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OPINIONS AND ORDERS

REHEARING ORDER

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING PRELIMINARY INJUNCTION (MARCH 17, 2022)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA CHAMBER OF COMMERCE,

Plaintiff-Appellee,

v.

COUNCIL FOR EDUCATION AND RESEARCH ON TOXICS, A CALIFORNIA PUBLIC BENEFIT CORPORATION,

Intervenor-Defendant-Appellant.

No. 21-15745

D.C. No. 2:19-cv-02019- KJM-JDP

Appeal from the United States District Court for the Eastern District of California Kimberly J. Mueller, Chief District Judge, Presiding

Before: Ronald M. GOULD, Mark J. BENNETT, and Ryan D. NELSON, Circuit Judges.

OPINION

BENNETT, Circuit Judge:

California Chamber of Commerce ("CalChamber") filed suit for declaratory and injunctive relief against the Attorney General of California, seeking to halt acrylamide litigation brought under California's Safe Drinking Water and Toxic Enforcement Act of 1986, better known as Proposition 65 or Prop. 65.[1] CalChamber argued that Prop. 65's warning requirement violates the First Amendment of the U.S. Constitution on its face and as applied to acrylamide in food products. The district court granted CalChamber's motion for a preliminary injunction, prohibiting "the Attorney General and his officers, employees, or agents, and all those in privity or acting in concert with those entities or individuals, including private enforcers" from filing or prosecuting "new lawsuit[s] to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products." Council for Education and Research on Toxics ("CERT") intervened as a defendant[2] and is the sole appellant challenging the preliminary injunction.

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[1] In its First Amended complaint, CalChamber named only the Attorney General as a defendant and sought to "enjoin [the Attorney General] and those in privity with and acting in concert with [him] from enforcing in the future a requirement to provide a false, misleading, and highly controversial cancer warning for food and beverage products . . . that contain the chemical acrylamide." CalChamber claimed that those in privity and acting in concert with the Attorney General included "private enforcers of Proposition 65 under Cal. Health & Safety Code § 25249.7(d)."

[2] CERT moved to intervene nine days after the lawsuit was filed. Both CalChamber and the Attorney General filed statements of non-opposition.

We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.[3]

I. Facts and Procedural Background

Prop. 65 provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer . . . without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10." Cal. Health & Safety Code § 25249.6. One exception under Section 25249.10 applies to those who "can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer." *Id.* § 25249.10(c). This is known as the "No Significant Risk Level." *See Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1254 (E.D. Cal. 2020).

A chemical is "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." Cal. Health & Safety Code § 25249.8(b). The California Office of Environmental Health Hazard

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[3] *Noerr-Pennington* immunity is at issue in our concurrently filed opinion in *B&G Foods North America, Inc. v. Kim Embry*, No. 20 16971. Though CERT raised *Noerr-Pennington* immunity below, it abandoned that argument on appeal.

Assessment ("OEHHA") "is the lead agency designated by the Governor to implement and enforce Proposition 65." *Cal. Chamber of Com. v. Brown*, 126 Cal. Rptr. 3d 214, 219 n.5 (Ct. App. 2011). In its initially published 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." *Id.* at 219 (citation omitted). Today, a "chemical agent must be listed even if it is known to be carcinogenic . . . only in animals." *Am. Chemistry Council v. Off. of Envt'l Health Hazard Assessment*, 270 Cal. Rptr. 3d 379, 402 (Ct. App. 2020).

OEHHA's regulations provide that a cancer warning for foods is "clear and reasonable" if it states: "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* Cal. Code Regs. tit. 27, § 25607.2(a)(1), (2). This is known as the "safe harbor" warning. A party that fails to provide such a warning or otherwise establish an exception may be enjoined, Cal. Health & Safety Code § 25249.7(a), and "is liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per day for each violation," *id.* § 25249.7(b)(1).

Prop. 65 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, the person acting in the public interest 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).

OEHHA added acrylamide to the Prop. 65 list in 1990 "because studies showed it produced cancer in laboratory rats and mice."[4] OEHHA, *Acrylamide*, https://oehha.ca.gov/ proposition-65/general-info/acrylamide (last visited Mar. 3, 2022). The EPA found that acrylamide was a "likely" human carcinogen, and the International Agency for Research on Cancer classified it as "probably carcinogenic to humans." According to the FDA, acrylamide "is a chemical that can form in some foods during high-temperature cooking processes, such as frying, roasting, and baking" and was first detected in foods in 2002. But the National Cancer Institute stated that "a large number of epidemiologic studies . . . have found no consistent evidence that dietary acrylamide exposure is associated with the risk of any type of cancer." The American Cancer Society stated that studies "suggest that dietary acrylamide isn't likely to be related to risk for most common types of cancer." And the FDA has stated that "warning labels based on the presence of acrylamide in food might be misleading." Between 2015 and October 2020, private enforcers have sent almost 1,000 notices of alleged acrylamide violations to the Attorney General.

CalChamber is a nonprofit business association with over 13,000 members, many of whom sell or

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[4] Toxicological studies have shown that tumors are observed in rodents only when they are exposed to acrylamide at approximately 500 times the average daily amount consumed by Americans.

produce food products that contain acrylamide. It filed its complaint to vindicate its members' First Amendment right to not be compelled to place false and misleading acrylamide warnings on their food products. CalChamber's preliminary injunction motion sought to prohibit parties from "filing and/or prosecuting new lawsuits to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products." CalChamber submitted expert declarations stating that there is no consistent or reliable evidence that acrylamide increases the risk of any type of cancer in humans, that the toxicological studies related to experimental animals are not relevant to humans at real-world levels of exposure, and that California consumers understood Prop. 65's safe harbor warning "to convey the message that eating [food with acrylamide] increases their risk of getting cancer."

In opposition, the Attorney General submitted a declaration from an expert who stated that evidence shows that acrylamide is a human carcinogen. Intervenor CERT also opposed the motion, arguing an injunction would impose an unconstitutional prior restraint on its First Amendment rights.[5]

The district court granted the preliminary injunction. Under the injunction:

> While this action is pending and until a further order of this court, no person may file or prosecute a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and

[5] Nothing in any of CERT's district court filings asserted or suggested that CERT was asserting the rights of any other private enforcers.

> beverage products. This injunction applies to the requirement that any "person in the course of doing business" provide a "clear and reasonable warning" for cancer before "expos[ing] any individual to" acrylamide in food and beverage products under California Health & Safety Code § 25249.6. It applies to the Attorney General and his officers, employees, or agents, and all those in privity or acting in concert with those entities or individuals, including private enforcers under section 25249.7(d) of the California Health and Safety Code.
>
> This order does not alter any existing consent decrees, settlements, or other agreements related to Proposition 65 warning requirements.

Cal. Chamber of Com. v. Becerra, 529 F. Supp. 3d 1099, 1123 (E.D. Cal. 2021) (alteration in original). The district court found that CalChamber was likely to succeed on the merits because neither the State nor CERT had shown that the Prop. 65 cancer warning for acrylamide in food is "purely factual and uncontroversial." The district court also rejected CERT's prior restraint argument.

CERT appealed the preliminary injunction order, but the Attorney General did not. A divided motions panel of this court[6] granted in part CERT's motion for

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[6] Dissenting, Judge Forrest stated that CERT did not contend that it intended to file any enforcement lawsuits, that CERT had filed no enforcement suits since CalChamber filed the litigation, and that CERT could still send demand letters. Judge Forrest believed CalChamber "raised serious questions regarding whether

an emergency stay of the preliminary injunction pending appeal. The majority found that "[e]ven if a court could enjoin lawsuits that infringe on a defendant's established First Amendment right against compelled speech, no court has made a final determination that a Proposition 65 warning is, in fact, unconstitutional with respect to acrylamide exposure." The motions panel also stated that the "breadth of the injunction"—prohibiting Prop. 65 lawsuits "with regard to acrylamide exposure by *any* private actor, including those who are not parties to the underlying action"—"exacerbates the concerns underlying the prior restraint doctrine." The motions panel stayed the preliminary injunction only to the extent it barred private enforcers, including CERT, from filing or prosecuting Prop. 65 lawsuits. Another motions panel later denied CalChamber's motion to dismiss CERT's appeal for lack of standing.

II. Standard of Review

This court reviews "the district court's decision to grant or deny a preliminary injunction for abuse of discretion. . . . The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam) (citation omitted).

"A district court abuses its discretion if it rests its decision 'on an erroneous legal standard or on clearly erroneous factual findings.'" *Am. Beverage Ass'n v. City*

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the warning required by Proposition 65 as [it] relates to acrylamide is permissible compelled commercial speech."

& County of San Francisco, 916 F.3d 749, 754 (9th Cir. 2019) (en banc) (quoting *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004)). "A district court's decision is based on an erroneous legal standard if: '(1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in the litigation.'" *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1096 (9th Cir. 2008) (quoting *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

"In the context of a trial court's factual findings, as applied to legal rules, to determine whether a district court has abused its discretion, the first step . . . is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011) (cleaned up). "If the trial court identified the correct legal rule, the second step is to determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (cleaned up).

"We review the scope of an injunction for abuse of discretion." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 823 (9th Cir. 2018).

III. Discussion

A. Standing

We first address the jurisdictional challenge raised by CalChamber. Notwithstanding that CERT intervened, that CalChamber sought to enjoin CERT, and that the preliminary injunction obtained by CalChamber does enjoin CERT, CalChamber argues that CERT lacks standing to appeal. CalChamber claims that the injunction might not affect CERT because CERT "does not have any pending 60 day notices concerning acrylamide in food on which it could file suit."[7] CalChamber therefore contends that CERT "does not have Article III standing and its appeal cannot proceed." CERT argues that because the district court enjoined "CERT and all other private enforcers from filing Proposition 65 cases regarding acrylamide in food, CERT ha[s] standing to appeal." We agree with CERT.

"[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). The Supreme Court

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[7] CalChamber also argues that it would be absurd for the Attorney General and other elected officials to not be able to enforce Prop. 65 while private enforcers could. But this result would flow from the Attorney General's decision not to appeal, not from any lack of injury to CERT. Moreover, it was CalChamber that sought to enjoin both the Attorney General and private enforcers like CERT.

has "repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up). As the Court held in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), "Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law." *Id.* at 2207 n.3. The same principle applies to an intervenor seeking to appeal. *Va. House of Delegates*, 139 S. Ct. at 1950-51.

We first note that CERT recently filed a Prop. 65 enforcement action against manufacturers and retailers of air fryers, alleging air fryers "generate extremely high levels of acrylamide to which Californians are exposed." CERT does not contend that air fryers are "food and beverage products," and stated at oral argument that its litigation against air fryer manufacturers would not have been barred by the injunction. CERT acknowledged that the defendants in that litigation, however, might contend that because air fryers create acrylamide in foods, the litigation would have been barred by the preliminary injunction, absent the stay. CalChamber stated at oral argument that the pending case faces the question whether air fryers are food and beverage products, and that the defendants in that case might argue that they are.

CERT did not contend below that it specifically intended to file any Prop. 65 lawsuits or pre-litigation notices about acrylamide in food or beverage products. Nor did it make such a claim in opposition to the motion to dismiss the appeal for lack of standing. Nonetheless, we look to CERT's long history of bringing

suits against manufacturers of food and beverage products, CERT's statement that it has "devote[d] [its] efforts to initiating new Proposition 65 matters regarding acrylamide," and CERT's very recent litigation against air fryers, as significant evidence of CERT's concrete interest in bringing Prop. 65 litigation related to acrylamide in food and beverage products. We also note that CalChamber has not cited, nor have we found, any case in which an enjoined party was denied, on standing grounds, the right to appeal the injunction.

We hold that CERT suffered "an invasion of a legally protected interest," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), when the district court enjoined it from filing Prop. 65 lawsuits as to acrylamide in food and beverage products. We find that CERT has suffered a concrete, particularized, and actual injury. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The injury is directly traceable to the preliminary injunction and redressable by a reversal of that injunction. We thus conclude that CERT has standing, and we proceed to the merits of CalChamber's and CERT's arguments on appeal.

B. Preliminary Injunction

For a court to grant a preliminary injunction, a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

1. Likelihood of Success on the Merits

a. Compelled Speech

The district court applied the three-factor test from *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), to decide whether "the compelled warning (1) requires the disclosure of purely factual and uncontroversial information only, (2) is justified and not unduly burdensome, and (3) is reasonably related to a substantial government interest." The district court's first two factors combine the "three inquiries" that comprise "[t]he *Zauderer* test, as applied in [*National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018)]": "whether the notice is (1) purely factual, noncontroversial, and (3) not unjustified or unduly burdensome." *Am. Beverage*, 916 F.3d at 756.[8] In *CTIA-The Wireless Ass'n v. City of Berkeley* ("*CTIA-II*"), 928 F.3d 832 (9th Cir. 2019), we joined our sister circuits in holding that "the *Zauderer* exception for compelled speech applies even in circumstances where the disclosure does not protect against deceptive speech." *Id.* at 843. We held that "the governmental interest in furthering public health and safety is sufficient under *Zauderer* so long as it is substantial." *Id.* at 844. The third factor considered by the district court here aligns with our holding in *CTIA-II*. The district court thus initially used the correct framework for determining whether Prop. 65's warning requirement was a constitutionally permissible compelled disclosure.

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[8] The inquiries or criteria need not be addressed in any particular order. *Am. Beverage*, 916 F.3d at 756.

The district court then found that the Prop. 65 acrylamide warning did not pass constitutional muster. "Courts asked to issue preliminary injunctions based on First Amendment grounds face an inherent tension: the moving party bears the burden of showing likely success on the merits . . . and yet within that merits determination the government bears the burden of justifying its speech-restrictive law." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc). "Therefore, in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction" on speech. *Id.* at 1116.

CalChamber bore the initial burden to show a colorable claim. As the district court found, "[t]he parties agree[d] Proposition 65 compels commercial speech." Thus, the court shifted its inquiry to assessing whether California could justify the compelled disclosure under *Zauderer*. The district court found that "[1] the State has not shown that the safe-harbor acrylamide warning is purely factual and uncontroversial, and [2] Proposition 65's enforcement system can impose a heavy litigation burden on those who use alternative warnings."[9] The court found that "the warning implies

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[9] As noted, the safe-harbor warning reads: "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." Cal. Code Regs. tit. 27, § 25607.2 (a)(2).

incorrectly that acrylamide is an additive or ingredient," and "is likely misleading." The court also referenced the consumer survey submitted by CalChamber that shows how those "who read the safe harbor warning will probably believe that eating the food increases their personal risk of cancer." The court acknowledged that some studies would "support such an inference," but also noted "dozens of epidemiological studies have failed to tie human cancer to a diet of food containing acrylamide." Thus, it found "the safe harbor warning is controversial because it elevates one side of a legitimately unresolved scientific debate about whether eating foods and drinks containing acrylamide increases the risk of cancer."

The record supports the district court's findings. First, the district court found that the safe harbor warning is controversial because of the scientific debate over whether acrylamide in food causes cancer in humans. In 2019, the American Cancer Society stated that "dietary acrylamide isn't likely to be related to risk for most common types of cancer." According to the National Cancer Institute, while "[s]tudies in rodent models have found that acrylamide exposure increases the risk for several types of cancer[,] . . . a large number of epidemiologic studies . . . in humans have found no consistent evidence that dietary acrylamide exposure is associated with the risk of any type of cancer." One epidemiologist who reviewed 56 studies concluded that "there is no consistent or reliable evidence to support a finding that dietary exposure to acrylamide increases the risk of any type of cancer in humans." In her publication, the researcher noted that the "epidemiologic studies . . . have failed to detect an increased risk of cancer, and they raise serious doubt regarding

the validity of extrapolating from rodent studies suggestive of multiorgan effects to humans." These opinions weigh against the conclusions of three organizations: the International Agency for Research on Cancer classifies acrylamide as "probably carcinogenic to humans," the U.S. National Toxicology Program classifies acrylamide as "reasonably anticipated to be a human carcinogen," and the EPA classifies acrylamide as "likely to be carcinogenic to humans." Given this robust disagreement by reputable scientific sources, the court did not abuse its discretion in concluding that the warning is controversial.[10]

The court similarly did not abuse its discretion in finding the warning is misleading. Scientific debate aside, Prop. 65's meaning of the word "known" is not conveyed in the warning.[11] The district court stated: "Statements are not necessarily factual and uncontroversial just because they are technically true." *See CTIA-II*, 928 F.3d at 847 ("[A] statement may be literally true but nonetheless misleading and, in that sense, untrue."). Under Prop. 65, a "known" carcinogen carries a complex legal meaning that consumers would not glean from the warning without context.[12]

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[10] We do not try to offer a general definition for "controversial" in the *Zauderer* context. However controversial is defined, the acrylamide Prop. 65 warning easily meets the definition because of the scientific debate.

[11] As noted above, the word "known" has a specialized meaning under Prop. 65, *see* Cal. Health & Safety Code § 25249.8(b), and OEHHA added acrylamide to the Prop. 65 list in 1990 "because studies showed it produced cancer in laboratory rats and mice."

[12] This interpretation of the "factual" requirement can also be understood as a corollary of the threshold requirement stated in *Zauderer*. While the First Amendment allows states and the

Thus, use of the word "known" is misleading—as the FDA acknowledged the warning might be. Even the State of California has stipulated that it "does not know that acrylamide causes cancer in humans, and is not required to make any finding to that effect in order to list the chemical under Proposition 65." As the consumer survey showed, when consumers read "known to the State of California to cause cancer" on the packaging of a food or beverage product, they would believe "that such products pose a risk of cancer in humans." But acrylamide "must be listed [as known to the state to cause cancer] even [though] it is known to be carcinogenic . . . only in animals." *Am. Chemistry Council*, 270 Cal. Rptr. 3d at 402. A reasonable person might think that they would consume a product that California knows will increase their risk for cancer. Such a consumer would be misled by the warning because the State of California does not know if acrylamide causes cancer in humans. The district court did not abuse its discretion when it concluded the warning is misleading.

Finally, the record supports the district court's finding that Prop. 65's enforcement regime creates a heavy litigation burden on manufacturers who use alternative warnings. The district court agreed with CalChamber that "only the safe harbor warning is actually useable in practice." The court found that Prop. 65 "does not permit businesses to add information to the required warning at their discretion, and thus

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federal government to bar others from disseminating false, deceptive, or misleading commercial speech, 471 U.S. at 638, the First Amendment also bars the government from compelling others to disseminate false, deceptive, or misleading commercial disclosures.

prevents them from explaining their views on the true dangers of acrylamide in food." Upon receipt of a notice of violation, CalChamber argues, a business must "communicate to consumers a disparaging health warning about food containing acrylamide that is unsupported by science, or face the significant risk of an enforcement action under Proposition 65." The former damages their "reputation and goodwill" with misleading information, and the latter bears a risk of "civil penalties of up to $2,500 per violation per day." If the business chooses to defend itself in the action, it bears the burden of proof to show the acrylamide levels in their products have a low enough risk of causing cancer that they do not need a warning. *See* Cal. Health & Safety Code § 25249.10(c) (requiring defendants to prove that the exposure to acrylamide "poses no significant risk assuming lifetime exposure at the level in question"). Proving the acrylamide level is lower than the No Significant Risk Level requires expensive testing and costly expert testimony if the case proceeds to trial. "[S]maller businesses . . . often cannot afford" these costs and "have decided to provide a Proposition 65 cancer warning for their acrylamide-containing food products, even though they believe that such a warning is unfounded, to avoid the risk of Proposition 65 litigation." Thus, in context, the compelled disclosure appears unduly burdensome, and the district court did not abuse its discretion in so finding.

Our circuit has established a clear legal framework for analyzing the constitutionality of a compelled commercial disclosure requirement, which the district court dutifully followed. Because California and CERT did not meet their burden to show the warning requirement was lawful under *Zauderer*, the district court

did not abuse its discretion when it concluded that CalChamber was likely to succeed on the merits of its First Amendment claim.

The district court assumed without deciding that it was also necessary to apply the heightened standard of review under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).[13] Theoretically, even if a compelled disclosure failed the *Zauderer* test because, for example, it was controversial, the government could get a "second bite at the apple" by showing that even if controversial, the compelled speech passed *Central Hudson*'s intermediate scrutiny hurdle. The State made this argument below. But CERT has not made this argument on appeal, nor has CERT even cited *Zauderer* or *Central Hudson* in its briefs. Thus, we need not reach this argument. *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003).[14]

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[13] At least one other district court has done the same, finding our precedent unclear on whether applying the heightened analysis was necessary. *See Wheat Growers*, 468 F. Supp. 3d at 1257, 1264.

[14] We note, though, that in *CTIA-II* we stated: "Five years after *Central Hudson*, the Court held that *Central Hudson*'s intermediate scrutiny test does not apply to compelled, as distinct from restricted or prohibited, commercial speech." 928 F.3d at 842. We also note, however, that no court appears to have ever directly held that the government can never compel factually accurate but "controversial" speech, no matter the government interest, and no matter how compelling its reasons. We leave that question for another day.

b. Prior Restraint

CERT (which, as noted, does not even discuss *Zauderer*) argues the injunction is a prior restraint that violates its First Amendment right to petition. The district court found the "illegal objective" of any Prop. 65 lawsuit prevented CERT from making a successful prior restraint claim.[15] Though the prior [15]restraint doctrine does apply to enjoined lawsuits, we conclude that the district court's finding at the preliminary injunction stage that Prop. 65 acrylamide in food lawsuits are likely unconstitutional prevents CERT from claiming the doctrine's protection.

The Supreme Court has held that "enjoining a lawsuit could be characterized as a prior restraint." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 530 (2002). But courts may enjoin a lawsuit with "an objective that is illegal" without violating the Petition Clause. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983); *see also Small v. Operative Plasterers' and Cement Masons' Int'l Ass'n Loc. 200*, 611 F.3d 483, 492 (9th Cir. 2010).[16]

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[15] In discussing "illegal objective," the court referenced the potential that CalChamber would succeed on the merits as problematic for the petition clause claim because "private enforcement actions targeting acrylamide would run head-on into a constitutional prohibition."

[16] CERT argues that its Prop. 65 lawsuits may not be enjoined because CERT is not "'subjectively motivated by an unlawful purpose,' [*BE & K Constr. Co.*, 536 U.S. at 531], so as to have an 'illegal objective' undeserving of First Amendment protection." But CalChamber need not allege or prove the subjective motive of Prop. 65 private enforcers. Suits that have "an objective that is illegal under federal law" may be enjoined without proving

CERT argues that the district court could not enjoin Prop. 65 litigation on the basis that it had an illegal objective until after the court made a final determination on the merits of CalChamber's claim. But CERT cited no binding precedent supporting its claim that the "falsity" of the compelled speech must be proven at trial, and thus by definition before a preliminary injunction can issue. And the cases cited by CERT are distinguishable.

CERT cited a district court case that stated: "A preliminary injunction is not ideal for resolving the actual truth or falsity of Defendants' speech, particularly where the merits of the matter is already pending in another court." *Gold Coast Search Partners LLC v. Career Partners, Inc.*, No. 19-cv-03059-EMC, 2019 WL 4305540, at *5 (N.D. Cal. Sept. 11, 2019). But that court found only that enjoining the defendants from "stating or claiming that Plaintiffs are prohibited from conducting their business or that they are violating any agreement with Defendants" or "stating or implying that Plaintiffs are bound by the Employment Agreement" would be an improper prior restraint on speech. *Id.* at *4-5. No similar speech is barred here—only lawsuits.

CERT also cites *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007), claiming the California Supreme Court "held that an injunction that enjoins speech prior to a determination on the merits is impermissible." But the case had nothing to do with enjoining prospective lawsuits "prior to a determination" on the First Amendment merits; it involved a

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subjective intent. *Bill Johnson's*, 461 U.S. at 737 n.5; *Small*, 611 F.3d at 492.

bar and restaurant owner seeking to enjoin a neighbor from interfering with its business by repeating statements that a court had already found defamatory. *Id.* at 341. The California Supreme Court ultimately determined that the trial court's permanent injunction was "overly broad, but that defendant's right to free speech would not be infringed by a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory." *Id.*

CalChamber, on the other hand, offers examples of preliminary injunctions against litigation to support its position that enjoining future lawsuits does not constitute an unlawful prior restraint on CERT's right to petition. *See County of Orange v. Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986); *Wood v. Santa Barbara Chamber of Com., Inc.*, 705 F.2d 1515, 1523 (9th Cir. 1983). The district court also pointed to other contexts in which federal courts enjoin prospective state court litigation.[17]

We agree with CalChamber and the district court. The serious constitutional issue raised by CalChamber gave the district court sufficient reason to enjoin Prop. 65 acrylamide litigation until the case was finally decided on the merits. The court's analysis of CalChamber's First Amendment claim was an "adequate determination that [such Prop. 65 acrylamide litigation] is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413

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[17] The district court cited cases as well as federal statutes, such as the All Writs Act and the Anti-Injunction Act, which show that enjoining prospective lawsuits does not per se violate the First Amendment.

U.S. 376, 390 (1973).[18] Thus, we hold that the preliminary injunction against likely unconstitutional litigation is not an unconstitutional or otherwise impermissible prior restraint.

2. Remaining Preliminary Injunction Factors

We conclude there was no abuse of discretion in the court's analysis of the remaining preliminary injunction factors. "Irreparable harm is relatively easy to establish in a First Amendment case." *CTIA-II*, 928 F.3d at 851. The plaintiff "need only demonstrate the existence of a colorable First Amendment claim." *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003) (cleaned up). As we held above, the district court correctly found that CalChamber did so.

The district court reviewed the final two factors of the preliminary injunction test together, weighing the State's and private enforcers' interest in enforcing Prop. 65 against CalChamber's members' First Amendment rights. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage*, 916 F.3d at 758 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). The district court noted that the "injunction requested here is also quite narrow," allowing "CERT and other private enforcers [to] send demand letters and notices of violations," "litigate existing claims and pursue appeals," "pursue public relations campaigns," "fund

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[18] The Court in *Pittsburgh Press* did not define the parameters of an "adequate determination." 413 U.S. at 390. Such adequacy would, of course, turn on the law and facts in individual cases.

research," and "buy advertisements."[19] Though we do not agree with the "quite narrow" description, the scope of the injunction speaks for itself, and is not impermissible.

For these reasons, the court found that the balance of equities tipped in CalChamber's favor, and that the injunction would be in the public interest. These findings were not an abuse of discretion, especially as this court 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), *abrogated on other grounds by Winter*, 555 U.S. 7).

C. Scope of the Injunction

CERT argues for the first time in its reply brief that the injunction was overly broad because CERT and the Attorney General are not in privity with one another. While we are unsure if we understand CERT's argument, which is forfeited because it is raised for the first time in the reply brief, we have "discretion to review an issue not raised by appellant . . . when it is raised in the appellee's brief." *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 324 (9th Cir. 1991). Given that CalChamber argues that because the Attorney General and private enforcers bring Prop. 65 claims in the public interest, private enforcers are "in privity" with one another and with the Attorney

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[19] CERT argued for the first time on appeal that the notices of violations are effectively enjoined. This argument is waived. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010).

General, we exercise our discretion to reach only whether the injunction is overly broad as to *CERT*.[20]

Federal Rule of Civil Procedure 65(d)(2) allows district courts to enjoin not just the parties and their affiliates, but also others who are "in active concert or participation" with them. The Supreme Court has interpreted this language to allow injunctions to bind not only defendants but also people "identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973) (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)). CalChamber argues that this group includes "private enforcers who are not parties to this action."[21]

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[20] We do not reach whether the injunction here is overly broad against other possible private enforcers. CERT intervened to protect its own interests and did not purport to speak for other private enforcers. Because CERT has not asserted the rights or interests of anyone but itself, its standing is limited to its own interests. We therefore discuss only whether the injunction was overly broad as to CERT. We express no view on the merits of whether the injunction was overbroad as it applies or purports to apply to other private enforcers who were not named as defendants and who did not intervene.

[21] "In general, . . . privity involves a person so identified in interest with another that he represents the same legal right." *Zaragosa v. Craven*, 202 P.2d 73, 75 (Cal. 1949) (en banc) (quotation marks omitted). "Generally, to be held liable in contempt, it is necessary that a non-party respondent must either abet the defendant or must be legally identified with him. Those not identified with a party, but in active concert or participation with him, are bound only with actual notice." *NLRB v. Sequoia Dist. Council of Carpenters, AFL-CIO*, 568 F.2d 628, 633 (9th Cir. 1977) (cleaned up).

Whether or not this is so, as an intervenor-defendant, CERT is in a different position from other private enforcers who are not parties to the case. CERT stated in its motion to intervene that its interests cannot be adequately represented by the Attorney General because their interests are adverse. CERT acknowledged that "as an intervenor, CERT has all of the same rights and obligations as [those] of a named defendant." This includes the duty to be bound by the district court's injunction order. *See United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) ("Intervenors under Fed. R. Civ. P. 24(a)(2) . . . enter the suit with the status of original parties and are fully bound by all future court orders."). We concluded at the outset that CERT has standing to appeal the injunction as a private enforcer, including because CERT has filed acrylamide lawsuits in the past and has discussed wanting to file them in the future. As an intervenor under Fed. R. Civ. P. 24(a), CERT brought itself into "active concert" and "participation" with the Attorney General in the context of this litigation. It would defy logic to now hold that the injunction as applied to CERT as a private enforcer is overly broad.

IV. Conclusion

For all these reasons, the district court did not abuse its discretion in granting the preliminary injunction.[22]

AFFIRMED.

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[22] We also find no abuse of discretion in the court's evidentiary hearing proceedings or its consideration of expert testimony.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT GRANTING MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL (MAY 27, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA CHAMBER OF COMMERCE,

Plaintiff-Appellee,

v.

ROB BONTA,

Defendant,

and

COUNCIL FOR EDUCATION AND RESEARCH ON TOXICS, A CALIFORNIA PUBLIC BENEFIT CORPORATION,

Intervenor-Defendant-Appellant.

No. 21-15745

D.C. No. 2:19-cv-02019-KJM-JDP
Eastern District of California, Sacramento

Before: PAEZ, BERZON, and FORREST, Circuit Judges.

Order by Judges PAEZ and BERZON; Dissent by Judge FORREST

Appellant Council for Education and Research on Toxics ("CERT") appeals the district court's March 29, 2021 preliminary injunction barring new lawsuits that seek to enforce California's Proposition 65 warning requirement for acrylamide exposure. CERT moves for an emergency stay of the preliminary injunction pending appeal (Docket Entry No. 5).

In evaluating a motion for stay pending appeal we consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Both parties advance First Amendment arguments in this case. Even if a court could enjoin lawsuits that infringe on a defendant's established First Amendment right against compelled speech, no court has made a final determination that a Proposition 65 warning is, in fact, unconstitutional with respect to acrylamide exposure. Given the preliminary nature of the proceedings in the district court and the ordinary prohibition on prior restraints of speech, CERT has made a sufficient showing that it is likely to prevail on appeal. *See Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment."). Additionally, the preliminary injunction prohibits lawsuits brought under Proposition

65 with regard to acrylamide exposure by any private actor, including those who are not parties to the underlying action. The breadth of the injunction exacerbates the concerns underlying the prior restraint doctrine and so the likelihood of success on the merits.

CERT is also sufficiently likely to succeed in challenging the district court's analysis of irreparable harm on appeal. The Supreme Court has held that the infringement of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). But again, both sides claim First Amendment injuries, and there is a serious question as to whether appellee California Chamber of Commerce demonstrated on behalf of its members the requisite irreparable harm to warrant a preliminary injunction. In particular, as the dissent notes, the record contains no indication that CERT, the only party to this action that might bring a private enforcement lawsuit, is likely to sue any member of the Chamber in the near future. That circumstance severely undercuts the California Chamber of Commerce's claims of irreparable harm with regard to the only private enforcement actions properly before us, and thereby increases CERT's likelihood of success on the merits of this appeal.

We therefore grant in part CERT's emergency motion to stay the district court's March 29, 2021 preliminary injunction order. We stay the preliminary injunction to the extent it bars any "private enforcer," including CERT, from "fil[ing] or prosecut[ing] a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products." This stay shall remain in effect

during the pendency of this appeal or until further order of this court.

The existing briefing schedule remains in effect.

The Clerk will place this matter on the next available calendar.

DISSENTING OPINION OF JUSTICE FORREST (MAY 27, 2021)

I disagree that CERT has met its burden in seeking to stay the district court's preliminary injunction, and I would deny the motion. It is the party seeking a stay who has the burden to demonstrate that the circumstances justify a stay. *Nken*, 556 U.S. at 433-34. As the court notes, we consider four factors. *Id.* at 434. But we have emphasized the importance of the applicant showing it will suffer irreparable harm, holding that "stays must be denied to all petitioners who d[o] not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam).

The court relies on the Supreme Court's decision in *Elrod* that the infringement of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. at 373. *Elrod* is distinguishable. In that case, it was "clear . . . that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Id.* (emphasis added). Indeed, the Court concluded that a First Amendment injury "was both threatened and occurring at the time of respondents' motion." *Id.* But here, the record is devoid of any evidence supporting CERT's conclusory assertion that the district court's preliminary injunction order threatened or impaired its First Amendment right to petition for redress. CERT does not contend that at the time it moved for an emergency stay it intended to file any Proposition

65 enforcement lawsuits. *See generally* CERT's Emergency Stay Mot. at 18-19. Nor does it even 1 contend it has such intention now. Instead, the evidence cuts the other way—while 2 other private enforcers filed multiple lawsuits during the approximately 18 months 3 between the California Chamber of Commerce filing this litigation and the district 4 court's preliminary injunction order, *see* district court order (district court dkt. # 114) 5 at 29:9-16, CERT filed no enforcement suits during this period. And there is 6 indication that CERT has filed very few Proposition 65 enforcement actions over the 7 last 18 years. *See* Resp. to CERT's Emergency Stay Mot. at 15.

A party being prevented from doing something it is unlikely to do is insufficient to demonstrate irreparable harm. *See Nken*, 556 U.S. at 434 (holding the mere possibility of irreparable harm does not meet the required standard). This is the thrust of CERT's evidence in this case.

And even if such a showing could demonstrate some measure of irreparable harm, in my view the circumstances presented in this case still do not justify the exercise of our discretion in granting a stay where there are competing First Amendment interests at play. *Id*. at 433 ("A stay is not a matter of right, even if irreparable injury might otherwise result."). It is not at all clear how the prior restraint doctrine referenced by the court applies to the First Amendment right to petition, as opposed to the right to speak. This is of particular importance because the preliminary injunction order allows parties seeking to enforce Proposition 65 to continue engaging in expressive conduct, such as sending demand letters, and prohibits only the filing of lawsuits. Additionally, the California Chamber of

Commerce has raised serious questions regarding whether the warning required by Proposition 65 as relates to acrylamide is permissible compelled commercial speech. Both of these points undermine CERT's likelihood of success on the merits. For these reasons, I would deny CERT's motion to stay the district court's preliminary injunction.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA GRANTING PRELIMINARY INJUNCTION (SIGNED MARCH 29, 2021; FILED MARCH 30, 2021)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA CHAMBER OF COMMERCE,

Plaintiff,

v.

XAVIER BECERRA IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Defendant.

No. 2:19-cv-02019-KJM-EFB

Before: Kimberly J. MUELLER,
Chief United States District Judge.

The California Chamber of Commerce contends California has compelled businesses to display misleading warnings about the dangers of acrylamide, a carcinogen. It seeks a preliminary injunction barring the California Attorney General and anyone else from filing new lawsuits against businesses that do not display the warning.

The Council for Education and Research on Toxics, or "CERT," joins the State as a defendant in this case. CERT is an intervening nonprofit organization that often files lawsuits against businesses that do not display warnings about acrylamide. CERT moves for summary judgment against the Chamber of Commerce. It argues its right to prosecute private enforcement actions is protected by the First Amendment.

The court held a hearing by videoconference on December 11, 2020. Trenton Norris and S. Zachary Fayne appeared for the Chamber of Commerce. Joshua Purtle and Harrison Pollak appeared for the State. Raphael Metzger and Scott Brust appeared for CERT. As explained in this order, the Chamber of Commerce's motion is granted, and CERT's motion is denied. The State has not shown that the cancer warnings it requires are purely factual and uncontroversial. Nor has it shown that Proposition 65 imposes no undue burden on those who would provide a more carefully worded warning. CERT, for its part, has not shown it is entitled to judgment as a matter of law.

I. Background

Acrylamide is a toxic chemical. It is produced industrially for use in plastics, grouts, water treatment products, and cosmetics. *See, e.g.*, U.S. Food & Drug Admin., "Acrylamide Questions and Answers" (Sept. 25, 2019), Norris Decl. Ex. E, ECF No. 95-7.[1] It is also found in cigarette smoke. *Id.* And in 2002, it was

[1] https://www.fda.gov/food/chemicals/acrylamide-questions-and-answers, last visited Mar. 24, 2021. *See also* U.S. Food & Drug Admin., "Survey Data on Acrylamide in Food" (Sept. 27, 2019), https://www.fda.gov/food/chemicals/survey-data-acrylamide-food, last visited Mar. 24, 2021.

detected in food. Maier Decl. at 16 ¶ 44, ECF No. 95-24,[2] Solomon Decl. ¶ 18, ECF No. 101-1.[3]

Although acrylamide was first detected in food in 2002, it has likely always been a part of many foods. *See* Acrylamide Questions & Answers, *supra*. Sometimes it occurs naturally. Maier Decl. ¶ 44. Often, however, it forms as a result of a reaction between sugars and the amino acid asparagine, which naturally occur in many foods. *See* Acrylamide Questions & Answers, *supra*. Roasting, baking, frying, or otherwise cooking food at a high temperature appears to cause acrylamide to form, whether at home or at industrial scale. *Id.*; Solomon Decl. ¶ 18; Letter from Lester Crawford, Deputy Comm'r, U.S. Food & Drug Admin. at 2 (July 14, 2003), Norris Decl. Ex. G, ECF No. 95-9.

Acrylamide is most commonly found in foods made from plants. *See* Acrylamide Questions & Answers, *supra*. Dairy products, meat, and fish do not usually contain acrylamide after they are cooked at high temperatures, and when acrylamide is found in these foods, it forms at lower levels. *Id.* According to the U.S. Food & Drug Administration (FDA), the foods that contribute the most acrylamide to the American diet are baked and fried starchy foods like french fries, chips, crackers, donuts, pancakes, and toast. Solomon

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[2] Dr. Andrew Maier is a toxicologist with a Ph.D. in molecular toxicology and a principal science advisor at Cardno ChemRisk, a consulting firm. Maier Decl. ¶¶ 4-6, 13. The Chamber of Commerce retained him to offer opinions on its behalf. *See id.* ¶ 13.

[3] Dr. Gina Solomon is a medical doctor with an expertise in environmental health who teaches at the University of California San Francisco Medical School. Solomon Decl. ¶ 5 & Ex. A. The State retained her to offer opinions on its behalf. *See id.* ¶ 17.

Decl. ¶ 19 (citing Eileen Abt et al., "Acrylamide Levels and Dietary Exposure from Foods in the United States, An Update Based on 2011-2015 Data," 36 Food Additive Contamination Part A 1475-90 (July 18, 2019)). Coffee also contains acrylamide, *see id.,* as do almonds, olives, and asparagus, Maier Decl. at 16 ¶ 44; Nat'l Cancer Institute, "Acrylamide and Cancer Risk" (Dec. 5, 2017).[4]

For decades, experiments have shown that when mice and rats eat or drink food or water containing acrylamide, they develop cancerous tumors in many parts of their bodies, including in their lungs, stomachs, skin, brains, and reproductive organs. *See* Solomon Decl. ¶ 33 (citing, among other materials, Keith A. Johnson, et al., "Chronic Toxicity and Oncogenicity Study on Acrylamide Incorporated in the Drinking Water of Fischer 344 Rats," 85 Toxicology & Applied Pharmacology 154-68 (Sept. 15, 1986)). The greater the quantity of acrylamide the animals ingest, the more cancer is found in the tested group. *Id.* ¶ 34.

Administering toxic chemicals to people is, of course, highly unethical, so the most powerful and reliable clinical tools for testing the effects of food-borne acrylamide, such as double-blind clinical trials, are impossible. *See* Lipworth Decl. ¶ 17,[5] ECF No. 95-20; *see also* Michael D. Green, et al., Reference Guide

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[4] https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet, last visited Mar., 24, 2021.

[5] Dr. Lauren Lipworth is an epidemiologist and professor at the Vanderbilt University School of Medicine. Lipworth Decl. ¶ 6-8. The Chamber of Commerce retained her to offer opinions on its behalf. *See id.* ¶ 15.

on Epidemiology, in Federal Judicial Center Reference Manual on Scientific Evidence at 555 (3d ed. 2011). Animal studies are the main source of data for assessing whether chemicals are safe or dangerous to people. *See, e.g.*, Solomon Decl. ¶ 24. Public health authorities commonly rely on them. *See, e.g.*, *id.* ¶¶ 27-28. As a result of these experiments, many public health authorities have concluded that exposure to acrylamide probably increases the risk of cancer in people. *See id.* ¶¶ 37-40. The U.S. National Toxicology Program, for example, has said that acrylamide is "reasonably anticipated to be a human carcinogen." *See id.* ¶ 37; U.S. Dep't of Health & Human Servs. Nat'l Toxicology Program, Report on Carcinogens, "Acrylamide" (12th ed. 2011).[6] The U.S. Environmental Protection Agency has found that acrylamide is "likely to be carcinogenic in humans." Solomon Decl. ¶ 39; U.S. Envt'l Protection Agency, Acrylamide Integrated Risk Assessment (Mar. 22, 2010).[7] And a World Health Organization (WHO) committee that includes representatives from the FDA has concluded that acrylamide is carcinogenic. Solomon Decl. ¶ 20; J. Agric. Org. & Expert Comm. on Food Additives, "Evaluation of Certain Contaminants in Food" (Feb. 16-25, 2010).[8]

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[6] https://ntp.niehs.nih.gov/ntp/roc/content/profiles/acrylamide.pdf, last visited Mar. 24, 2021.

[7] https://cfpub.epa.gov/ncea/iris/iris_documents/documents/subst/0286_summary.pdf# nameddest=woe, last visited Mar. 24, 2021.

[8] https://apps.who.int/iris/bitstream/handle/10665/44514/WHO_TRS_959_eng.pdf;jsessionid=B264F817F200B900E810643F558BD16D?sequence=1, last visited Mar. 24, 2021.

Animal experiments have limitations. When researchers study the effects of a chemical on animals in a laboratory, they must frequently use very large doses to compensate for small study groups and limited timeframes, and these doses usually do not approximate a person's real-world exposure. *See* Solomon Decl. ¶ 26; Maier Decl. ¶¶ 78–83, 87; *see supra* note 1, "Survey Data." According to an expert retained by the Chamber of Commerce, a person would have to eat more than ninety large bags of potato chips every day to consume an equivalent dose of acrylamide. *See* Maier Decl. ¶ 82. Some researchers also believe that rats and mice react differently to acrylamide. *See id.* ¶ 58. Acrylamide changes to glycidamide when it is broken down in the body, and glycidamide reacts more potently with DNA to cause cancer. *See id.*; *see also* Solomon Decl. ¶¶ 43-44, 48. Mice and rats may metabolize acrylamide into glycidamide more efficiently than people, so they may be more sensitive to acrylamide. *See* Maier Decl. ¶ 58.

The National Cancer Institute offers similar cautions about animal experiments. *See supra* Acrylamide and Cancer Risk ("[T]oxicology studies have shown that humans and rodents not only absorb acrylamide at different rates, they metabolize it differently as well."). Some of the studies of acrylamide were authored by researchers with financial connections to the food and beverage industries, however, and many experts disagree with their conclusions. *See* Solomon Decl. ¶¶ 49-58.

Experiments on animals are not the only tool researchers can use to evaluate the danger of acrylamide for people. For example, researchers can and have exposed human cells to acrylamide and glycidamide in a laboratory setting. *See id.* ¶ 44; U.S. Envt'l Protection

Agency, "Toxicology Review of Acrylamide" at 168 (Mar. 2010), Purtle Decl. Ex. G, ECF No. 101-11. They observed that these chemicals react with human DNA and may become permanently attached. *See* Solomon Decl. ¶ 44. These attachments are called "adducts," and they are known to cause breaks and mutations in chromosomes, *id.*, which can in turn cause cancer if the damaged cells proliferate, *id.* ¶ 59.

Researchers have also found that glycidamide leaves a unique genetic signature when it causes mutations in human cells. *See id.* ¶ 64 (citing Maria Zhivagui et al., "Experimental and Pan-Cancer Genome Analyses Reveal Widespread Contribution of Acrylamide Exposure to Carcinogenesis in Humans," 29 Genome Res. 521-31 (Apr. 2019)). The International Agency for Research on Cancer (IARC) maintains a database of 1,600 human tumor genomes, and scientific researchers scanned that database to see how many tumor genomes could be matched with the unique glycidamide signature. *See id.* According to the scientists who published the results of this analysis, about one third of the tumor genomes could be connected to glycidamide and thus to acrylamide. *See* Zhivagui, *supra*, Abstract; *see also* Solomon Decl. ¶ 64. This may mean that a large portion of human cancer is connected to acrylamide exposure. *See* Solomon Decl. ¶ 64.

Epidemiology also offers well-known statistical tools for investigating whether people are at greater risk of cancer as a result of acrylamide exposure. *See* Lipworth Decl. ¶ 31. Epidemiologists can, for example, collect data about human consumption of foods that contain relatively high amounts of acrylamide. *See id.* ¶¶ 19, 44; Green, *supra*, at 557-59. A "food frequency

questionnaire" is a common survey tool for that purpose. Researchers ask participants how often they eat or drink various foods and beverages and then categorize the participants by their levels of likely acrylamide consumption. *See* Lipworth Decl. ¶¶ 44, 46, 48; Solomon Decl. ¶¶ 82-83. If people in low-exposure groups later report lower average cancer rates, and if people in higher-exposure groups report higher average cancer rates, then it could be that eating foods with more acrylamide increases the risk of cancer, assuming other causes can be excluded and the data is free of errors and biases. *See* Lipworth Decl. ¶ 19.

Dozens of epidemiological studies conducted in Europe, the United States, and Asia have investigated whether acrylamide in food causes cancer in humans. *See id.* ¶¶ 35-43, 57-58. An epidemiologist retained by the Chamber of Commerce reviewed these studies. She found none showing that eating food with acrylamide increases the risk of cancer. *See id.* ¶¶ 141, 144. In her opinion, "there is no consistent or reliable evidence to support a finding that dietary exposure to acrylamide increases the risk of any type of cancer in humans." *Id.* ¶ 144. "In fact," she concludes, "most cancer-specific relative risks have been close to or below the null value." *Id.* ¶ 141. That is, statistical tests do not reveal any increase in cancer risk among people who report greater consumption of acrylamide in food and drinks. *Id.* The National Cancer Institute reports a similar assessment of this research. *See supra* Acrylamide and Cancer Risk ("[A] large number of epidemiologic studies . . . in humans have found no consistent evidence that dietary acrylamide exposure is associated with the risk of any type of cancer.").

Aside from a brief note that some data do show correlations, *see* Cal. Opp'n Prelim. Inj. at 8, ECF No. 101, the State does not contest the epidemiological analysis above. It argues instead that epidemiological studies are poorly suited to investigating the effects of acrylamide in food. *See id.* at 6. Cancer caused by acrylamide may not surface for decades, and if it does not, then the absence of a statistical relationship may prove only that a study did not last long enough. *See* Solomon Decl. ¶ 70. Data might also be inaccurate. Food frequency questionnaires, for example, may not reliably estimate acrylamide exposure if people cannot consistently remember what they ate, when, and how often. *See id.* ¶¶ 70, 84-88. If measurements of acrylamide exposure are unreliable, studies that rely on those measurements might systematically underestimate the effects of acrylamide. *See id.* ¶¶ 72–73; Lipworth Decl. ¶ 52. But that is not always so. *See* Lipworth Decl. ¶ 55.

Epidemiological studies must also contend with the ubiquity of acrylamide. It may be impossible to find a truly low-exposure group. *See* Solomon Decl. ¶ 76. Acrylamide exposure is also relatively uniform. *See id.* If everyone in a study is exposed at similar rates, then everyone in that study can be expected to experience similar outcomes. *See id.* So epidemiological studies that reveal no relationship between acrylamide and cancer might not be meaningful.

Despite these uncertainties in the epidemiological evidence, many government authorities have concluded, as noted above, that acrylamide "probably" causes or is "likely" to cause cancer in humans. But none of these authorities has urged people to avoid foods that contain acrylamide. At most they voice "concern." *See*

Purtle Decl. Ex. O, ECF No. 101-19. Some, such as the FDA, have also offered guidance for reducing acrylamide consumption and production. *See* U.S. Food & Drug Amin., "You can Help Cut Acrylamide in Your Diet (Mar. 14, 2016)[9]; U.S. Food & Drug Admin., "Guidance for Industry: Acrylamide in Foods" (Mar. 2016).[10]

At the end of the day, however, because acrylamide is found in so many foods, it is probably impossible to avoid it completely. *See* U.S. Food & Drug Admin., Statement from Comm'r Scott Gottlieb, M.D. (Aug. 29, 2018), Norris Decl. Ex. H, ECF No. 95-10.[11] Both federal and state public health authorities in fact recommend eating foods that may contain acrylamide. The FDA advises Americans not to attempt removing fried, roasted, and baked foods from their diets. *See* Acrylamide Questions and Answers, *supra*. Its best advice is to eat a variety of healthy foods. *Id.* (citing U.S. Dep't of Health & Human Servs. & U.S. Dep't of Agriculture, "2015–2020 Dietary Guidelines" (8th ed. Dec. 2015)). California public health authorities have also decided not to warn against acrylamide exposure in coffee. *See* Cal. Envt'l Protection Agency, Office of Envt'l Health Hazard Assessment, Final Statement of

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[9] https://www.fda.gov/consumers/consumer-updates/you-can-help-cut-acrylamide-your-diet, last visited Mar. 24, 2021.

[10] https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-acrylamide-foods, last visited Mar. 24, 2021.

[11] https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-fdas-support-exempting-coffee-californias-cancer, last visited Mar. 24, 2021.

Reasons on Adoption of New Section 25704, Purtle Decl. Ex. C, ECF No. 101-7. The State found "inadequate evidence for the carcinogenicity of drinking coffee" in "a very large number of human studies"; in fact, the State found "inverse associations—decreasing risk with increasing coffee consumption—for [some] human cancers." *Id.* at 5.

Sources of acrylamide other than coffee, however, remain subject to the warning requirements of California's Safe Drinking Water and Toxic Enforcement Act of 1986, more commonly known as "Proposition 65," the initiative that put the act on the books, *see AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425, 429 (1989). Under Proposition 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." *Id.* at 431 (citing Cal. Health & Safety Code § 24249.6). A chemical is "known" to cause cancer or reproductive toxicity if it meets one of three statutory criteria:

- "[I]n the opinion of the state's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity";
- "[A] body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity";
- "[A]n agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity."

Cal. Health & Safety Code § 25249.8(a)-(b).

The list of chemicals "known to cause cancer" must also include, "at a minimum," any substances listed in California Labor Code subsections 6382(b)(1) and (d), which define "hazardous substances" under California's Hazardous Substances Information and Training Act. Those subsections refer to "[s]ubstances listed as human or animal carcinogens by [IARC]" and "any substance within the scope of the federal Hazard Communication Standard" as specified by federal regulation. *See* Cal. Labor Code § 6382(d) (citing 29 C.F.R. § 1910.1200). The cited federal regulation refers again to chemicals identified by IARC and the National Toxicology Program. *See Deukmejian*, 212 Cal. App. 3d at 435 (citing 29 C.F.R § 1910.1200 App'x A & B).

A few years after Proposition 65 was passed, a California Court of Appeal interpreted Health & Safety Code 25249.8(a)–(b), 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) (citing *Deukmejian*, 212 Cal. App. 3d at 436). A chemical "must be listed even if it is known to be carcinogenic or a reproductive toxin only in animals." *Am. Chemistry Council v. Office of Envt'l Health Hazard Assessment*, 55 Cal. App. 5th 1113, 1142 (2020). In Proposition 65 enforcement litigation over acrylamide in potato chips, California has agreed that a chemical may be listed as "known to the state to cause cancer" even if the State does not "know" in the colloquial sense "that acrylamide causes cancer in humans." Norris Decl., Ex. L at 2 ¶ 4, ECF No. 95-14 (Joint Stipulation of Undisputed Facts, *People v.*

Frito-Lay, Inc., No. BC 338956 (Cal. Sup. Ct. L.A. Cty., filed July 28, 2008)). That finding is simply not required. *See id.*

Proposition 65 does not specify what warning is necessary for chemicals "known" to cause cancer; it requires only that the warning be "clear and reasonable." Cal. Health & Safety Code § 25249.6. Regulations promulgated by the California Office of Environmental Health Hazards Assessment require warnings to name the chemical and to be displayed "prominently," "with such conspicuousness" that they are "likely to be seen, read, and understood by an ordinary individual." *See* Cal. Code Regs. tit. 27 § 25601(b)–(d). A warning may include more information than this, but only if the addition "identifies the source of the exposure or provides information on how to avoid or reduce exposure." *Id.* § 25601(e). The regulations also offer a model warning that serves as a safe harbor against liability for food warnings: "Consuming this product can expose you to [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to www.P65warnings.ca.gov/food." Cal. Code Regs. tit. 7, § 25607.2(a)(2) (bracketed phrases in original).

California has permitted more nuanced warnings about acrylamide in at least some foods in settlement agreements. It permitted a warning about acrylamide in the potato chip litigation to say the chips "contain acrylamide, a substance identified as causing cancer under California's Proposition 65." Purtle Decl. Ex. E at 10, ECF No. 101-9 (Consent J. as to Frito-Lay at 10, *People v. Frito-Lay, Inc.*, *supra* (filed Aug. 1, 2008)). The State also permitted the potato chip warning to explain that foods other than chips contain acrylamide

and that acrylamide is not added to these foods, but rather is "created when these and certain other foods are browned." *Id.* The State further permitted the chip warning to say the "FDA has not advised people to stop eating potato crisps and/or potato chips . . . or any foods containing acrylamide as a result of cooking." *Id.*

The penalties under California law for a failure to warn are "severe." *Deukmejian*, 212 Cal. App. 3d at 430. Violations are subject to civil penalties of up to $2,500 "per day for each violation." Cal. Health & Safety Code § 25249.7(b)(1). Proposition 65 also permits injunctions against both existing violations and conditions "in which there is a substantial probability that a violation will occur." *See id.* §§ 25249.7(a), 25249. 11(e). State and local prosecutors can bring enforcement actions for failures to warn, *id.* § 25249.7(c), as can private litigants, *see id.* § 25249.7(d). Successful private enforcers can recover a quarter of the civil penalty imposed and their reasonable attorneys' fees. *See id.* § 25249.12(d); Cal. Civ. P. Code § 1021.5.

Proposition 65 does include some safeguards against overzealous or frivolous private enforcement. For example, a private litigant must give sixty days' notice of the alleged violation both to the alleged violator and to the prosecutor in whose jurisdiction the violation is alleged. *See id.* § 25249.7(d)(1). That notice must include a "certificate of merit" stating the private enforcer "has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical." *Id.* The certificate must then confirm the private

enforcer believes "there is a reasonable and meritorious case for the private action." *Id.*

The warning requirement is also subject to exceptions and affirmative defenses. Proposition 65 grants businesses an affirmative defense if they can prove the alleged exposure "poses no significant risk assuming lifetime exposure at the level in question." *See* Cal. Health & Safety Code § 25249.10(c). The defendant must prove that fact using "evidence and standards of comparable scientific validity" to the evidence and standards that led to the inclusion of that substance on the Proposition 65 list. *See id.* A business can also make that showing preemptively in a declaratory judgment action. *See Baxter*, 120 Cal. App. 4th at 344. Under the terms of this exception, the California Office of Environmental Health Hazards Assessment has determined that an exposure of 0.2 micrograms of acrylamide per day "poses no significant risk." *See* Cal. Code Regs. tit. 27, § 25705(c)(2). That Office has also published regulations permitting higher levels of exposure in some circumstances, including when "chemicals in food are produced by cooking necessary to render the food palatable or to avoid microbial contamination." *Id.* ¶ 25703(b)(1). A business can also ask the Office for a formal opinion about whether a warning is necessary (a "safe use determination"). *See* Cal. Code Regs. tit. 27, § 25204. And finally, as is clear from the record on this matter, businesses could urge the Office to create an exception for a specific food or drink as it did for acrylamide in coffee.

Despite these safeguards and exceptions, a successful defense might be impossible to mount, practically speaking. It is a defendant's burden to prove an

exposure poses no significant risk under section 25249.10(c), so a plaintiff need not plead or prove that an exposure did or could cause cancer. *See Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185, 1214-15 (2006). And given the high standard of scientific proof required by section 25249.10(c), "it may take a full scale scientific study to establish the amount of the carcinogen is so low that there is no need for a warning." *Id.* at 1215. One state appellate court has observed that this allocation of burdens, when combined with other provisions of the private enforcement regime, sets up a framework that may permit unscrupulous attorneys to "shake down" vulnerable targets" wielding dubious claims of carcinogenic exposure. *See id.* at 1215-19.

Acrylamide was added to the Proposition 65 list in 1990, long before the publication of research showing acrylamide was present in food. *See* Norris Decl. Ex. L at 2. After acrylamide was discovered in food, CERT—the intervenor defendant in this case—was one of the first plaintiffs to file a private enforcement action. *See* Metzger Decl. ¶ 5, ECF No. 93. Its early lawsuits resulted in consent judgments in Los Angeles County Superior Court. *Id.* French fry manufacturers agreed to display warnings, potato chip manufacturers agreed to reduce acrylamide levels in chips, and the defendants paid more than $2 million in penalties and attorneys' fees. *See id.*

CERT also pursued Proposition 65 litigation through multiple cases against coffee roasters and retailers after the California Office of Environmental Health Hazards Assessment published opinions about the risks of acrylamide in coffee. *See id.* ¶¶ 6-13; *see also* Cal. Off. of Envt'l Health Hazards Assessment,

"Characterization of Acrylamide Intake from Certain Foods at 11-12 (Mar. 2005).[12] These cases were consolidated and tried in several phases. *See* Metzger Decl. ¶¶ 10-13; Norris Decl. ¶¶ 5, 12-15. Some of the defendants settled after unsuccessfully attempting to prove exposures to acrylamide in coffee did not elevate the risk of cancer and to show Proposition 65 was unconstitutional because it compelled false cancer warnings. *See* Metzger Decl. ¶ 12. CERT secured an award of more than $1.8 million in attorneys' fees. *Id.* Other defendants continued in the litigation. While the case was still pending, the Office of Environmental Health Hazards Assessment proposed to change its Proposition 65 regulations to make an exception for coffee. The FDA supported the proposed change. *See supra* Gottlieb Statement, ECF No. 95-10. The exception was eventually adopted, as described above. On the coffee roasters' and retailers' motion, the California court then granted summary judgment to the defendants remaining in the case, and CERT appealed. *See* Metzger Decl. ¶ 14; Norris Decl. ¶ 5 & Ex. Q. The appeal is pending, as are many other private enforcement actions about acrylamide in food, which have multiplied in recent years. *See* Sixth Not., ECF No. 111.

The Chamber of Commerce filed this case in October 2019 while the coffee litigation was ongoing. Its legal claim is simple: the First Amendment prohibits California from forcing businesses to make false statements, so because California does not "know" that eating food with acrylamide causes cancer in

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[12] https://oehha.ca.gov/media/downloads/crnr/acrylamideintakereport.pdf, last visited Mar. 24, 2021.

people, Proposition 65 is unconstitutional if it mandates that assertion. *See generally* Compl., ECF No. 1. The Chamber named one defendant, the Attorney General in his official capacity, and asserted one claim for declaratory relief. *See id.* ¶¶ 13, 73-84. CERT moved to intervene as a defendant, and the court approved the parties' stipulation to permit the intervention. *See* Stip. & Order, ECF No. 29. The court then granted the State's and CERT's motions to dismiss. *See* Order, ECF No. 56. It declined to assert jurisdiction over the Chamber's claim in light of the pending litigation in state court, described above. *See id.* at 3-6 (applying *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942)). The Chamber's request for relief was also partially retrospective, so the court found dismissal was appropriate under the Anti-Injunction Act, 28 U.S.C. § 2283. *See id.* at 6-8.

The Chamber then amended its complaint to add a claim under 42 U.S.C. § 1983 and to request only prospective relief. *See* First Am. Compl., ECF No. 57. California and CERT both moved to dismiss for lack of subject matter jurisdiction and under the abstention doctrine described in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The court denied these motions. ECF No. 84. The case is thus proceeding on the First Amended Complaint, ECF No. 57, which again names only the Attorney General as a defendant, with CERT remaining a defendant in intervention.

The Chamber now asks the court to enter a preliminary injunction. Chamber's Mot., ECF Nos. 95 & 95-1. CERT has moved for summary judgment to the extent the Chamber's claims would prohibit private enforcement of Proposition 65. CERT Mot., ECF No. 93.

CERT argues those claims are barred by the *Noerr–Pennington* doctrine. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). The court addresses CERT's motion first.

II. Summary Judgment

A court may grant summary judgment only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, the parties dispute none of the relevant facts. CERT's motion rests on a legal question: whether the Chamber's claims are barred by the *Noerr–Pennington* doctrine because those claims burden CERT's First Amendment right to petition.

"Under the *Noerr–Pennington* doctrine, those who petition all departments of the government for redress are generally immune from liability." *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005). "Although the *Noerr–Pennington* doctrine originally immunized individuals and entities from antitrust liability, *Noerr–Pennington* immunity now applies to claims under § 1983 that are based on the petitioning of public authorities." *Id.* It also protects "conduct incidental to the prosecution of the suit," such as demand letters and related prelitigation communications. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 935-36 (9th Cir. 2006) (citation omitted). In practical effect, however, the doctrine is one of constitutional avoidance: courts should "construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Id.* at 931.

The Ninth Circuit has derived a three-step "analysis" for evaluating *Noerr–Pennington* defenses from the Supreme Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). *See Sosa*, 437 F.3d at 930-31. First, would an adverse decision impose a burden on the defendant's alleged petitioning activity? Second, is there at least a "substantial question" whether the statute that imposes this burden conflicts with the Constitution? And third, can the statute be construed in a way to avoid the burden? If so, then that construction should prevail; if not, then the court must decide whether the statute cannot be enforced because it would deprive the defendant of a constitutional right.

This analysis is easier to understand when expressed in more concrete terms. In *Sosa*, for example, DirecTV had sent more than a hundred thousand demand letters to people who bought "smart cards" that allowed them to intercept DirecTV's satellite signals without paying. *See id.* at 926. Several of the recipients then sued DirecTV for extortion and unfair business practices in California state court, and DirecTV successfully moved to strike the complaint. *Id.* at 927. Some of the unsuccessful state-court plaintiffs then filed a lawsuit in federal district court, claiming DirecTV had violated the Racketeer Influenced and Corrupt Organizations Act. *Id.* DirecTV moved to dismiss, citing the *Noerr–Pennington* doctrine, and prevailed. *Id.* The Ninth Circuit affirmed. First, the federal lawsuit sought "to impose RICO liability on DirecTV for sending the demand letters," so it burdened the petitioning activity, *id.* at 932-33; second, that burden implicated the Petition Clause, which at least arguably protects "reasonably based prelitigation settlement demands," *id.* at 933-39; and third, the

RICO statute could be interpreted to permit legitimate prelitigation demand letters. *Id.* at 939-42. For that reason, the Ninth Circuit concluded that the trial court had correctly dismissed the claims against DirecTV. *See id.* at 942.

Here, as in *Sosa*, the answer to the first question is clear. If the Chamber of Commerce ultimately succeeds in this lawsuit, CERT would no longer be able to enforce Proposition 65's warning requirements against businesses that sell food and drink containing acrylamide. The Chamber's claims thus impose a burden on CERT's attempts to petition California courts.

But in answer to the second question, the burden imposed does not weigh on a right protected by the Petition Clause. The Petition Clause prohibits Congress from making laws that abridge "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. First Am. The court is aware of no authority interpreting the First Amendment as preserving a person's right to enforce a state law that contradicts the Constitution, which is the effect of CERT's argument here. The court declines to read the Petition Clause as CERT would have it. Doing so would permit states to insulate their unconstitutional laws from constitutional challenges by permitting private parties to enforce them.

Another way to express this reasoning is in terms of liability, as the Chamber argues persuasively. It points out, for example, that CERT is not named in the Chamber's complaint and will not face any liability if the Chamber prevails. *See* Opp'n Summ. J. at 6-12. The Chamber's goal in this case is not to punish CERT. Nor is its purpose to obtain compensation for

an injury CERT caused or to discourage CERT from petitioning for relief under Proposition 65. It is instead to vindicate the constitutional rights of the Chamber's own members. The *Noerr– Pennington* doctrine is a defense against claims "based on the petitioning of public authorities," *Empress LLC*, 419 F.3d at 1056, not claims based on the proponent's own constitutional rights, *see Cisco Sys., Inc. v. Beccela's Etc., LLC*, 403 F. Supp. 3d 813, 825 (N.D. Cal. 2019) ("Defendants' declaratory judgment claim is not seeking to hold [the plaintiff] liable for its protected activity. . . . [T]he claim seeks a declaration that Defendants are not liable for infringement under the Lanham Act. The claim thus is outside the ambit of *Noerr–Pennington*." (emphasis in original)). The *Noerr–Pennington* defense is thus unavailable to CERT.

This is not to say the *Noerr–Pennington* doctrine never a offers a defense to requests for equitable relief, including in a declaratory judgment action. "[A]n action seeking a declaratory judgment . . . may force a citizen who petitions the government to incur the expense of defending his position in court and may therefore have precisely the sort of chilling effect on protected petitioning activity that the *Noerr–Pennington* doctrine is designed to prevent." *Westlands Water Dist. Distribution Dist. v. Nat. Res. Def. Council, Inc.*, 276 F. Supp. 2d 1046, 1054 (E.D. Cal. 2003). This court's decision in *B&G Foods North America, Inc. v. Embry* is a rare example of exactly such a case. *See* No. 20-0526, 2020 WL 5944330 (E.D. Cal. Oct. 7, 2020). The plaintiff in *B&G Foods*, a food manufacturer, sued a consumer who had herself filed a Proposition 65 enforcement action in state court the day before. *See generally* Compl., No. 20-0526 (E.D. Cal. filed

Mar. 6, 2020).[13] The food manufacturer even sued the attorney who was representing the consumer in state court. *See id.* As a result, the federal lawsuit's burden on the defendant's right to petition was clear even though the claims were, on their face, equitable constitutional claims. Here, by contrast, the Chamber is not litigating concurrently against CERT in state court, did not sue CERT or CERT's attorneys, and did not even name CERT in its complaint. CERT became a defendant by its own choice when it moved to intervene.

Granting CERT's motion could also lead to an absurd result. The State does not argue it is entitled to a defense under the *Noerr–Pennington* doctrine. CERT implies the State would remain a defendant in this case even if CERT is entitled to summary judgment. *See* Reply Summ. J. at 2, ECF No. 105 (suggesting Chamber of Commerce "could litigate solely against [Attorney General] Becerra"). If this implication were correct, CERT and others would be free to pursue private enforcement actions, but this case could continue. And if the Chamber eventually prevailed, the State itself could not enforce Proposition 65. This would leave consumers free to file enforcement actions even though the same enforcement actions would be unconstitutional if filed by the State. CERT has cited no authority that could justify such an improbable outcome, and the court is aware of none. If anything, California law appears to favor public

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[13] The court takes judicial notice of this document, its filing, and its allegations (but not their truth). *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record.").

enforcement of Proposition 65, not private enforcement, while not precluding the latter. *See, e.g.*, *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 750 (2001) (concluding that Proposition 65 notice letters are intended to encourage public enforcement).

CERT is not entitled to a defense under the *Noerr–Pennington* doctrine. Its motion for summary judgment is denied.

III. Preliminary Injunction

The Chamber of Commerce moves for a preliminary injunction barring the State and any private litigant from enforcing Proposition 65 against businesses who do not warn consumers that acrylamide in food is "known to the State of California to cause cancer." It seeks prospective relief only; it asks the court to enjoin only "new lawsuits." *See* Chamber's Mot. at 20. It does not ask the court to prohibit notices of alleged Proposition 65 violations, to enjoin existing suits, to prohibit settlements or consent decrees, or to bar CERT from continuing its litigation about acrylamide in coffee. *See* Chamber's Reply at 14-15.

The State and CERT both oppose the motion. Each argues separately that the Chamber has not met its obligation to show a preliminary injunction should be granted under the test in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). *See* Cal. Opp'n at 9-20, ECF No. 101; CERT Opp'n at 17, ECF No. 100. CERT also contends, more ardently, that a preliminary injunction would be an unconstitutional prior restraint on its First Amendment rights. *See* CERT Opp'n at 8-16. The court addresses that argument first.

A. Prior Restraint

A "prior" or "previous" restraint is an administrative or judicial order "forbidding certain communications" before those communications occur. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation, quotation marks, and emphasis omitted). Preliminary injunctions barring speech "are classic examples of prior restraints." *Id.* They are almost always improper; the Supreme Court has described the "constitutional freedom from previous restraint" as an "immunity" against "censorship" rooted deeply in American and English legal history. *See Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716, 720 (1931). There is "a heavy presumption" against the validity of a prior restraint on speech. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citations and quotation marks omitted).

Not all orders that make expression more difficult, expensive, or less effective are prior restraints. An order forfeiting a publisher's assets, for example, is not a prior restraint even if it prevents the publisher from selling its magazines. *See Alexander*, 509 U.S. at 550-51. If the publisher could find new funding, it could continue publishing. *See id.* at 551. Nor is an order closing a bookstore necessarily a prior restraint. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986). The store could move to a new building. *See id.* at 706.

If the Chamber of Commerce were requesting a preliminary injunction against pre-suit demand letters, settlement negotiations, or notices of violations, it would likely be requesting a prior restraint. These are "communications" under *Alexander*, 509 U.S. at 550. But the Chamber is not asking for that relief. As confirmed at hearing, at this stage it is asking only for

an injunction against future lawsuits while this case is pending. An injunction barring enforcement through litigation would admittedly dull the teeth of a demand letter or notice for the injunction's duration. Without a legal threat, a recipient may not negotiate or even respond. But the injunction the Chamber requests today would not forbid letters and demands, so it would not be a prior restraint on speech. *See id.* at 550-51 (holding that order was not prior restraint because it did not "forbid petitioner from engaging in any expressive activities in the future" (emphasis in original)). The court need not and does not consider now whether some broader or more permanent form of relief might be an unconstitutional prior restraint.

What remains, then, is CERT's argument that a preliminary injunction against future enforcement actions and nothing more would still be an impermissible prior restraint. CERT cites no decision denying a preliminary injunction against likely unconstitutional private litigation because the injunction would amount to a prior restraint. This court's own searches have uncovered no such case. To the contrary, the All Writs Act permits federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions," 28 U.S.C. § 1651, and the Anti-Injunction Act permits "injunctions against the institution of state court proceedings," *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965), which implies that a federal court may enjoin new state court lawsuits if necessary and appropriate, *see, e.g.*, *In re Baldwin-United Corp.*, 770 F.2d 328, 335-36 (2d Cir. 1985). Federal courts have indeed enjoined lawsuits preemptively in many circumstances, for example to quiet post-settlement

donnybrooks,[14] to resolve class actions[15] and multi-district litigation,[16] to consolidate admiralty claims in a single venue,[17] and to sanction vexatious litigants or prevent frivolous lawsuits,[18] among other reasons.[19]

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[14] *See, e.g.*, *Flanagan v. Arnaiz*, 143 F.3d 540, 544-45 (9th Cir. 1998) (affirming injunction against "filing any action in the courts of any state" related to settlement agreement because "'federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.'" (quoting *Atl. Coast Line R.R. Co. v. B'hood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970))).

[15] *See, e.g.*, *Nitsch v. Dreamworks Animation SKG Inc.*, No. 14-04062, 2016 WL 4424965, at *8 (N.D. Cal. July 6, 2016) (enjoining any lawsuits by members of proposed settlement class).

[16] *See, e.g.*, *Baldwin-United*, 770 F.2d at 331 (affirming injunction against "persons having actual knowledge of" injunction from "commencing any action or proceeding" against any defendants in multidistrict litigation that "may in any way affect the right of any plaintiff or purported class member in any proceeding under" multidistrict litigation).

[17] *See, e.g.*, *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1017 (9th Cir. 2000) (per curiam) (describing Limitation of Liability Act, 46 U.S.C. § 183, which permits district courts to enjoin related actions against owner of vessel).

[18] *See, e.g.*, *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523 (9th Cir. 1983) ("A United States District Court hearing a particular case possesses the power to enjoin the filing of related lawsuits in other federal courts."); *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990) ("[T]here is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." (citation omitted)).

[19] *See, e.g.*, *Orange Cty. v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986) (affirming district court's decision to bar intervention

In rare circumstances, district courts in this circuit can even enjoin a litigant from pursuing claims in another country.[20]

That said, the Supreme Court has suggested that "enjoining a lawsuit could be characterized as a prior restraint." *BE & K*, 536 U.S. at 530. An injunction against future litigation "carries at least some risk" of violating the First Amendment's Petition Clause. *Jones v. Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO*, No. 13-3015, 2013 WL 5539291, at *2 (C.D. Cal. July 24, 2013). In this respect, CERT's prior restraint argument echoes its *Noerr–Pennington* argument. Both rest on CERT's claim to a First Amendment right to pursue Proposition 65 litigation in state court regardless of any constitutional implications of that litigation. As explained in the previous section, CERT's argument leads to an absurd conclusion. In addition, if the Chamber is correct that Proposition 65 lawsuits about acrylamide in food are inconsistent with the First Amendment, private enforcement actions targeting acrylamide would run head-on into a constitutional prohibition. And "if the lawsuit seeking to be enjoined 'has an illegal objective,' it is 'not protected by the Petition Clause.'" *Id.* (quoting *Small v. Operative Plasters' Local 200*, 611 F.3d 483, 493 (9th Cir. 2010),

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after explaining the district court had enjoined "filing [of] new CEQA actions in state court").

[20] *See, e.g.*, *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981) ("A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be used sparingly." (citation and quotation marks omitted)); *Sun World, Inc. v. Lizarazu Olivarria*, 804 F. Supp. 1264, 1270 (E.D. Cal. 1992) (same).

in context of retaliatory labor claims); *see also Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983) (holding that suit with "an objective that is illegal" may be enjoined without violating First Amendment).

In sum, if the presumption against prior restraints protects a Petition Clause right to file new lawsuits, it would not bar the relief the Chamber seeks here. The court thus considers whether the Chamber is likely to succeed on the merits of its First Amendment claim.

B. Likelihood of Success on the Merits

"A preliminary injunction is an extraordinary remedy, never awarded as of right." *Winter*, 555 U.S. at 24. In determining whether to issue a preliminary injunction, courts must consider (1) whether the moving party "is likely to succeed on the merits" (2) whether it is "likely to suffer irreparable harm in the absence of preliminary relief," (3) whether "the balance of equities tips in [its] favor, and" (4) whether "an injunction is in the public interest." *Id.* at 20. The moving party has the burden of proving an injunction is warranted by "a clear showing." *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation, quotation marks, and emphasis omitted)).

The court begins with Chamber's potential for success on the merits of its First Amendment claim. "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech." *Nat'l Inst. of Family & Life Advocates* (*NIFLA*) *v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Laws that target speech "based on its communicative content" are unconstitutional unless the government shows the laws survive strict scrutiny in

that they are "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The government must also satisfy this test when it compels people to say something they would not otherwise say, as Proposition 65 does here, because these types of regulations necessarily change what a person says. *See NIFLA*, 138 S. Ct. at 2371; *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988).

Although strict scrutiny is the "ordinary" rule in such cases, the Supreme Court has sometimes "applied a lower level of scrutiny" to regulations of commercial speech. *NIFLA*, 138 S. Ct. at 2372. "Commercial speech" is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Under *Zauderer v. Office of Disciplinary Counsel*, "the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial governmental interest." *CTIA—The Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 845 (9th Cir.), *cert. denied*, 140 S. Ct. 658 (2019) (quoting 471 U.S. 626, 651 (1985)). The required disclosure must be "limited to 'purely factual and uncontroversial information.'" *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651). Although *Zauderer* itself concerned the government's interest in preventing deception, *see* 471 U.S. at 651, the Ninth Circuit has held that the *Zauderer* test also applies when "the disclosure does not protect against deceptive speech," *CTIA*, 928 F.3d at 843-44.

The parties agree Proposition 65 compels commercial speech. *See* Cal. Opp'n at 9 n.4; Chamber's Mot. at 9. This leaves the court to decide whether, under

Zauderer, the compelled warning (1) requires the disclosure of purely factual and uncontroversial information only, (2) is justified and not unduly burdensome, and (3) is reasonably related to a substantial government interest. *See Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019) (en banc). The court may consider these requirements in any order. *See id.* The State bears the burden to show each element of this test is likely to be resolved in its favor, both in response to a motion for a preliminary injunction and on the merits. *See id.*; *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115-16 (9th Cir. 2011), *overruled in part on other grounds by Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) (en banc).

In analyzing whether the Chamber is likely to succeed, the safe harbor warning described in the regulations implementing Proposition 65 is the natural place to start. In this case, the safe-harbor warning would read: "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." Cal. Code Regs. tit. 27, § 25607.2(a)(2).

At this stage of the case, the State has not shown this warning is purely factual and uncontroversial. By asserting vaguely that consuming a product can "expose" a person to acrylamide—a chemical most people have likely never used in preparing food or even heard of—the warning implies incorrectly that acrylamide is an additive or ingredient. The safe harbor language is also only "factual" if consumers can discern its underlying logic:

- Animals more frequently develop cancerous tumors when they consume doses of the chemical many hundreds of times larger than the amounts in the food.
- Toxicologists presume that chemicals causing cancer in experimental animals also cause cancer in people, even in much smaller doses, absent evidence to the contrary, and
- As a result, following a cascade of self-referential state and federal regulations, the chemical is, by definition, "known" to cause cancer in humans. *See* Cal. Opp'n at 12-13.

Such discernment is unlikely. People who read the safe harbor warning will probably believe that eating the food increases their personal risk of cancer. *See id.* at 2 (citing Nowlis Decl. ¶ 54, ECF No. 95-25).

Some evidence does support such an inference, including laboratory experiments with mice and rats, in vitro studies of human cells, and statistical investigations of tumor genomes. But dozens of epidemiological studies have failed to tie human cancer to a diet of food containing acrylamide. Nor have public health authorities advised people to eliminate acrylamide from their diets. They have at most voiced concern. California has also decided that coffee, one of the most common sources of acrylamide, actually reduces the risk of some cancers. And that decision rested in part on a review of epidemiological evidence similar to the evidence the Chamber cites now. *See* Norris Decl. Ex. N at 5. In short, the safe harbor warning is controversial because it elevates one side of a legitimately unresolved scientific debate about whether eating foods and drinks containing acrylamide increases the risk of

cancer. *Cf. CTIA*, 928 F.3d at 845 (distinguishing *NIFLA*, 138 S. Ct. at 2372).

The State cannot escape these uncertainties by redefining what it means for California to "know" that acrylamide causes cancer, *see Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518, 529-30 (D.C. Cir. 2015), or by showing the warning contains no affirmative falsehoods, *CTIA—The Wireless Ass'n v. City & Cty. of San Francisco, Cal.*, 827 F. Supp. 2d 1054, 1062-63 (N.D. Cal. 2011), *aff'd in relevant part*, 494 F. App'x 752 (9th Cir. 2012) (unpublished). Statements are not necessarily factual and uncontroversial just because they are technically true. Courts in this Circuit have reached that conclusion many times with respect to Proposition 65 and other regulations. Another judge of this court recently enjoined a Proposition 65 warning about what was "known" to California because the warning was only correct if the reader understood the "complex web of statutes, regulations, and court decisions" behind Proposition 65. *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1259-60 (E.D. Cal. 2020). A Northern District court found similarly that a warning about radiation from cell phones went too far because it could leave "the uninitiated" with a "misleading impression" about the dangers they actually faced. *CTIA*, 827 F. Supp. 2d at 1062-63. And the Ninth Circuit rejected California's argument that a label about a video game age ratings was uncontroversial and factual because the scheme invited incorrect conclusions about what was legal and what was not. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-67 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).

The problems posed by the safe harbor warning could have been avoided. The State could allow businesses to explain that acrylamide forms naturally when some foods are prepared. It could permit businesses to say that California has listed acrylamide as a chemical that "probably" causes cancer or is a "likely" carcinogen or that the chemical causes cancer in laboratory animals. It could permit businesses to say that acrylamide is commonly found in many foods and that neither the federal government nor California has advised people to cut acrylamide from their diets. The State indeed permitted a more circumspect warning as a result of the *Frito Lay* litigation. *See* Consent J. as to Frito-Lay at 10, Purtle Decl. Ex. E.

According to the State, an alternative warning along these lines is already available to any California business. *See* Cal. Opp'n at 15-16. And the Chamber concedes California regulations no longer require warnings to state that "the chemical in question is known to the state to cause cancer." *See* Chamber's Mot. at 5. The Attorney General's current regulations also permit the parties to a private enforcement action to agree for a defendant to warn that a product "may" cause cancer. *See* Cal. Code Regs. tit. 11, § 3202(b).

Other regulations, by contrast, appear to contradict the State's position. The Attorney General's regulations do not permit warnings that the chemical itself "may" cause cancer. *See id.* Regulations bar all but a few limited additions and clarifications. *See* Cal. Code Regs. tit. 27 § 25601(e); *id.* tit. 11 § 3202(b). California courts have overruled demurrers and denied motions for summary adjudication in enforcement actions about warnings similar to those the State accepted in the *Frito Lay* litigation, leading to years-long litigation.

See Norris Decl. ¶¶ 34-41. Defending the resulting litigation can then be cost-prohibitive, as described above. As a result, when recent Proposition 65 settlements have resulted in an agreed warning, rather than, for example, a reformulation or cessation of business, they have almost uniformly used the safe harbor language that is likely misleading. *See id.* ¶¶ 17-23. On this basis, the Chamber argues that only the safe harbor warning is actually useable in practice. *See* Chamber's Mot. at 11-12; Chamber's Reply at 8-9, ECF No. 106.

On this record, the Chamber's argument is persuasive. The State cannot "put the burden on commercial speakers to draft a warning that both protects their right not to speak and complies with Proposition 65." *Wheat Growers*, 468 F. Supp. 3d at 1261. If the seas beyond the safe harbor are so perilous that no one risks a voyage, then the State has either compelled speech that is not purely factual, or its regulations impose an undue burden. *See Am. Beverage Ass'n*, 916 F.3d at 757 (holding State did not carry its burden because warning "'effectively rule[d] out the possibility of having an advertisement in the first place'" and that the disclosure "fail[ed] for that reason alone" (quoting and citing *NIFLA*, 138 S. Ct. at 2378 (other alterations omitted)); *cf. CTIA*, 928 F.3d at 848 (finding disclosure regulation not unduly burdensome in part because it permitted businesses to disclose "additional information"). The State has not carried its burden to show Proposition 65 warnings about acrylamide in food are constitutional under *Zauderer*.

The State relies primarily on two cases to urge the opposite conclusion. Both are readily distinguishable from this one. First, it cites the Second Circuit's

decision in *National Electric Manufacturers' Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). The compelled speech at issue in that case was a Vermont statute requiring manufacturers to inform consumers if a product contained "mercury added during manufacture." *Id.* at 107 n.1. The warning was required to "clearly inform the purchaser or consumer that mercury is present" and that the product "may not be disposed of . . . until the mercury is removed and reused, recycled, or otherwise managed." *Id.* The statute did not appear to permit any private enforcement scheme analogous to that created by Proposition 65. *See id.* at 107–08. The Second Circuit agreed with Vermont that this warning did not violate the manufacturers' First Amendment rights. *See id.* at 115–16. The manufacturers did not dispute that the warning was factual and uncontroversial under *Zauderer*. *See id.* The Second Circuit focused instead on the relationship between the warning and Vermont's interest in reducing mercury pollution. *See id.* It found that relationship to be obvious. *Id.* at 115. Here, by contrast, the State has not shown that the safe-harbor acrylamide warning is purely factual and uncontroversial, and Proposition 65's enforcement system can impose a heavy litigation burden on those who use alternative warnings.

Second, the State relies on the Ninth Circuit's decision in *CTIA v. City of Berkeley*, 928 F.3d 832. Berkeley required cell phone retailers to give the following warning:

> 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.

Id. at 838 (quoting Berkeley Mun. Code § 9.96.030(A) (2015)). The city permitted retailers to add "other information" to the warning at their discretion "as long as that information is distinct from the notice language." *Id.* (quoting Berkeley Mun. Code § 9.96. 030(B) (2015)). The plaintiffs argued that the warning was neither factual nor uncontroversial because it implied incorrectly that cell phones emit dangerous radiation. *See id.* at 846. The Ninth Circuit disagreed and upheld the warning under *Zauderer*. *See id.* at 843-49.

California's acrylamide warning differs from Berkeley's radiation warning in three ways that, on this record, show that the State's warning is unlikely to survive the Chamber's First Amendment challenge. First, here, although Berkeley's warning hinted at potential dangers, for example by referring vaguely to "safety," *cf. id.* at 853-55 (Friedland, J., dissenting), its text was a purely factual summary of federal regulation about radio frequency radiation. The cell phone retailers did not even argue that the radiation disclosure was "controversial as a result of disagreement about whether radio-frequency radiation can be dangerous to cell phone users." *Id.* at 848. The State's acrylamide warning language, by contrast, states without qualification that the acrylamide in the particular food identified is "known to cause cancer." The truth of that statement is the subject of controversy. The State urges this court to draw a contrast between the hot political and

moral controversy at issue in *NIFLA,* abortion, and the Chamber's disagreement about whether acrylamide causes cancer, along the lines of the Ninth Circuit's opinion in *CTIA*. *See* Opp'n Prelim. Inj. at. 14 (citing 928 F.3d at 845). The court declines to draw that distinction. A controversy may prevent *Zauderer* from applying even if it is not political. *See, e.g.*, *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530 (holding compelled warnings about whether mineral was "conflict free" were controversial).

Second, in *CTIA*, federal regulations had already required cell phone manufacturers to disclose the same or similar information as the Berkeley ordinance required of retailers. *See* 928 F.3d at 840-41. Here, no other public health body has warned that acrylamide in food causes cancer in people or has even reached that conclusion. No regulatory or public health authority has advised against consuming foods with acrylamide.

Third, unlike the Berkeley ordinance, Proposition 65 does not permit businesses to add information to the required warning at their discretion, and thus prevents them from explaining their views on the true dangers of acrylamide in food. That prohibition exacerbates the effect of the warning. It threatens to "drown out" a business's "messaging" addressing the claimed dangers of acrylamide in food. *See id.* at 849.

The court thus concludes the Chamber of Commerce is likely to show the acrylamide warning required by Proposition 65 is controversial and not purely factual. The warning is therefore unlikely to be permissible under *Zauderer*.

It is unclear whether a further analysis under some other more stringent constitutional test is necessary.

On the one hand, in *American Beverage Association*, the Circuit held that the plaintiff was likely to succeed on the merits immediately after deciding that the defendant had not carried its burden under *Zauderer*. *See* 961 F.3d at 757–58. But on the other hand, in a footnote, the Circuit suggested that an analysis under a "higher standard" was still necessary, although it left little doubt that if a claim does not meet the "lower standard" of *Zauderer*, it could not meet any "higher standard" either. *See id.* at 757 n.5. It is also unclear what that "higher standard" would be. The Chamber and the State both assume the correct test is the one described in *Central Hudson*. *See* Chamber's Mot. at 16-18; State Opp'n at 16-17. But in *CTIA*, the Circuit made clear that "*Central Hudson*'s intermediate scrutiny test does not apply to compelled, as distinct from restricted or prohibited, commercial speech." 928 F.3d at 842.

This court assumes without deciding that an analysis under a heightened standard of constitutional scrutiny is necessary and that the correct constitutional test is the "intermediate" level of scrutiny described in *Central Hudson*: "the government may restrict or prohibit commercial speech that is neither misleading nor connected to unlawful activity, as long as the governmental interest in regulating the speech is substantial." *CTIA*, 928 F.3d at 842 (citing 447 U.S. at 564). "The restriction or prohibition must 'directly advance the governmental interest asserted,' and must not be 'more extensive than is necessary to serve that interest.'" *Id.* (quoting 447 U.S. at 566).

"There is no question that protecting the health and safety of consumers is a substantial government interest." *CTIA*, 928 F.3d at 845. California therefore

has a substantial interest in protecting its citizens from substances that cause cancer. But at this stage of the litigation, the Chamber has shown the warning the State demands likely does not "directly advance" that interest and is "more extensive than necessary." *Cent. Hudson*, 447 U.S. at 566. As discussed above, the safe harbor warning is incorrect, and it implies misleadingly that the science about the risks of food-borne acrylamide is settled. In setting the statewide rules applicable to all, state regulators have also rejected alternative, less controversial language than the safe harbor language. If a business decides not to use the safe harbor warning, it risks expensive and lengthy litigation against private enforcers or the State, and defendants carry heavy evidentiary burdens if they attempt to show their products contain permissibly small quantities of acrylamide. The State also has many alternatives to compelled private speech at its disposal. It can fund scientific research and pursue public awareness campaigns, for example. Regulators could also modify safe harbor warnings to eliminate inaccuracies and controversial statements.

The Chamber is thus likely to show the Proposition 65 acrylamide warning falls short of the *Central Hudson* test. If a law fails the "intermediate" test of *Central Hudson*, it also fails the more stringent test that applies to content-based restrictions in general. *See NIFLA*, 138 S. Ct. at 2375. The Chamber is likely to succeed on the merits of its First Amendment claims.[21]

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21 The court does not reach the Chamber's facial challenge. *See* Chambers Mem. at 18.

C. Harms and the Public Interest

A likelihood of success on the merits does not alone entitle the Chamber to a preliminary injunction. It must also show it would suffer irreparable harm if new Proposition 65 enforcement actions can be filed while this lawsuit is pending and that this harm outweighs the State's and the public's interest in those enforcement actions. *See Winter*, 555 U.S. at 20.

"Irreparable harm is relatively easy to establish in a First Amendment case." *CTIA*, 928 F.3d at 851. Because the Chamber has a "colorable First Amendment claim," it has demonstrated it "likely will suffer irreparable harm" if Proposition 65 warnings against acrylamide can be enforced while this litigation is pending. *Am. Bev. Ass'n*, 916 F.3d at 758.

California argues the Chamber cannot show it would suffer any irreparable harm because its members have known for so long that acrylamide is found in foods. *See* State Opp'n at 18-19. As the Chamber points out, however, its decision to file this lawsuit now is in response to a recent increase in private enforcement actions. *See* Chamber's Mot. at 8 ("[S]ince [the Chamber] filed its complaint, private enforcers have served 391 pre-litigation notices and filed 43 new Proposition 65 lawsuits in state courts for alleged exposures to acrylamide in food."); Chamber's Reply at 12-13 ("In 2019 alone, there were 205 notices (up from 147 notices in 2018), and private enforcers show no signs of slowing down, serving more than 400 notices to date in 2020."); *see also* ECF Nos. 15, 37, 58, 86, 97, 111 (collecting new notices and private enforcement actions). The cases the State cites are also not comparable to this one. The Chamber of Commerce is not in the same position as a person who waits several

months to assert a copyright claim after she finds the allegedly infringing video on the internet. *Cf. Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc). Nor is it in the position of a newspaper that inexplicably delays in asserting a claim that its rival stole its subscribers and harmed its reputation. *Cf. Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). And unlike the plaintiff in *Lydo*, the Chamber has shown it has likely suffered a First Amendment injury. *Cf. Lydo Enters. v. Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984).

As for the balance of harms and the public interest, although a state "suffers a form of irreparable injury" any time it is "enjoined by a court from effectuating statutes," *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., Circuit Justice), the Ninth Circuit has "consistently recognized the significant public interest in upholding First Amendment principles," *Am. Bev. Ass'n*, 916 F.3d at 758 (quoting *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014)). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). The injunction requested here is also quite narrow, as noted above. It leaves private parties and the State with many tools for increasing public awareness about the risks of acrylamide in foods. CERT and other private enforcers can send demand letters and notices of violations. They can litigate existing claims and pursue appeals. They can pursue public relations campaigns. They can fund research. They can buy advertisements.

The State argues a preliminary injunction would create uncertainty because businesses might argue it

permits them to modify consent decrees already in place. *See* Cal. Opp'n at 20 (citing *3750 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp 1257, 1260 (C.D. Cal. 1995) (explaining injunctions that "change the status quo are viewed with hesitancy and carry a heavy burden of persuasion" (citation and quotation marks omitted)). The Chamber does not request that relief, however. *See* Chamber's Reply at 13. The court sees no reason to award it. This order does not alter existing consent decrees, settlements, or other agreements. For example, this order does not permit businesses that have already agreed to display a certain warning do take those warnings down, and businesses that have agreed to reformulate their products to reduce acrylamide content are not permitted by this order to breach those agreements.

Finally, the State cautions that enjoining an aspect of Proposition 65, even preliminarily, would invite challenges to other regulations about carcinogens and reproductive toxins. *See* Cal. Opp'n at 20; *see also Nat'l Elec. Mfrs.*, 272 F.3d at 116 ("Innumerable federal and state regulatory programs require the disclosure of product and other commercial information."). The risk of misinterpretation or misuse of an order is not lost on this court. California has a substantial and likely compelling interest in protecting people from exposure to dangerous chemicals, including chemicals that have been shown to cause cancer or reproductive harm in experimental animals, even if epidemiological evidence is inconclusive. Health and safety warnings have "long been considered permissible." *NIFLA*, 138 S. Ct. at 2376. The State may ultimately show the Chamber is not entitled to a permanent injunction. It may also move to dissolve

the preliminary injunction, perhaps to permit the enforcement of alternative warnings. But given the record before the court at this juncture, these are questions for another day.

IV. Conclusion

The Chamber of Commerce's motion for a preliminary injunction is granted. CERT's motion for summary judgment is denied.

While this action is pending and until a further order of this court, no person may file or prosecute a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products. This injunction applies to the requirement that any "person in the course of doing business" provide a "clear and reasonable warning" for cancer before "expos[ing] any individual to" acrylamide in food and beverage products under California Health & Safety Code § 25249.6. It applies to the Attorney General and his officers, employees, or agents, and all those in privity or acting in concert with those entities or individuals, including private enforcers under section 25249.7(d) of the California Health & Safety Code.

This order does not alter any existing consent decrees, settlements, or other agreements related to Proposition 65 warning requirements.

This order resolves ECF Nos. 93 and 95.

IT IS SO ORDERED.

/s/ Kimberly J. Mueller
Chief United States District Judge

Dated: March 29, 2021.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (OCTOBER 26, 2022)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA CHAMBER OF COMMERCE,

Plaintiff-Appellee,

v.

COUNCIL FOR EDUCATION AND RESEARCH ON TOXICS, A CALIFORNIA PUBLIC BENEFIT CORPORATION,

Intervenor-Defendant-Appellant.

No. 21-15745

D.C. No. 2:19-cv-02019- KJM-JDP
Eastern District of California, Sacramento

Before: GOULD, BENNETT, and R. NELSON, Circuit Judges.

Judges Gould, Bennett, and Nelson have voted to deny Appellant's petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote

on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the non-recused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

DISSENTING STATEMENT OF JUDGE BERZON, WITH JUDGES WARDLAW, WATFORD, KOH, AND SANCHEZ JOINING

The right to access the courts is one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). But in this opinion, without basis in law or precedent, this Court narrows that fundamental right. The panel opinion closes the courtroom doors to all those seeking to enforce provisions of California's Proposition 65 with respect to a chemical present in a wide range of food products—on pain of contempt. In doing so, the panel opinion expands the so-called "illegal objective" exception far beyond any prior decision of the Supreme Court or the appellate courts: it allows a single judge to enjoin potential plaintiffs from filing any sort of lawsuit if the judge predicts that the lawsuits will fail upon a defense grounded in a federal right. I object to the panel's unjustified curtailment of the First Amendment's protections and of litigation norms and respectfully disagree with this Court's refusal to reconsider the panel opinion en banc.

I.

Enacted by the voters of California in 1986, Proposition 65 is a "landmark" statute aimed at protecting the public from exposure to toxic chemicals. *People ex rel. Lungren v. Superior Ct.*, 14 Cal. 4th 294, 315 (1996) (Baxter, J., dissenting). The statute provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or

reproductive toxicity without first giving clear and reasonable warning." Cal. Health & Safety Code § 25249.6. Certain government officials (such as the California Attorney General) and private litigants are both statutorily authorized to bring actions to enforce Proposition 65's guarantees. Cal. Health & Safety Code § 25249.7(c), (d).

In this case, the California Chamber of Commerce ("CalChamber") filed a complaint and motion for preliminary injunction asking the district court to bar "the Attorney General and all those in privity with him from filing and/or prosecuting new lawsuits to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food products." The Council for Education and Research on Toxics ("CERT"), a non-profit with expertise in acrylamide warnings, intervened in the lawsuit as a defendant. Rejecting CERT's argument that an injunction would constitute an unlawful prior restraint in violation of its First Amendment rights, the district court granted a preliminary injunction, providing that the injunction applied to the Attorney General, his agents, and all "private enforcers" of Proposition 65. After a motions panel of this Court granted a stay of the injunction pending appeal, the merits panel affirmed the injunction as to CERT, holding that CERT had standing and that the district court did not err in granting the preliminary injunction—in part because the "illegal objective" doctrine barred CERT's prior restraint claim. *See Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 475-83 (9th Cir. 2022).

II.

The merits panel's opinion contradicts decades of settled First Amendment precedent regarding the "illegal objective" exception. The opinion transforms a narrowly tailored labor law doctrine into a broad tool permitting the preclusion of the filing of good-faith, reasonably based lawsuits when a judge predetermines the merits of those lawsuits—or, in the case of a preliminary injunction, predicts the likely merits. Nothing in Supreme Court precedent sanctions such a severe restriction on the First Amendment's protection of the right to petition for redress. This Court should have reheard this case en banc.[1]

A.

The "illegal objective" doctrine originates from a footnote in the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 737 n.5 (1983). A case about the National Labor Relations Board's ("NLRB") authority to block retaliatory employer lawsuits, *Bill Johnson's* held that the NLRB could enjoin "an improperly motivated suit lacking a reasonable basis" under the National Labor Relations

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[1] The panel opinion declined to review an interlinked aspect of the district court injunction: its breadth as to the parties covered. *See Cal. Chamber of Com.*, 29 F.4th at 482-83. In a lawsuit with a single defendant (*i.e.*, the California Attorney General) and one intervenor (*i.e.*, CERT), the district court issued an injunction that applied to "all . . . private enforcers" of Proposition 65. Under recent binding Supreme Court precedent, a federal court may not issue "an injunction against any and all unnamed private persons who might seek to bring their own . . . suits," even if the attorney general also has the authority to enforce the law in question. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021).

Act ("NLRA"). *Id.* at 744. In footnote five, the Supreme Court briefly noted an additional category of suit that the NLRB had the authority to enjoin as well: "a suit that has an objective that is illegal under federal law."[2] *Id.* at 737 n.5.

Crucially, in its fleeting allusion to the "illegal objective" exception, the Supreme Court spoke solely about the NLRB's authority to forbid litigation, not that of any other body. *Id.* Such an exception had been applied, the Court wrote, in two instances: (1) the Court had previously "upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the [NLRA]" and (2) the Court had once "concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction 'where [the Board's] federal power pre-empts the field.'" *Id.* (alteration in original) (quoting *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). In other words, the "illegal objective" exception was a doctrine to preserve the NLRB's authority to decide issues of labor law—a power delegated to the Board by Congress, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959)—and to block litigants from undercutting that authority once the NLRB had issued its decisions.

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[2] The panel opinion exclusively relies on the "illegal objective" exception as the basis for affirming the district court's injunction, explicitly distinguishing the "illegal objective" exception from *Bill Johnson's* "improperly motivated/reasonable basis" test. *See Cal. Chamber of Com.*, 29 F.4th at 481 n.16.

B.

The panel opinion erred in its unprecedented extension of the "illegal objective" exception beyond the NLRB context. To my knowledge, every circuit court decision invoking the "illegal objective" doctrine over the past 40 years besides the panel opinion—has faithfully applied the Supreme Court's reasoning in *Bill Johnson's* and used the doctrine only in labor law cases concerning the NLRB's authority; in almost all of those cases, the NLRB was a party.[3] *See, e.g.*, *United Nurses Ass'ns of Cal. v. N.L.R.B.*, 871 F.3d 767 (9th Cir. 2017); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), *aff'd sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Sheet Metal Workers Int'l Ass'n Loc. Union No. 27 v. E.P. Donnelly, Inc.*, 737 F.3d 879 (3d Cir. 2013); *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Loc. 200*, 611 F.3d 483 (9th Cir. 2010); *Wright Elec., Inc. v. N.L.R.B.*, 200 F.3d 1162 (8th Cir. 2000); *Loc. 30, United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n v. N.L.R.B.*, 1 F.3d 1419 (3d Cir. 1993); *Chauffeurs, Teamsters & Helpers Loc. 776 Affiliated With Int'l Bhd. of Teamsters v. N.L.R.B.*, 973 F.2d 230 (3d Cir. 1992); *Nelson v. Int'l Bhd. of Elec. Workers, Loc. Union*

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[3] I was able to find only a single federal case applying the "illegal objective" doctrine in a non-labor-law dispute: a district court decision in *United States v. Wagner*, 940 F. Supp. 972 (N.D. Tex. 1996). *Wagner* contained no reasoning to justify its use of the "illegal objective" exception outside the labor law context, and it invoked both parts of *Bill Johnson's* "improperly motivated/ reasonable basis" test in addition to the separate, "illegal objective" test as the foundation for its decision, *see id.* at 980–82 (unlike the merits panel's opinion which relied solely on the "illegal objective" test, *see Cal. Chamber of Com.*, 29 F.4th at 480–82).

No. 46, 899 F.2d 1557 (9th Cir. 1990), *overruled on other grounds by Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994) (en banc); *Int'l Longshoremen's & Warehousemen's Union v. N.L.R.B.*, 884 F.2d 1407 (D.C. Cir. 1989). In fact, when the Tenth Circuit was presented with the opportunity to extend the reach of the "illegal objective" doctrine beyond its defined limits in labor law—the only such instance that I have found of an appellate court confronting the question—the court refused, specifically grounding its analysis in the Petition Clause. *See CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1283, 1289–90 (10th Cir. 2020). As the Tenth Circuit explained:

> [G]ood reasons counsel against extending this per se rule beyond the labor-relations context. . . . By adopting an unlawful-objective exception to Petition Clause immunity, we would eliminate immunity even in cases in which the party petitioning for redress does so for benign reasons. We reject that result. Petition Clause immunity exists to promote access to the courts, allowing people to air their grievances to a neutral tribunal. In fact, "the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force" and ensures that litigants can argue for "evolution of the law."

Id. at 1290 (quoting *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002)).

The panel opinion cites no cases to defend its novel application of the "illegal objective" exception and offers no reply to the Tenth Circuit's persuasive reasoning. *See Cal. Chamber of Com.*, 29 F.4th at 480-

82. Instead, the panel submits two cases—one about an injunction against relitigation, *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523 (9th Cir. 1983), and another about intervention, *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986)[4]—and a fleeting reference to the All Writs Act and the Anti-Injunction Act for the proposition that federal courts may preliminarily enjoin lawsuits in certain instances. *See Cal. Chamber of Com.*, 29 F.4th at 481 & n.17. I do not dispute that federal courts possess the authority to enjoin future litigation in limited circumstances, usually linked to avoiding repetitive or frivolous litigation. However, neither case and neither law cited by the panel justifies a federal court's decision to enjoin a non-labor lawsuit using the NLRB-protective "illegal objective" doctrine, especially when no appellate court has done so before.

C.

The merits panel's opinion compounds its error by expanding the "illegal objective" exception even further. In addition to applying the "illegal objective" doctrine in a non-labor-law case for the first time at the appellate level weakening the First Amendment protection accorded to the instigation of good-faith, non-frivolous litigation—the panel invokes the doctrine without a final merits determination regarding whether the lawsuit sought an illegal objective. *See Cal. Chamber of Com.*, 29 F.4th at 482. Put another way, the panel opinion allows a court to enjoin an entire class of non-labor lawsuits using a labor law doctrine

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[4] *Orange County* mentions an injunction in its fact section and nowhere else in the opinion. 799 F.2d at 536-37.

solely because the court *predicts* that the suits are likely to fail on a federal law defense.

No precedent supports the panel's new and expansive exception to the Petition Clause, and none should. There are established methods in the American legal system to discourage and dispense with lawsuits with viable federal defenses. A party may file a motion to dismiss or motion for summary judgment. *See* Fed. R. Civ. P. 12(b)(6), 56. If the offending lawsuit is based on a statutory provision, a litigant may file an anticipatory, declaratory judgment suit seeking to declare the statutory provision unconstitutional. *See* 28 U.S.C. § 2201; Fed. R. Civ. P. 5.1. But a preliminary injunction prohibiting plaintiffs from filing good-faith, nonfrivolous lawsuits is not an appropriate remedy. Good-faith litigants should not be threatened with contempt of court, and potentially fines or even incarceration to compel compliance, *see* 18 U.S.C. § 401, because there may be a valid federal defense to a lawsuit they may wish to bring. The First Amendment protects "genuine" but ultimately "unsuccessful" lawsuits, *see BE & K Const. Co.*, 536 U.S. at 532, and it ordinarily protects non-NLRB-related lawsuits from being enjoined when the success of the lawsuits—which definitionally have yet to be filed—has not been finally determined.

* * *

The consequences of the panel opinion should not be understated. As the Supreme Court has long held, the right to petition the government is implied by "[t]he very idea of a [republican] government." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875); *see Bill Johnson's*, 461 U.S. at 741. With its unprecedented expansion of the "illegal objective" exception, the panel

significantly undermines the Petition Clause's protections, permitting courts to enjoin litigation on pain of contempt because one court forecasts that the litigation will fail against a federal defense. The labor-specific "illegal objective" exception does not countenance such an injunction for non-labor lawsuits. Accordingly, I respectfully regret this Court's decision to deny rehearing en banc and its resulting effects on litigants' right to their day in court.