No. 18-84

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest.[1] Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF actively engages in research and litigation nationwide over a broad spectrum of public interest issues. In furtherance of PLF's continuing mission to defend individual and economic liberties, PLF has participated in many cases involving the scope of public nuisance theory and its application to business enterprises, including manufacturers of lead paint. *See, e.g.*, *State of Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007). PLF also has participated in several cases before this Court and others on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See, e.g.*, *CTIA v. City of Berkeley*, 138 S. Ct. 2708 (2018), *Spirit Airlines, Inc. v. Dep't of Transp.*, 569 U.S. 903 (2013); *Citizens United v. F.E.C.*, 558 U.S. 310 (2010);

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[1] Pursuant to this Court's Rule 37.2(a), all parties, via blanket consent and Greta Hansen's consent on behalf of all respondents, have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Nike, Inc. v. Kasky, 539 U.S. 654 (2003). PLF submitted an amicus brief in the court below. *People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51 (2017).

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The doctrine of public nuisance, when not strictly cabined, violates property owners' constitutional due process rights. This doctrine is so vaguely and variously defined that commentators have described it as "at least contested, and perhaps confused beyond repair,"[2] and noted that "no judicial consensus has emerged on some of the core issues that should establish the parameters of the tort of public nuisance."[3] The decision below, declaring that paint manufacturers' promotion of the then-lawful lead paint creates a public nuisance, demonstrates both substantively and procedurally the infringement to the guarantee of due process of law.

Due process requires that laws—including common law doctrines—be sufficiently clear and definite to allow persons to understand whether particular conduct violates the law or leaves one open to liability and civil retribution. The decision below severely undermines this constitutional protection by taking the extraordinarily vague and convoluted doctrine of public nuisance and removing all perceptible limits on its application.

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[2] Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Envtl. Aff. L. Rev. 89, 96 (1998).

[3] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 748 (2003).

Moreover, the First Amendment protects against state action that punishes speech that promotes lawful goods and services. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (truthful promotion of prices for alcoholic beverages protected, despite potential harm caused by overindulgence). *See* Pet. App. 75 (Defendants are "liable for *promoting* lead paint for interior residential use . . . the identity of the manufacturer of that lead paint is irrelevant."). The enormous financial punishment of modern paint companies for promoting lawful products decades ago under a newly-developed tort theory cannot be consistent with the constitutional free speech protection.

This Court should grant the petition for writ of certiorari to review and reverse the decision below.

REASONS TO GRANT THE PETITION

I

THE DECISION BELOW CONFLICTS WITH OTHER COURTS AND RAISES AN IMPORTANT NATIONAL QUESTION OF HOW THE DUE PROCESS CLAUSE LIMITS RETROACTIVE APPLICATION OF COMMON LAW TORTS

A basic element of due process of law is that the law must be clear enough that a reasonable person can know beforehand, with some reasonable degree of certainty, what acts will violate the law and what punishment is likely to follow from a violation. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[O]rdinary notions of fair play" prohibit states from enforcing any law written "in terms so vague that men of common

intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

Although most cases involving the "constitutional requirement of definiteness," *United States v. Harriss*, 347 U.S. 612, 617 (1954), addressed criminal statutes, the requirement also applies to nuisance law, particularly where it intersects with First Amendment speech rights. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a protestor was convicted of violating a noise-abatement ordinance that prohibited a person from making "any noise or diversion which disturbs or tends to disturb the peace or good order" of a nearby school campus. *Id.* at 108. The protestor claimed that the law was unconstitutionally vague. While rejecting this claim, Justice Marshall explained that "a basic principle of due process" requires that the law should clearly define its "prohibitions." *Id.*

The dangers inherent in vague statutes exist when judges create vague common law doctrines as well.[4] First, they may trap the innocent by not providing fair warning of what conduct is prohibited. *Id.* Second, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. *See also Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (noting the dangers and counterproductive effects of

[4] *See BMW of N. Am., Inc. v. Gore, Jr.*, 517 U.S. 559, 575 (1996) (due process protection applies to judge-made law relating to punitive damages, which may not be wholly disproportionate to the harm caused by the defendant).

arbitrary and discriminatory enforcement). And finally, vague laws—including vague common law duties—end up deterring lawful conduct, because people must be always wary of violating them. *Cf. Grayned*, 408 U.S. at 109.

This Court should grant certiorari to hold that the Due Process Clause of the Fourteenth Amendment forbids states from holding liable a manufacturer of a legal product made and sold in a lawful and non-tortious way.

A. Due Process Requires Causation in Tort Law Claims

Proof of causation is an essential element of any plaintiff's cause of action. In all but rare cases, the plaintiff must establish some causal relationship between the injury and the alleged wrongful conduct. *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014). The plaintiffs below alleged that the Petitioners promoted the sale of lead paint in California that is currently contributing to increased blood lead levels, particularly in children. Pet. App. 209-11 (trial court acceptance of this allegation). But neither the trial court nor the appellate court required proof—and cited none—that lead paint sold by any of the Petitioners actually caused an injury. Pet. App. 26 (referring to trial court); 34-36, 39-40 (appellate court) (liability is based on promotion of lead paint with actual knowledge of hazards, not on any resulting injury to individuals).

The court below accepted circumstantial evidence that the paint manufacturers "*must have known*" (Pet. App. 35) that lead paint used in residential interiors posed a serious risk of harm to children and

consequently held that the Petitioners must pay to identify such residences built before 1951 in 10 California counties and remediate the harmful condition. Pet. App. 26 (trial court required defendants to pay $1.15 billion into an abatement fund); Pet. App. 118, 182 (appellate court approval of abatement fund, recalculated to include remediation of homes built before 1951).[5] Such a weak and attenuated causation analysis raises serious due process concerns. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011).

Other courts considering these types of creative public nuisance lawsuits express significant concerns about the weakness of the causation element in such cases. For example, in *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, 615 F.3d 496 (6th Cir. 2010), city officials sued banks on the theory that funding low-interest home mortgage loans caused a public nuisance when the homebuyers were unable to make their payments and abandoned their homes. The court held that the harms alleged by the city ("eyesores, fires, drug deals, and looting") were not caused by the lenders. *Id.* at 505. Rather, "[h]omeowners . . . were responsible for maintaining their properties. Fires were likely started by negligent or malicious individuals or occurred because a home was poorly built. Drug dealers and looters made independent decisions to engage in that criminal conduct." *Id.* And in *Ashley County v. Pfizer, Inc.*, 552 F.3d 659, 668 (8th Cir. 2009), the court held that city officials failed to demonstrate a causal connection between the legal

[5] Of this amount, $400 million was designated to fund investigation to discover where lead paint hazards actually exist. Pet. App. 339.

sales of cough medicine and the later criminal activity of manufacturing methamphetamine. It noted several intervening causes, such as "the conduct of the independent retailers in selling the products; the illegal conduct of methamphetamine cooks purchasing the cold medicine along with numerous other items with the intent to manufacture methamphetamine; the illegal conduct of cooking the items into methamphetamine," and so forth. *Id.* The court below provided no meaningful analysis of causation.

If allowed to stand, the decision below effectively eliminates the element of causation, fundamentally reshaping California tort law. This Court should not countenance this radical effort to "re-engineer the law in order to reach the conduct of big industry," in violation of the Due Process Clause. Fredrick C. Schaefer & Christine Nykiel, *Lead Paint: Mass Tort Litigation and Public Nuisance Trends in America*, 74 Def. Couns. J. 153, 155 (2007).

B. Unduly Vague Laws, Including Common Law Doctrines, Violate Due Process

Public nuisance was poorly defined at common law, and recent decisions have served only to blur what few perceptible lines existed. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting) ("one searches in vain . . . for anything resembling a principle in the common law of nuisance."). According to the Restatement (Second) of Torts § 821B (1998), a public nuisance is an "unreasonable interference with a right common to the general public." But some recent judicial decisions, including the decision below, hold that even reasonable activities—such as legally selling lead

paint without fraud or concealment—can serve as the basis for liability. The Rhode Island Supreme Court even declared that "plaintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury." *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) (emphasis added).

In this case, conduct that was lawful and non-tortious at the time that the Petitioners engaged in it[6] has been declared "unreasonable." The state does not argue that the paint was defective; on the contrary, it was marketable at the time it was sold. Nevertheless, the court imposed liability on the basis of the Petitioners' constructive knowledge that lead paint was harmful.[7] Pet. App. 33-34. The court below was unmoved by its retroactive application of liability. Contrary to this Court's jurisprudence,[8] the court below held that states could seek indemnification from companies whenever they later determine that a lawfully-sold product subsequently caused too many negative consequences, no matter how many decades later. This makes it impossible for anyone to know today what conduct will be held to violate the law tomorrow.

In contrast to the decision below, the New Jersey Supreme Court rejected a public nuisance complaint

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[6] *See*, *e.g.*, Pet. App. 284 (noting that federal agencies advised states to use lead paint in residential housing contracts and in schools through the 1950s).

[7] This is distinguished from the failure to warn, which is not at issue in this case. Pet. App. 33.

[8] *E. Enter. v. Apfel*, 524 U.S. 498, 532 (1998) (plurality) (rejecting retroactive liability); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (noting "retribution" effect of retroactive liability, particularly against "unpopular groups or individuals.").

based on a similar theory. That court held that permitting liability in these circumstances would "stretch the theory" of public nuisance "to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold, and although sold no more recently than a quarter of a century ago, have become dangerous through deterioration and poor maintenance by the purchasers." *In re Lead Paint Litig.*, 924 A.2d at 502.

By eliminating important legal guidelines, the court below has rendered the theory of public nuisance so vague that reasonable persons cannot be assured whether their actions will subject them to liability decades later. This violates one of the fundamental principles of due process of law, guaranteed by the Fourteenth Amendment. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

C. The Expansive Public Nuisance Doctrine Captures Property Owners in a Liability Net Without Notice or Hearing

The decision below profoundly affects the rights of millions of property owners throughout California whose homes or other holdings may be declared to be public nuisances. The court below imposed these massive new liabilities on property owners without allowing them to participate in the proceedings and be heard. Due process requires that a property owner receive notice and an opportunity to be heard before his property is declared a nuisance subject to

abatement. *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 286 (1996).

The problem is most severe for the state's owners of rental properties. Under California law, a property may not be rented if it has a nuisance condition. *See* Cal. Health & Safety Code § 17920.3 (imposing liability on landowners for maintaining property under certain conditions). State statutes do not define intact lead paint as a lead hazard. *See id.* § 17920.10(a). But the decision below effectively does, as the Petitioners must fund investigations as to the nature and potential deterioration of paint in those residences. Once a property is determined to require remediation, it becomes an unrentable public nuisance.

This result is exacerbated by the trial court order (affirmed by the court below) requiring that the abatement fund first target properties with "substantial deferred maintenance," defined as 10 or more code violations in the past four years, and in "high-risk census tracts or neighborhoods." Pet. App. 329-30, 333. This means that the primary beneficiaries of the abatement plan are those landlords who failed to maintain their properties, while more conscientious landlords are saddled with potential nuisance liability—and must wait in line for reimbursement under the abatement program. One commentator thus wryly concluded that the "big winners" in this case are "slumlords." Daniel Fisher, *Slumlords are The Big Winners in California Judge's $1 Billion Lead-Paint Ruling*, Forbes, (Dec. 19, 2013).[9]

[9] https://www.forbes.com/sites/danielfisher/2013/12/19/slumlords-are-the-big-winners-in-california-judges-1-billion-lead-paint-ruling/#1ebf24772870.

D. The Decision Below Implicates Other Industries

If the lawful sale of a legal product can later serve as the basis of public nuisance liability of unlimited severity, businesses will be less willing to participate in the California market, or to provide citizens with products that might later prove hazardous or simply unpopular. This is not only true of such items as paints and firearms, but also of dangerous or unhealthy yet lawful products such as fast food, alcohol, or even automobiles. *See generally* Richard C. Ausness, *Tell Me What You Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for "Big Food"?*, 39 Ga. L. Rev. 839 (2005); Samuel J. Romero, Comment, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 Chap. L. Rev. 239, 277 (2004) ("Whether the fast-food industry has created a public nuisance by promoting unhealthy products and whether courts should ever interfere in this area of personal choice are difficult questions.").

In this case, the court below described the existence of "intact lead paint" as a "potential risk" of future harm because it "will inevitably deteriorate." Pet. App. 5. Thus, it is only the passage of time that may result in harm. Under such a theory, lawful products such as wood houses and electrical wiring could be future public nuisances because they can cause fires when they get old and in need of repair. For example, when the cost of copper wiring skyrocketed in the mid-1960s, residential contractors sometimes substituted aluminum wiring. While lawful and effective at the time the homes were built (1965-1973), aluminum wiring weakens over time,

creating poor connections that result in overheating and fire hazards.[10] Under the decision below, a home developer's touting of the cost-effective use of aluminum wiring, when it was known that copper offered greater performance, would be retroactively considered a public nuisance.[11] This cannot be a proper rule of law.

It is not far-fetched to imagine that, if the state is ultimately successful in this case, lawsuits against the manufacturers of other important and pervasive products will be forthcoming as well. California has already filed such cases. In *People of the State of California v. General Motors Corp.*, No. CO6-05755MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), the state sought millions of dollars in damages against car manufacturers for contributing to the public nuisance of global warming by manufacturing and selling automobiles. And in *In re Firearm Cases v. Arcadia Machine & Tool, Inc.*, 126 Cal. App. 4th 959, 967 (2005), government officials sought nuisance damages against firearms manufacturers on the theory that legally making and selling guns contributed to crimes and other social harm. Ohio officials have tried—so far unsuccessfully—to sue banks on a public nuisance theory for funding sub-prime home mortgage loans, which homebuyers were later unable to pay, leading them to abandon the

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[10] *See* Nick Gromicko and Kenton Shepard, *Inspecting Aluminum Wiring*, International Ass'n of Certified Home Inspectors, https://www.nachi.org/aluminum-wiring.htm (visited Aug. 9, 2018).

[11] Individuals injured by malfunction of aluminum wiring certainly may bring a traditional tort claim based on duty, breach, causation, and damages. *See In re Beverly Hills Fire Litig. v. Bryant Elec.*, 695 F.2d 207 (6th Cir. 1982).

houses. For example, in *City of Cincinnati v. Deutsche Bank National Trust Co.*, 863 F.3d 474 (6th Cir. 2017), the Sixth Circuit rejected the city's claim that a bank's foreclosed properties constituted a public nuisance was properly dismissed because the city could not identify the specific properties. "A plaintiff may use nuisance law only to remedy an existing nuisance, not to sue someone who may one day own (or create) a nuisance property, . . . An allegation about 'unknown' public emergencies does not supply a plausible factual predicate for a lawsuit." *Id.* at 479.

Also in conflict with this case, the Eighth Circuit dismissed an attempt by Arkansas officials to sue makers of legal cough medicine for public nuisance on the theory that some buyers use the medicine to make methamphetamine, which leads to social harms. *Pfizer, Inc.*, 552 F.3d at 668. That court was "very reluctant to open Pandora's box to the avalanche of actions that would follow" if it permitted such lawsuits, because it:

> could easily predict that the next lawsuit would be against farmers' cooperatives for not telling their farmer customers to sufficiently safeguard their anhydrous ammonia (another ingredient in illicit methamphetamine manufacture) tanks from theft by methamphetamine cooks. And what of the liability of manufacturers in other industries that, if stretched far enough, can be linked to other societal problems?

Id. at 671. The court was reluctant to encourage "a proliferation of lawsuits . . . against these defendants

but against other types of commercial enterprises—manufacturers, say, of liquor, anti depressants, SUVs, or violent video games—in order to address a myriad of societal problems." *Id.* at 672 (quoting *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 651 (D.C. 2005)); *see also People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003) ("[G]iving a green light to a common law public nuisance cause of action today will . . . likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.").

II

THE PETITION SHOULD BE GRANTED TO ADDRESS THE FIRST AMENDMENT RIGHT TO AVOID POST HOC PUNISHMENT FOR LAWFUL PROMOTION OF A LEGAL PRODUCT

The First Amendment protects the dissemination of truthful and non-misleading commercial messages about lawful products and services. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (striking down as unconstitutional a federal law abridging a brewer's right to provide the public with accurate information about the alcoholic content of malt beverages). A statute barring truthful and non-misleading commercial messages is plainly unconstitutional under these precedents. And "[t]he Free Speech

Clause of the First Amendment . . . can serve as a defense in state tort suits . . . ", *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (actual malice standard necessary in intentional infliction of emotional distress claim of public figure to "give adequate 'breathing space' to the freedoms protected by the First Amendment."); *Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013) (First Amendment restrictions apply to suits for intentional interference with contractual relations.). This case presents the question of whether the First Amendment forbids application of a state's judicially-created tort law from retroactively punishing commercial messages promoting a then-lawful product.

The decision below conflicts with cases that constrain tort liability to avoid infringing First Amendment rights.[12] The court flatly held that "Defendant's lead paint promotional advertising and participation in trade-association-sponsored lead paint promotional advertising were not entitled to any First Amendment protections." Pet. App. 49. The court issued this broad declaration even while acknowledging that "a large number of these advertisements did *not* promote *interior* residential use of lead paint." Pet. App. 50 (emphasis original). Many of these advertisements were not even placed or subsidized by the Petitioners, but by non-party paint

[12] The court below offered only a brief analysis, dismissing the free speech claims as inappropriate because the trial court's order "did not bar any communications" and concluding "as a matter of law" that "advertisements were not protected by the First Amendment." Pet. App. 47-48.

stores and hardware retailers. *Id.* Permitting retroactive tort liability for such attenuated, lawful speech cannot be consistent with the First Amendment.

Other courts show greater solicitude to free speech when it intersects with tort law. In *Charles v. City of Los Angeles*, 697 F.3d 1146, 1153-54 (9th Cir. 2012), *cert. denied* 569 U.S. 973 (2013), the Ninth Circuit held that "the First Amendment extends to the sale of truthful information about a public figure, and thus renders such conduct non-actionable under a right to publicity theory" and extended "this protection from tort liability, which is ordinarily limited to noncommercial speech, to advertisements for expressive works so as to prevent tort actions from choking the truthful promotion of protected speech." *Id.* The court was particularly concerned that First Amendment-protected expression should not be unduly chilled by tort actions. *Id.* at 1153. *See also Hall v. Post*, 323 N.C. 259, 267 (1988) (rejecting "constitutionally suspect" tort of publication of private facts because of its tension with the First Amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (tort of defamation cannot allow recovery of damages absent proof of actual harm because a presumption, absent proof, would inhibit the exercise of First Amendment freedoms). As one commentator explained, "the communication of truthful information in a commercial setting is constitutionally protected, courts do not have the option of deciding, on public policy grounds, that one party should be subjected to tort liability for providing truthful information to another." Robert L. Tucker, *"And the Truth Shall Make You Free": Truth as a First Amendment Defense in Tortious Interference with*

Contract Cases, 24 Hastings Const. L.Q. 709, 739 (1996), cited in *Kutcher v. Zimmerman*, 87 Haw. 394, 409 n.24 (Ct. App. 1998); *see also* Dan B. Dobbs, *Tortious Interference With Contractual Relationships*, 34 Ark. L. Rev. 335, 361 (1980) ("so far as tort liability is imposed for the communication of facts, opinions or arguments, that liability is simply inconsistent with the law's long commitment to free speech.").

The First Amendment serves an especially important purpose to encourage study to challenge and expand existing scientific understanding. Scientific research is not characterized by perfect theories, flawless studies, and desired results. Rather, the hallmarks of scientific research are continuous inquiry, testing, debate, disagreement, and revision. *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 533 (2013), citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (scientific conclusions "subject to perpetual revision"); *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) ("More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us"). The decision below imposes a penalty on speech by applying more recent scientific understandings of the public health to previously accepted understandings that turned out to be wrong.

This retroactive imposition of tort liability based on wrong (or questionable) speech impacts industries far beyond lead paint. For example, in the 1940s, breakfast cereals with added sugar were touted as beneficial for children as the sugar energized away the morning dullness. Ian Lender, *How Cereal Transformed American Culture*, Mental Floss (Oct.

20, 2013).[13] More recently, of course, public health advocates disdain sugared cereal as contributing to obesity among children. The decision below invites such advocates to sue cereal manufacturers for touting the positive effects created by the sugar content of products long since discontinued or reformulated. *Cf. Krommenhock v. Post Foods, LLC*, 255 F. Supp. 3d 938, 943, 946 (N.D. Cal. 2017) (putative class action on behalf of California consumers who purchased "high sugar" cereals because of current packaging implying that the cereals are healthy fare).

Shoe stores in the 1940s and 1950s routinely offered x-rays of customers' feet as a means of finding the best fit for new shoes. Sarah C. Rich, *Better Feet Through Radiation: The Era of the Fluoroscope*, Smithsonian (Apr. 4, 2012).[14] Although these fluoroscope x-rays were not illegal, scientists knew even by 1950 that repeated exposures could result in unhealthful quantities of radiation, particularly in children.[15] Today, these machines are but a memory, yet under the decision below, manufacturers could still be on the hook for promoting their long-ago use of the devices and ordered to fund investigation of any potential cancer-victims who might have used them.[16]

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[13] http://mentalfloss.com/article/20320/how-cereal-transformed-american-culture.

[14] https://www.smithsonianmag.com/arts-culture/better-feet-through-radiation-the-era-of-the-fluoroscope-171211371/.

[15] Leon Lewis and Paul E. Kaplan, *The Shoe-Fitting Fluoroscope as a Radiation Hazard*, 72 Cal. Med. 26 (Univ. Cal., Berkeley 1950), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC 1520288/pdf/califmed00247-0028.pdf.

[16] *See generally* Allan Mazur, *Looking Back: Unneeded X-rays*, 11 Risk: Health Safety & Env't 1 (2000) (describing the evolution

This open-ended potential liability for speech promoting a lawful product cannot stand under the First Amendment.

CONCLUSION

The decision below violates a key principle of due process, which "protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law . . . [through] judicial alteration of a common law doctrine." *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001). It also conflicts with this Court's First Amendment jurisprudence that protects promotion of lawful products and protects such speech from retroactive punishment.

The petition for a writ of certiorari should be granted.

DATED: August, 2018.

Respectfully submitted,

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of knowledge regarding x-rays and subsequent laws prohibiting use of x-ray machines by anyone other than licensed medical professionals).