No. F075362

IN THE COURT OF APPEAL OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MONSANTO COMPANY,
Plaintiff and Appellant,

and

CALIFORNIA CITRUS MUTUAL, et al.,
Plaintiff-Intervenors and Appellants,

v.

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, et al.,
Defendants and Respondents,

and

Sierra Club, et al.,
Defendant-Intervenors and Respondents.

Appeal from the Fresno County Superior Court
The Honorable Kristi Culver Kapetan
Case No. 16CECG00183

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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November 21, 2017

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e), the undersigned counsel of record for *amicus curiae* Washington Legal Foundation (WLF) states:

(1) WLF is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent company, issues no stock, and no entity or person has any ownership interest in WLF.

(2) WLF has no financial interest in the outcome of this proceeding, nor is WLF aware of anyone other than the parties who possesses such an interest.

Dated: November 21, 2017

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states, including California. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF has appeared as *amicus curiae* before this and other California courts in a variety of cases that impact WLF's free-market mission. (See, e.g., *Bristol-Myers Squibb Co. v. Superior Court* (2016) 1 Cal.5th 783, rev'd, (2017) 137 S.Ct. 1773; *In re Cipro Cases I & II* (2015) 61 Cal.4th 116; *Alcoser v. Thomas* (Cal. App. 2011) 2011 WL 537855, cert. denied, (2012) 565 U.S. 978.) WLF has also filed formal comments with California's Office of Environmental Health Hazard Assessment (OEHHA) on proposed amendments to implementing regulations for California's Proposition 65 law (Prop 65). (See WLF Comments, *Proposed Repeal of Article 6 and Adoption of New Article 6 in Title 27, California Code of Regulations ("Clear and Reasonable" Warnings)* (March 21, 2015).)

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes and distributes articles discussing an array of liability issues arising from Prop 65. (See, e.g., Lisa L. Halko, *California's Attorney General Acknowledges Prop 65 Abuse* (July 27, 2017) WLF Legal

Backgrounder; Ann G. Grimaldi *Manufacturer's Lawsuit Spotlights Substance Listings Under Proposition 65* (Nov. 30, 2007) WLF Legal Backgrounder.)

WLF has long been critical of Prop 65's "bounty hunter" provision, which invites plaintiffs' lawyers to bring lawsuits claiming that manufacturers and retailers have exposed the public to cancer-causing chemicals without providing an adequate warning—even though there often is little or no scientific evidence that the chemical in question actually causes cancer in humans. The threat of liability from such suits not only imposes enormous compliance costs on the business community, but it interferes with the free flow of commerce. Because neither the federal government nor any other State deems such warnings necessary, a product destined for California requires labeling that differs from that required when that same product is sold elsewhere.

WLF believes that the trial court's misguided decision in this case—by exposing companies to potential liability for failing to "warn" the public about glyphosate even though OEHHA (and every other governmental regulatory body) has determined that glyphosate does *not* cause cancer in humans—threatens to exacerbate these problems. For the reasons that follow, WLF urges the Court to reverse the judgment below.

STATEMENT OF FACTS

Adopted by California voters as an initiative measure in 1986, 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." (Cal. Health & Saf. Code § 25249.6.) The Governor of California is required to maintain a list of chemicals "known to the state" to cause cancer, which list is published by OEHHA. (*Id*. § 25249.8(a).) Under the Labor Code's listing mechanism (§ 6382(b)(1)), which is incorporated by reference in Prop 65 (§ 25249.8(a)), that list ***must*** include any substance identified as a potential carcinogen in experimental animals by the International Agency for Research on Cancer (IARC), an independent, non-governmental entity free from oversight by any California governmental body. (*See* Cal. Labor Code § 6382(b)(1); Cal. Health & Saf. Code § 25249.8(a).)

Under Prop 65's regulatory regime, any business whose products contain a detectable amount of one of the approximately 1000 listed chemicals must provide "clear and reasonable" warnings to the public. (Cal. Health & Saf. Code § 25249.6.) Failure to comply is subject to $2,500 in civil penalties per day of violation, enforceable in civil litigation by the California Attorney General, designated District Attorneys and City

Attorneys, or (more commonly) private "bounty hunter" plaintiffs. (*Id*. § 25249.7.)

Glyphosate is the most effective and widely used herbicide in the world. The federal government has approved the use of glyphosate under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 et seq.), and the Environmental Protection Agency (EPA) has concluded that glyphosate is not a potential carcinogen. (1 AA at pp. 54-57.) Nonetheless, on September 4, 2015, OEHHA issued a notice of its intent to list glyphosate under Prop 65 as a chemical "known to the state to cause cancer," based solely on IARC's conclusion that glyphosate is "probably carcinogenic to humans." (*Id.* at p. 67.) OEHHA finalized its decision to list glyphosate on March 28, 2017.

Unlike other chemicals listed via the Labor Code mechanism, OEHHA itself has thoroughly evaluated glyphosate and concluded that it is unlikely to cause cancer in humans. (*Id*. at pp. 53-54.) Because of Prop 65's Labor Code mechanism, however, OEHHA has declared that it "cannot consider scientific arguments concerning the weight of quality of the evidence considered by IARC," explaining that "these are ministerial listings." (*Id*. at p. 68.)

This appeal arises from a suit challenging the constitutionality of Prop 65's Labor Code listing of glyphosate. Monsanto, a leading

agricultural company that manufactures and sells products containing glyphosate, brought an as-applied challenge to OEHHA's listing of glyphosate in Fresno County Superior Court, seeking declarative and injunctive relief. (*Id*. at p. 8.) Monsanto's complaint alleged, among other things, that reliance on the Labor Code mechanism to list glyphosate constitutes an improper delegation of rulemaking authority in violation the California Constitution. (*Id*. at pp. 10-11.)

Monsanto further alleged that by granting IARC the power to determine which chemicals are placed on the Prop 65 list maintained by OEHHA, the Labor Code listing mechanism violates Article II, § 12 of the California Constitution, under which "no statute proposed to the electors by the Legislature or by initiative" that designates "any private corporation to perform any function or to have any power or duty" shall "have any effect." (*Ibid*.; Cal. Const. art. II, § 12.)

OEHHA moved for judgment on the pleadings. (1 AA at p. 296.) The trial court granted OEHHA's motion, concluding that the "primary concern" of California's non-delegation doctrine is in preventing "members of the regulated industries to have control over the process of making regulations or legislation that affected their businesses." (2 AA at p. 514.) Because the Prop 65 list "is not made by a private entity with ties to the

industries being regulated," there could be "no concern that the legislature has allow[ed] the 'fox to guard the henhouse.'" (*Id.* at 515.)

As for Monsanto's reliance on Article II, § 12 of the California Constitution, the trial court held that IARC is not a "private corporation" and that, in any event, Prop 65 "does not confer any special power or privilege" on IARC, which was "formed prior to enactment of [Prop 65]." (*Id*. at p. 516.) Accordingly, the trial court dismissed—with prejudice—Monsanto's operative complaint and entered judgment for OEHHA. (*Id*. at pp. 493, 504.)

SUMMARY OF ARGUMENT

The California Constitution vests the legislative power of the State in the Legislature. (See Cal. Const. art. IV, § 1.) Although California courts have interpreted this vesting so as not to prohibit *all* delegations, they nonetheless have imposed meaningful limitations. In particular, the Legislature may not leave "the resolution of fundamental policy issues to others" or fail "to provide adequate direction for the implementation of that policy." (*Mobilehome Park Owners' Ass'n v. City of Carson* (1983) 35 Cal.3d 184, 190.)

Here, the Labor Code's listing mechanism, by relying ***exclusively*** on IARC's determination that glyphosate is a "probable carcinogen" that must be included on the Prop 65 list (notwithstanding OEHHA's own

determinations to the contrary), has surrendered control over a crucial regulatory policy determination to an unaccountable foreign body in violation of the non-delegation doctrine. This complete surrender of decision-making authority to an international group wholly unaccountable to Californians is precisely the sort of approach to delegated authority the non-delegation doctrine exists to prevent.

In those instances where a statute appears to confer such an exceedingly broad delegation, only the existence of clear standards and safeguards will avoid any constitutional infirmity. Such standards and safeguards are not only an essential check on the dangers of ad hoc or arbitrary decision-making, but they also ensure that the exercise of discretion in implementing policy judgment is left to those who are directly accountable to the public for their public-policy choices. No such protections are available under the Prop 65 Labor Code listing mechanism's application in this case, which necessarily forecloses any accountability or oversight by Californians.

As the record below makes clear, once IARC classifies a chemical substance as a potential carcinogen in experimental animals, that determination—no matter how biased or scientifically flawed—is all that is needed to expose Californians to ruinous liability under Prop 65 for failure to warn of that chemical. The listing mechanism thus not only delegates

substantial policy-making authority to unaccountable private parties, but it fails to establish any adequate safeguards against the arbitrary exercise of the power delegated; no California governmental body retains ultimate discretion to determine whether IARC's classification determinations are binding on Californians. The listing mechanism's operation in this case therefore violates the non-delegation doctrine and must be invalidated.

The Labor Code listing mechanism also violates Article II, § 12 of the California Constitution, which prohibits adoption of any initiative statute that "names or identifies any private corporation to perform any function or to have any power or duty." The listing mechanism, by requiring state officials to accept without question IARC's designation of glyphosate as a probable carcinogen and to add glyphosate to the Prop 65 list, runs afoul of that prohibition. IARC is a "private corporation" within the meaning of Article II, § 12. Prop 65 grants IARC the "power" to take actions that ultimately require state officials to include substances on the Prop 65 list. Finally, the initiative directly "identifies" IARC as the entity on which that power is conferred.

This delegation of authority to IARC would be unconstitutional even if IARC possessed a good reputation. But in light of OEHHA's contention that IARC's supposedly sterling reputation somehow provides grounds to excuse any constitutional violation, WLF deems it appropriate to call the

Court's attention to recent scandals involving IARC. As shown below, IARC is an entity beset by controversy and credibly accused of condoning blatant conflicts of interest among its scientists. Indeed, it is exhibiting the very sorts of self-interested conduct that led to adoption of Article II, § 12's prohibition against the delegation of powers to entities not answerable to the people of the State.

ARGUMENT

I. THE LABOR CODE LISTING MECHANISM VIOLATES THE NON-DELEGATION DOCTRINE

The non-delegation doctrine prohibiting the Legislature's delegation of its inherent powers "is well established in California." (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375.) "An unconstitutional delegation of legislative authority occurs if a statute authorizes another person or group to make a fundamental policy decision or fails to provide adequate direction for the implementation of a fundamental policy determined by the Legislature." (*Plastic Pipe & Fittings Ass'n v. Cal. Bldg. Standards Comm'n* (2004) 124 Cal.App.4th 1390, 1410.)

The Labor Code listing mechanism, by relying ***exclusively*** on IARC's determination that glyphosate is a "probable carcinogen" that must be included on the Prop 65 list—despite OEHHA's own determinations to the contrary—has surrendered control over a crucial regulatory policy

determination to an unaccountable foreign body in violation of the non-delegation doctrine. Contrary to the trial court's reasoning, the Labor Code listing mechanism does not merely rely on an outside entity's expertise to "fill in" factual findings needed to implement an underlying legislative policy.

As Monsanto has thoroughly demonstrated, the decision to list a substance under Prop 65 is a quasi-legislative action with serious legal and policy consequences. Among other things, when IARC classifies a chemical as a potential carcinogen, it is making a multifaceted policy judgment about which criteria to apply, which scientists to use, which studies to consider, how much weight to afford each study, and how to aggregate statistical analyses across studies. (See Monsanto's Reply Br. at pp. 34-35.) Yet given the clear absence of any meaningful safeguards, the trial court's decision upholding the listing of glyphosate gives short shrift to the important democratic values of accountability and public deliberation that animate California's non-delegation doctrine.

A. The Listing Mechanism Lacks Adequate Safeguards to Ensure Accountability to the Electorate

"When a statute delegates power with inadequate protection against unfairness where such protections can be easily provided, the reviewing court may insist that such protections be included or, in the alternative,

declare the legislation invalid." (*Bock v. City Council* (1980) 109 Cal.App.3d 52, 57-58.) Neither Prop 65 nor OEHHA's regulations implementing it provide any oversight or direction to IARC regarding how its determinations should be made. By providing IARC with unfettered discretion to determine which chemicals ***must*** be added to the Prop 65 list, the Labor Code listing mechanism contains no safeguards to ensure that IARC performs its function consistent with the policy goals of Prop 65 or the will of the voters who enacted it.

California law prohibits the "total abdication" of legislative authority (*Kugler, supra*, 69 Cal.2d at p. 384), so all delegations must, at a minimum, retain ***some*** degree of oversight and control by either the Legislature or its implementing agency. Because "truly fundamental issues should be resolved by the Legislature," California courts permit the delegation of legislative functions only where the grant of authority is "accompanied by safeguards adequate to prevent its abuse." (*Wilke v. Holzheiser, Inc. v. Dep't of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 369.) In the absence of such safeguards, "effective review of the exercise of the delegated power [is] impossible." (*Blumenthal v. Bd. of Med. Exam'rs* (1962) 57 Cal.2d 228, 236.)

Here, IARC's classification determinations are final and not subject to review by *any* other entity, much less any California governmental

entity. Under the Labor Code listing mechanism (Cal. Labor Code § 6382(b)(1)), which is incorporated by reference in Prop 65 (§ 25249.8(a)), if IARC classifies a substance as likely to cause cancer in humans or experimental animals, OEHHA is automatically required to include it on the Prop 65 list—and has no discretion to exclude it. Indeed, OEHHA itself has conceded that it "cannot consider scientific arguments concerning the weight or quality of the evidence considered by IARC when it identified [glyphosate] and will not respond to such [criticisms] if they are submitted." (1 AA at p. 68.) Under OEHHA's view, "these are ministerial listings." (*Ibid*.) But that is tantamount to an admission that IARC enjoys ongoing, absolute discretion when deciding to expose California citizens to liability under Prop 65.

The extent of the safeguards necessary in any given case turns on the degree of discretion afforded to the delegated entity. Where, as here, a legislative delegation is open-ended and wholly lacking in any ascertainable standards, the existence of safeguards is all the more necessary to ensure that ***some*** politically accountable body retains the final say over delegated matters. (*People's Fed. Sav. & Loan Ass'n v. State Franchise Tax Bd.* (1952) 110 Cal.App.2d 696, 700 [invalidating a statute that gave administrative officers "uncontrolled and unguided power" to set the rate of a tax deduction].) Such an approach reflects California's concern

with "establishing a safeguard that will prevent any deviation from [the Legislature's] policies" by the delegated entity. (*Sturgeon v. Cty. of Los Angeles* (2010) 191 Cal.App.4th 344, 354.)

Adequate safeguards may take the form of statutory backstops, meaningful agency oversight, or notification procedures allowing the Legislature to redress unjust applications of the particular law or regulation at issue. (See, e.g., *Duarte Nursery, Inc. v. Cal. Grape Rootstock Improvement Comm'n* (2015) 239 Cal.App.4th 1000, 1019 [finding adequate safeguards where the state agency's oversight included the power to order the delegated entity "to cease or correct any acts not in the public interest"]; *Sturgeon*, *supra*, 191 Cal.App.4th at 354 [finding adequate safeguards where the Legislature had the statutory authority "to review and abrogate any termination of benefits it believes is inappropriate"].)

In *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, for example, the Court considered whether a municipality had unconstitutionally delegated authority to appropriate and expend funds for social services. Of critical importance to the Court's analysis was the fact that the budget-setting decisions implicated by the delegation constituted "a fundamental legislative function … vested by law in the board of supervisors." (*Id*. at p. 1517.) Emphasizing that all legislative functions must be performed by politically accountable entities, the Court approved the delegation because

the board of supervisors "retained its budgeting authority" and "retained authority to modify or rescind its delegation of [relevant] authority to the County CEO." (*Ibid*.)

Similarly, in *Martin v. Cnty. of Contra Costa* (1970) 8 Cal.App.3d 856, 862, the Court found that a delegation involving public employee compensation was "not an abdication of the Legislature's duty" to set compensation. The Court's holding turned on the fact that the statute explicitly provided "for interim changes" in compensation decisions "subject to review by the Legislature." (*Ibid*.) Such oversight, the Court concluded, would prevent any "violation of the legislative policy" and avoid non-delegation concerns. (*Ibid*.)

No such protections are available under Prop 65's Labor Code listing mechanism, which necessarily forecloses any accountability or oversight by Californians. Once IARC classifies a substance as a potential carcinogen, that determination—no matter how biased or scientifically flawed—is the end of the matter. Such unfettered discretion is contrary to California law. (*See Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 169 [invalidating charter amendment imposing residential rent controls adopted by initiative process because the delegated rent-control board established rents of "indefinite duration" and lacked any "adjustment mechanism … to provide for changes in circumstances"].) Because the

abiding concern of the nondelegation doctrine is the need for adequate safeguards against usurpation of legislative authority, the Court should reverse the judgment below.

B. Invalidating the Listing Mechanism's Application in This Case Would Vindicate Core Values Undergirding the Non-Delegation Doctrine

As a corollary of the separation of powers, the non-delegation doctrine guards against the concentration of power in unaccountable, unelected entities. It promotes "public accountability" by requiring the Legislature "to make specific decisions, thereby incorporating the views of the public." (C. Boyden Gray, *The Search for an Intelligible Principle: Cost-benefit Analysis and the Nondelegation Doctrine* (2000) 5 Tex. Rev. L. & Pol. 1, 21.) Because "[l]iberty requires accountability" (*Dep't of Transp. v. Ass'n of Am. Railroads* (2015) 135 S.Ct. 1225, 1234 (Alito, J., concurring), the protections afforded by the non-delegation doctrine are fundamental to a free society.

Such protection is critical, for "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." (*Ibid*.) That temptation is strong because "delegation enables individual legislators to reduce the political costs of policies that injure relatively uninterested voters, without losing credit for benefits

bestowed on those interest groups intensely enough motivated to trace the chain of power." (Donald A. Dripps, *Delegation and Due Process* (1988) 1988 Duke L.J. 657, 668.)

Because IARC is not accountable to California voters, and no California governmental body can override IARC's classification determination for glyphosate, invalidating the Labor Code listing mechanism's application in this case would further the core democratic policy behind the non-delegation doctrine. Such a holding would force legislators to take primary responsibility for implementing Prop 65 policy choices rather than permitting them to pass off the difficult decisions to others. (See Cynthia R. Farina, *Deconstructing Nondelegation* (2010) 33 Harv. J.L. & Pub. Pol'y 87, 95 ["Lawyers and political scientists alike have charged that delegation enables the legislature to punt the really tough policy choices."].)

In addition, invalidating the Labor Code listing mechanism here would serve the non-delegation doctrine's additional purpose of "avoiding or minimizing unchecked power" (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 362), by requiring that IARC's discretion in making listing determinations be circumscribed by meaningful standards and goals consistent with California public policy. The ability of the California Legislature or the OEHHA to ratify or reject IARC's

classification determinations would provide a much needed safeguard against the usurpation of sovereign functions by unelected decision makers.

II. THE LABOR CODE LISTING MECHANISM VIOLATES ARTICLE II, § 12 OF THE CALIFORNIA CONSTITUTION

As explained above, it is "well established" that the California Constitution vests legislative power, including the power to change the law, "exclusively in the legislature and cannot be delegated by it." (*Kuglar*, *supra*, 69 Cal.2d at 375.) The California courts have established constitutional limits that are broadly applicable to *all* efforts to delegate legislative power.

In addition, the Constitution includes a provision that imposes limitations on one specific means of delegating legislative power: delegations sought to be accomplished through the initiative process. Article II, § 12 of the California Constitution provides that "no statute proposed to the electors ... by initiative" that "names or identifies any private corporation to perform any function or to have any power or duty" shall "have any effect." (Cal. Const. art. II, § 12.) It stands to reason that this provision, when applicable, imposes a stricter standard than that imposed by the more generally applicable non-delegation doctrine; otherwise, it would be mere surplusage and would have no independent significance. WLF respectfully submits that Prop 65's Labor Code listing

mechanism, as applied to IARC's designation of glyphosate as a probable carcinogen, runs afoul of the initiative-specific anti-delegation principle set forth in Article II, **§** 12.

Monsanto's briefs explain in detail why OEHHA's listing of glyphosate based on IARC's finding violates Article II, **§** 12. WLF will not repeat that explanation in detail here. Instead, WLF focuses on several points that render the constitutional violation particularly glaring.

A. The Labor Code Listing Mechanism Delegates Overwhelming "Power" to IARC

OEHHA contends that Article II, § 12 is inapplicable because the Labor Code listing mechanism does not delegate any "power" to IARC. That contention is risible in the face of OEHHA's response to IARC's classification decision. OEHHA concedes that it fully evaluated the carcinogenicity of glyphosate several years ago and concluded that the herbicide is "unlikely to pose a cancer hazard to humans." Yet, despite that finding, OEHHA now contends that IARC's contrary cancer classification *compels* it to list glyphosate under Prop 65 as a chemical "known to the state to cause cancer." There is only one appropriate description of a situation in which the state agency charged with implementing Prop 65 determines that the actions of a third party (IARC) compel it to include a

chemical on its list of known carcinogens: IARC possesses the "power" to bring about that listing.

OEHHA contends that Prop 65 merely "takes advantage of IARC's pre-existing practice of evaluating carcinogenicity of chemicals." (OEHHA Br. at p. 31.) That contention is a *non sequitur*; whether the evaluation process was "pre-existing" is irrelevant to the question of whether "power" has been conveyed. The uncontested record demonstrates that Prop 65 places into IARC's hands the power to determine *unilaterally* that a specified chemical should be included on the Prop 65 list of known carcinogens.

In support of its no-power argument, OEHHA has misconstrued *Tain v. State Bd. of Chiropractic Examiners* (2005) 130 Cal.App.4th 609. *Tain* rejected a claim that a 1978 initiative amendment to the Chiropractic Act violated Article II, § 12 because it allegedly delegated legislative control of chiropractic licensing to the Council on Chiropractic Education (CCE), a private organization. The court rejected the factual basis for the delegation claim; it held that the amendment ensured that the State Board of Chiropractic Examiners (a state agency) retained full control of all licensing decisions. (130 Cal.App.4th at 632.) The initiative amendment limited the State Board's licensing authority somewhat; it decreed that only graduates of accredited schools (whether accredited by the CCE or others) were

eligible for licensing by the State Board. (*Ibid.*) The court deemed Article II, § 12 inapplicable because the amendment conferred no real power on the CCE: the State Board remained free to reject license applications from graduates of CCE-accredited schools, and also to accept applicants from a school not accredited by the CCE—so long as the school was accredited by one of the many other accreditation organizations. (*Id.* at 633.)

Tain fully supports Monsanto's position. In sharp contrast to the 1978 chiropractic initiative, Prop 65 grants IARC the unilateral power to require the State of California to add a substance to the Prop 65 list by declaring that substance a carcinogen. No language in Article II, § 12 indicates that application of the constitutional prohibition is limited to situations in which the non-governmental entity *intends* to impose its will on the State of California. While there is every reason to believe that the IARC working group acted with full awareness of the effect of its glyphosate determination on the Prop 65 list, the absence of awareness does not diminish IARC's "power." Under either scenario, the Labor Code listing mechanism *requires* OEHHA to adhere to the IARC determination—even when (as here) OEHHA has made a conflicting determination.

B. Prop 65 "Identifies" IARC as an Organization to Which Power Is to Be Delegated

OEHHA further contends that Article II, § 12 is inapplicable for the additional reason that Prop 65 did not "directly" identify IARC in the text of the Labor Code listing mechanism. (OEHHA Br. at pp. 33-34.) That contention is without merit.

Prop 65 states that the list of chemicals "known to the state to cause cancer" "shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1)." (Cal. Health & Saf. Code § 25249.8(a).) The referenced Labor Code section in turn provides that "substances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC)" "shall be presumed ... to be potentially hazardous." (Cal. Labor Code § 6382(a) & (b)(1).) Accordingly, by directly referencing a Labor Code provision that gives binding force to all IARC determinations that a substance is "a human or animal carcinogen," Prop 65 fully satisfies Article II, § 12's "identifies" requirement. The identity of the entity (IARC) granted binding authority over OEHHA's Prop 65 listings is not subject to dispute.

OEHHA asserts that Prop 65 should not be deemed to "identif[y]" IARC because the Legislature *might* at some later time "amend Labor Code section 6382 to eliminate reference to IARC, and thus remove IARC from

the Labor Code mechanism with respect to future listings." (OEHHA Br. at p. 34.) That assertion is irrelevant to Monsanto's as-applied challenge to the Labor Code listing mechanism as it currently exists. Laws are always subject to amendment at some unspecified future date; indeed, the Legislature *might* choose (by a 2/3 vote) to repeal Prop 65 in its entirety. But until such an amendment occurs, the question before the Court is whether the enactment (through initiative) of Prop 65 as currently formulated can be said to have "identif[ied]" IARC within the meaning of Article II, § 12. The only plausible answer to that question is "yes."

Indeed, OEHHA concedes that "IARC was mentioned in the ballot materials supporting Proposition 65." (OEHHA Br. at p. 33.) It nonetheless cites *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194 in support of its contention that Prop 65 should not be deemed to have "identifie[d]" IARC for purposes of Article II, § 12. (*Id.* at pp. 33-34.) OEHHA's reliance on *Apple Valley* is misplaced. That decision held that when a municipality conducts a referendum regarding amendments to its zoning and "general plan" to permit the development of privately owned real property, the referendum should not thereby automatically be deemed to "identif[y]" the owner of the property as someone designated to perform a "function" or granted a "power" for purposes of Article II, § 12. (*Apple Valley*, 7 Cal.App.5th at 209-13.)

Apple Valley makes perfect sense in the context of land-use questions. A decision to relax development restrictions results in a lessening of government restraints; that decision can hardly be said to "delegate" to the property owner the right to perform some official "function" or to provide it with some special "power." An amendment to a municipality's general plan with respect to particular parcels of land will apply to any owner of the parcels, whether the current owner or a subsequent purchaser. (*Id.* at 211.) Contrary to OEHHA's claim, nothing in *Apple Valley* suggests that a statute adopted by initiative does not "identif[y]" a private entity simply because the power(s) explicitly conferred on that entity *might* later be eliminated by statutory amendment.

Indeed, *Apple Valley* stated explicitly that its conclusion regarding the inapplicability of Article II, § 12 was based primarily on the exigencies of land-use referenda, not on the absence of an explicit reference to the current landowner in the referendum. The court explained:

> The initiative did not assign th[e] power [to develop the property] to [the current owner] only. If we were to extend article II, section 12 as requested by Hernandez and the amicus curiae, any land-use initiative would be invalidated as one only would need to establish the company who intended to develop the property, even though the Initiative itself makes no reference to the entity.

(*Id.* at 213.) Such concerns are wholly inapplicable in this case. Prop 65 is designed to attach the coercive powers of government to the findings of a

private entity, not (as in *Apple Valley*) to relax government regulation of privately owned property.

C. Prop 65 Conflicts with the Purposes of Article II, § 12 by Providing a Special Advantage to IARC and Its Findings

Article II, § 12 of the California Constitution is an amalgam of two constitutional provisions enacted "to prevent the initiative from being used to confer special privilege or advantage on specific persons or organizations." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 832.) Prop 65 conflicts with that purpose by providing a special advantage to IARC; it grants special precedence to IARC's carcinogenicity findings, even when (as here) every other major study that has examined the substance in question has determined that it is not a carcinogen. Accordingly, there is every reason to give full effect to the express language of Article II, § 12 by striking down Prop 65's Labor Code listing mechanism as applied to glyphosate.

The history leading to adoption of Article II, § 12 confirms that constitutional provision's application to Prop 65's Labor Code listing mechanism. The first of the two constitutional provisions that eventually became Article II, § 12 was enacted in 1950 in response to two initiatives on the 1948 ballot. Each of those initiatives would have mandated the appointment of designated individuals to specific state offices. The 1950

constitutional provision declared that any initiative statute or constitutional amendment that names an individual to any office shall have no effect. (Cal. Const., former art. IV, § 1d.)

The second constitutional provision, adopted in 1964, was introduced by the Legislature in response to a constitutional amendment proposed by a company that sought to operate lotteries. The company's proposal (ultimately defeated by voters) would have established a state lottery and designated the company as the lottery's administrator. The 1964 constitutional amendment, adopted at the behest of the Legislature, stated that any amendment that names any private corporation "to have any power or duty" shall have no effect. (Cal. Const., former art. IV, § 1d(b).) The Legislature made plain that it intended its prohibition to sweep broadly: it rejected an amendment that would have limited the prohibition to only "profit-making" entities. (*Calfarm*, 48 Cal.3d at 833.)[1]

One can readily discern from this history that voters intended the prohibition against initiative legislation that provides special advantage to private parties to apply broadly. The prohibition was adopted following initiative efforts designed to garner special advantage for both individuals and organizations; in response, the Article II, § 12 prohibition covers both

[1] In 1966, the Constitution Revision Commission combined the two provisions and adopted (with the approval of voters in 1966) the wording now found in Article II, § 12.

groups. Moreover, the history makes clear that the prohibition applies without regard to whether the entity granted the special advantage is a profit-seeking entity.

OEHHA contends that IARC is not the sort of entity that the proponents of Article II, § 12 had in mind because (it contends) IARC is not a "private" entity. (OEHHA Br. at pp. 33-34.) The California Supreme Court rejected that argument in *Calfarm*, which held that a nonprofit corporation established pursuant to a 1998 initiative measure for the purpose of representing the interests of ratepayers during rate-setting proceedings was a "private" corporation (as that term is used in Article II, §12)—because California officials would not control the appointment of individuals to the board of directors. (*Calfarm*, 48 Cal.3d at 833-34.)

Similarly, IARC must be deemed a "private" entity because it is not controlled by California public officials, or even by United States government officials. Rather, IARC is controlled by foreigners unanswerable to the citizens of California, and thus there is no assurance that, if given a special advantage in establishing California pesticide policy, IARC will use that advantage with the best interests of California citizens in mind. (See also, *California Assoc. of Retail Tobacconists v. California* (2003) 109 Cal.App.4th 792, 805, 828-29 [commissions established by 1998 initiative statute were "public" entities—and thus not subject to

Article II § 12—precisely because all their members were to be appointed by California public officials].)

Finally, OEHHA contends that IARC is exempt from the restrictions of Article II, § 12 because it is not a "corporation." Citing *Calfarm*, OEHHA argues that the court should look to the Corporations Code to determine whether an entity is a corporation, and that IARC does not fit within any of the categories of "corporations" recognized by the Corporations Code. (OEHHA Br. at p. 30.) OEHHA has misread *Calfarm*, which expressly *declined* to rely on the Corporations Code in determining whether the entity in question in that case was a "private corporation." (*Calfarm*, 48 Cal.3d at 833-34.) Instead, the Supreme Court focused on rules governing operation of the entity in determining that the entity was, indeed, a "private corporation" subject to Article II, § 12. (*Ibid.*)

As Monsanto has explained at length, a "corporation" is commonly understood to mean "a body formed and authorized by law to act as a single person although constituted by one or more persons and legally endowed with various rights and duties including the capacity of succession." (Monsanto Opening Br. at p. 27 [quoting Merriam-Webster Online].) IARC fits comfortably within that definition. Moreover, the history leading to enactment of Article II, § 12 indicates that the provision was intended to be interpreted in that broad sense. The constitutional provision and its two

predecessors were designed to cover delegations to both "individuals" and "corporations," thereby indicating an intent to cover the entire field—both natural persons and artificial entities.

If, as urged by OEHHA, the term "corporation" were defined narrowly so as to encompass only those entities described in the Corporations Code, numerous artificial entities, including partnerships and LLCs, could escape the restrictions imposed by Article II, § 12. It is not reasonable to assume that the citizenry, in adopting Article II, § 12, intended the prohibition against providing a "special advantage" to private entities to be so easily evaded.

D. IARC Has Been Beset by the Very Conflicts of Interest and Irregularities that Article II, § 12 Was Designed to Prevent

As outlined above, a fair reading of Article II, § 12 can lead to only one conclusion: the constitutional provision applies to foreign entities such as IARC that are not accountable to California public officials and voters. There is simply too great a danger that such entities will utilize any special advantages afforded them by an initiative statute to serve their own interests, not those of the State.

OEHHA has responded by attempting to place IARC on a pedestal. It repeatedly asserts that IARC is a highly regarded scientific body whose work is widely accepted by governments around the world. (OEHHA Br. at

pp. 17-22.) According to OEHHA, IARC's carcinogenicity findings are the product of "recognized international experts with no identified conflicts of interest." (*Id.* at 47.)

WLF does not believe that IARC's reputation is relevant to whether Prop 65's delegation of authority to the IARC complies with the California Constitution. But because OEHHA has made IARC's supposedly sterling reputation an issue, a response is warranted. IARC is, in fact, an entity beset by controversy and credibly accused of condoning blatant conflicts of interest among its scientists. Indeed, it is exhibiting the very sorts of self-interested conduct that led to adoption of a constitutional amendment prohibiting the delegation of powers to entities not answerable to the people of the State.

For example, recent press reports have disclosed that Christopher Portier played a leading role in IARC's evaluation of glyphosate despite a severe financial conflict of interest. Prior to joining IARC, Portier was affiliated with the Environmental Defense Fund, which has actively litigated against *all* use of pesticides. Although he had no prior experience working with glyphosate, Portier in 2014 chaired the IARC committee that proposed glyphosate as a substance to be studied by an IARC working group. He then served as an "invited specialist" and "external special advisor" to the working group.

What Portier failed to disclose was his financial ties to law firms that have filed numerous products-liability claims against Monsanto based on glyphosate's alleged carcinogenicity. The very week that IARC listed glyphosate as a probable human carcinogen, Portier signed a lucrative consulting contract with two such law firms, under which he was to assist the firms with their glyphosate litigation. According to an October 2017 expose in the *Times of London*, Portier had been paid $160,000 for his work as of June 2017. Ben Webster, *Weedkiller Scientist Was Paid £120,000 by Cancer Lawyers*, Times (London), Oct. 18, 2017. Moreover, Portier admitted that he had been hired by one of the law firms (for work unrelated to glyphosate) at least two months *before* the IARC issued its glyphosate determination. *Ibid.*

Following IARC's glyphosate determination, Portier extensively lobbied a variety of governmental bodies to accept the determination and to reject contrary findings by the European Food Safety Authority (EFSA) and other science groups. Yet when engaged in such activities, he repeatedly neglected to mention that he was on the payroll of the plaintiffs' bar.

Similarly troubling is the conduct of Aaron Blair, a retired epidemiologist *who led IARC's review of glyphosate* in 2015. A recent Reuters report revealed that Blair was aware of significant scientific evidence indicating that glyphosate is *not* a human carcinogen, yet he did

not bring that evidence to the IARC working group's attention. Kate Kelland, *Cancer Agency Left in the Dark over Glyphosate Evidence*, Reuters, June 14, 2017.

One of the largest and most highly regarded studies of the effects of pesticide use on humans is the Agricultural Health Study (AHS), a study of about 89,000 American agricultural workers that has been gathering detailed health information from participants for the past 25 years. Blair played a key role in a research study based on data collected by the AHS. In 2013, the researchers issued a draft report that concluded that glyphosate was not a human carcinogen. Yet when the study was published in final form, it omitted any discussion of glyphosate and other herbicides.

The glyphosate evidence was never even considered by the IARC working group, because it was never brought to the working group's attention by Blair, the group's leader. The IARC (unlike many similar bodies) has a policy of never considering studies that have not been published in a peer-reviewed journal. But that policy only serves to highlight the fact that Blair and his fellow researchers deliberately chose not to publish a report that concluded that glyphosate was not a human carcinogen and that independent observers have concluded should have been published.

Blair later told reporters that the glyphosate material was deleted from the published study not because it was unreliable but "because there was too much to fit into one scientific paper." (*Ibid.*) Other, independent scientists who reviewed the draft study concluded that there was no legitimate reason not to publish the glyphosate material. (*Ibid*.) Even Blair conceded that the material exonerated glyphosate and would have affected IARC's final determination had it been presented to IARC. (*Ibid*.) Blair's unusual conduct has led some to suggest that Blair deliberately concealed his research findings (*ibid*)—not the sort of conduct one would expect from a scientist charged with supervising a purportedly unbiased study of glyphosate.

In sum, IARC's integrity has been widely questioned in recent years. At the very least, Monsanto is entitled to a remand to permit it to engage in discovery to permit it a closer look at some of the explosive new evidence that has been recently revealed. More importantly, OEHHA should not be permitted to defend its position based on IARC's supposedly sterling reputation, when the evidence suggests that IARC lacks such a reputation and is precisely the sort of special-interest group that Article II, § 12 had in mind when it prohibited the state government from providing special advantages to private entities.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that the trial court's judgment of dismissal be reversed in its entirety.

Dated: November 21, 2017

Respectfully submitted,

/s/ Gregory Herbers

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that, according to the word-count feature of the Microsoft Word computer program used to prepare this brief, the foregoing Brief of Washington Legal Foundation as *Amicus Curie* in Support of Appellants contains 6,904 words, including footnotes, but excluding any content excepted by Rule 8.204(c)(3).

Dated: November 21, 2017

/s/ Gregory Herbers

PROOF OF SERVICE

(i) I declare that I am over 18 years of age and not a party to this action. I am employed in the District of Columbia. My business address is 2009 Massachusetts Ave., NW, Washington, DC 20036.

(ii) On November 21, 2017, I served a copy of the following document:

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Dated: November 21, 2017

_____
Cory L. Andrews