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November 22, 2017

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WLF Asks California Appeals Court to Rein In Controversial Prop 65 Listing Mechanism

(Monsanto Co. v. Office of Environmental Health Hazard Assessment)

“The listing mechanism not only delegates substantial policy-making authority to unaccountable private parties, but it fails to establish any adequate safeguards against the arbitrary exercise of that power: no California governmental body retains ultimate discretion to determine whether IARC’s classification determinations are binding on Californians.”

—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation yesterday asked the California Court of Appeal’s Fifth Appellate District to reverse a trial court decision that sustained the California Office of Environmental Health Hazard Assessment’s (OEHHA) controversial listing of glyphosate as a potential carcinogen under its Proposition 65 (Prop 65) warning regime.

Glyphosate is a popular herbicide that is used worldwide, including throughout the U.S. and California, in the cultivation of major crops. California’s Prop 65 law prohibits businesses from exposing Californians to listed chemicals “known to the state to cause cancer” without first providing a warning. By statute, that list includes any substances designated as potential carcinogens by the International Agency for Research on Cancer (IARC), a private organization. This appeal arises out of Monsanto’s as-applied challenge to OEHHA’s listing of glyphosate under Prop 65—even though OEHHA has itself independently determined that glyphosate is unlikely to cause cancer in humans.

In support of Monsanto’s challenge, WLF’s brief contends that OEHHA’s obligatory reliance on IARC to add glyphosate to the Prop 65 list constitutes an improper delegation of rulemaking authority in violation of the California Constitution. WLF argues that the glyphosate listing surrenders control over a crucial 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.

WLF further argues that by granting IARC the power to determine which chemicals are placed on the Prop 65 list maintained by OEHHA, Prop 65’s listing mechanism violates Article II, § 12 of the California Constitution, which expressly prohibits designating “any private corporation to perform any function or to have any power or duty.” Reliance on IARC is especially problematic, WLF’s brief contends, because IARC is beset by controversy and stands 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.

Celebrating its 40th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.