WASHINGTON LEGAL FOUNDATION
2009 Massachusetts venue, NW
Washington, DC 20006
202-588-0302

June 29, 2018

The Honorable Tani Cantil-Sakauye, Chief Justice
and the Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Monsanto Co., et al. v. Office of Environmental Health and Hazard Assessment, et al.***
Case No. S249056
***Amicus Curiae* Letter of Washington Legal Foundation**
(Court of Appeal Case No. F075362, Fifth Appellate District)

To the Chief Justice and Associate Justices:

The Washington Legal Foundation hereby submits this letter as an *amicus curiae*, urging the Court to grant the petition for review filed by Petitioners Monsanto Co., *et al.* Monsanto's petition sets forth several cogent reasons for reviewing the issues presented in the petition, including that the appeals court's rejection of Monsanto's nondelegation claim, as well as its rejection of claims under Article II, Section 12 of the California Constitution, conflict with the decisions of this Court. WLF submits this letter to focus on the third issue raised by the petition: Monsanto's rights under the U.S. and California Constitutions to due process of law were violated when the State deprived Monsanto (and thousands of other stakeholders) of valuable property without providing them with *any* opportunity to demonstrate that the State based its decision to list glyphosate on bogus scientific findings that were generated by a biased and politically motivated body.

"[T]he central meaning of procedural due process [is that] parties whose rights are to be affected are entitled to be heard." (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80 (citations omitted).) Moreover, "the root requirement of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest." (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 542 (citations omitted) (emphasis in original).) Yet Respondent Office of Environmental Health and Hazard Assessment (OEHHA) rebuffed all efforts by Monsanto to be permitted to explain why the Proposition 65 listing of glyphosate was unwarranted. Indeed, OEHHA told Monsanto that whether a conflict-laden International Agency for Research on Cancer (IARC) working group acted arbitrarily in classifying glyphosate as a probable human carcinogen was irrelevant to its listing decision—and thus that it was uninterested in Monsanto's abundant evidence of bias. That unwillingness to permit stakeholders to be heard on an issue that threatens substantial injury to their property interests is the very essence of a due process violation. Review is warranted to correct the appeals court's erroneous pleadings-stage dismissal of the due process claims.

OEHHA's refusal to allow affected parties to be heard in connection with Proposition 65 listings is unique to listings employing what is known as "the Labor Code listing mechanism."[1] OEHHA regulations provide that when the agency proposes to add a substance to the Prop 65 list using any one of the other three listing mechanisms (set forth in Health and Safety Code § 25249.8(b)), interested parties are permitted an opportunity to submit evidence to demonstrate that the substance in question is not a human carcinogen. Accordingly, the Court can address the denial of due-process rights in connection with Labor Code listings without fear that doing so would adversely affect the operation of Prop 65 in other contexts.

Interests of *Amicus Curiae*

WLF is a public-interest law and policy center located in Washington, D.C. with supporters in all 50 States, including many in California. WLF devotes a significant portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF supports the rights of all individuals and entities to a meaningful opportunity to be heard before the government may deprive them of life, liberty, or property; it regularly appears before California courts and other state and federal courts in cases presenting due-process issues. (*See, e.g.*, *Casey v. Kaiser Gypsum Co.* (2016) *rev. denied*, __Cal. 4th __, No. S232453, *cert. denied* 137 S. Ct. 204; *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408.) WLF states that no counsel for a party authored this letter brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the submission of this brief.

Why Review Should Be Granted

This petition raises issues of exceptional importance. The complaint sets out substantial factual allegations that the IARC working group's "probable human carcinogen" finding is scientifically unsound and was orchestrated by members of the working group with substantial conflicts of interest—and that OEHHA refused to consider those claims in connection with its decision to list glyphosate. Monsanto later submitted additional evidence substantiating its claims. Yet the Court of Appeal gave the back of its hand to Monsanto's due-process claims.

Indeed, the appeals court held that the Due Process Clauses of the U.S. and California Constitutions have no application to California's determination that a substance is a probable human carcinogen and thus should be added to the Prop 65 list. That holding conflicts with

---

[1] The Labor Code listing operates as follows: Proposition 65 states that the "list of those chemicals known to the state to cause cancer or reproductive toxicity ... shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1)." Section 6382(b)(1) in turn identifies "[s]ubstances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC)."

numerous due-process decisions of both this Court and the U.S. Supreme Court. Review is warranted to resolve that conflict.

A. The "Probable Human Carcinogen" Finding Is Not Exempt from Due Process Constraints

The appeals court devoted less than a page to disposing of Monsanto's due-process claims. It held that Monsanto and other stakeholders were not entitled to *any* due-process protections because (it concluded) the decisions to classify glyphosate as a probable human carcinogen and to include it on the Prop 65 list were "quasi-legislative acts" and were thereby rendered exempt from due process constraints. (Slip Op. 31–32.) But as Monsanto cogently explains, the label applied to IARC's decision to classify glyphosate as a probable human carcinogen has no bearing on the constitutional right of affected parties to be heard regarding that decision. (Pet. for Review at 36–38.)

This Court has repeatedly held that "[d]ue process principles require reasonable notice and opportunity to be heard before government deprivation of a significant property interest." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) *Horn* rejected a county government's efforts to avoid due-process constraints when it adopted a subdivision map that affected the development rights of a small tract of real property and that "constitute[d] a substantial or significant deprivation of the property rights of other landowners." (*Id.* at 616.)

The Court recognized that principles of comity require a court to defer to the elected branches of government when they are acting legislatively—that is, when they are adopting general rules that apply to a broad number of individuals. (*Id.* at 613 (quoting *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 212–13).) Due-process notice and-opportunity-to-be-heard rights are sometimes inapplicable in those situations, both because the very large number of affected parties may make compliance impractical and because the judicial role generally does not include second-guessing the wisdom of broad-based (*i.e.*, legislative or quasi-legislative) rules adopted by the elected branches.

But none of those considerations ever come into play when, as here, the decision in question is made by a private organization (such as IARC), not by the elected branches of California government. The distinction between "quasi-legislative" and "adjudicative" actions is simply irrelevant to judicial consideration of due-process challenges to IARC's decision to classify glyphosate as a probable human carcinogen. Under those circumstances, there are no comity-based reasons for courts to refrain from ensuring that classification decisions comply with all constitutional requirements, including the due-process requirement that affected parties have been provided an adequate opportunity to be heard. Judicial review is particularly warranted when, as here, the private organization's decision runs counter to the decision of every other scientific body to address the issue.

The decision to classify glyphosate as a probable human carcinogen cannot be viewed as one made legislatively by the State's voters when they adopted Prop 65 in 1986. The voters decided, as a general rule, that California should add to the Prop 65 list those chemicals subsequently determined by IARC to be probable human carcinogens,[2] but they made no decision regarding the status of glyphosate in particular. Only decades later did an IARC working group determine that glyphosate is a probable human carcinogen. That determination by a private organization is one to which due-process requirements attach; and the legislature (or voters acting in a legislative capacity) have no authority to exempt subsequent decisions from normal due-process constraints. Yet it is uncontested that Monsanto was provided no opportunity—either before IARC or OEHHA—to present its case that glyphosate is not a carcinogen.

B. Monsanto Has Been Provided No Opportunity to Be Heard on Its Claims that IARC's Determination Is Scientifically Unsound and Tainted by Bias

Monsanto was not permitted to submit evidence to the IARC working group that considered glyphosate, nor does IARC authorize appeals from working group findings. (First Amended Petition ("Am. Pet.") ¶¶ 82, 85.) When Monsanto sought to submit evidence to OEHHA that the working group's findings were scientifically unsound and the product of a biased assessment, OEHHA responded that the evidence was irrelevant—that its obligation to accept IARC's probable human carcinogen finding and to add glyphosate to the Prop 65 list was a mere "ministerial" act. (*See Notice of Intent to List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate*, OEHHA (Sept. 4, 2015) (stating that OEHHA "cannot consider scientific arguments concerning the weight or quality of the evidence considered by IARC when it identified these chemicals and will not respond to such comments if they are submitted"); *Glyphosate to be Listed under Proposition 65 as Known to the State to Cause Cancer*, OEHHA (Mar. 28, 2017).) In sum, it is uncontested that Monsanto was provided *no* opportunity to be heard on its claims before California determined that glyphosate was "known to the State to cause cancer" and therefore should be added to the Prop 65 list. That failure to provide an opportunity to be heard to a party facing substantial injury to its property interests is the very definition of denial of due-process rights.

California's refusal to permit Monsanto to present its evidence was particularly egregious given the damning nature of that evidence, which (in reviewing a pleadings-stage dismissal) must be accepted as true. It is uncontested that the working group's finding is an extreme outlier; every other scientific group that has addressed the issue has concluded that glyphosate is

---

[2] Prop 65 is ambiguous regarding whether the Labor Code listing mechanism applies to substances not classified by IARC as carcinogenic until after adoption of Prop 65. (*See* Health and Safety Code § 25249.8(a).) The Court of Appeal later held that it does so apply. (*Cal. Chamber of Commerce v. Brown* (2011) 196 Cal. App. 4th 233.)

not a human carcinogen. Those other groups include OEHHA itself, which on two occasions (in 1997 and again in 2007) reviewed glyphosate and concluded that, "[b]ased on the weight of the evidence, glyphosate is judged unlikely to pose a cancer hazard to humans." (Am. Pet. ¶ 35.) Importantly, those conclusions were based on an examination of *the exact same set of animal carcinogenicity studies* on which IARC relied. (*Id.*, ¶ 36.) Other groups that disagree with the IARC working group's conclusion include the U.S. Environmental Protection Agency, the German Federal Institute for Risk Assessment, the European Food Safety Authority (on behalf of the European Union), the Canadian Pest Management Regulatory Authority, and the World Health Organization. (*Id.*, ¶¶ 37–48.)

Moreover, evidence calling into serious question the reputation, status, and impartiality of IARC and its glyphosate working group is spelled out both in the First Amended Petition and in subsequent news stories that Monsanto submitted to the lower courts. (*See, e.g.*, Am. Pet. ¶¶ 45, 72, 87, 88, 96.) The Court of Appeal simply ignored those well-pleaded allegations and concluded as a matter of law that IARC can be relied on to "reasonably perform its function" because "[i]ts reputation and authority on the world stage—and relatedly its funding—is dependent, in part, on its work being accepted as scientifically sound." (Slip op. 28–29.) The court dismissed as "factually irrelevant" the "factual assertions appellants make about the Agency, the formation of the working group investigating glyphosate, the potential ties to the plaintiff's bar of the working group's lead scientist, and the general assertions regarding the alleged malleability of the Agency's procedures." (*Id.* at 30.) That holding cannot be squared with Monsanto's well-established due-process rights. Monsanto's allegations call into serious question the scientific validity and impartiality of the working group's finding that glyphosate is a probable human carcinogen, yet California adopted that finding as its own without providing any meaningful opportunity for Monsanto to be heard.

To ensure that the Court fully appreciates the seriousness of Monsanto's bias allegations, WLF briefly summarizes some of them here. Most serious is the disclosure that Christopher Portier played a leading role in IARC's evaluation of glyphosate despite a severe financial conflict of interest. Prior to joining IARC, Portier was affiliated with the Environmental Defense Fund, which has actively litigated against *all* use of pesticides. Although he had no prior experience working with glyphosate, Portier in 2014 chaired the IARC committee that proposed glyphosate as a substance to be studied by an IARC working group. He then served as an "invited specialist" and "external special advisor" to the working group.

What Portier failed to disclose was his financial ties to law firms that have filed numerous products-liability claims against Monsanto based on glyphosate's alleged carcinogenicity. The very week that IARC listed glyphosate as a probable human carcinogen, Portier signed a lucrative consulting contract with two such law firms, under which he was to assist the firms with their glyphosate litigation. According to an October 2017 exposé in the Times of London, Portier had been paid $160,000 for his work as of June 2017. (Ben Webster,

Weedkiller Scientist Was Paid £120,000 by Cancer Lawyers, Times (London), Oct. 18, 2017.) Moreover, Portier admitted that he had been hired by one of the law firms (for work unrelated to glyphosate) at least two months *before* the IARC issued its glyphosate determination. (*Id.*) Following issuance, Portier lobbied extensively for acceptance of that determination by a variety of governmental bodies and for rejecting contrary findings by other science groups. When he engaged in such activities, however, he repeatedly neglected to mention that he was on the payroll of the plaintiffs' bar.

Similarly troubling is the conduct of Aaron Blair, a retired epidemiologist who led IARC's review of glyphosate in 2015. A 2017 Reuters report revealed that Blair was aware of significant scientific evidence indicating that glyphosate is not a human carcinogen, yet he did not bring the evidence to the IARC working group's attention. (Kate Kelland, *Cancer Agency Left in the Dark over Glyphosate Evidence*, Reuters, June 14, 2017.) One of the largest and most highly regarded studies of the effects of pesticide use on humans is the Agricultural Health Study (AHS), a study of about 89,000 American agricultural workers that has been gathering detailed health information from participants for the past 25 years. Blair played a key role in a research study based on data collected by the AHS. In 2013, the researchers issued a draft report that concluded that glyphosate was not a human carcinogen. However, when the study was published in final form, it omitted discussion of glyphosate and other herbicides.

Blair later told reporters that the glyphosate material was deleted from the published study "because there was too much to fit into one scientific paper." (*Ibid.*) Other, independent scientists who reviewed the draft study concluded that there was no legitimate reason not to publish the glyphosate material. (*Ibid*.) Blair conceded that the material exonerated glyphosate and would have affected IARC's final determination had it been presented to IARC. (*Ibid*.) The material was never considered by the IARC working group, however, because it was never brought to the working group's attention by Blair, the group's leader. Blair's unusual conduct has led some to suggest that Blair deliberately concealed his research findings (*ibid*)—not the sort of conduct one would expect from a scientist charged with supervising a purportedly unbiased study of glyphosate.

California's refusal to permit affected parties to be heard on the scientific propriety of carcinogenicity determinations is unique to the Labor Code listing mechanism. OEHHA regulations provide that when the agency proposes to add a substance to the Prop 65 list using any one of the other three listing mechanisms (set forth in Health and Safety Code § 25249.8(b)), interested parties are permitted an opportunity to submit evidence to demonstrate that the substance in question is not a human carcinogen. For example, at least 60 days prior to adding to the Prop 65 list a chemical identified by an "authoritative body" as causing cancer, OEHHA must provide notice to affected parties and an opportunity to present evidence that the chemical is not, in fact, cancer-causing. (27 C.C.R. § 25306(e) & (g).) If OEHHA is considering adding a chemical based on "the opinion of the state's qualified experts," it provides affected parties at

least 45 days to submit scientific evidence demonstrating that a Prop 65 listing is unwarranted. (*See* "How chemicals are added to the Proposition 65 list," OEHHA fig. 2 (May 2016), https://oehha.ca.gov/media/downloads/proposition-65/policy-procedure/ldfig2.pdf.) Only when OEHHA seeks to list a chemical via the Labor Code listing mechanism are affected parties denied all opportunity to be heard on the issue of whether their products are, in fact, carcinogens. That denial is inconsistent with well-established due-process rights; it cries out for review by this Court.

C. The Post-Listing Opportunity for Businesses to Defend Themselves in Enforcement Actions Does Not Provide the "Process" Due Them

Because the Court of Appeal erroneously concluded that the Due Process Clauses of the U.S. and California Constitutions were inapplicable, it had no occasion to consider the extent of the "process" due to entities adversely affected by potential Prop 65 listings. California has previously argued that affected entities are already receiving all the process (if any) that they are due. California can be expected to continue to assert that crabbed interpretation of due-process rights, and thus review by this Court is particularly important to provide needed guidance regarding the scope of those rights.

Prop 65 imposes significant burdens on manufacturers and sellers of products included on the Prop 65 list, including a prohibition against discharging those products into drinking water and a requirement to include clear cancer warnings on product labels. (Health and Safety Code §§ 25249.5 & 252495.6.) Moreover, by providing for private enforcement of those provisions (§ 25249.7), Prop 65 has spawned a cadre of private bounty hunters who annually file hundreds of lawsuits alleging violations of the discharge and labeling requirements and seeking billions of dollars in damages. It is virtually inevitable that Monsanto and thousands of others whose products contain glyphosate will be targeted for such suits. California has argued, however, that these requirements provide a benefit to manufacturers and sellers—it permits them to assert (as an affirmative defense) that the level of exposure is below the level requiring a warning. It argues that this post-listing right to defend the safety of the chemical provides manufacturers with all the "process" to which they are constitutionally required.

That contention conflicts with due-process decisions of this Court and the U.S. Supreme Court. This Court has explained that "[t]he opportunity be heard must be afforded at a meaningful time and in a meaningful manner." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal. 4th 197, 212 (citations omitted).) Requiring Monsanto to wait until after potentially ruinous private enforcement actions have been filed before being permitted to be heard is anything but a "meaningful time" and a "meaningful manner." For one thing, the right to defend enforcement actions does not permit Monsanto to challenge the decision to add glyphosate to the Prop 65 list. Moreover, businesses cannot afford to "bet the company" by refusing to provide warning labels, given that noncompliance can result in statutory penalties of

up to $2,500 per day (Health and Safety Code § 25249.12(d)) as well as attorney's fees. (Civil Proc. Code § 1021.5). The U.S. Supreme Court has repeatedly held that a litigant's right to be heard on contested issues cannot be delayed to the point that it becomes financially unfeasible for him to continue to assert his defense. (*U.S. Army Corps of Engineers v. Hawks Co*. (2016) 136 S. Ct. 2807, 1815; *Sackett v. EPA* (2012) 566 U.S. 120, 127.) Affording a right to be heard at a time when it is no longer feasible to assert one's claim does not comport with the Due Process Clause's "meaningful time" requirement. Because California continues to assert a contrary position, review is warranted.

Conclusion

The Washington Legal Foundation respectfully requests that the Court grant the Petition for Review.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp, Chief Counsel
Marc Robertson, Staff Attorney
Amanda Voeller, Judge K.K. Leggett Fellow

cc: See attached Proof of Service

PROOF OF SERVICE

I am employed in Washington, District of Columbia. I am over the age of 18 and not a party to the within action; my business address is 2009 Mass. Ave, NW, Washington, DC 20036.

On June 29, 2018, I served true copies of the attached document, described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

(1) Electronic service.

Trenton H. Norris	trenton.norris@arnoldporter.com
Sean M. SeLegue	sean.selegue@arnoldporter.com
S. Zachary Fayne	zachary.fayne@arnoldporter.com
David M. Axelrad	saxelrad@horvitzlevy.com
Dean A. Bochner	dbochner@horvitzlevy.com
George H. Soares	gsoares@kscsacramento.com
Ann M. Grottveit	agrottveit@kscsacramento.com
Susan Fiering	susan.fiering@doj.ca.gov
Laura Zuckerman	laura.zuckerman@doj.ca.gov
Dennis Ragen	dennis.ragen@doj.ca.gov
Heather Leslie	heather.leslie@doj.ca.gov
Ryan Mallard	ryan.mallard@doj.ca.gov
Stephen P. Berzon	sberzon@altshulerberzon.com
Jonathan Weissglass	jweissglass@altshulerberzon.com
Connie K. Chan	cchan@altshulerberzon.com
Danielle Leonard	dleonard@altshulerberzon.com
Selena Kyle	skyle@nrdc.org
Sarah Fort	sfort@nrdc.org
Milcah Zewdie	mzewdie@nrdc.org
Adam Keats	AKeats@centerforfoodsafety.org
Sylvia Shih-Yau Wu	SWu@centerforfoodsafety.org
James R. Wheaton	wheaton@envirolaw.org
	elfservice@envirolaw.org

BY ELECTRONIC SERVICE (E-Mail). Based on a court order or an agreement of the parties to accept service by relectronic transmission, I transmitted the document and an unsigned copy of this declaration to the persons at the electronic notification addresses. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsucessful.

(2) Service by Mail.

The Honorable Kristi Culver Kapetan
Department 403
Fresno County Superior Court
1130 O Street
Fresno, CA 93721-2220

Clerk
Fresno County Superior Court
1130 O Street
Fresno, CA 93721-2220

BY MAIL: I am "readily familiar" with the practices of the Washington Legal Foundation for collecting and processing correspondence for mailing with the U.S. Postal Service. Under that practice, it would be deposited with the U.S. Postal Service that same day in the ordinary course of business. I enclosed the foregoing in sealed envelopes as shown above, and such envelopes were placed for collection and mailing with postage thereon fully prepaid at Washington, DC on that same day, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 29, 2018, at Washington, DC.

/s/ Richard A. Samp
Richard A. Samp