

July 2, 2018

Honorable Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

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Re: *Monsanto Co. v. Office of Env'l Health & Hazard Assessment*, No. S249056

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The International Association of Defense Counsel (IADC) files this letter brief as *Amicus Curiae* pursuant to Rule 8.500(g) of the California Rules of Court. For the reasons stated herein, IADC respectfully requests that the Court grant the petition for review filed on May 29, 2018 in the above-referenced appeal.

Interest of Amici Curiae

The IADC maintains an abiding interest in ensuring that state-mandated product warnings are backed by sound science. The decision below violates this principle finding that California's Office of Environmental Health & Hazard Assessment (OEHHA) may constitutionally require companies to warn consumers that glyphosate, a widely-used herbicide, is "known to cause cancer" based solely on a monograph published by the International Agency for Research on Cancer (IARC) designating the chemical a probable carcinogen—a purpose for which the monograph was not intended.

The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

Proposition 65 warnings, when inadequately supported, expose businesses represented by IADC members to burdensome regulatory requirements and liability, needlessly discourage consumers from purchasing beneficial products, and may result in consumers ignoring important warnings that are critical to their safety. California's misuse of IARC monographs to automatically impose labeling obligations also abdicates the state's core policymaking role, ignoring the potential adverse consequences that can flow from labeling a substance or product as causing cancer.

Reasons Why this Court Should Grant the PetitionJuly 2, 2018
Page 2**California Misuses IARC Monographs to Automatically List Substances as “Known to Cause Cancer” and Trigger Labeling Obligations**

The California Court of Appeals found that OEHHA may constitutionally list a chemical such as a glyphosate as “known to cause cancer” based purely on that substance’s designation as “probably carcinogenic” in an IARC monograph. IARC monographs, however, are not intended to serve the purpose for which they are used in California—to trigger labeling requirements conveying, in no uncertain terms, that a product contains a substance “known to cause cancer.”¹

IARC indicates that it designates a substance as “probably carcinogenic” (Group 2A) based on “limited” or “inadequate” evidence that an agent is carcinogenic in humans (designated as “Group 2A”).² As IARC itself recognizes, its designations are intended to be a “first step in carcinogen risk assessment” and “represent only one part of the body of information on which public health decisions may be based.”³ For that reason, IARC specifically notes that a monograph makes “no recommendation . . . with regard to regulation or legislation, which are the responsibility of individual governments or other international organizations.”⁴

Yet, California implements Proposition 65 in a manner that does just that, giving binding regulatory effect to a preliminary guidance document. State law requires OEHHA to “presume” a substance is hazardous and automatically include it on the state’s list upon an IARC designation.⁵ Here, OEHHA listed glyphosate based solely on IARC’s monograph. As the Court of Appeals recognized, OEHHA’s notice of its intention to list glyphosate as a substance known to cause cancer indicated that the Office “cannot consider scientific arguments concerning the weight or quality of evidence considered by [IARC] when it identified these chemicals and will not respond to such comments if they are submitted.”⁶ OEHHA regards its listing of a purported cancer-causing substance based on an IARC monograph as merely

¹ Cal. Health & Safety Code § 25249.7(b).

² IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Preamble, at 22 (last updated Sept. 2015), <http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf>.

³ *Id.* at 2-3.

⁴ *Id.* at 3.

⁵ *See* Cal. Labor Code § 6382(b)(1).

⁶ *Monsanto Co. v. Office of Env’tl Health & Hazard Assessment*, 22 Cal.App.5th 534, 542 (2018).

“ministerial,”⁷ effectively turning a preliminary finding intended to spark further research into a binding legal obligation to warn that products cause cancer. California law elevates IARC Monographs above determinations by the U.S. Environmental Protection Agency (EPA), Occupational Safety and Health Administration, and Director of Food and Agriculture, even as IARC does not have the transparency or accountability of federal government agencies.⁸ Here, California has declared that glyphosate is “known to cause cancer” based on an IARC Monograph when the EPA has repeatedly found that glyphosate is not likely to be a carcinogen.⁹

California’s Imposition of Labeling Obligations Based Solely on IARC Monographs Results in Warnings that are Not Supported by Sound Science, Mislead the Public, and Encourage Unwarranted and Costly Litigation

California’s uncritical reliance on IARC monographs to add substances to its list of cancer-causing chemicals, in some instances, results in state-mandated warnings that are not supported by sound science, mislead the public, and encourage unwarranted product liability and consumer litigation.

Over time, California’s list of cancer-causing chemicals has grown to twenty-two pages.¹⁰ If a product has a trace amount of one of the nearly one thousand substances on that list, the seller must label it as “known to cause cancer” unless it is prepared to defend its doing otherwise in a lawsuit seeking substantial civil penalties (up to \$2,500 per day per violation).¹¹ Indeed, Prop. 65 has created a cottage litigation industry. Companies protect themselves by conveying warnings regardless of whether a true risk of cancer or reproductive toxicity is backed by sound science.

⁷ *Id.*

⁸ A Reuters investigation revealed that multiple scientists’ studies that found no link between glyphosate and cancer in laboratory animals were removed from earlier drafts of the IARC monograph and that the Chairman of an IARC sub-group tasked with reviewing the evidence served as an expert witness in personal injury lawsuits targeting glyphosate. See Kate Kelland, *In Glyphosate Review, WHO Cancer Agency Edited Out “Non-carcinogenic” Findings*, Reuters, Oct. 19, 2017, <https://www.reuters.com/investigates/special-report/who-iarc-glyphosate/>.

⁹ See U.S. Environmental Protection Agency, Office of Pesticide Programs, Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential 12-13 (Dec. 12, 2017).

¹⁰ See OEHHA, Chemicals Known to the State to Cause Cancer or Reproductive Toxicity (May 25, 2018), <https://oehha.ca.gov/media/downloads/proposition-65/p65list052518.pdf>.

¹¹ Cal. Health & Safety Code § 25249.7(b).

They often quickly settle claims and pay a penalty and attorneys' fees.¹²

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Given the widespread use of glyphosate in agriculture, many food products may have residual (and safe) amounts of the herbicide. In addition to requiring a warning on Monsanto's Roundup product line, California's listing of glyphosate will expose any company that makes or sells products with traces of glyphosate to private attorney general and other lawsuits.

Such fearmongering not only harms businesses, it threatens public health and safety. Serious adverse consequences can result when product warnings are not based on sound science. When products are engulfed with too many warnings, consumers may ignore the important ones—those that can help them avoid a real risk of injury. This Court,¹³ learned treatises,¹⁴ and the American Law Institute¹⁵ have all cautioned about the pernicious effects of over-warning. That is what occurs when California effectively cedes its authority to designate chemicals as “known to cause cancer” to an outside organization that does not intend its findings to automatically trigger such warnings.

Blindly Imposing Labeling Obligations Based Solely on IARC Monographs Ignores the Practical Consequences of Proposition 65 Warnings

California's use of IARC monographs for a purpose for which they are not intended may have adverse consequences beyond over-warning. IARC monographs consider the strength of available evidence that an agent is “capable of causing

¹² In 2017, companies settled 688 Prop. 65 cases with 24 advocacy groups, law firms, and individuals, including \$25.8 million in settlement payments. More than three-quarters of this sum went to their lawyers. State of California Dep't of Justice, Proposition 65 Settlement Summary 2017, <https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/2017-summary-settlements.pdf>. Private enforcers sent 2,710 violation notices to businesses in 2017 and 1,055 of these demand letters in 2018 through June 26. See State of California Dep't of Justice, 60-Day Notice Search, <https://www.oag.ca.gov/prop65/60-day-notice-search>.

¹³ See *Johnson v. Am. Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2008) (recognizing that limiting warnings to those that are necessary to reduce the risk of harm “helps ensure that warnings will be heeded”).

¹⁴ See W. Page Keeton, et al., *Prosser & Keeton on Torts* § 96, at 686 (5th ed. 1984) (observing it is “a naive belief that one can warn against all significant risks. Too much detail can be counterproductive.”).

¹⁵ See Restatement (Third) of Torts, Products Liability § 2, cmt. j (1998) (recognizing that excessive numbers of warnings “may be ignored by users and consumers and may diminish the significance of warnings about [other] risks” and “could reduce the efficacy of warnings generally”).

cancer under some circumstances” even when the risks may be very low.¹⁶ What IARC monographs do not do is consider the broad public policy implications of designating a substance as a possible carcinogen, which it leaves to government policymakers. California’s abdication of that role through its listing of glyphosate could have adverse consequences aside from scaring consumers with unnecessary warning labels and prompting unwarranted litigation.

For example, a critical component of an effective plan to mitigate the risk of wildfires is vegetation management to reduce the fuel that allows fires to spread and places people and their homes in danger.¹⁷ Glyphosate has a limited, but important, role as it is used to control highly flammable invasive species that grow in open space near populated areas.¹⁸ While, despite the IARC and California designations, the California Invasive Plant Council (Cal-IPC) continues to support the use of glyphosate in invasive plant management as part of an Integrated Pest Management (IPM) approach,¹⁹ California cities, counties, state agencies, and private property owners may reflexively discontinue use of glyphosate due to the Proposition 65 “known to cause cancer” designation.²⁰ By inappropriately relying on IARC monographs, California does not consider these and other practical consequences of its labeling requirements.

¹⁶ IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Preamble, at 2 (last updated Sept. 2015), <http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf>.

¹⁷ Nearly 9,000 wildfires tore through California in 2017, burning 1.2 million acres of land, destroying more than 10,800 structures, and killing at least 46 people. See Lauren Tierney, *The Grim Scope of 2017’s California Wildfire Season is Now Clear. The Danger is Not Over*, Wash. Post, Jan. 4, 2018. Nearly \$12 billion in insurance claims were filed as a result. Joseph Serna, *Nearly \$12 Billion in Insurance Claims have been Filed Due to California Wildfires*, L.A. Times, Jan. 31, 2018.

¹⁸ See, e.g., Hillsborough, California, Fire Hazard Mitigation & Fuel Reduction Project, <https://www.hillsborough.net/176/Fire-Hazard-Mitigation-Fuel-Reduction-Pr> (last visited June 26, 2018) (indicating the town used a glyphosate-based herbicide where “absolutely needed to reduce and eliminate invasive species to meet the project’s wildfire mitigation objects” because “[t]he EPA has determined this herbicide to be non-carcinogenic and to have a relatively low toxicity to humans”).

¹⁹ See Cal-IPC Fact Sheet and Position Statement: The Use of Glyphosate for Invasive Plant Management, Oct. 20, 2017, <https://www.cal-ipc.org/wp-content/uploads/2017/11/Cal-IPC-glyphosate-policy.pdf>. Cal-IPC observes that the IARC and California designations provide no guidance as to the risk presented in the typical exposure scenario for land managers apply glyphosate and do not account for the use of personal protective equipment, such as coveralls, eye protection and chemical-resistant gloves.

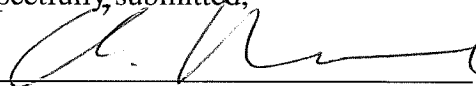
²⁰ See, e.g., Mark Prado, *Marin Parks Report: No Glyphosate Use at County Sites*, Marin Indep. J., Mar. 2, 2018, <http://www.marinij.com/article/NO/20180302/NEWS/180309937> (reporting that Marin County has not applied glyphosate in the past two years even as “[w]ildfire remains a threat in the county, especially during drought, and glyphosate is effective in controlling flammable growth that could torch hillsides and homes if left unchecked”).

CONCLUSION

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For the foregoing reasons, IADC respectfully requests that this Court grant Monsanto Company's Petition.

Respectfully submitted,



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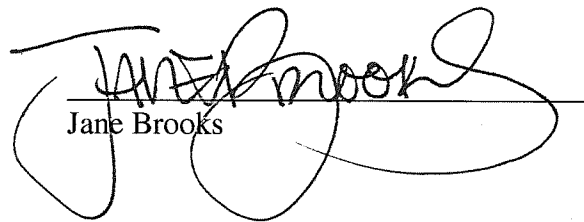
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