

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 27 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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

ORDER

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.

1 *California Chamber of Commerce v. Bonta*, No. 21-15745

2 Forrest, J., dissenting.

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

11 The court relies on the Supreme Court's decision in *Elrod* that the
12 infringement of First Amendment rights “for even minimal periods of time,
13 unquestionably constitutes irreparable injury.” 427 U.S. at 373. *Elrod* is
14 distinguishable. In that case, it was “clear . . . that First Amendment interests were
15 either threatened or in fact being impaired *at the time* relief was sought.” *Id.*
16 (emphasis added). Indeed, the Court concluded that a First Amendment injury “was
17 both threatened and occurring at the time of respondents' motion.” *Id.* But here, the
18 record is devoid of any evidence supporting CERT's conclusory assertion that the
19 district court's preliminary injunction order threatened or impaired its First
20 Amendment right to petition for redress. CERT does not contend that at the time it
21 moved for an emergency stay it intended to file any Proposition 65 enforcement

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

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

13 And even if such a showing could demonstrate some measure of irreparable
14 harm, in my view the circumstances presented in this case still do not justify the
15 exercise of our discretion in granting a stay where there are competing First
16 Amendment interests at play. *Id.* at 433 (“A stay is not a matter of right, even if
17 irreparable injury might otherwise result.”). It is not at all clear how the prior
18 restraint doctrine referenced by the court applies to the First Amendment right to
19 petition, as opposed to the right to speak. This is of particular importance because
20 the preliminary injunction order allows parties seeking to enforce Proposition 65 to

1 continue engaging in expressive conduct, such as sending demand letters, and
2 prohibits only the filing of lawsuits. Additionally, the California Chamber of
3 Commerce has raised serious questions regarding whether the warning required by
4 Proposition 65 as relates to acrylamide is permissible compelled commercial speech.
5 Both of these points undermine CERT's likelihood of success on the merits. For
6 these reasons, I would deny CERT's motion to stay the district court's preliminary
7 injunction.