IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

CONAGRA GROCERY PRODUCTS COMPANY, NL INDUSTRIES, INC., AND THE SHERWIN-WILLIAMS COMPANY,

Applicants,

v.

THE PEOPLE OF CALIFORNIA,

Respondent.

APPLICATION TO THE HON. ANTHONY M. KENNEDY FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH APPELLATE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

Pursuant to Supreme Court Rule 13(5), ConAgra Grocery Products Company, NL Industries, Inc., and The Sherwin-Williams Company (collectively, "Applicants") hereby move for an extension of time of 30 days, to and including Thursday, June 14, 2018, for the filing of a petition for a writ of certiorari to review the decision of the Sixth Appellate District Court of Appeal of the State of California dated November 14, 2017 (Exhibit 1). A petition for review to the Supreme Court of California was denied on February 14, 2018 (Exhibit 2). The jurisdiction of this Court is based on 28 U.S.C. §1257.

1. Unless an extension is granted, the deadline for filing the petition for certiorari will be Tuesday, May 15, 2018.

2. This case presents exceptionally important questions about the constitutional limits on public-nuisance adjudication. This case began 18 years ago

as a product-liability lawsuit filed by a group of California municipalities against companies that sold white lead carbonate pigments for use in residential paint in the early twentieth century. Those product-liability claims ran into obvious statute-of-limitations and evidentiary problems, as the defendants had not sold lead paint for several decades, and there was no evidence linking any of their products to any particular injury. Undeterred, the plaintiff municipalities convinced the California courts to allow their lawsuit to proceed under a novel and expansive public-nuisance theory. Under this new theory, the lead paint that was used in thousands of individual homes as the result of thousands of individual decisions by thousands of individual homeowners, architects, and contractors would be treated as an "indivisible" public nuisance, and any defendant could be held jointly and severally liable for the entire nuisance as long as its conduct was a "very minor force" in the indivisibly treated, collective presence of lead paint, regardless of whether the defendant's conduct was causally connected with the presence of lead paint anywhere.

3. In addition, defendants' liability would not be premised on any product defect or failure to warn, but rather on defendants' *promotion* of lead paint for a common, lawful use in the early 1900s (long before federal or California law prohibited the sale of lead paint for residential use). But while the allegedly tortious conduct was defendants' promotion of lead paint, plaintiffs would not be required to prove that anyone actually relied on defendants' promotions in deciding to use lead paint in their homes. Instead, as long as there was proof that each defendant's

promotions was "at least a very minor force" in the creation of the entire "indivisible" nuisance, that defendant could be held jointly and severally liable for the entire cost of inspecting and abating all interior residential lead paint in the plaintiff jurisdictions. On the basis of this theory, Applicants were ordered to pay hundreds of millions of dollars to inspect for and remediate interior lead-based paint in more than a million homes across ten of California's largest cities and counties.

4. The imposition of massive retroactive liability based on advertisements from the early 1900s runs roughshod over fundamental principles of due process. Due process demands individualized determinations of liability, and collective actions cannot be used to impose liability without reliable evidence that the individual defendant caused the harm for which it is being held liable. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352, 365-367 (2011). The imposition of immense retroactive liability is all the more problematic because the court held defendants liable based solely on their advertisements—*i.e.*, their speech—without any proof that those advertisements were false, deceptive, or misleading, or that any individuals even relied on them in deciding to purchase or use lead paint. That runs afoul not only of due process, but of the First Amendment as well. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996).

5. Applicants' Counsel of Record, Paul D. Clement, was not involved in the proceedings below and requires additional time to familiarize himself with the extensive factual record and research complex legal issues presented in this case, and

to prepare a petition that fully addresses the important and far-reaching issues raised by the decision below in a manner that will be most helpful to the Court. Furthermore, between now and the current due date of the petition, Mr. Clement has substantial briefing and oral argument obligations, including a reply brief in support of certiorari in *Coscia v. United States*, No. 17-1099 (U.S.), an opening brief in *United States ex rel. Oberg v. PHEAA*, No. 18-1028 (4th Cir.), an opening brief in *Ky. Waterways Alliance, et al. v. Ky. Utils. Co.*, No. 18-5115 (6th Cir.), a reply brief in support of certiorari in *N. Arapaho Tribe v. Wyoming*, No. 17-1159 (U.S.), a brief opposing a motion to affirm in *Rucho v. Common Cause*, No. 17-1295 (U.S.), and oral argument in *Walker v. City of Calhoun*, No. 17-13139 (11th Cir.).

For the foregoing reasons, Applicants request that an extension of time to and including Thursday, June 14, 2018, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,

April 20, 2018

PAUL D. CLEMENT
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20001
(202) 879-5000
paul.clement@kirkland.com
Counsel for Applicants