric Corp. v. Public Service Commission* directed courts to apply "intermediate scrutiny" to such speech, which requires the government to show the speech directly advances a substantial government interest in a way that is not more extensive than necessary. But a later U.S. Supreme Court decision created an easier standard for the government to meet. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* concluded that compelled commercial speech is permissible if it "conveys purely factual and uncontroversial information."

In this case, OEHHA's Prop. 65 warning for glyphosate does not qualify under *Zauderer* because it is not purely factual and it is controversial, the 9th Circuit ruled. In 2015, the World Health Organization's International Agency for Research on Cancer (IARC) declared glyphosate a "probable" human carcinogen. That designation required OEHHA to list glyphosate under Prop. 65 as a carcinogen, which in turn triggered a requirement for products to come with a warning stating that glyphosate is "known" by the state of California to cause cancer. But, despite IARC's conclusion, other regulatory agencies around the world have disagreed, including OEHHA itself, as it relates to [glyphosate in drinking water](https://oehha.ca.gov/water/public-health-goal/public-health-goal-glyphosate) <https://oehha.ca.gov/water/public-health-goal/public-health-goal-glyphosate>, as well as the U.S. Environmental Protection Agency (EPA), according to the ruling.

The 9th Circuit pointed to its decision in the acrylamide case, which upheld a preliminary injunction blocking the filing of Prop. 65 lawsuits for acrylamide in food.

"Under Prop. 65, a 'known' carcinogen carries a complex legal meaning that consumers would not glean from the warning without context and 'thus, use of the word 'known' is misleading,'" wrote Judge Consuelo M. Callahan in the opinion. "Moreover, the safe harbor Prop. 65

glyphosate warning is not 'uncontroversial.'"

"From the standpoint of an average consumer, saying that something is carcinogenic or has serious deleterious health effects—without a strong scientific consensus that it does—remains controversial," Callahan wrote. "It is also controversial from the subjective standpoint of the speakers, as plaintiffs assert that they are being forced 'to convey a message fundamentally at odds' with their businesses."

"Also, the warning requirement applied to glyphosate is undeniably controversial from an objective scientific standpoint," Callahan wrote. "Although 'uncontroversial' does not mean 'unanimous,' here IARC stands essentially alone in its determination that glyphosate is probably carcinogenic to humans, while EPA, OEHHA, and regulators from around the world conclude that it is not."

While the litigation was proceeding, OEHHA suggested alternative warning language to assuage the court's concerns and last year approved new safe harbor warning language tailored for glyphosate [see [OEHHA Finalizes Alternative Safe Harbor for Glyphosate as EPA Withdraws Its Interim Registration](#), November 9, 2022]. The new safe harbor warning reads: "Using this product can expose you to glyphosate. The International Agency for Research on Cancer classified glyphosate as probably carcinogenic to humans. U.S. 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."

On appeal, the California Attorney General argued that this alternative warning language satisfied *Zauderer* because "first, it omits the language that glyphosate is 'known to the state of California to cause cancer,'" and "second, it addresses the district court's concerns that the previous warnings improperly conveyed an equal consensus among scientific regulators," according to the ruling.

"While these are true observations, they do not alter the overall message," Callahan wrote. While "each statement may be factually true ... the OEHHA warning still conveys the overall message that glyphosate is unsafe which is, at best, disputed."

The warning language also fails to pass muster under the standard set out in *Central Hudson*, the court ruled. Under *Central Hudson*, the compelled speech must directly advance a substantial government interest in a way that is not more extensive than necessary.

"California unquestionably has a substantial interest in preserving the health of its citizens," Callahan wrote. "However, compelling sellers to warn consumers of a potential 'risk' never confirmed by any regulatory body—or of a hazard not 'known' to more than a small subset of the scientific community—does not directly advance that interest."

"California could employ various other means to promote its (minority) view that glyphosate puts humans at risk of cancer without burdening plaintiffs with unwanted speech," Callahan wrote. "For example, the state could reasonably post information about glyphosate on its own website or conduct an advertising campaign."

Callahan was joined by Judge Patrick J. Bumatay in the opinion. Senior Judge Mary M. Schroeder dissented.

Dissent

In her dissent, Schroeder opined that the new OEHHA warning rejected by the 9th Circuit should first be reviewed by the district court. The new warning "consists of five factually accurate sentences informing users that the product can expose them to a substance the IARC has

determined probably causes cancer," she wrote.

The majority apparently rejects the new OEHHA warning language "because of the very scientific disagreement the new warning discloses," Schroeder wrote. The dissent listed three reasons for the district court to first review the warning language:

- "We have no guidance from the Supreme Court on compelled commercial speech in the sphere of product liability and consumer protection;"
- "The majority refuses to look at the actual content of the new warning, even though our circuit law looks to the content of the message rather than the nature of the controversy;"
- "The majority adopts the district court's conclusion that the existence of scientific debate over the safety of glyphosate precludes any warning requirement. It looks to the EPA's decision that glyphosate was not likely to be carcinogenic to humans. Yet this court recently vacated the EPA's decision on the ground it was not supported by substantial evidence ... The majority merely accepts the EPA's promise it will do better some time in the future. There remains no adequate basis for reliance on the EPA, and a strong reason for the district court to reconsider the scientific record" [see [Ninth Circuit Overturned EPA's Glyphosate FIFRA Registration](#), July 5, 2022].

The majority adopts a too narrow view of *Zauderer*, Shroeder wrote.

"In a scientific context, as presented here, our understanding of what is noncontroversial should not require scientific unanimity," Schroeder wrote. "We should learn from the historic episodes where hazardous product manufacturers have themselves manufactured controversy by financing studies to create doubt about the hazards they were creating."

Arguing for OEHHA in the case was Laura J. Zuckerman of the California Attorney General's office. Attorney Richard P. Bress of Latham & Watkins argued for the plaintiffs.