No. _____

In the
Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY AND NL INDUSTRIES, INC.,

Petitioners,

v.

THE PEOPLE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners (or their predecessors) are two of the dozens of companies that promoted lead pigments for use in house paints from the late-nineteenth to mid-twentieth centuries, when interior residential use of lead paint was both lawful and widespread. Now, decades later, the decision below has deemed those lawful activities a "public nuisance," and has ordered petitioners to pay hundreds of millions of dollars to remedy the continued existence of lead paint inside residences constructed before 1951 in ten of the most populous counties in California.

This massive judgment was not imposed because petitioners' paint was traced to any such residence. Instead, the linchpin for imposing this massive liability was petitioners' speech, not their paint. Yet plaintiffs were expressly relieved of any need to demonstrate that anyone relied on the speech for which petitioners were held liable. In fact, plaintiffs stipulated that they had no proof of reliance, and the trial court expressly held that no such proof was required. Instead, under the legal ruling below, it was enough that petitioners (or their predecessors) promoted lead paint for interior residential use during the first half of the twentieth century. In short, petitioners were ordered to pay hundreds of millions of dollars to remediate a decades-old problem that plaintiffs were not required to trace to either petitioners' paint or their speech.

The questions presented are:

1. Whether imposing massive and retroactive "public nuisance" liability without requiring proof that the defendant's nearly century-old conduct caused any

individual plaintiff any injury violates the Due Process Clause.

2. Whether retroactively imposing massive liability based on a defendant's nearly century-old promotion of its then-lawful products without requiring proof of reliance thereon or injury therefrom violates the First Amendment.

PARTIES TO THE PROCEEDING

ConAgra Grocery Products Company ("ConAgra") and NL Industries, Inc. ("NL") are petitioners here and were defendants-appellants below. The Sherwin-Williams Company ("Sherwin-Williams") was defendant-appellant-cross-complainant below. The People of the State of California ("the People") is respondent here and was plaintiff-respondent-cross-defendant below.

CORPORATE DISCLOSURE STATEMENT

ConAgra is 100% owned by ConAgra Grocery Holdings, Inc. ConAgra Grocery Holdings, Inc. is not a publicly traded company and is 100% owned by the publicly traded entity Conagra Brands, Inc. The Vanguard Group owns more than 10% of the shares of Conagra Brands, Inc.

More than 10% of the shares of NL are owned by Valhi, Inc., a publicly held company that may be considered NL's parent corporation. A majority of the shares of Valhi, Inc. are owned by Valhi Holding Company, which is owned by Dixie Rice Agricultural L.L.C., which is owned by Contran Corporation.

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PETITION FOR WRIT OF CERTIORARI

This petition arises out of a remarkable California state-court decision holding three companies jointly and severally liable for a sweeping effort to remedy whatever lead-paint hazards may exist in any private residence built before 1951 in ten of California's most populous counties. This massive and retroactive liability was imposed on petitioners not because they manufactured residential lead paint, but because they occasionally promoted it for interior residential use during the first half of the twentieth century—when such use was common, lawful, and affirmatively encouraged by the State of California itself.

The decision below imposed hundreds of millions of dollars in liability for petitioners' speech without affording them the most basic protections guaranteed by the Due Process and Free Speech Clauses of the Constitution. Plaintiffs did not need to link petitioners' paint or promotional efforts to specific residences. Indeed, plaintiffs stipulated that they had no proof that anyone relied on the promotional efforts for which petitioners were held liable. But under the extreme version of "public nuisance" liability embraced by the courts below, none of that mattered. In fact, plaintiffs were excused from even having to demonstrate the presence of deteriorating lead paint at any house. And under the remediation order, petitioners must spend several hundred million dollars *looking for the purported nuisance*, if there even is one.

None of this is remotely consistent with basic notions of fairness or fundamental constitutional guarantees. The proceedings below combined the

worst aspects of abusive class actions and massively retroactive CERCLA-like liability. Even those analogies understate the problem. Plaintiffs could not have proceeded as a class because central elements of any traditional tort claim—*e.g.*, whether lead paint is present, how it got there, what state it is in, and so on—vary from property to property. And even CERCLA requires proof of causation, and limits liability to a defendant's proven share of fault. Here, by contrast, the courts below took it on themselves to recognize a form of "public nuisance" liability fundamentally at odds with the core guarantees of due process, which require, at an absolute minimum, that plaintiffs causally connect their injuries to the purportedly tortious acts of defendants.

To make matters worse, the linchpin for this massive liability was petitioners' speech, not their paint. Even the most modest of promotional efforts was deemed a sufficient predicate for massive liability, without any need to show reliance by anyone. That is not an exaggeration. Petitioner ConAgra never itself sold lead paint. Yet the Court of Appeal found that a single brochure *from 1931*, a few other advertisements, and small contributions to a trade association that conducted a lead-paint promotional campaign some 75 years ago sufficient promotion to require remediating the entirety of the (presumed) lead-paint "nuisance" in all ten jurisdictions. It did not matter that the decades-old speech concerned a lawful product for a use that was lawful at the time. Applying twenty-first-century views of the matter, the California courts deemed speech dating back to the turn of the previous century misleading to the tune of

hundreds of millions of dollars. The First Amendment cannot begin to tolerate that result.

While the decision below is, for now, an extreme outlier, it will not stay that way if this Court lets it stand. Municipalities throughout California are already employing this case to seek massive recoveries from other industries, be it holding fossil-fuel companies responsible for climate change, holding pharmaceutical companies responsible for opioid addiction, or holding former PCB manufacturers responsible for decades-old water contamination. And cash-strapped states and municipalities throughout the nation are being encouraged to follow suit by plaintiffs' lawyers promising massive inflows to state and local coffers without the need for any immediate outflows—or the need to prove any of the basic predicates of an ordinary tort case. It is thus imperative that this Court intervene now, before an extreme causation-and-reliance-free form of "public nuisance" liability becomes the weapon of choice in the ongoing tort wars. The stakes are simply too high for this Court not to step in and reaffirm that a "public nuisance" label is no excuse for discarding centuries-old fundamentals of due process and free speech.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 17 Cal. App. 5th 51 and reproduced at App.1-182. The trial court's amended statement of decision, which is unreported, is available at 2014 WL 1385823 and reproduced at App.185-344.

JURISDICTION

The California Court of Appeal issued its opinion on November 14, 2017. A divided Supreme Court of

California denied review on February 14, 2018. Justice Kennedy extended the time for filing a petition for certiorari to and including July 14, 2018. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476-86 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant parts of the First and Fourteenth Amendments to the U.S. Constitution and the California Code of Regulations are reproduced at App.420.

STATEMENT OF THE CASE

A. The Prevalence of Lead-Based Paint

For much of the first half of the twentieth century, residential paint in the United States overwhelmingly included white lead pigments, which improved durability and increased moisture resistance. That state of affairs was the result of myriad decisions made by myriad actors, both private and public. In addition to the thousands of contractors, developers, architects, landlords, and homeowners that chose to use the lead-based paint that hundreds of companies sold, the federal government specified lead-based paint for interior use, and even mandated its use in some government buildings, until the beginning of World War II. California likewise specified lead-based paint in its own new construction contracts until the 1970s.

Indeed, it was not until 1971 that President Nixon signed the Lead-Based Paint Poisoning Prevention Act, Pub. L. No. 91-695, 84 Stat. 2078 (codified as amended at 42 U.S.C. §4801 *et seq*.), which restricted the lead content in paint used in housing built with federal dollars and provided funds for states to reduce the amount of lead in paint. And even then, "there was little understanding about the effects of lead dust." U.S. Dep't of Housing & Urban Dev., *Legislative History of Lead-Based Paint*, https://bit.ly/2qYAf7z (last visited July 13, 2018). Six years later, the Consumer Product Safety Commission banned residential lead-based paint manufactured after February 27, 1978. 42 Fed. Reg. 44192-201 (Sept. 1, 1977); 16 C.F.R. pt. 1303. But it was not until 1992 that Congress enacted the Residential Lead-Based Paint Hazard Reduction Act, Pub L. 102-550, 106 Stat. 3672 (Oct. 28, 1992) (codified as amended at 15 U.S.C. §§2601-90 and 42 U.S.C. §4851 *et seq*.), which "set out a comprehensive scheme to regulate, and eventually eliminate, the risk of lead poisoning in children from pre-1978 structures." *In re A Cmty. Voice*, 878 F.3d 779, 782 (9th Cir. 2017); *see* 42 U.S.C. §4851a(1). To that end, Congress delegated to the Environmental Protection Agency ("EPA") authority to identify lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil, and to establish national actionable dust-lead hazard standards. 15 U.S.C. §2683.

Meanwhile, California began developing its own efforts to address childhood lead poisoning. In 1986 and 1991, the state enacted the Childhood Lead Poisoning Prevention Acts, California Health & Safety Code §105275 *et seq*. and §124125 *et seq*. Cognizant

that there are many sources of lead in the environment, California opted to fund childhood lead-poisoning prevention programs at the local level by imposing fees on contributors to the presence of lead in the environment in proportion to their estimated contributions. *Id.* §105310. The state assessed the bulk of the fees—85%—to gasoline producers, and assessed paint manufacturers 14% (a figure based on the estimated volume of lead-based paint distributed in the state, not on the manufacturers' promotion of their product). *See* Cal. Code Regs. tit. 17, §33001 *et seq.*

Ultimately, "[i]t was only in 1998 that scientific studies demonstrated … that even very low levels of exposure to lead paint could cause serious damage." App.401. Armed with those scientific advancements, the EPA finalized its rulemaking concerning lead-dust hazards in 2001. *See* 66 Fed. Reg. 1206, 1215 (Jan. 5, 2001). Shortly thereafter, California enacted legislation allocating responsibility for remediating the presence of lead hazards. Recognizing that it is the failure to properly maintain lead paint, not the paint's mere presence, that creates lead hazards, the state put the onus on property owners to prevent and remediate lead hazards. *See* Cal. Health & Safety Code §§17920.10, 17980(c)(l), (e); Cal. Code Regs. tit. 17, §35037. To this day, state law continues to impose that obligation, and provides for enforcement against noncompliant property owners through loss of tax deductions and criminal penalties. *See* Cal. Health & Safety Code §§17980(c)(l), (e), 17985, 17992, 17995-17995.2.

These and other federal and state regulatory efforts have proven remarkably successful. The incidence of lead poisoning has decreased by 90 percent in the past half-century, as has the average American's blood-lead level. Joe Nocera, *The Pursuit of Justice or Money?*, N.Y. Times, Dec. 8, 2007, at C1. By any measure, those developments constitute "a great public health triumph." *Id.* Indeed, the reduction in California was so striking that it prompted an epidemiologist at the California Department of Public Health to declare the existing lead mitigation program "one of the most significant public health successes of the last half of the 20th century." Reporter's Transcript on Appeal ("RT") 4921.

B. Modern Lead-Paint Litigation

In spite (or, perhaps, because) of that "significant … success[]," a predictable pattern emerged: As understanding of the hazards associated with poorly maintained lead paint grew, so did plaintiffs' lawyers' appetite for suing lead paint manufacturers. Beginning in the 1980s, private plaintiffs filed dozens of products-liability suits against the companies that produced lead pigments for paint (and their corporate successors), alleging all manner of traditional tort claims.

Few of these cases met with success. *See, e.g.*, *Skipworth ex rel. Williams v. Lead Indus. Ass'n*, 690 A.2d 169 (Pa. 1997) (affirming summary judgment to defendant on all claims); *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245 (5th Cir. 1997) (affirming dismissal of all claims); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112 (3d Cir. 1993) (same).

Many claims were dismissed on statute-of-limitations grounds, as the relevant conduct was already decades old. And those claims not dismissed as untimely typically failed because plaintiffs plainly could not prove that lead paint manufacturers actually caused them injury. For one thing, the industry voluntarily removed lead from interior paint as soon "as the science became clear[]" enough to justify such action—which made it "hard to make the case in court that the companies had done anything wrong." Nocera, *supra*. Moreover, the mere presence of lead paint on a wall does not in and of itself cause harm; poor maintenance (or improper removal) is the immediate cause of the problem. As a result, "the conduct that" caused any injuries was, "in point of fact, poor maintenance of premises where lead paint may be found by the owners of those premises," and that was not conduct for which paint *manufacturers* could be held liable. *In re Lead Paint Litig.*, 924 A.2d 484, 501 (N.J. 2007). And in all events, even assuming the mere presence of lead paint in a home were injurious, most plaintiffs had no idea who manufactured the paint that was applied to their houses years, if not decades, earlier.

Moreover, because plaintiffs could not prove when lead paint was applied, the paint may have been manufactured and applied *after* the defendants no longer produced or marketed lead paint. Courts thus were reluctant to adopt plaintiffs' expansive theory of harm, under which defendants "not only could be held liable for more harm than they actually caused, but also could be held liable when they did not, in fact, cause any harm to plaintiff at all." *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 551 (1st Cir. 1993); *see also Skipworth*, 690 A.2d at 173.

Unable to prove that lead paint manufacturers were actually responsible for particular injuries, plaintiffs tried a different tack: They started recasting the mere presence of lead paint in residences as a single, indivisible "public nuisance," and claiming that anyone who did anything to contribute to its existence should share joint-and-several liability for its "abatement." "Suddenly, the case[s] [were] no longer about … individual[s] who had been harmed by lead." Nocera, *supra*. Instead, they were simply about whether lead paint manufacturers had any responsibility whatsoever for the presence of any lead paint in homes in the aggregate. Most courts rejected this novel application of nuisance doctrine as contrary to centuries of settled law. *See, e.g.*, *In re Lead Paint Litig.*, 924 A.2d at 505; *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 129-40 (Ill. App. Ct. 2005); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113-15 (Mo. 2007) (en banc); *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 442-58 (R.I. 2008). But it would only take one court to accept this theory to obtain massive recoveries without needing to show any direct link between defendants' conduct and plaintiffs' injuries.

C. Proceedings Below

1. This case began in March of 2000 as a products-liability class action filed by municipal and private plaintiffs' attorneys on behalf of the County of Santa Clara, California, against several lead pigment manufacturers or their alleged successors-in-interest. Santa Clara's initial complaint "alleg[ed] causes of action for strict liability, negligence, fraud and concealment, unjust enrichment, indemnity, and

unfair business practices." App.346. After the defendants demurred, Santa Clara (now joined by three more California counties) filed an amended complaint that deleted the unfair business practices claim and added causes of action for civil conspiracy and nuisance. The defendants again demurred. The court sustained the demurrer without leave to amend as to the conspiracy claim, overruled the demurrer as to plaintiffs' concealment claims, and sustained the demurrer with leave to amend as to the rest. App.348.

In January of 2001, plaintiffs (now joined by six other municipalities) filed a second amended complaint as class representatives *and* on behalf of the People of the State of California. App.347. The second amended complaint again alleged concealment, strict liability, and negligence, and it added a private nuisance claim plus two claims for public nuisance—one on behalf of the People seeking abatement, and one on behalf of the municipality class members alleging "special injury" to municipal buildings. App.347. After yet another round of demurrer proceedings, plaintiffs filed a third amended complaint, which mirrored the prior complaint except in one respect: It "replaced the three nuisance causes of action with a single cause of action for public nuisance." App.348.

The trial court sustained the defendants' demurrer to the nuisance claim. Joining a virtually unbroken string of courts that had rejected identical efforts to expand public-nuisance claims into territory long occupied by products-liability law, the court ruled that plaintiffs' would-be nuisance claims "sound in products liability rather than nuisance." *Cty. of Santa*

Clara v. Atl. Richfield Co., No. CV788657, 2001 WL 1769999, at *1 (Cal. Super. Ct. May 31, 2001). The court subsequently granted summary judgment for the defendants on the remaining products-liability claims. The court ruled that the limitations period began to accrue when lead paint was applied, and because lead paint could not lawfully be applied after 1978, the limitations period had long ago expired. App.352-53.

The Court of Appeal reversed and remanded in part. The court agreed that "the law of nuisance is not intended to serve as a surrogate for ordinary products liability," and thus acknowledged that plaintiffs could not pursue a nuisance claim on a negligence or failure-to-warn theory. App.362. But the court nonetheless allowed plaintiffs' nuisance claim to proceed, reasoning that because it sought abatement rather than damages, whether "the hazard" (*i.e.*, the presence of lead paint inside residences) "cause[d] any physical injury or physical damage to property" was irrelevant. App.365. Instead, the court concluded that the conduct for which the defendants could be held liable was their "affirmative *promotion* of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards." App.365 (emphasis added).

2. After that ruling, the number of public entities litigating the suit on behalf of the People of California predictably grew,[1] and ten public entities filed a fourth

[1] The entities are: Alameda County, Los Angeles County, Monterey County, City of Oakland, City of San Diego, San Francisco City and County, San Mateo County, Santa Clara County, Solano County, and Ventura County. App.2.

amended complaint that withdrew all claims (including their "special injury" claims) *except* the public-nuisance claim, now pursued solely on behalf of "the People" and now based solely on promotion of lead paint for interior residential use. App.25-26.

As trial approached, the trial court ruled that although the allegedly tortious conduct that was the linchpin for liability was the defendants' promotion of lead paint for interior residential use, plaintiffs would not be required to prove that anyone actually relied on any such promotion in deciding to use lead paint inside a residence. Indeed, the court did not even require plaintiffs to identify any actual residences containing lead paint, and it would not allow the defendants to conduct any discovery into individual properties or their owners. App.156-59, 298.

Instead, the court ruled that any and all lead paint found inside any residences in any of the jurisdictions could be treated as a single "indivisible" public nuisance, even though residences contained lead paint (if at all) only as a result of countless individual actions by myriad different homeowners, residents, landlords, and contractors. App.92. And despite decades (if not centuries) of law holding that a nuisance must be tied to a particular condition at a particular location that a court or jury can inspect, *see, e.g.*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926), the court ruled that any defendant could be held jointly and severally responsible for abating that entire "nuisance" so long as its historical promotions were at least a "very minor force" in the collective presence of lead paint inside residential homes in the relevant jurisdictions. As a consequence,

mere proof that a defendant had promoted lead paint for interior use in even one of the jurisdictions at any point (no matter how long ago) would render that defendant jointly and severally liable to inspect for and abate the presence of lead paint in *all* homes built before 1980 in all ten jurisdictions. App.63-64.

3. In March of 2014, the trial court issued a decision holding three companies jointly liable for the presence of lead paint inside all residences built before 1980 in the relevant jurisdictions: ConAgra, which never even sold lead paint itself, but was merely held to have acquired the liabilities of W.P. Fuller & Co. ("Fuller"), a company that sold lead paint during the first half of the twentieth century; NL; and Sherwin-Williams. App.185-344. The court reached that conclusion even though plaintiffs introduced no evidence connecting any promotion of any of these defendants' products to the presence of lead paint in any particular residence, let alone connecting it to any actual or anticipated lead-paint-related injuries. Indeed, plaintiffs did not even prove that any particular residence had lead paint inside it, instead relying on a state-law "presumption" that every residence built before 1978 has lead paint, Cal. Code Regs. tit. 17, §35043 ("Presumed Lead-Based Paint"), and generalized statistics about the number of residences in which lead paint is believed to be present, App.215-16.

Decades-old promotional materials constituted the sole evidence purportedly linking defendants to this "public nuisance." Based on those ordinary commercial activities, plus financial contributions to two trade associations—the Lead Industries

Association ("LIA") and the National Paint, Varnish, and Lacquer Association ("NPVLA")—that at times promoted the use of lead paint, App.13, the court found each defendant liable for all lead paint that might be found in residences in any of the ten jurisdictions. According to the court, because lead paint "is prevalent in the jurisdictions and is of continuing adverse effect," and each defendant "promoted and sold lead paint in the [jurisdictions] for years," their promotions were at least a "very minor force" in the single, indivisible "nuisance" of the contemporary presence of lead paint inside homes in the relevant jurisdictions. App.317. The fact (conceded by plaintiffs' experts) that plaintiffs failed to prove that any of defendants' promotions increased the use of white lead in interior paints was thus deemed irrelevant, as was the fact that plaintiffs failed to prove that defendants were the proximate cause of any (unproven) injuries.

As for defendants' argument that plaintiffs failed to prove that anyone relied on the advertisements that provided the critical link between defendants and the nuisance, the court concluded that "[t]he People do not need to prove reliance" because "[r]eliance is not an element of a public nuisance cause of action." App.298. As for their argument that plaintiffs failed to prove that defendants were the ones responsible for the (presumed) continued existence of lead paint inside residences, the court declared "the existence of alternative sources of lead poisoning … irrelevant to whether lead paint in the Jurisdictions is a nuisance." App.298. *But cf. In re Lead Paint Litig.*, 924 A.2d at 499, 501 (public nuisance has always been limited "to conduct[] performed in a location within the actor's

control"). And the trial court answered defendants' argument that they could not be held retroactively liable decades after the fact based on truthful promotion of a product that was entirely lawful at the time with a rhetorical question: "All this says is medicine has advanced; shouldn't we take advantage of this more contemporary knowledge to protect thousands of lives?" App.320.

The court ordered defendants to pay $1.15 billion into a fund to abate the purported public nuisance, with all three defendants jointly and severally liable. App.26. Because plaintiffs never actually established the location of any interior residential lead paint, the court allocated $400 million of the fund to be spent on determining whether there is any "nuisance" to remediate in the first place. App.339.

4. On appeal, defendants argued, *inter alia*, that plaintiffs failed to prove causation (or reliance) and that imposing liability without proof of causation violated their due process rights. The Court of Appeal disagreed, holding that "the identity of the manufacturer of lead paint at a specific location was of limited relevance" because "Defendants were held liable for *promoting* lead paint for interior residential use," not for actually selling it. App.96. Accordingly, so long as each defendant's promotions constituted "at least '*a very minor force*' in leading to the current presence of interior residential lead paint in a substantial number of homes in the 10 jurisdictions," App.68 (emphasis added), each defendant could be held jointly and severally liable for the abatement of *all* lead paint in residences in the relevant

jurisdictions that was either deteriorated or on a friction surface. App.63-70.

Underscoring just how "very minor" a force would suffice, the court found sufficient evidence that ConAgra was responsible for any and all of this abatement based on (1) a 1931 Fuller brochure that "instruct[ed] consumers to use its lead paint for interior residential use," and (2) Fuller's "participation" in (*i.e.*, financial support for) LIA while it was running promotional campaigns in the 1930s and 1940s. App.56. And as to NL, the court found sufficient a handful of newspaper and magazine articles from the first half of the twentieth century, as well as a salesman's manual and a handbook that "encouraged the use of white lead paint on interior surfaces." App.60.

Based solely on this decades-old speech, the court affirmed the trial court's decision to hold defendants jointly and severally liable for first "discovering … where remediation is necessary" and then providing any necessary remediation in residences built before 1951. App.96. The court reversed as to residences built afterwards, however, concluding that there was no evidence that petitioners promoted lead paint for interior use after 1950. The court thus based the entirety of the judgment on promotions that pre-dated this litigation by more than half a century, and predated the trial court's judgment by at least 65 years.

According to the Court of Appeal, imposing this retroactive and remedial liability based solely on defendants' speech did not violate—or even implicate—their First Amendment rights. App.46-49.

Despite the long line of cases recognizing that commercial speech is protected by the First Amendment and must be false or misleading to lose constitutional protection, the court held that defendants' "promotional advertising and participation in trade-association-sponsored lead paint promotional advertising were not entitled to *any* First Amendment protections" because such promotion "implicitly asserted that [lead paint] was safe for [residential] use when it was not." App.57 (emphasis added).

The court remanded for recalculation of the abatement fund to include only homes built before 1951, and for the appointment of a receiver to manage the abatement fund, but it affirmed in all other respects. App.182. Although the parties dispute the amount of the recalculated fund, there is no dispute that it will be in the hundreds of millions of dollars.[2]

5. Petitioners petitioned the Supreme Court of California for review. A divided court denied the petition over the dissent of Justices Liu and Kruger. App.184.

REASONS FOR GRANTING THE PETITION

The decision below strikes at the heart of basic guarantees of due process and free speech: that individuals will be held accountable only for harms they actually caused and will be penalized for their speech only if, *inter alia*, others demonstrably relied

[2] Because both liability and the federal issues have been conclusively resolved, the remand proceedings through which the trial court will effectuate the remedy are no impediment to this Court's jurisdiction. *See Cox*, 420 U.S. at 479-86.

on that speech to their detriment. The decision below allowed ten California municipalities to hold petitioners liable for abating the entirety of the purported "nuisance" of interior residential lead paint without any need to prove that petitioners' actions—all taken well over half a century ago—caused the injury. Indeed, under the extreme version of "public nuisance" liability unleashed below, plaintiffs were not even required to prove the full extent of the harm; instead, petitioners themselves were ordered to pay for determining the scope of necessary remediation.

That would all be problematic enough under the Due Process Clause even if the underlying conduct that gave rise to the remediation order were not constitutionally protected speech. But the critical linchpin for this massive liability was not petitioners' paint, but their speech. Without requiring any plaintiffs to demonstrate anyone's reliance on that speech, the courts below imposed hundreds of millions of dollars in liability based solely on petitioners' decades-old (and in some cases century-old) promotion of the then-lawful use of their then-lawful products. The First and Fourteenth Amendments cannot remotely tolerate that result.

First, it is a bedrock rule of due process that liability may not be imposed without affording a defendant a meaningful opportunity to demonstrate that his conduct did not actually cause the plaintiff any injury. Due process similarly strongly disfavors retroactive liability. The proceedings below violated these basic norms by combining the worst aspects of abusive class actions and CERCLA-like retroactivity, without any legislative sanction. Fashioning an

extreme version of a "public nuisance" action, the California courts dispensed with any need for plaintiffs to show that petitioners' paint could be found in any residence requiring remediation and imposed massive liability based on promotions run by corporate predecessors nearly a century ago. Indeed, not only were plaintiffs excused from tracing petitioners' paint to particular residences; they were excused from demonstrating the scope of the problem to be remedied. Instead, *petitioners* were ordered to spend hundreds of millions of dollar to determine the scope of the problem and to ascertain which residences need remediation.

Plaintiffs were excused from needing to trace each petitioner's lead paint to any particular residence on the theory that the ultimate conduct giving rise to the "public nuisance" was not paint, but speech. But that effort to explain the deviation from basic due process guarantees only highlights the glaring First Amendment problem with the speech-as-public-nuisance theory embraced below. Make no mistake, petitioners were held liable not for manufacturing lead paint, but for *promoting* it. And they were held liable for that speech without the need for plaintiffs to show that anyone relied on petitioners' speech to their detriment. That fact too is unmistakable: Plaintiffs *stipulated* that they had no evidence of reliance. And the speech at issue occurred half a century ago—in some cases longer— yet was judged with the benefit of hindsight. None of that is consistent with our constitutional commitment to the value of free speech, including commercial speech. The need to prove reliance and avoid extreme retroactivity is only heightened when liability turns on speech. The notion

that plaintiffs' burdens were lightened because the "public nuisance" turned on speech, not conduct, gets things exactly backwards under our constitutional system.

It is tempting to dismiss this extreme version of "public nuisance" as an extreme outlier, but if this Court does not intervene, this outlying doctrine will become the weapon of choice in the tort wars. What plaintiff will bother to satisfy the elements of traditional torts when causation and reliance are excused in "public nuisance" cases? What municipality will say no to an entreaty to enjoy two-thirds of the recovery from out-of-state defendants when doing so involves no need to expend municipal funds, voters like the results, and everyone else is doing it? This is not speculation. Municipalities throughout California have already filed copycat cases against several cornerstone industries of the nation's economy, and states and municipalities throughout the country have not been shy about following suit. Accordingly, absent this Court's invention, this extreme version of "public nuisance" will proliferate to the detriment of bedrock guarantees of due process and free speech.

I. California's Attempt To Impose Massive Retroactive Liability Without Proof That Petitioners Caused Any Identifiable Injury Is Irreconcilable With Due Process.

1. It is a basic requirement of our legal system that defendants may be held liable only for damages causally linked to their own misconduct. Whatever authority states have to impose liability on conspirators, joint tortfeasors, or the like, the

requirement to trace the injury to the party forced to compensate it remains a "bedrock principle." *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014). Consistent with that principle, proof that the defendant caused the plaintiff's injury is and always has been a core element of tort law. *See, e.g.*, Restatement (Second) of Torts §430 (1965) ("In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm."); *id.* §870 (1979); *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). Indeed, even strict-liability torts require proof of causation. *See, e.g.*, Restatement (Second) of Torts §§504-05, 507, 509, 519 (1977). And causation cannot be proven without first proving that the plaintiff actually suffered an identifiable injury.

These principles apply with full force to "collective" and "aggregate" litigation. This Court has repeatedly made clear that the need to prove individualized injury and causation cannot be dispensed with to make a case work as a class action. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011) (reversing certification of class that sought to litigate inherently individualized employment discrimination claims of 1.5 million employees); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (affirming decertification of class that sought to litigate inherently individualized asbestos-related claims of "hundreds of thousands, perhaps millions, of individuals"); *Tyson Foods, Inc. v.*

Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring).

With good reason, as "extrapolat[ing] classwide liability from" anything less than proof that the defendant actually caused each class member's injuries would deprive the defendant "of the ability to litigate its … defense" that causation and/or injury were not proven. *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014). And "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). "[O]ne-on-one 'traditional' modes" of adjudication thus "find expression in defendants' right to due process," *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990), and the protections they provide must be preserved even in class, mass, or any other aggregate form of litigation. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.").

Just as procedural rules cannot be abused to dispense with the requirements to prove the individualized aspects of substantive claims, courts do not have free rein to change substantive law in a manner that disposes of the obligation to show causation. Indeed, it has long been settled that "a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause." *W. & Atl. R.R. v. Henderson*, 279 U.S. 639,

642 (1929). Denying a defendant the opportunity to demonstrate that he did not actually cause a plaintiff's injuries would be a paradigm arbitrary deprivation of private property. A state cannot get around that bedrock constitutional protection through the simple expedient of eliminating the traditional elements of liability against which a defendant is entitled to defend. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 53 (1932) ("[R]egard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required."). In short, labeling something a class action, a mass action, or a "public nuisance" action is no substitute for honoring the basic guarantees of due process.

2. The proceedings below make a mockery of these core tenets of our judicial system. Petitioners have been ordered to pay hundreds of millions of dollars to "remediate" a "public nuisance" that plaintiffs were not even required to prove exists at any particular place. Indeed, a significant portion of the "remediation" effort petitioners were ordered to fund was expressly allocated to investigating whether there even is any interior residential lead paint in need of remediation in the jurisdictions that pressed this novel lawsuit. In other words, petitioners have been ordered to pay the cost of determining whether and to what extent the harms for which they have been held jointly and severally liable exist.

That shoot-first-aim-later order of affairs is utterly foreign to our judicial system, and is a direct product of the extreme variant of "public nuisance" law manufactured by the California courts. Acutely aware that plaintiffs could not meet their burden of

proving the traditional elements of tort law—*i.e.*, breach of a duty, injury, and causation—the courts simply relieved them of those obligations. As the trial court candidly put it, it did not matter whether plaintiffs could "identify the specific location of the nuisance or a specific product sold by each such Defendant," App.298, let alone connect the two. Instead, the continued existence of lead paint inside residences in the jurisdictions was simply "presumed." App.259. Indeed, petitioners were not even permitted to conduct discovery into how many residences actually continue to contain lead paint (or whose lead paint they contain) because, in the trial court's view, those core questions were simply irrelevant to whether petitioners could be held liable. App.156-59.

Having reconceptualized the "injury" at this exceedingly high level of generalization, the courts then proceeded to do the same thing for causation. Plaintiffs were never required to trace any of petitioners' paints to particular residences. Rather, they were required to prove only that petitioners' historical "promotions of lead paint for interior residential use played at least a 'minor' role" in creating the single, indivisible injury of the modern-day "presence of interior residential lead paint" in any of the ten jurisdictions. App.65, 68. Thus, the linchpin for liability was speech, not paint; and the answer to the absence of proof that particular paint reached particular residences was that liability turned on promotion, not on particular paint reaching particular walls.

Making matters worse, plaintiffs did not need to prove that anyone actually relied on (or even saw) the

handful of century-old advertisements to which they pointed—*i.e.*, that the promotions were the (or even a) cause of the "nuisance." App.298 ("The People do not need to prove reliance."). In fact, plaintiffs stipulated that they had no evidence of reliance. Instead, all they had to prove was that each petitioner promoted lead paint for interior use at some point in history. Clearing that lowest of low bars sufficed to render each petitioner jointly and severally liable to investigate *all* of the millions of homes in the jurisdictions built before 1951 and to remedy *all* lead paint hazards found upon such inspections, regardless of whether any given hazard was traceable to any petitioner's paint or speech.

3. None of that is remotely reconcilable with the Constitution and the basic requirement to prove causation and injury. But California's extreme and outlying notion of "public nuisance" is extreme in yet another constitutionally suspect respect: It imposes liability that is retroactive in the extreme. Indeed, the California courts imposed massive liability for promotional efforts nearly a century after the fact.

"[I]n accordance with 'fundamental notions of justice' that have been recognized throughout history," "[r]etroactivity is generally disfavored in the law." *E. Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (plurality) (holding unconstitutional an effort to "reach[] back 30 to 50 years to impose liability … based on [a] company's activities between 1946 and 1965"); *see also id.* at 549 (Kennedy, J., concurring) ("due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity"); 2 J. Story, Commentaries on

the Constitution §1398 (5th ed. 1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."). Accordingly, even a legislative effort to allocate economic responsibility for a societal problem can be "unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Apfel*, 524 U.S. at 528-29 (plurality).

Here, the California courts have reached back not just "30 to 50 years," but nearly a century, "to impose liability … based on … activities" from the early 1900s. *Id.* at 532. In fact, the Court of Appeal expressly found that there was no evidence that any petitioner (or any petitioner's corporate predecessor) had promoted lead paint for interior residential use *since 1950*—50 years before this protracted litigation even began—and it ordered petitioners to remediate lead paint in homes built (at a minimum) more than 65 years before the trial court issued its judgment. The court did so, moreover, after expressly depriving petitioners of the ability to try to prove whether and to what extent the injuries for which they were held liable even exist, let alone whether and to what extent they were caused by petitioners' century-old promotions.

Forcing petitioners to shoulder the enormous burden of remedying the entirety of the purported lead-paint "nuisance" based on conduct that pre-dated this litigation by nearly a century (if not longer) is

exactly the kind of "severe, disproportionate, and extremely retroactive burden" that the Constitution prohibits. *Id.* at 538; *see also id.* at 549 (Kennedy, J., concurring). "Elementary notions of fairness … dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Here, petitioners had neither.

* * *

In short, the proceedings below dispensed with some of the most elementary and "well-established common-law protection[s] against arbitrary deprivations of property." *Oberg*, 512 U.S. at 430. To get around the problem that plaintiffs brought their claims decades too late, the courts shoehorned their products-liability claims into a novel form of "public nuisance" claim with no statute of limitations. To get around the problem that plaintiffs could not identify actual residences that contain lead paint, the courts simply presumed the existence of the lead paint "nuisance." To get around the problem that plaintiffs could not prove whether petitioners' lead paint is the source of this purported "nuisance," the court declared unlawful the mere *promotion* of lead paint for interior residential use. And to get around the problem that plaintiffs could not prove that anyone actually relied on century-old advertising in deciding to apply or keep the interior residential lead paint that (presumptively) continues to exist in each of the jurisdictions, the court declared reliance irrelevant.

The result is a massive and retroactive judgment to remedy a nuisance that plaintiffs were not even

required to prove exists, let alone required to prove that petitioners' purportedly tortious conduct caused. The Constitution simply cannot tolerate such an utterly arbitrary deprivation of property.

II. California's Attempt To Impose Liability For Speech Without Proof Of Reliance Is Antithetical To The First Amendment.

The proceedings below are all the more remarkable—and all the more unconstitutional—because the linchpin for the imposition of massive retroactive liability was not the manufacture of lead paint, but its *promotion*. Petitioners were explicitly and exclusively held liable for speech. And the courts below were equally explicit that plaintiffs were under no obligation to show any reliance on petitioners' promotional speech. The trial court, for example, held unequivocally that "[t]he People do not need to prove reliance." App.298. The plaintiffs, for their part, stipulated that they had no such evidence. Stipulation at ¶1, *Cty. of Santa Clara v. Atl. Richfield Co.*, No. 1-00-CV-788657 (Cal. Sup. Ct. Aug. 13, 2012). Moreover, the courts below did not find that petitioners' speech was false or misleading in any traditional sense; instead, they declared century-old promotions of a then-lawful product for a then-lawful use "inherently misleading" because they "implicitly asserted" that lead paint was safe for interior residential use, which the trial court concluded (with the benefit of considerable hindsight) is not true. App.57.

These core elements of speech-based torts are not optional. The First Amendment jealously guards against imposing massive liability on speech without

significant protections. That is true even of torts that pre-date the Republic and the First Amendment. *See, e.g., N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964). It is true *a fortiori* of novel and extreme theories of liabilities with no comparable historical pedigree. To be sure, the First Amendment does not preclude holding a defendant liable for false or misleading speech, whether commercial or otherwise. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980). But even when speech is actually proven to be false or misleading (which did not happen here), the traditional principles that govern judicial actions for misrepresentations, including proof of reliance on the allegedly false speech, have always required a link—indeed, a substantial link—between that speech and a resulting injury. *See, e.g.*, Restatement (Second) of Torts §525 (1977); Dee Pridgen & Richard M. Alderman, *Consumer Protection and the Law* §2.26, at 2-64 (2002); *Stewart v. Wyo. Cattle Ranche Co.*, 128 U.S. 383 (1888); *Smith* v. *Richards*, 38 U.S. 26 (1839).

That link is essential to ensure that efforts to impose liability based on speech remain consistent with the First Amendment. As this Court has recognized, "erroneous statement[s] of fact" are "inevitable in free debate," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), both in the marketplace for speech and in the marketplace for products. Accordingly, if liability could be imposed for misleading speech at the behest of plaintiffs who did not rely on that speech and cannot demonstrate injury from it, the threat of massive tort liability could inhibit a speaker from voicing his view "even though [he] believe[s] [it] to be true and even though it is in

fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 279. And given the reality that speech can now be broadcast across the world nearly instantaneously, allowing liability based on speech without that core causation requirement could expose defendants to nearly limitless liability. As a result, a causation-free regime may well lead individuals to confine themselves to "statements which 'steer far wider of the unlawful zone,'" thereby "dampen[ing] the vigor and limit[ing] the variety of public debate." *Id.* In short, allowing speech-based claims to be pursued "by one who has suffered no injury, threatens to impose a serious burden upon speech." *Nike, Inc. v. Kasky*, 539 U.S. 654, 679 (2003) (Breyer, J., dissenting from dismissal as improvidently granted).

That is particularly true of a public-nuisance action pursued by (or at least in the name of) government actors. As noted, the First Amendment imposes serious hurdles to liability even when a private citizen is seeking compensation for private injuries, the traditional office of tort liability. But the core office of the First Amendment is to protect against direct government efforts to punish unpopular speech. Such government efforts generally take the form of statutory or regulatory regimes that provide relatively clear notice of what speech is verboten. The proceedings below, by contrast, are the product of an amorphous and novel common-law action that exclusively benefits the government and gives it massive incentives to target private speech. The

result is a perfect storm of First Amendment concerns.[3]

Those First Amendment concerns are still more acute given the retroactive standards that were used to deem petitioners' promotional speech "implicitly" misleading a century after the fact. The courts below unabashedly used "contemporary knowledge" gleaned as "medicine has advanced" to condemn petitioners' speech. App.320. This Court has held time and again, however, that speech promoting a lawful product is protected by the First Amendment even if the product is known at the time to have deleterious health effects. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (tobacco); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184-85 (1999) (gambling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (liquor); *Bigelow v. Virginia*, 421 U.S. 809, 818-25 (1975) (abortion). If that speech may retroactively lose its protection based on later-discovered facts that change how society evaluates the product—but do not alter the truth of

[3] The decision below offends First Amendment values in an additional dimension: by holding petitioners responsible for the speech of trade associations to which they contributed. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.). By imposing massive retroactive liability on petitioners in large part simply for having supported a trade association that published truthful advertisements about their products, the California courts have made protected associational activities "unjustifiably risky." *Id.*

the speech—then the commercial speech doctrine is all but a dead letter.

Yet that is exactly what the courts below did here. To be clear, the courts did not hold petitioners' speech (or the trade association speech in which they "participated") tortious because they found that petitioners were secretly in possession of information about the hazards of lead paint that they concealed from the public. Nor could they, as plaintiffs' own expert conceded that no defendant had "knowledge of any medical or scientific information … that was hidden from the public or public health community." RT5386. At most, then, petitioners possessed only the same information that led the State of California itself to openly promote (indeed, mandate) the use of lead of paint. The proceedings below thus vitiate core First Amendment protections multiple times over and cry out for this Court's review.

III. The Questions Presented Are Exceptionally Important And Have Extraordinarily Far-Reaching Implications.

This case is a radical departure from basic norms of due process and free speech. While there is a temptation to dismiss it as an extreme outlier, absent this Court's intervention, the decisions below will provide a roadmap for municipalities and plaintiffs' lawyers to reap the benefits of massive recoveries without the need to satisfy nettlesome requirements like causation and reliance. Indeed, numerous California municipalities have *already* filed equally sweeping lawsuits against other industries seeking to capitalize on the extreme public-nuisance theory approved below. *See, e.g.*, *People of the State of Cal. v.*

BP P.L.C., Nos. 3:17-CV-06011 & 3:17-CV-06012 (N.D. Cal. filed Oct. 20, 2017) (public-nuisance action seeking to hold fossil-fuel companies responsible for sea-level rise associated with climate change); *Cty. of Mariposa v. Amerisourcebergen Drug Corp.*, No. 1:18-cv-00626 (E.D. Cal. filed May 7, 2018) (public-nuisance action seeking to hold manufacturers and distributors of pain medication responsible for opioid addiction); *City of Long Beach v. Monsanto Co.*, No. 2:16-cv-03493 (C.D. Cal. filed May 19, 2016) (public-nuisance action seeking to hold manufacturers of polychlorinated biphenyls responsible for contamination of public waterways).

This looming threat is hardly confined to California. Other states and municipalities are seeking to follow this case's blueprint. *See* Kimberly Stone, *Public Nuisance Lawsuits Spiraling out of Control*, San Diego Union Trib. (June 14, 2016), https://bit.ly/2JIzBGP (discussing influx of public-nuisance lawsuits). And given the potential pay-offs, it will be difficult for even the most principled of public officials to explain why they are not involved in such litigation when everyone else is doing it.

To be clear, the point is not that public-nuisance law is incompatible with the Constitution. Traditional public-nuisance law has long co-existed with the First and Fourteenth Amendments. But the kind of extreme "public nuisance" law, shorn of traditional constraints, embraced by the courts below is another matter. Traditionally, "the very meaning of conduct in the public nuisance realm" has been limited "to conduct[] performed in a location within the actor's control." *In re Lead Paint Litig.*, 924 A.2d at 499, 501.

Likewise, a defendant's conduct has always been required to be meaningfully linked to the presence of a particular and defined nuisance—*i.e.*, has always been required to be far more than "a very minor force." Those elements together "limit a person's responsibility for the consequences of that person's own acts," which comports with "what justice demands." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). After all, absent those limitations, "the conduct of merely offering an everyday household product for sale [could] suffice" to trigger massive remedial liability if it were later determined that the product was not quite as safe as everyone once thought. *In re Lead Paint Litig.*, 924 A.2d at 501; *see also, e.g.*, Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 940 (2009).

Without this Court's review, that is precisely where public-nuisance law is headed. After all, why bother with the procedural and substantive complexities of a class action if private plaintiffs' attorneys can secure a cut of billion-dollar public-nuisance judgments obtained on behalf of "the People" without having to prove that the defendants' purportedly tortious conduct actually caused any actual person any actual injury? Armed with after-the-fact knowledge and easy-to-obtain proof (especially if there is no statute of limitations) that defendants at some point in time "promoted" their own products, their public-nuisance suits will become impossible to defend against, and will eliminate the line between lawsuits and exactions. In the

meantime, not only will defendants be deprived of property without due process of law, but the constant threat of public-nuisance suits based on nothing more than the promotion of lawful products will severely chill the exercise of First Amendment rights.

In short, the decision below poses an enormous risk to everyone who has ever done business in California, as it opens the door to potentially unbounded suits targeting manufacturers of products sold decades ago in situations where traditional common-law and constitutional protections should prevent recovery. Indeed, the whole point of the public-nuisance theory developed below was to ensure that plaintiffs could recover *notwithstanding* the fact that every traditional path to recovery was closed by common law, state law, federal law, or some combination of the three.

This is an ideal case for this Court to examine the constitutional limits on this brave new world of "public nuisance" law. Precisely because the decisions below embrace such a remarkable variant of public-nuisance liability, the issues are presented starkly. There is no question that the judgment below rests exclusively on petitioners' speech, not petitioners' paint. There is no question that the courts below relieved plaintiffs of any obligation to prove reliance on that speech. And there is no question that the massive liability imposed is retroactive in the extreme, as the Court of Appeal reached all the way back to 1904 to identify promotions for which defendants could be held liable, and expressly concluded that all promotions for which petitioners were held liable came before 1950. This is thus an exceptionally clean case for determining

whether the Due Process Clause and the First Amendment can tolerate the imposition of massive and retroactive liability for speech without even proving causation or reliance. This Court should intervene now, before California's radical departure from bedrock rules of adjudication fundamentally transforms our legal landscape.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

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