UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA CHAMBER OF COMMERCE,

Plaintiff,

v.

ROB BONTA, in his Official Capacity as Attorney General of the State of California,

Defendant;

and

COUNCIL FOR EDUCATION AND RESEARCH ON TOXICS,

Defendant-Intervenor.

No. 2:19-cv-02019-DJC-JDP

ORDER

California's Proposition 65 ("Prop 65") is a "right to know" statute requiring companies that expose consumers to carcinogens or reproductive toxins to provide a reasonable and clear warning. At issue in this case is whether, under Prop 65, California may compel businesses to display warnings about the dangers of dietary acrylamide, a "probable" or "likely" human carcinogen found in certain foods, consistent with the First Amendment of the United States Constitution. Plaintiff

California Chamber of Commerce ("CalChamber"), which represents businesses selling foods containing dietary acrylamide, has moved for summary judgment arguing the warnings are unconstitutional as a matter of law as they convey the message that those foods will cause cancer in humans despite a lack of scientific consensus supporting that conclusion. Defendant California Attorney General Rob Bonta ("State") opposes, arguing that the warnings pass constitutional muster as there is no legitimate scientific debate that dietary acrylamide is a likely or probable human carcinogen and the warnings communicate that stance accurately.

For the reasons set forth below, the Court will grant summary judgment in CalChamber's favor. The Court finds that the Prop 65 warnings for dietary acrylamide are misleading and controversial as they state that dietary acrylamide is carcinogenic to humans despite vigorous scientific debate concerning that conclusion and compel CalChamber's members to espouse that view despite their disagreement. Thus, the Court finds the State's Prop 65 warnings as to dietary acrylamide are unconstitutional and will grant CalChamber's request for declaratory relief and a permanent injunction enjoining enforcement of the Prop 65 warning requirements as to dietary acrylamide.

BACKGROUND

I. Overview of Prop 65

Prop 65, also known as the Safe Drinking Water and Toxic Enforcement Act, was enacted by California voters as a ballot initiative on November 4, 1986. *See* Cal. Health & Safety Code §§ 25249.5–25249.14. Among other things, it requires the Governor of California to publish a "list of those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of this chapter" at least once per year. *Id.* § 25249.8(a). Under Prop 65, businesses must not knowingly or intentionally expose people to chemicals "known to the state to cause cancer or reproductive toxicity" without a "prior clear and reasonable warning." *AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425, 431 (1989) (citing Health & Safety Code § 24249.6).

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The California Office of Environmental Health Hazard Assessment ("OEHHA") "is the lead agency designated by the Governor to implement and enforce Prop[] 65." *Cal. Chamber of Com. v. Brown*, 196 Cal. App. 4th 233, 242 n.5 (2011). OEHHA must list a chemical as "known to the state to cause cancer" if it meets one of three statutory criteria: (1) the state's qualified experts believe "it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer"; (2) "a body considered to be authoritative by such experts has formally identified it as causing cancer"; or (3) "an agency of the state or federal government has formally required it to be labeled or identified as causing cancer." Health & Safety Code § 25249.8(b). The state's qualified expert, here the Carcinogen Identification Committee, has designated five agencies as "authoritative bodies" for carcinogen identification. Cal. Code Regs. tit. 27, § 25306(m). These agencies are the United Nations World Health Organization's International Agency for Research on Cancer ("IARC"), the National Institute for Occupational Safety and Health, the National Toxicology Program ("NTP"), the U.S. Environmental Protection Agency ("EPA"), and the U.S. Food and Drug Administration ("FDA"). *Id.*

Initially, when publishing the list of chemicals known to cause cancer, OEHHA "listed only chemicals that had been identified as carcinogens . . . based on human epidemiological studies. It did not include chemicals identified as carcinogens . . . based on animal studies." *Brown*, 196 Cal. App. 4th at 242 (citation omitted). However, a few years after Prop 65 was passed, a California Court of Appeal interpreted Health and Safety Code section 25249.8, Labor Code section 6382, and the regulations they cite as requiring the list of chemicals to include "not only those chemicals that are known to cause cancer in humans, but also those that are known to cause cancer in experimental animals." *Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 345 (2004). Thus, now, a chemical "must be listed even if it is known to be carcinogenic or a reproductive toxin only in animals." *Am. Chemistry Council v. Off. Envt'l Health Hazard Assessment*, 55 Cal. App. 5th 1113, 1142 (2020).

Once a chemical is placed on the Prop 65 list, businesses are generally required to give a "clear and reasonable warning" before exposing individuals to a listed chemical unless an exemption applies. Health & Safety Code §§ 25249.6, 25249.10. As is relevant here, "a business can obtain an exemption from [this] requirement[] if it can demonstrate . . . the exposure to the chemical poses no significant risk at specified exposure levels." *Am. Chemistry Council*, 55 Cal. App. 5th at 1142 (citing Health & Safety Code § 25249.10(c)). The no significant risk safe harbor means no more than 1 in 100,000 people are calculated to get cancer assuming lifetime exposure. Health & Safety Code § 25249.10(c); Code Regs. tit. 27, § 25703(b). Businesses can either rely on the safe harbor established by OEHHA or can attempt to prove that exposure at an alternative level similarly poses no significant risk by employing their own experts. *See* Health & Safety Code § 25249.10(c); Code Regs. tit. 27, § 25705.

Where a warning is required, the statute requires any business with 10 or more employees to provide a "clear and reasonable" warning before it "knowingly and intentionally expose[s] any individual [in California] to a chemical known to the state to cause cancer . . . ." Health & Safety Code § 25249.6. To assist businesses, OEHHA has developed, and adopted by regulation, optional "safe harbor" language for a variety of types of exposures. Code Regs. tit. 27, § 25601 *et seq*. One such warning is the general safe harbor warning for food, which states (for carcinogens): "**WARNING**: Consuming this product can expose you to [name of chemical], which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov/food." *See id.* § 25607.2(a)(1), (2).

While use of a safe harbor warning is optional, "electing to do so has significant benefits because it shields the business from exposure to potential private enforcement lawsuits." *Nat'l Ass'n Wheat Growers v. Bonta* ("*NAWG*"), 85 F.4th 1263, 1268 (9th Cir. 2023). In the event that a business chooses to utilize its own Prop 65 warning, whether that formulation is clear and reasonable is normally a "question of

fact to be determined on a case by case basis." *Ingredient Commc'n Council, Inc. v. Lungren*, 2 Cal. App. 4th 1480, 1485 & n.3 (1992), *as modified* (Feb. 14, 1992) (quoting OEHHA's explanation in a Final Statement of Reasons on the interpretation of non-safe harbor warnings).

A party that fails to provide a required warning or otherwise establish an exemption may be enjoined, and "is liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per day for each violation in addition to any other penalty established by law." Health & Safety Code § 25249.7(a), (b)(1). Prop 65 features both public and private enforcement mechanisms. Enforcement actions "may be brought by the Attorney General in the name of the people of the State of California, by a district attorney," by a city attorney or city prosecutor, or "by a person in the public interest." *Id.* § 25249.7(c), (d). Before suing, a private enforcer must provide a sixty-day notice of the alleged violation to the Attorney General, other local prosecutors with jurisdiction, and the alleged violator. *Id.* § 25249.7(d)(1). The private enforcer can only bring suit if "[n]either the Attorney General, a district attorney, a city attorney, nor a prosecutor has commenced and is diligently prosecuting an action against the violation." *Id.* § 25249.7(d)(2). Successful private enforcers can recover a quarter of the civil penalty imposed and reasonable attorneys' fees. *See id.* § 25249.12(d); Cal. Civ. Proc. Code § 1021.5.

II. Dietary Acrylamide and Prop 65

This Court has previously explained dietary acrylamide, its addition to the Prop 65 list, and the scientific controversy surrounding its carcinogenicity to humans in thorough detail. (*See* Prelim. Inj. Order (ECF No. 114) at 2–8.) In the interests of judicial economy, the Court incorporates those facts here and will only retread them as needed.

As is relevant, acrylamide was historically used industrially as a chemical in plastics and grouting agents. (Plaintiff's Statement of Undisputed Material Facts ("Pl.'s SUF") (ECF No. 280-2) ¶ 46.) In 1986, IARC determined that acrylamide represented a

carcinogenic hazard to humans. (Defendant's Statement of Additional Material Facts ("Def.'s SUF") (ECF No. 282-1) ¶ 12.) In 1994, after considering new supporting evidence, IARC revised its classification to "probably carcinogenic to humans." (Pl.'s SUF ¶ 29; Def.'s SUF ¶ 12.) EPA likewise classified acrylamide as a "probable carcinogen in humans" in 1988, although in 2010, it revised its hazard determination to state that acrylamide is "likely to be carcinogenic to humans." (Pl.'s SUF ¶ 21; Def.'s SUF ¶ 13.) In 1990, OEHHA listed acrylamide as a chemical "known to the State of California to cause cancer" based on the determinations by IARC and EPA that acrylamide was a carcinogen. (Joint Statement of Undisputed Material Facts ("JUF") (ECF No. 280-2) ¶ 1.) Following OEHHA's addition of acrylamide to the Prop 65 list, NTP also listed acrylamide as "reasonably anticipated to be a human carcinogen." (Def.'s SUF ¶ 14.)

At the time it was added to the Prop 65 list, acrylamide had not yet been discovered in foods. In 2002, however, researchers discovered that acrylamide can form in certain, primarily plant-based, foods such as potato products, grain products, and coffee during high-temperature cooking processes such as frying, roasting, and baking. (Pl.'s SUF ¶¶ 2–5.) In light of this discovery, OEHHA in 2003 sought to "clarify the application of Proposition 65 to foods containing acrylamide," and eventually considered exempting from the warning requirement exposures to chemicals "formed from natural constituents as a result of cooking or heat processing" like acrylamide. (*Id.* ¶¶ 47–48.) OEHHA acknowledged two unintended consequences of requiring warnings for acrylamide in food: (1) consumer avoidance of foods that are "necessary for a balanced diet"; and (2) "warning fatigue." (*Id.* ¶ 49.) Ultimately, however, no exemption was adopted.

Since its discovery in 2002, the carcinogenic risk of dietary acrylamide to humans has been the subject of debate. (*See* Prelim. Inj. Order at 3–8.) IARC, EPA, and NTP have each judged acrylamide to be a carcinogenic hazard; in other words, they have determined acrylamide is capable of causing cancer under some

circumstances. (Def.'s SUF ¶¶ 1, 6.) However, a hazard determination is distinct from a risk determination, which evaluates the numerical probability that cancer will occur depending on the cancer potency of the chemical as well as the amount of exposure. (*Id.* ¶¶ 2, 5.) Health and scientific agencies such as IARC, EPA, and NTP identify carcinogens by conducting hazard assessments based on the evaluation of three "streams" of scientific evidence: epidemiological data, cancer bioassay data (animal studies), and mechanistic data. (Def.'s SUF ¶¶ 6–8.) In the case of dietary acrylamide, numerous animal studies have shown that when mice and rats eat or drink food or water containing acrylamide, they develop cancerous tumors. (*See* Solomon Decl. (ECF No. 282-4) ¶¶ 38–40; *see also* Prelim. Inj. Order at 3–4.) IARC, EPA, and NTP based their acrylamide hazard determination primarily on animal studies, as well as mechanistic data.[1] (Pl.'s SUF ¶¶ 21–29, 62–63; Def.'s SUF ¶ 15.) For example, IARC's 1994 classification of acrylamide as "probably carcinogenic to humans" was based on IARC's findings of "inadequate" evidence of carcinogenicity in humans, "sufficient" evidence of carcinogenicity in experimental animals, and "strong" mechanistic data. (Straif Decl. (ECF No. 282-2) ¶ 59.)

However, as this Court has previously acknowledged, the implications of these animal studies and mechanistic data for assessing dietary acrylamide's cancer *risk* are uncertain. (Prelim Inj. Order at 4–5.) Dr. Andrew Maier,[2] a toxicologist retained by CalChamber, opines that mechanisms that drive tumor formation in experimental

[1] As the State's expert Dr. Kurt Straif explains, "[i]ncreasing insights into cancer development over recent decades and potential limiting factors of epidemiological studies and cancer bioassays have led to an increased use of mechanistic data, or data other than that obtained from classical toxicity testing, in identifying human carcinogens. For chemical agents, mechanistic data may include data on absorption, distribution, metabolism and excretion; data on toxic effects; data on reproductive and developmental effects; and genetic and related effects." (Straif Decl. (ECF No. 282-2) ¶ 49.)

[2] Dr. Andrew Maier is a toxicologist with a Ph.D. in molecular toxicology retained to offer opinions on CalChamber's behalf. (Maier Decl. (ECF No. 280-40) ¶¶ 3–10, 12.) As the State notes, in the interest of unveiling potential bias, Dr. Maier is a longstanding member and former director of Toxicology Excellence for Risk Assessment, an organization underwritten by industry trade and lobbying groups. (Def.'s SUF ¶ 28.) Dr. Maier also worked as an advisor for the Institute for the Advancement of Food and Nutrition Sciences, which, along with food industry members, has funded Dr. Maier's published articles on acrylamide. (*Id.* ¶ 34.)

animals are not relevant to humans at real-world levels of exposure to acrylamide through the diet because, for example, humans process acrylamide differently than rodents and in ways that detoxify acrylamide more readily than in rodents. (Maier Decl. (ECF No. 280-40) ¶¶ 1–2, 82–85, 139–145, 149.) The National Cancer Institute has offered comparable cautions about animal experiments, stating that while "[s]tudies in rodent models have found that acrylamide exposure increases the risk for several types of cancer . . . toxicology studies have shown that humans and rodents not only absorb acrylamide at different rates, they metabolize it differently as well." (Nat'l Cancer Inst., *Acrylamide and Cancer Risk* (Dec. 5, 2017), Norris Decl., Ex. I (ECF No. 280-13).)

Similarly, the FDA stated in 2024 that it is "not clear exactly what risk acrylamide poses to humans," noting that "[i]n research studies, high levels of acrylamide caused cancer in laboratory animals, but the levels of acrylamide used in these studies were much greater than those found in human food." (U.S. Food & Drug Admin., *Acrylamide* (Mar. 5, 2024), Norris Decl., Ex. D (ECF No. 280-8).) The FDA has been reticent to advise consumers against consuming foods containing acrylamide in recognition of the health benefits these foods may offer (*see* Pl.'s SUF ¶¶ 7–14), although it has provided recommendations for food providers to reduce the level of acrylamide in their products and for consumers to reduce their acrylamide exposure in foods in light of the studies showing cancer in laboratory animals at high acrylamide doses (Def.'s SUF ¶¶ 42–43).

Epidemiological studies have also been inconclusive as to the carcinogenicity of dietary acrylamide. (Prelim. Inj. Order at 5–7.) For example, Dr. Loren Lipworth,[3] an epidemiologist retained by CalChamber, reviewed 62 epidemiological studies conducted in Europe, the United States, and Asia investigating whether acrylamide in

[3] Dr. Lauren Lipworth is an epidemiologist and professor at the Vanderbilt University School of Medicine retained to offer opinions on CalChambers's behalf. (Lipworth Decl. (ECF No. 280-41) ¶¶ 5–10, 15.)

food causes cancer in humans. (Lipworth Decl. (ECF No. 280-41) ¶¶ 42–159, 169, 173.) She found none showing that eating food with acrylamide increases the risk of cancer, stating "there is no consistent or reliable epidemiologic evidence to support a finding that dietary exposure to acrylamide increases the risk of any type of cancer in humans, either overall or among non-smokers." (*Id.* ¶ 173.) "In fact," she concluded, "most cancer-specific relative risks have been close to or below the null value," indicating no increase in cancer risk among people who report greater consumption of acrylamide in food and drinks. (*Id.* ¶ 170.) The National Cancer Institute has reported a similar assessment of epidemiological research, stating "a large number of epidemiologic studies (both case-control and cohort studies) in humans have found no consistent evidence that dietary acrylamide exposure is associated with the risk of any type of cancer." (Nat'l Cancer Inst., *Acrylamide and Cancer Risk* (Dec. 5, 2017), Norris Decl., Ex. I.) The National Cancer Institute further stated that "[a]dditional epidemiologic studies in which acrylamide adduct or metabolite levels are serially measured in the same individuals over time (longitudinal cohorts) are needed to help determine whether dietary acrylamide intakes are associated with increased cancer risks in people." (*Id.*) The American Cancer Society has also acknowledged the limits of available epidemiological data, explaining that "reviews of studies done in groups of people (epidemiologic studies) suggest that dietary acrylamide isn't likely to be related to risk for most common types of cancer," and recognizing that further research is needed on this topic. (Am. Cancer Soc'y, *Acrylamide and Cancer Risk* (Feb. 11. 2019), Norris Decl., Ex. J (ECF No. 280-14).)

However, other experts have pushed back on these findings. For example, Dr. Gina Solomon,[4] a medical doctor retained by the State, argues that animal studies and mechanistic data is strong evidence that acrylamide is a human carcinogen because there is clear evidence that acrylamide is a carcinogen for rodents, humans and

[4] Dr. Gina Solomon is a medical doctor and professor at the University of California San Francisco Medical School retained to offer opinions on the State's behalf. (Solomon Decl. ¶¶ 5–16.)

rodents metabolize acrylamide in similar ways, and recent genetic analysis of human cancers reveals a potentially large contribution from acrylamide. (Solomon Decl. ¶¶ 4, 20–30, 38–63.) Dr. Solomon argues this conclusion is bolstered by the numerous scientific agencies that have considered whether acrylamide causes cancer in humans and come to the same essential conclusion: it does. (*Id.* ¶¶ 31–37.) In particular, the IARC has concluded that acrylamide is "probably carcinogenic to humans"; the EPA has concluded acrylamide is "likely to be carcinogenic to humans"; the NTP has concluded acrylamide is "reasonably anticipated to be a human carcinogen"; the European Food Safety Authority has concluded acrylamide is "both genotoxic and carcinogenic"; and the Joint Food and Agriculture Organization/World Health Organization has concluded that levels of exposure to dietary acrylamide indicate a human health concern. (*Id.*)

Dr. Solomon also explains that epidemiological studies are generally ineffective for studying cancer caused by acrylamide as these studies must be conducted over at least 30 years given that cancer has a long and variable latency period; individuals have significant differences in their diets, environment, personal habits, and biological responses; and an individual's extent of exposure will often vary over time. (*Id.* ¶¶ 64–88.) Thus, Dr. Solomon opines that any null results from epidemiological studies do not necessarily prove the absence of acrylamide's carcinogenic effects. (*Id.*)

Dr. Kurt Straif,[5] an epidemiologist and medical doctor retained by the State, goes even further, opining that new epidemiological data about dietary acrylamide supports a conclusion it is carcinogenic to humans. (Straif Decl. (ECF No. 282-2) ¶ 28.) Reviewing recent epidemiological studies on the association between dietary exposure to acrylamide and cancer, Dr. Straif finds that the studies "do report results of an association between dietary exposures to acrylamide and some cancers and cancer subtypes, including ovarian, breast, and endometrial cancer." (*Id.* ¶¶ 60–78.)

[5] Dr. Kurt Straif is an epidemiologist, medical doctor, and previous Head of the IARC Monographs Programme retained to offer opinions on the State's behalf. (Straif Decl. (ECF No. 282-2) ¶¶ 1–14, 17.)

As with Dr. Solomon, he acknowledges the limitations of epidemiological studies assessing human exposures to acrylamide from dietary sources due to factors such as acrylamide levels fluctuating based on types of food and their preparation, and individuals' fluctuating diets. (*Id.* ¶¶ 88–101.) However, Dr. Straif ultimately concludes that, when assessing animal studies and mechanistic data in conjunction with epidemiological studies, there is no debate that dietary acrylamide is "probably carcinogenic to humans." (*Id.* ¶¶ 102–18.)

III. Procedural History

CalChamber filed this action in 2019 alleging that requiring a Prop 65 warning for acrylamide in food violates its members' and other entities' First Amendment rights because, given the scientific debate discussed above, the State does not "know" that acrylamide in food causes cancer in humans. (*See* ECF No. 1.) At the time, OEHHA's regulations deemed warnings for foods containing acrylamide to be "clear and reasonable" (i.e., the safe harbor warning) if they stated: "**WARNING: / CA WARNING: / CALIFORNIA WARNING:** Consuming this product can expose you to acrylamide, which is known to the State of California to cause cancer. For more information go to www.P65warnings.ca.gov/food." Code Regs. tit. 27, § 25607.2(a)(1), (2) ("Original Warning").

In 2020, CalChamber moved for a preliminary injunction to prohibit all prospective enforcement of the acrylamide warning requirement. (ECF No. 95.) Based on the record at that stage, the Court found there was an "unresolved scientific debate" about the carcinogenicity of acrylamide in food, and therefore held the State had not shown the Original Warning was "purely factual and uncontroversial" under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). (*See* Prelim Inj. Order at 22–28.) As a result, the Court issued a preliminary injunction in March 2021. (*Id.*) The State did not appeal the preliminary injunction ruling. However, Defendant-Intervenor Council for Education and Research on Toxics appealed, and the Ninth Circuit Court of Appeals held that the Court had not abused

its discretion in granting the motion for preliminary injunction. *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics* ("*CERT*"), 29 F.4th 468, 474 (9th Cir. 2022).

Six months after the Court issued its preliminary injunction, OEHHA issued a new safe harbor warning specific to acrylamide in food that read: "**WARNING: / CA WARNING: / CALIFORNIA WARNING:** Consuming this product can expose you to acrylamide, a probable human carcinogen formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide." Code Regs. tit. 27, § 25607.2(c)(1) ("Alternative Warning"). The Alternative Warning has been in effect since January 1, 2023. (JUF ¶ 5.)

In November 2023, the Ninth Circuit Court of Appeals issued an opinion in *NAWG*, 85 F.4th 1263, a First Amendment challenge to the Prop 65 warning requirement for glyphosate, the primary ingredient in Monsanto Company's Roundup weedkiller. Subsequently, OEHHA issued a new regulation, effective January 1, 2025, that provides an additional safe harbor warning for acrylamide in food. (*See* ECF No. 264; JUF ¶ 6.) The new warning consists, in pertinent part, of the following:

(A) "**WARNING: / CA WARNING: / CALIFORNIA WARNING:**" and "Consuming this product can expose you to acrylamide" or "Consuming this product can expose you to acrylamide, a chemical formed in some foods during cooking or processing at high temperatures."

(B) At least one of the following sentences:

(a) "The International Agency for Research on Cancer has found that acrylamide is probably carcinogenic to humans."

(b) "The United States Environmental Protection Agency has found that acrylamide is likely to be carcinogenic to humans."

(c) "The United States National Toxicology Program has found that acrylamide is reasonably anticipated to cause cancer in humans."

(C) The content in (A) and (B) may be followed by one or more of the following sentences:

(a) "Acrylamide has been found to cause cancer in laboratory animals."

(b) "Many factors affect your cancer risk, including the frequency and amount of the chemical consumed."

(c) "For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide."

Code Regs. tit. 27, § 25607.2(c)(2) ("New Warning").

CalChamber now seeks declaratory relief and a permanent injunction barring enforcement of the Prop 65 warning requirement as to acrylamide in food, arguing none of the safe harbor warnings (the Original, Alternative, or New Warning) pass constitutional muster. (Mot. Summ. J. ("MSJ") (ECF No. 280).) The Court held a hearing on February 12, 2025, with Trenton Norris and Alex Tablan appearing for CalChamber, and Megan Hey and Laura Zuckerman appearing for the State. The matter was taken under submission.

SUMMARY JUDGMENT STANDARD

Summary judgment may be granted when the evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The principal purpose of summary judgment is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Therefore, the "threshold inquiry" is whether there are any factual issues that could reasonably be resolved in favor of either party, or conversely, whether the facts are so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

In a summary judgment motion, the moving party must inform the court of the basis for the motion and identify the portion of the record which it believes

demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party meets its initial burden, the burden then shifts to the opposing party, which must establish that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574. 585 (1986). To meet their burden, parties must either cite to materials in the record supporting their position or show that the materials cited do not establish the absence or presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1).

For the opposing party to succeed and avoid summary judgment, they "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Rather, the opposing party must produce enough evidence such that the specific facts set forth by the nonmoving party, coupled with undisputed background or facts, are such that a reasonable jury might return a verdict in their favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, for the moving party to succeed, the court must conclude that no rational trier of fact could find for the opposing party. *Matsushita*, 475 U.S. at 587. However, so as not to usurp the role of the jury, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and so the court draws all reasonable inferences and views all evidence in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587–88.

DISCUSSION

I. CalChamber has Standing to Challenge Prop 65's Compelled Government Speech

As a threshold issue, the State argues that CalChamber has failed to show the State requires any of its members to warn about dietary acrylamide in their products, a necessary element of any First Amendment compelled speech claim. (Opp'n MSJ (ECF No. 282) at 10.) The State argues that there is no legal obligation to provide a warning under Prop 65 when a business can establish that exposure to acrylamide

from its product falls below the no significant risk level under Health and Safety Code section 25249.10(c); thus, CalChamber's members are required to warn for exposures to acrylamide only if their food products exceed that level. (*Id.* at 10–11.) The State argues CalChamber cannot show any member was compelled to provide Prop 65 warnings because it has failed to provide any evidence about its members' food products. (*Id.* at 11.) In the absence of this proof, the State argues the Court cannot infer that any Prop 65 warnings were *compelled* by the State; to the extent any CalChamber member placed a Prop 65 warning on their products without a legal obligation to do so, that speech is not compelled. Thus, the State argues that CalChamber "falls short of its summary judgment burden to establish standing (since it has established no member's injury-in-fact) and to establish that there is any compelled speech at all." (*Id.* at 11–12.)

The Court disagrees. There is a presumptive burden on all businesses who sell foods containing dietary acrylamide to include a Prop 65 warning unless they can affirmatively establish their product falls below the no significant risk level. *See* Health & Safety Code § 25249.10(c). Even if a business attempts to exempt their product by proving it contains acrylamide levels below the no significant risk level,[6] incurring attendant costs to do so, there is no guarantee they will then be free from litigation challenging their compliance with Prop 65's warning requirements. As other courts in this district have observed, the nature of Prop 65's enforcement scheme creates a constant, credible threat of enforcement by private enforcers because "to bring suit . . . a private plaintiff need only credibly allege that a product has some of the chemical at issue, not that the amount of the chemical is harmful or that it exceeds this level." *National Ass'n of Wheat Growers v. Becerra* ("*Wheat Growers*"), 469 F. Supp. 3d 1247, 1256 (E.D. Cal. 2020). Indeed, as "one California Court of Appeal has explained," the "instigation of Proposition 65 enforcement actions is 'easy – and

[6] OEHHA has calculated a no significant risk level for acrylamide of 0.2 micrograms (µg)/day. (Def.'s SUF ¶ 18.)

almost absurdly easy at the pleading and pretrial stages.'" *Id.* (quoting *Consumer Def. Grp. v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1215 (2006)). Thus, the availability of a no significant risk level exemption effectively offers businesses no reprieve from Prop 65's warning requirement, as businesses risk "[f]acing enforcement actions . . . even if a business can prove that its product is not a cancer risk." *Id.* Businesses must either utilize a Prop 65 warning on their products or run the risk of incurring substantial costs in defending against enforcement actions. Given Prop 65's enforcement scheme, a business's decision to adopt a Prop 65 warning is compelled by the State whether or not their product exceeds the no significant risk level.

Further, CalChamber has provided evidence demonstrating a history of Prop 65 acrylamide enforcement actions, including actions brought against its members who sell products containing dietary acrylamide. (*See* Norris Decl. (ECF 280-4) ¶ 42 (issuance of 686 notices of violation, entry of 90 settlements, and filing of 92 lawsuits concerning acrylamide since the filing of this lawsuit); *id.* ¶ 43 (issuance of 120 notices of violation during the less than 10 months the preliminary injunction was stayed); *id.* ¶ 44 (issuance of 29 notices of violation in 2024 after proposal of New Warning regulation); *id.* ¶ 45 (CalChamber's members sell products containing acrylamide and have been sued in connection with notices of violation).) This evidence is sufficient to establish a credible threat of enforcement against CalChamber's members such that they have standing to challenge the constitutionality of Prop 65's compelled warning. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) (threatened enforcement of a law creates a cognizable Article III injury); *see also Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1173 (9th Cir. 2018) (party had standing because "even if the Attorney General would not enforce the law," private citizens had a right of action to sue for damages).

Accordingly, CalChamber has satisfactorily demonstrated that its members have standing to challenge Prop 65's compelled speech requirements.

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II. Constitutionality of Prop 65 Safe Harbor Warnings for Dietary Acrylamide

A core purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)). "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). While the First Amendment typically protects against speech restrictions, the "'right to speak and the right to refrain from speaking are complimentary components' of free speech principles." *NAWG*, 85 F.4th at 1275 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Indeed, the First Amendment's guarantee of free speech makes no significant distinction between compelled speech and compelled silence. *Id.*

"Although commercial speech is afforded less protection than private, noncommercial speech, it is still entitled to the protections of the First Amendment." *Id.* In the commercial speech context, the Supreme Court has articulated two tests for determining the constitutionality of governmental action. First is the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under that test, the government may restrict or prohibit commercial speech that is not misleading or related to illegal activity as long as the restriction or prohibition directly advances a substantial governmental interest and is not more extensive than necessary. *Id.* at 564. Second, there is the less stringent test set forth in *Zauderer*, 471 U.S. 626. *Zauderer* is an "exception for compelled speech," *CTIA–The Wireless Ass'n v. City of Berkeley* ("*CTIA II*"), 928 F.3d 832, 843 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 658 (2019), and is only available in certain contexts. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("*NIFLA*"), 585 U.S. 755, 768–69 (2018). Under *Zauderer*, the government may compel commercial speech so long as it is reasonably related to a substantial governmental interest, and the compelled speech is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome. *Am.*

Beverage Ass'n v. City & Cnty. of San Francisco, 916 F.3d 749, 755–56 (9th Cir. 2019) (en banc).

To determine if the Prop 65 warnings at issue qualify for the more permissive *Zauderer* test, the Court first must determine whether the warnings concern "purely factual and uncontroversial information" before considering whether they are reasonably related to a substantial governmental interest and are not "unjustified or unduly burdensome." *NAWG*, 85 F.4th at 1275. If the Prop 65 warnings do not qualify for review under *Zauderer*, then the Court will evaluate if they meet the more stringent *Central Hudson* test. *See id.* at 1282–83 ("Because no version of the Prop 65 glyphosate warning comes within the scope of the exception found in *Zauderer*, we consider whether it passes intermediate scrutiny under *Central Hudson*.").

As discussed further below, the Court finds that the Prop 65 warnings for dietary acrylamide fail to satisfy either standard. First, under *Zauderer*, the Court finds that the Prop 65 warnings are neither uncontroversial nor purely factual as the warnings espouse a one-sided view that dietary acrylamide poses a human cancer risk despite a lack of scientific consensus on that point. While each sentence of the new warning may be factual in a strict sense of the word, under Ninth Circuit case law the Court does not take such a narrow view of the warning. Rather, the Court looks to the meaning of the warning in context, which clearly communicates the message that dietary acrylamide poses a risk of cancer. Second, under *Central Hudson*, the Court finds that misleading statements about acrylamide's carcinogenicity do not advance the State's interests in protecting the health of its citizens and that the State has less burdensome alternatives to achieve its goals. Accordingly, the Court holds that Prop 65's warning requirement as applied to dietary acrylamide violates the First Amendment and will grant summary judgment in CalChamber's favor.

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A. No Prop 65 Safe Harbor Warning for Dietary Acrylamide is "Purely Factual and Uncontroversial" under *Zauderer*

This Court previously found that the Prop 65 warning requirement for dietary acrylamide was not "purely factual and uncontroversial" given the weight of scientific authority showing that acrylamide was not "known" to cause cancer. (Prelim. Inj. Order at 20–28, 31.) The question, then, is whether developments in the evidentiary record and to the warning language since the Court's preliminary injunction order change the conclusion that the warning requirement for dietary acrylamide is misleading and not purely factual and uncontroversial. The Court finds they do not.

As discussed above, *Zauderer* applies where the government requires disclosure of "purely factual and uncontroversial information" about commercial products or services. *Zauderer*, 471 U.S. at 651; *NIFLA*, 585 U.S. at 768. The State has the burden of demonstrating that the applicable Prop 65 safe harbor warnings for acrylamide in food meet this standard. *See Zauderer*, 471 U.S. at 641. As the Ninth Circuit has explained, "[i]nformation that is purely factual is necessarily 'factually accurate,' but that alone is not enough to qualify for the *Zauderer* exception." *NAWG*, 85 F.4th at 1276.

By way of illustration, in *CTIA II*, the City of Berkeley had an ordinance requiring cell phone retailers to inform prospective cell phone purchasers of the risks of radiofrequency radiation from carrying cell phones on their person. 928 F.3d at 836–38. This warning was required as part of the FCC's regulatory scheme in order for cell phone manufacturers to obtain FCC device approval. *Id.* at 840–41. The Ninth Circuit, in reviewing this ordinance, found that *Zauderer* review was appropriate because, examining the warning sentence-by-sentence, each sentence was factually accurate and none contained an "inflammatory warning." *Id.* at 838, 846–48. However, the Ninth Circuit noted that, of course, "a statement may be literally true but nonetheless misleading and, in that sense, untrue." *Id.* at 847. Judge Friedland, who dissented in part, echoed this admonition, observing that by parsing the sentences individually

and concluding that each was literally true, the court had "misse[d] the forest for the trees" because the overall message conveyed by the ordinance was that carrying a cell phone was not safe, which was untrue and misleading, and ordering the cell phone retailers to convey such a message they disagreed with was unconstitutional. *Id.* at 853. Since *CTIA II*, the Ninth Circuit has adopted Judge Friedland's approach—i.e., requiring that courts consider the overall impression delivered by a compelled warning in evaluating whether it meets *Zauderer*'s "purely factual" requirement. *See NAWG*, 85 F.4th at 1279.

Zauderer also requires that commercial speech be "uncontroversial" to pass constitutional scrutiny. "[T]he topic of the disclosure and its effect on the speaker is probative of determining whether something is subjectively controversial." *NAWG*, 85 F.4th at 1277. For example, in *NIFLA*, a group of medical providers and crisis pregnancy centers challenged a California statute requiring "licensed" abortion clinics to notify women that California provides "immediate free or low-cost access" to family planning services (including abortion) and provide a phone number. 585 U.S. at 760–65. The Supreme Court held that the notice was controversial because, while factual, "the compelled statement took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission." *CTIA II*, 928 F.3d at 845. Thus, "[w]hile the effect on the speaker is one part of the equation, an objective evaluation of 'controversy' is also an important consideration." *NAWG*, 85 F.4th at 1277. However, not every factual statement that can be tied in some way to a controversial issue is, in fact, controversial. *Id.*

CalChamber argues that, under the *Zauderer* standard, none of the dietary acrylamide safe harbor warnings are "purely factual and uncontroversial" because, at their core, they convey the scientifically contested message that consuming foods containing acrylamide increase a consumer's risk of cancer and force CalChamber's members to espouse this disputed viewpoint. (MSJ at 12–22.) In opposition, the State effectively concedes the Original and Alternative Warnings are unconstitutional,

instead focusing on the New Warning. (Opp'n MSJ at 12–23.) The State argues that every required sentence of the New Warning is purely factual, as the warning includes: (1) a statement that consuming the product can expose you to acrylamide; and (2) a statement concerning the findings of an authoritative scientific agency on acrylamide's carcinogenicity which recites the agency's findings verbatim. (*Id.* at 12.) Additionally, the State argues that the New Warning is not misleading because only foods that will expose consumers to a risk of cancer are subject to the warning requirement; foods whose acrylamide concentrations fall below the no significant risk level are excused. (*Id.* at 15–19.) Finally, the State argues the New Warning is not controversial because there is consensus in the scientific community that acrylamide is a probable or likely human carcinogen. (*Id.* at 19–23.)

The State's new summary judgment evidence fails to change the Court's conclusion that the Prop 65 safe harbor warnings for dietary acrylamide are controversial. As the Ninth Circuit has explained, 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." *NAWG*, 85 F.4th at 1278. "It is also controversial from the subjective standpoint of the speakers," who are "forced 'to convey a message fundamentally at odds' with their businesses." *Id.* Here, while the science is clear that dietary acrylamide can cause cancer when administered to mice and rats in large doses, the Parties' experts strongly disagree that the results of these animal studies can be extrapolated to humans based on epidemiological studies and mechanistic data. The State points out that numerous scientific authorities, including the IARC, EPA, and NTP, agree that acrylamide is a probable or likely carcinogenic hazard to humans. (Opp'n MSJ at 13.) However, while a hazard indicates that at some theoretical level of exposure the chemical is capable of causing cancer, by contrast, a cancer risk is the likelihood that cancer will occur at a real-world level of exposure (because risk depends not only on the cancer potency of the chemical, but also on the dose). The distinction here is a

meaningful one. As the Ninth Circuit has explained, "[a]t its core, the function of Prop 65 is to inform consumers of risks, not hazards." *NAWG*, 85 F.4th at 1269.

Moreover, whatever the risk of cancer from acrylamide in industrial sources, authorities such as the FDA, National Cancer Institute, and American Cancer Society have questioned whether there is sufficient scientific proof *dietary* acrylamide is a cancer risk to humans. For example, the National Cancer Institute has cautioned that "[a]dditional epidemiologic studies in which acrylamide adduct or metabolite levels are serially measured in the same individuals over time (longitudinal cohorts) are needed to help determine whether dietary acrylamide intakes are associated with increased cancer risks in people." (Nat'l Cancer Inst., *Acrylamide and Cancer Risk* (Dec. 5, 2017), Norris Decl., Ex. I.) The American Cancer Society has similarly acknowledged that "reviews of studies done in groups of people (epidemiologic studies) suggest that dietary acrylamide isn't likely to be related to risk for most common types of cancer." (Am. Cancer Soc'y, *Acrylamide and Cancer Risk* (Feb. 11. 2019), Norris Decl., Ex. J.) This uncertainty is bolstered by CalChamber's experts, who opine that there is insufficient or inconsistent evidence to support a finding that dietary exposure to acrylamide increases the risk of any type of cancer in humans.

The Ninth Circuit, in affirming the Court's prior preliminary injunction order, evaluated substantially the same evidence CalChamber has presented here, and concluded those "opinions weigh[ed] against the conclusions of" IARC, EPA, and NTP. *CERT*, 29 F.4th at 478. Characterizing this as a "robust disagreement" by "reputable scientific sources," the Ninth Circuit concluded the "[C]ourt did not abuse its discretion in concluding that the warning is controversial." *Id.* While the State has provided stronger scientific evidence that dietary acrylamide is a human carcinogen at this stage, the Court does not find this evidence sufficient to overcome judgment in CalChamber's favor. "However controversial is defined, the acrylamide Prop 65 warning easily meets the definition because of the scientific debate." *Id.* at 478 & n.10. In other words, there is no scientific consensus that *dietary* acrylamide is

carcinogenic *risk* to *humans*. Thus, the New Warning is controversial both as to consumers, who will read the warning and necessarily conclude that the food containing acrylamide they will be consuming poses a cancer risk, and as to CalChamber's members, who are forced to espouse a viewpoint they vigorously disagree with.

The State's argument that the New Warning is factually true, because it repeats statements of various advisory bodies and states the fact of acrylamide exposure, ignores the reality that it conveys the "core message" that consuming a food containing acrylamide poses a risk of cancer. Under the New Warning, taking one of the more benign statements permitted, a business could state:

> **WARNING**: Consuming this product can expose you to acrylamide. The International Agency for Research on Cancer has found that acrylamide is probably carcinogenic to humans. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed.

Code Regs. tit. 27, § 25607.2(c)(2). While all factually true, this warning is again misleading as it conveys the message that dietary acrylamide increases a consumer's risk of cancer even though this is an unsettled question in the scientific community. This conclusion is bolstered by the Ninth Circuit's opinion in *NAWG*, in which the Ninth Circuit considered a similar Prop 65 warning for glyphosate:

> **CALIFORNIA PROPOSITION 65 WARNING**: Using this product can expose you to glyphosate. The International Agency for Research on Cancer classified glyphosate as probably carcinogenic to humans. US 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.

85 F.4th at 1280 (quoting Code Regs. tit. 27, §§ 25607.48, 25607.49(a)). *NAWG* held that the warning, while factually true, did not qualify for *Zauderer* review because it still

"convey[ed] the overall message that glyphosate is unsafe which is, at best, disputed," and elevated one side of "a legitimately unresolved scientific debate" over the other. *Id.* at 1281. As the court clarified, whether "each sentence" in a compelled warning "is entirely and literally true" is insufficient to satisfy *Zauderer*, as "the totality of the warning may be 'nonetheless misleading.'" *Id.* at 1279. Thus, even if "purely factual," the disclosure remained controversial and misleading. *Id.* at 1281. A similar conclusion is compelled here.

In addition, the State attempts to rely on the Ninth Circuit's decision in *CTIA II* to support its contention that the New Warning is purely factual and not misleading because it merely restates findings by leading scientific agencies. (Opp'n MSJ at 14–15.) *CTIA II* is distinguishable. In *CTIA II*, the court approved a warning stating:

> To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

928 F.3d at 838 (quoting Berkeley Mun. Code § 9.96.030(A) (2015)). However, rather than implicating that cell phones cause cancer, the *CTIA II* warning only pointed to federal guidelines regarding radiofrequency exposure and stated that certain uses of cell phones would cause the user to exceed those guidelines. The disclosure did not make any claims that failure to comply with those guidelines would cause any particular effect, other than implying that compliance with the guidelines was necessary for safety. That is not the case here. Rather, people who read the safe harbor warning will likely believe that eating the food increases their personal risk of cancer. Stating that a food contains a chemical that is "probably," "likely," or "reasonably anticipated" to be carcinogenic heavily implies that, by ingesting that

food, the consumer will increase their risk of cancer. Thus, the Ninth Circuit's approval of the warning in *CTIA II* is inapposite.

That the consumer receives this intended message is necessary to meet the State's declared goals behind Prop 65's warning requirements. As the State admits, the "New Safe Harbor Warning directly advances" the State's "substantial governmental interest" in "protecting the health and safety of consumers" by "requiring businesses that expose consumers to levels of acrylamide above the applicable no significant risk level to warn consumers of the hazard." (Opp'n MSJ at 25.) This "requirement fits squarely with Californians' declared right '[t]o be informed about exposures to chemicals that cause cancer[.]'" (*Id.* (quoting *Deukmejian*, 212 Cal. App. 3d at 431).) In other words, the intent behind the New Warning is to inform California consumers they run the risk of developing cancer if they ingest dietary acrylamide. The State cannot have it both ways by focusing myopically on the individual words in the New Warning and also justifying the regulation by the importance of warning consumers about cancer risk.

In short, while the law does not require the Prop 65 warning to disclose the full debate regarding acrylamide's carcinogenicity, and while there need not be complete consensus among the scientific community before a warning may be required, given the evidence in the record the Court finds the New Warning is not purely factual and uncontroversial. It conveys the one-sided message that people who consume dietary acrylamide will increase their risk of cancer without sufficient scientific consensus to support that message. Accordingly, *Zauderer*'s lower scrutiny does not apply, and the Prop 65 warning as to dietary acrylamide must satisfy intermediate scrutiny.

B. No Prop 65 Safe Harbor Warning for Dietary Acrylamide Satisfies *Central Hudson's* Heightened Scrutiny

Having determined that *Zauderer*'s lower standard does not apply to the New Warning because it is not purely factual and uncontroversial, the Court turns to whether the warning requirement satisfies intermediate scrutiny under *Central*

Hudson. Under intermediate scrutiny, the law must "directly advance the governmental interest asserted and must not be more extensive than is necessary to serve that interest." *Am. Beverage*, 916 F.3d at 755 (internal quotation marks omitted). The government has the burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 136 (1994).

Here, the State has neither shown that the New Warning directly advances the asserted government interest, nor that it is not more extensive than necessary to achieve that interest. "California unquestionably has a substantial interest in preserving the health of its citizens," *NAWG*, 85 F.4th at 1283, and the purpose of Prop 65's warning requirement is to inform the people of California "about exposures to chemicals that cause cancer," *see Brown*, 196 Cal. App. 4th at 258. However, misleading statements about acrylamide's carcinogenicity do not directly advance that interest. California has options available to inform consumers of its determination that acrylamide in food is a carcinogen without burdening the free speech of businesses, including advertising campaigns or posting information on the Internet. *See, e.g., NAWG*, 85 F.4th at 1283 ("[T]he State could reasonably post information about glyphosate on its own website or conduct an advertising campaign."); *NIFLA*, 585 U.S. at 775 (even assuming an advertising campaign would be less effective at broadcasting California's message than mandated disclosures, the state may not "co-opt" businesses "to deliver its message for it," because "[t]he First Amendment does not permit the State to sacrifice speech for efficiency").

Accordingly, Prop 65's warning requirement as to acrylamide in food fails intermediate scrutiny under the First Amendment, and the Court will grant summary judgment in CalChamber's favor.

III. Permanent Injunction and Declaratory Relief

Having determined that Prop 65's warning requirement as to dietary acrylamide violates the First Amendment, the Court turns to whether a permanent injunction and

declaratory relief are appropriate. To obtain a permanent injunction, a plaintiff "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The standard for a permanent injunction is essentially the same as for a preliminary injunction, with the exception that the plaintiff must show actual success, rather than a likelihood of success. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). In addition, under 28 U.S.C. § 2201, this Court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

Here, the Court's analysis of the permanent injunction factors is largely the same as in its order granting a preliminary injunction. Because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), and CalChamber has prevailed on their First Amendment claim, they have established that they will likely suffer irreparable harm for which there are no adequate legal remedies if Prop 65's warning requirement is not enjoined as to acrylamide in food. When the government is a party, the balance of equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). To determine the balance of equities, the court must "balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citation omitted). The Court recognizes that the State has a significant interest in protecting its citizens and informing them of possible health risks, but the Ninth Circuit has "consistently recognized the significant public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d 563, 583

(9th Cir. 2014) (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)). Further, the State "has no legitimate interest in enforcing an unconstitutional" law. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Providing misleading or false labels to consumers also undermines California's interest in accurately informing its citizens of health risks at the expense of CalChamber's First Amendment rights. Accordingly, the balance of equities and public interest weigh in favor of permanently enjoining Prop 65's warning requirement for dietary acrylamide. The Court will grant CalChamber's requested injunction.

CalChamber also argues they are entitled to a declaration that Prop 65's warning requirement as to dietary acrylamide violates the First Amendment because existing consent judgments concerning acrylamide in food continue to force businesses, including CalChamber's members, to either "disparage their products with alarmist warnings or needlessly reformulate their products," and a declaration is needed to relieve the hundreds of businesses that were wrongly sued pursuant to an unconstitutional warning requirement and pressured into burdensome settlements. (MSJ at 25.) The Court finds such declaratory relief is warranted and will grant CalChamber's request.

CONCLUSION

As Plaintiff California Chamber of Commerce has prevailed on the merits of its First Amendment claim, is likely to suffer irreparable harm absent an injunction, and has shown that the balance of equities and public interest favor an injunction, the Court will grant its request for injunctive and declaratory relief to permanently enjoin Proposition 65's warning requirement as to acrylamide in food. It is therefore ORDERED that California Chamber of Commerce's Motion for Summary Judgment (ECF No. 280) is GRANTED.

It is further ORDERED that California Chamber of Commerce's request for a permanent injunction enjoining the warning requirement of Proposition 65 as to dietary acrylamide is GRANTED. Defendant Rob Bonta, in his official capacity as

Attorney General of the State of California, the State of California's agents and employees, all persons or entities in privity with them, and anyone acting in concert with them are hereby ENJOINED from enforcing as against California Chamber of Commerce, its members, and all persons its represents, Proposition 65's warning requirement with respect to dietary acrylamide, including California Health and Safety Code section 25249.6's requirement that any person in the course of doing business provide a clear and reasonable warning before exposing any individual to dietary acrylamide. The Court further DECLARES that Proposition 65's warning requirement is unconstitutional as applied to dietary acrylamide.

IT IS SO ORDERED.

Dated: **May 2, 2025**

Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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