CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

September 14, 2020

Hon. Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Letter Brief in Support of Review in *American Chemistry Council v. Office of Environmental Health Hazard Assessment, et al.*, S263931. CRC 8.500(g).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

IMPORTANCE OF ISSUE AND INTEREST OF CJAC

The Civil Justice Association of California ("CJAC") urges the Court to grant review of this opinion and clarify the important statewide issue it presents:

> **Should an administrative agency's decision under Proposition 65 to list a chemical as a human carcinogen be set aside when based on the agency's failure to follow its own rules?**

Specifically, must the Office of Environmental Health Hazard Assessment ("OEHHA") comply with its own published Guidance Criteria in determining whether to list under Proposition 65, diisononyl phthalate ("DINP"), as a chemical known to cause cancer in *humans*? That Criteria permits consideration of evidence derived from rodent experiments, but adds that this evidence must be balanced with whatever other presented evidence shows the chemical is *not* a cancer hazard to humans. Amicus believes that because this second half of the determination was not taken the decision should be set aside and remanded for reconsideration.

To be sure, underlying this legal question is a more fundamental one about who we are as a people and what kind of representative government we established to secure justice and liberty for ourselves? If our government need not say what it means and mean what it says when

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it comes to obeying rules for its own decision-making, then it is free to say and do anything, to lie about what it does or says and excuse it by asserting that the decisions made are in compliance with whatever is required. If we do not wish to visit that dystopian consequent upon us, we must recognize that "words matter,"[1] and they matter especially for a government that should set an example for all to follow, an example that is inspirational and aspirational, not cynical and defeatist accepting whatever the government decides is best for us.

CJAC – a 42-year-old organization committed to making California's civil liability laws more fair, consistent, economical and certain – is vitally interested in and impacted by this opinion. Our members are businesses, manufacturers, professional associations and financial institutions. Many members use or sell products containing DINP; some even use it in products they manufacture, and others provide liability insurance to companies that use or sell such products. Unsurprisingly, the listing of a warning about a chemical under Proposition 65 "known to cause cancer in humans" that must be placed upon or accompany any product containing it has an adverse impact on the continued manufacture, sales or use of that product. Accordingly, it is critically important that these required "warnings" about chemicals be accurate and made in compliance with the administrative agency's own rules governing that determination.

Moreover, once a Proposition 65 "warning" about a chemical's cancer causing propensities is required to be posted on or accompany products that contain it, litigation inevitably follows. "[C]itizen prosecutors . . . have filed more than 30,000 violation notices under [Proposition 65] since it went into effect in 1998." Geoffrey Mohan, *You See the Warnings Everywhere. But Does Prop. 65 Really Protect You?*, *Los Angeles Times*, July 23, 2020.

Four consecutive [California] attorneys general have accused

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[1] "At Cornell University, my professor of European literature, Vladimir Nabokov, changed the way I read and the way I write. Words could paint pictures, I learned from him. Choosing the right word, and the right word order, he illustrated, could make an enormous difference in conveying animage or an idea." Justice Ruth Bader Ginsburg, *Advice for Living*, *N.Y. Times*, Oct. 1, 2016.

> these citizen enforcers and their attorneys of preying on companies that can ill afford to defend themselves, of filing weak or frivolous cases, collecting unreasonable fees, and offering illusory remedies in settlements that vaccinate companies from further accountability for their products.

Id.

This litigation onslaught is expensive and time consuming to defend, increasing costs to consumers, clogging courts and primarily rewarding a coterie of Proposition 65 plaintiff law firms with little corresponding public benefit. When the listing decision that a chemical is carcinogenic to humans runs afoul of the agency's own rules about how that determination should be made, these deleterious consequences are exacerbated.

REASONS WARRANTING REVIEW

1. The Opinion Disregards Sound Public Policy and High Court Authority by Allowing an Administrative Agency Discretion to Ignore its own Rules for Determining if a Chemical should be Listed as Causing Cancer in Humans.

There is nothing startling or even controversial about the proposition that agencies must comply with their own rules when making important decisions affecting others. After all, this is the teaching of *United States ex rel. Accardi v. Shaugnessy* (1954) 347 U.S. 260, 268 and its progeny, which hold that an administrative agency cannot "exercise its . . . discretion contrary to [its own] existing valid regulations." See also *Amuluxen v. Regents of University of California* (1975) 53 Cal.App.3d 27, 36, citing *Accardi* for the legal principle that "if the government agency has established [employee] discharge regulations the agency must comply with [them] . . . even if [it] could have discharged the employee summarily."

While numerous theories have been advanced to explain what legal principles undergird the "*Accardi* doctrine," Justice Marshall sought to rationalize existing *Accardi* cases as being "explicable in no other terms" than due process. *United States v. Caceres* (1978) 440 U.S. 741, 757-58, n. 1; Marshall, J., dissenting. "Underlying these decisions," he wrote, "is a judgment, central to our concept of due process, that government officials no less than private citizens are bound by rules of law." *Id*. "[T]he

Due Process Clause is first and foremost a guarantor of *process*. It embodies a commitment to procedural regularity independent of result." *Id*. at 764; italics original.

Of course, an "arbitrary" governmental decision often violates due process. "We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . .." *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845-46; internal citations omitted. Accord: *People v. Ramirez* (1979) 25 Cal.3d 260, 267 ("The public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.").

The appellate opinion does not mention *Accardi* or its descendants nor discuss due process and its relationship to arbitrary and capricious decision making. Neither does the opinion discuss the need for OEHHA and the Committee to follow their own rules when making decisions as to which chemicals should be listed as human carcinogens pursuant to Proposition 65. Nonetheless, the opinion concludes "we cannot assume Committee members failed to follow the criteria they were instructed [by staff] to follow and instead were led astray by [the Chairman's] somewhat confusing and possibly erroneous interpretation." 51 Cal.App.5th at 929.

Despite these well-established but non-discussed authorities, OEHHA accepted, and the appellate opinion gave its imprimatur to, the decision of OEHHA's Carcinogen Identification Committee ("Committee") that the chemical DINP[2] satisfies the published Guidance Criteria requirement that it "clearly show," by "the weight of the scientific evidence," that it "causes invasive cancer in animals (*unless the mechanism of action has been shown not be relevant to humans*)." *Id.*;

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[2] DINP is a widely used chemical for softening or "plasticizing" polyvinyl chloride. It is used to "improve the flexibility, pliability, and elasticity of a variety" of products, ranging from "vinyl flooring, wire and cable insulation, stationery, coated fabrics, [and] gloves . . . [to] roofing materials." Petition for Review ("Pet."), p. 14.

italics added. Yet the Committee's decision, and by extension OEHHA's rubber stamping of it, does not comply with this standard because the Committee Chairman arrogated to himself (as the self-identified drafter of the Criteria) the role of a judge who proceeded to erroneously instruct the other six Committee members that the prepositional phrase, beginning with "unless" and set-off by parentheses, can be ignored when there is "no epidemiological data." (The pertinent Criteria guideline does not mention "epidemiological data.") He instructed Committee members that this required them to "go solely on the animal data" and give no credence to evidence about the parenthetical "mechanism of action" prong mentioned in the Criteria.

But there was evidence submitted to the Committee showing that the "mechanism of action" in the animal studies "was not relevant to humans." In fact, overwhelming scientific evidence shows it "is *not* a cancer hazard to humans." Pet. at 8, 30-31; italics added. The Chairman simply misread the pertinent Criteria and wrongly instructed his colleagues that because Proposition 65 does not ask whether a chemical causes cancer in humans, the question before them was solely whether "this stuff cause[s] cancer." 51 Cal.App.5th 927. That was not the sole question before the Committee; and the purpose of Proposition 65 is "to protect people and not household pets or livestock [or laboratory rats]." *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425, 435. But because there was no dispute that the animal studies submitted showed cancer in rats from prolonged DINP exposure, that "was all she wrote." Ernest Tubb, *That's All She Wrote* (1942)(sheet music). Four of the 7 Committee members voted with the Chairman making it a 5 vote majority for listing DINP as a human carcinogen.

The opinion concedes that the Chairman provided the Committee a "garbled and possibly erroneous interpretation of the law" rather than correctly reading and interpreting the guidance criteria. This lacuna was supposedly remedied by *staff* "twice instruct[ing the Committee] to follow" the Criteria, though apparently without any explanation from staff as to how that Criteria was to be interpreted and applied. A review of the transcript and the Chairman's above-quoted guidance to his colleagues suggests inordinate, undue and confusing influence on what the Criteria means and how much and what kind of evidence was necessary to satisfy the second prong of the applicable test. Petitioner cited

substantial evidence showing a serious question as to whether the agency failed to comply with its own guidelines.

2. The Opinion Shows a Disturbing Disregard of the Deleterious Consequences Flowing from the Administrative Agency's Decision to Ignore its Own Rules.

When OEHHA neglects to follow its own rules for determining what chemicals should be listed as human carcinogens, errors are bound to occur. Some negative consequences of these "errors" are mentioned by the opinion: causing "manufacturers to replace DINP with other chemicals that are less safe, not as well studied, and less effective;" "an increase in unnecessary warnings on consumer products;" "overuse of Proposition 65 warnings [that] will cause individuals to become desenstitized to legitimate warnings that *are* supported by scientific evidence;" and "a barrage of harmful and costly litigation filed by 'bounty hunters' against manufacturers who use DINP." 51 Cal.App.5th at 931-32.

Surprisingly, the opinion then dismisses any significance to such deleterious consequences with the remark that "[c]onsequences do not bear on OEHHA's discretion to list DINP" as a human carcinogen. *Id.* While that is true for the Committee's consideration, it is not a reason for the appellate court, or this Court, to turn a blind eye to the effects of the decision made in contravention of the agency's own Criteria. In fact, this ivory tower "divorced from reality" attitude by the opinion is bizarre and dangerous. One would hope that negative consequences resulting from any administrative agency's determination are relevant for consideration by courts charged with reviewing the propriety of that decision.

Contrary to the opinion's denigration of real world impacts in its reasoning, courts often afford great weight, as well they should, to the "practical consequences" of their decisions. "This court has an obligation to consider the practical consequences of its decisions." *Williams v. Superior Court* (1989) 49 Cal.3d 736, 751; concurring and dissenting opn. of Broussard, J. "Our . . . final reason was . . . to 'avoid a number of practical consequences adverse to the administration of justice and the right of fair trial.'" *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 307; dissenting opn. of Mosk, J., quoting from *People v. Smith* (1983) 34 Cal.3d 251, 261. "We ought not close our eyes to the practical

consequences of a rule which would allow a party to avoid an arbitration commitment . . .." *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322-23.

Indeed, ignoring or disregarding the real world effect of their opinions is not conducive to the administration of justice. "[S]elf-restraint motivated by *failing to anticipate the consequences of [a court's] own rulings* seems unlikely to promote a stable regime that limits judicial overreaching." Abramowicz & Stearns, *Defining Dicta* (2005) 57 *STAN. L. REV.* 953, 1013; italics added.

3. The Opinion Indisputably Concerns a Matter of First Impression on an Issue of Continuing Public Interest that Needs and Deserves this Court's Clarifying Guidance.

The parties to this case and amicus are unanimous in their belief that the opinion is vitally important. Respondent sought and succeeded in getting it published on the ground that it is "the first appellate decision" addressing "a legal issue of continuing public interest"—the scope and application of the mechanism by which the state's qualified experts determine to list chemicals as carcinogens or reproductive toxins under Proposition 65. OEHHA Request for Publication, Exhibit B to Pet.

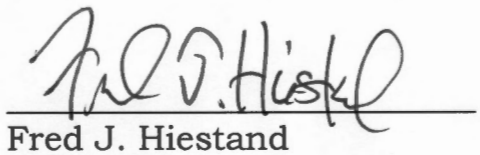
Left undisturbed, the opinion gives a "green light" for litigation against manufacturers and distributors of a wide range of useful products in which a chemical is listed, perhaps improperly in violation of the agency's own rules governing that determination, as a human carcinogen. While the opinion concerns the listing of DINP and its use as a plasticizer, it effectively serves to insulate the agency from a challenge that its listing violated its own process for making that determination.

Already, since OEHHA listed DINP in 2013, nearly 1,400 60-day notices have been filed with the California Attorney General's office alleging the inadequacy of warnings on various products. That defendants may contest these enforcement actions by proving its products contain concentrations of the chemical below the safe harbor set by OEHHA (27 CCR § 25705), the cost of doing so often exceeds what it cost to settle. "Litigating Proposition 65 enforcement actions has cost businesses more than $370 million in settlements since 2000," in which "[a]ttorney fees account for nearly three-quarters" of that amount. Mohan, *You See the Warnings Everywhere*, *supra*.

CONCLUSION

This case presents the Court with an opportunity to provide needed guidance and clarification on the important issue of whether an administrative agency should be required to hew to its own rules when making a determination affecting the public interest. Amicus asks the Court to seize this opportunity.

Respectfully submitted,



Fred J. Hiestand
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Proof of service attached

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On September 14, 2020, I served the foregoing document(s) described as: CJAC *Amicus Curiae* Letter Brief in Support of Review in *American Chemistry Council v. Office of Environmental Health Hazard Assessment, et al.*, S263931 on all interested parties in this action by transmitting via TrueFiling to the following:

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

Executed this 14th day of September 2020 at Sacramento, California.

/s/ David Cooper
David Cooper