

Nos. 18-84 and 18-86

In The
Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY, et al.,
Petitioners,

v.

CALIFORNIA,

Respondent.

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

v.

CALIFORNIA,

Respondent.

**On Petitions For Writ Of Certiorari
To The California Court Of Appeals,
Sixth Appellate District**

**BRIEF OF AMICUS CURIAE
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
IN SUPPORT OF PETITIONER
THE SHERWIN-WILLIAMS COMPANY**

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QUESTION PRESENTED

This case presents the question whether, consistent with the First Amendment, a state may retroactively impose massive tort liability based on (1) Petitioner’s remote and isolated advertisement of its lawful product (paint) and (2) its participation in the Lead Industries Association (LIA), a trade association which promoted lead paint products. Liability was imposed decades after the advertisements, when lead paint was discovered to pose a widespread health risk as it deteriorates after use on interior residential surfaces.

The California court of appeal rejected Petitioner The Sherwin-Williams Company’s defense based on the First Amendment protection of freedom of association. The court held that the LIA’s lawful advertising of lead paint could support Petitioner’s liability for assisting the creation of a public nuisance because Petitioner contributed \$5,000 to the LIA during the course of its promotional campaign. *People v. ConAgra Grocery Prods. Co.*, 17 Cal.App.5th 51 (2017).

The court also held that the paint advertising was “misleading” and therefore not protected by the First Amendment, because it failed to disclose the health risk associated with residential interior use.

The judgment imposed massive tort liability for lawful expression, but failed to require a reasonably tight causal nexus between Petitioner’s speech, the harm, and the relief awarded.

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INTEREST OF AMICUS CURIAE¹

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers (including Petitioner The Sherwin-Williams Company).² These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain.

PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this Court. PLAC briefs support its members' interests, present the broad perspective of product

¹ Counsel for a party did not author this brief in whole or in part. Such counsel or a party did not make a monetary contribution used or intended to be used to fund the preparation or submission of this brief. No person other than amicus curiae made such a monetary contribution. Counsel for the parties were timely notified of this amicus' intent to file this brief. Petitioners and Respondents consented to the filing of this amicus brief through blanket consents.

² See <https://plac.com/PLAC/AboutPLACAmicus> (listing the corporate members of PLAC).

manufacturers, and seek fairness and balance in the application and development of the law as it affects product risk management.

PLAC's interest in this Petition stems from its concern over the decision's legal and practical impact on the associational and expressive rights of its members. The California court of appeal held that the corporate members of a trade organization may incur massive tort liability based on communicative activities of the association, due solely to their membership and participation in the association. The court also branded Petitioner's routine advertising speech "misleading", and consequently unprotected, based on the failure to include mention of a potential health risk. Thus, the California court of appeal's decision increases the liability exposure of product manufacturers and sellers for the seemingly ordinary promotion of lawful and useful products and threatens to inhibit their participation in trade and advocacy organizations, in violation of their rights under the First and Fourteenth Amendments.



INTRODUCTION/SUMMARY OF ARGUMENT

The Petition provides this Court with an ideal opportunity to address three issues critical to protecting the First Amendment rights of product manufacturers.

1. Businesses and the industry trade and advocacy organizations that represent them routinely engage in various forms of speech-related activity,

including product advertising. The California court of appeal held it was permissible to impose massive tort liability on paint manufacturers based on the lawful promotional campaigns of the organizations to which they belong, without any finding, or showing, of any illicit goal or intent. The court's holding impermissibly chills the right of association protected by the First Amendment, and is inconsistent with this Court's decision in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and the Third Circuit's decision in *In re Asbestos School Litig.*, 46 F.3d 1284 (3d Cir. 1984).

This Court has repeatedly recognized that American businesses have a constitutional right to associate in order to promote their interests, just as individual citizens enjoy the right to come together to advance their political, cultural, economic, and social interests. The threat of incurring liability for routine promotional statements of their trade group discourages exercise of the existing or potential member's First Amendment right to associate.

2. In cases involving protection for commercial speech such as product advertisements, the determination of whether the speech is eligible for constitutional protection may turn on whether the speech is deemed "misleading." Consequently, the standard for deciding whether an advertisement is misleading is of paramount importance.

The California court of appeal branded Petitioner's 1904 advertisement of its paints and the trade association's late 1930s lead paint advertising

campaign misleading, and therefore unprotected, because it failed to mention known potential health risks associated with the product. According to the court, the ads therefore deceptively implied that the product was “safe.”

That standard is unsupported by any precedent; it is inconsistent with the recognition that lawful commercial speech is entitled to protection, as it would erase virtually all constitutional protection for product advertising; and it is unworkable, as it is neither feasible nor truthful to transform every advertisement, large or small, into a bulletin board to call out every potential or suspected risk attending use of the product. Every product has risks, some known, some suspected, and some entirely speculative.

3. The Court has always recognized that robust First Amendment protection requires a reasonably tight connection between the speech regulated, the harm averted or redressed, and the remedy awarded. That connection is noticeably lacking here.

The Speech: Petitioner published a single ad in newspapers in two of the ten plaintiff jurisdictions in 1904 touting its entire line of paint products (without differentiation, without mentioning lead, and without promoting the use of lead paint in residential interiors). It also contributed \$5,000 to the LIA, a trade organization, which promoted paint use, including lead paint, from 1937-1941.

The Harm: Decades later, in 1998, “scientific studies were published disclosing the dangers of low-level

lead exposure.” *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 321, 331 (Cal. Ct. App. 2006) (a prior decision in this case). This is the newly reported risk that the court found to constitute a public nuisance, in need of abatement.

The Remedy: The court ordered the three defendants to inspect the interior of every residential house and apartment building in each of the ten jurisdictions and abate any deteriorating lead paint. The injunction extends to *every residence* built before 1951, whether or not it contained paint sold or promoted by the defendant, and whether or not the purchase or use of the paint was influenced by exposure to the defendant’s promotional messages. Every residence, even though the three defendants constituted only a fraction of the historical lead paint market in the jurisdictions. This breathtaking liability flows from the court’s finding that Petitioner’s advertising was a “very minor” but more than “infinitesimal” force in the creation of the existing nuisance.

Thus, the California court imposed massive, wildly disproportionate liability for de minimus advertising, speech lacking any specific causal nexus to the properties to be inspected and abated and contributing minimally, at best, to the general health problem deemed a nuisance. This Court has never tolerated this type and magnitude of burden on First Amendment interests predicated on this attenuated connection between the expression, the harm and the remedy.

Certiorari should be granted.

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ARGUMENT

A. Public Nuisance Liability Based on Routine Promotion of Lead Paint Use By a Trade Association to Which the Defendant Belongs Violates the Freedom of Association Protected by the First Amendment

The First and Fourteenth Amendments protect the right to associate for the advancement of political, economic, religious or cultural beliefs and ideas. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The right serves to enhance effective advocacy, *ibid.*, and “lies at the foundation of a free society.” *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960). “The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981).

Businesses commonly exercise their right to associate by participating in industry or trade associations, groups formed to advance the interests of members through the exchange and dissemination of ideas and information and the exercise of advocacy. PLAC itself, devoted to advancing legal education and advocacy interests of its members, is an example.

The Court has recognized that the right to associate for lawful purposes must be protected against

unjustified or excessive burdens that might inhibit membership or expressive activity. For example, in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court protected the members of a civil rights organization from state common law tort liability for economic injuries resulting from the group's organized boycott of the plaintiffs' businesses. Though some members of the group had engaged in unlawful violent or coercive activity in the course of the boycott, the court held that the First Amendment precluded holding the other members liable for associating with them. 458 U.S. at 918-19.

The Court explained what showing was needed to impose liability on a member for acts of the association or certain of its members:

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)." *Carroll v. Princess Anne*, 393 U.S. 175, 183-184.

Claiborne Hardware, 458 U.S. at 920. Further, the Court required that the existence of this specific intent

must be evaluated under the “strictest” standard. *Id.* at 919. The Court concluded that even though the coercive activities of some members were part of the boycott activity and contributed to the economic harm, this could not justify imposing liability for all of the harm on all the participants. *Id.* at 921. Liability could not be imposed based on “guilt by/for association” without violating the First Amendment. *Id.* at 925.

In *In re Asbestos School Litig.*, 46 F.3d 1284 (3d Cir. 1994), the Third Circuit applied these principles in rejecting an attempt to hold manufacturers of asbestos-containing building products liable in tort for the conduct of other manufacturers with which they had associated in a trade organization, the SBA. The organization had allegedly “disseminated misleading information about the danger of asbestos in schools” to limit the liability of its members for their prior sales. Plaintiffs claimed Defendant Pfizer’s membership in the organization, contribution of \$50,000, and its personnel’s attendance at organization meetings, were sufficient to hold it liable for the SBA’s communications.

The Third Circuit concluded that Pfizer had a “clear and indisputable right” to dismissal of that claim under the First Amendment. *Id.* at 1289. Even if some of the SBA’s activities were unlawful and unprotected by the First Amendment, some were lawful and protected; consequently, members like Pfizer could not be held “liable for any wrongful conduct committed by the SBA or its members . . . unless it can be shown that actions taken in relation to the SBA were specifically

intended to further such wrongful conduct.” *Id.* at 1290.

The court rejected reliance on Pfizer’s \$50,000 contribution, as it could have been intended to further protected activities or earmarked for general, undifferentiated assistance to the organization. Membership “does not necessarily endorse everything done by [the] organization or its members.” And attendance at meetings likewise “does not necessarily signify approval of *any* of that organization’s activities.” Even if there were “general approval of the SBA’s goals”, that “unquestionably could not rationally be viewed as sufficient to show that Pfizer specifically intended to further any allegedly tortious and constitutionally unprotected activities committed by the SBA or its other members” under *Claiborne Hardware*. *Ibid.*

The court further explained that holding Pfizer potentially liable for the allegedly tortious acts of SBA and its members “has implications that broadly threaten First Amendment rights.”

The implications of such a holding are far-reaching. Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. [Citations omitted.] But the district court’s holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them.

46 F.3d at 1294.

It is precisely these implications, ignored by the California court, which trouble PLAC, which should trouble all trade and advocacy organizations and their members, and should trouble this Court.

As *In re Asbestos School Litig.* demonstrates, the right of free association is incompatible with the threat of massive tort liability based on a company's participation in an industry organization which lawfully promotes the industry's products. The liability threat may well convince potential or existing members that participation in the group is "unjustifiably risky", generating "an unwarranted inhibiting effect" on their willingness to associate to advance common interests.

The very substantial chilling effect on the right of association warrants this Court's intervention.

B. The California Court's Low Standards For Denying Constitutional Protection to Product Advertising and Imposing Disproportionate and Disconnected Liability to Promotional Speech Warrants Review

The decision and reasoning of the California court gives far too little protection to lawful product advertising.

One hallmark of this Court's First Amendment jurisprudence is that the decision to deny protection to speech is not to be made lightly. Rather, a robust First Amendment requires that speech be presumptively protected, and any denial of protection must be

well-justified by compelling proof that the expression in question will directly cause (or has directly caused) serious adverse consequences.

For evidence, one need look no further than the seminal case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court had previously held that a speaker could be punished for using “fighting words” – words likely to cause violence – without raising any constitutional infirmity. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

In *Brandenburg*, a Ku Klux Klan leader’s fiery filmed speech and presentation resulted in his conviction for advocating violent overthrow under an Ohio statute. The Supreme Court reversed, concluding that the First Amendment did not permit the punishment of speech advocating the use of force or criminal activity unless the speech is directed to inciting or producing imminent lawless action, and is likely to do so. Accordingly, the statute’s failure to delineate this distinction rendered it, and the conviction, unconstitutional. 395 U.S. at 448-49.

The Court’s rigorous erection of that exquisitely fine line between unprotected “fighting words” and protected advocacy was required to strictly limit the scope of expression deprived of all First Amendment protection. The Court has taken similar care to define and limit the scope of other categories of speech excluded from the ambit of the First Amendment, such as obscenity.

In stark contrast, the most striking characteristic of the California court’s decision in this case is the ease with which it dismissed the notion that Petitioner’s advertising could be constitutionally protected. The entire justification consisted of the finding that the advertisements, in hindsight, were “misleading.”³

The court’s treatment of the “misleading speech” issue is enigmatic. It reasoned that the ads were misleading, and unprotected, because they implied that interior use of lead paint was safe by not disclosing any risks. But the only known health risk associated with lead paint in 1904 and even circa 1940, the time of the subject advertising, was the risk of high exposure lead poisoning, a well-known occupational risk but a rare risk for children (typically with pica) materially different from the one later found by the court to be a nuisance. The finding of nuisance was based on the different health risk of children’s cumulative, chronic low-dose exposure to lead dust, discovered decades after the advertising.

The most fundamental principle of toxicology is that “the dose makes the poison.” *In re Lipitor*, ___ F.3d

³ The court also suggested that the First Amendment was not implicated by the judgment because “[t]he trial court’s order did not bar any communications” and “[a]lthough liability may be based in part on prior commercial speech, the *remedy* will not involve enjoining current or future speech.” 17 Cal.App.4th at 91 n.30, 92. The suggestion is obviously erroneous, as the First Amendment protects against retrospective money judgments punishing protected speech, not just injunctions and the imposition of prior restraints. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

___ (4th Cir. June 12, 2018). Assuming that failing to discuss all potential safety risks in product advertising published in 1904 or the late 1930s could legitimately render the advertisement constitutionally “misleading” – a highly questionable proposition – the disconnect between the omitted risk and the liability-producing risk, discovered decades later, impermissibly and casually broadens the classes of speech left unprotected.

The First Amendment should not so easily be circumvented. If the omission of discussion of *any* risk in an advertisement can override the speaker’s First Amendment right to advertise without fear of tort liability, then the protection for advertising speech becomes vanishingly fragile. Product warnings have customarily been placed on product labels or in instruction manuals, not in advertising.

Alternatively, the court may have had in mind the risk of low-dose exposure. The court read the trial court’s decision to have implicitly found that the ads were published with knowledge that using lead paint in residential interiors “would create a public health hazard” because the trial court could not otherwise find that defendants had “created or assisted in the creation of a public nuisance.” 17 Cal.App.5th at 92.

But the court’s logic is flawed in at least two respects. First, it is inconsistent with First Amendment values and the requisite intellectual and analytical rigor to deny constitutional protection based on circular reasoning and assumed implicit findings. In “First

Amendment cases, the court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Snyder*, 131 S. Ct. at 1216 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal quotations omitted)).

Second, any suggestion that low-dose exposures were considered a known, generally accepted health risk in 1904 or the late 1930s ignores the science, the record, and the court’s prior holding that the risk did not become scientifically supported until 1998. Earlier in the century, the only evidence of the risk was speculative and anecdotal.

The court’s overly expansive reading of what qualifies as “misleading” speech, negating any constitutional protection, is inconsistent with this Court’s cautious and rigorous approach to identifying those limited types of speech which are not entitled to protection.

Similarly concerning is the vague relationship between the subject ads, the harm to be redressed, and the relief awarded. The court required only a finding that the advertisements were a “very minor” but more than “infinitesimal” force in creation of the nuisance. Imposing liability based on such a tenuous connection between the speech (the 1904 ad and the 1937-1941 LIA campaign) and the harm (the modern presence of peeling lead paint in homes within the plaintiff

jurisdictions) further undermines the interest in protecting the right to engage in lawful commercial speech. And that connection fades to obscurity when compared with the broad scope of relief granted.

This Court has recognized repeatedly that the Constitution requires a reasonably tight connection between the ends and the means. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (requiring that restrictions burdening commercial speech have a “reasonable fit” between the governmental purpose behind the restriction and means chosen to accomplish it). The loose relationship tolerated by the court between the ads, the harm, and the relief also clashes with this Court’s insistence on meaningful protection of lawful commercial speech. *See, e.g., Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

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CONCLUSION

The California court’s failure to carefully assess and ultimately protect the First Amendment interests of Petitioner in routine product advertising and in associating with other industry members in a trade organization, and the imposition of massive tort liability for isolated and remote innocuous advertisements,

calls for this Court's review and guidance on these important issues.

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Respectfully submitted,

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