Nos. 18-84, 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 Court of Appeal of California, Sixth Appellate District

AMICI CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The Civil Justice Association of California ("CJAC") is a 40-year-old association of businesses, professional organizations and financial institutions dedicated to making our civil liability laws more fair, economical, uniform and certain. Toward this end, CJAC regularly petitions the government for redress of grievances when it comes to determining who owes, how much, and to whom when some claim that the conduct of others occasions them harm. The constitutional issues presented by this case fall plainly within CJAC's principal objectives.

The California Chamber of Commerce ("CalChamber") is a nonprofit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California businesses. While CalChamber represents several of the largest corporations in California, 75% of its members are smaller businesses with less than 100 employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate on a broad array of legislative, regulatory, and legal issues that, like this one, threaten serious impositions.

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[1] Counsel of record for the parties received notice of the intent to file this brief. Petitioners and Respondent have given blanket consent for the filing of *amicus* briefs. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amici*, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

The California Manufacturers & Technology Association ("CMTA") works to improve and enhance a strong business climate for California's 30,000 manufacturing, processing and technology based companies. Since 1918, CMTA has worked with state government to develop balanced laws, effective regulations and sound public policies to stimulate economic growth and create new jobs while safeguarding the state's environmental resources. CMTA represents 400 businesses from the entire manufacturing community – an economic sector that generates more than $230 billion every year and employs more than 1.2 million Californians.

IMPORTANCE OF ISSUES THIS CASE PRESENTS

Amici are deeply worried that if the opinion below remains undisturbed, its construal of public nuisance doctrine is so amorphous and untethered by recognition of constitutional safeguards that numerous products, though completely legal and proper for manufacture, sale and promotion at the time, can be deemed more than a half-century later to constitute a "public nuisance." The consequence is that, as here, the manufacturers and promoters of these products will be forced to pay gargantuan sums to cash strapped public entities for damages or abatement. As a law review article astutely warned a decade ago about the dangers of this then-looming phenomena:

> The vagueness of public nuisance jurisprudence is currently being exploited in new and unprecedented ways as a substitute for products liability claims by some public authorities and their private counsel. They are pursuing their

> claims against manufacturers under the guise of "public nuisance" to overcome obstacles and defenses that ensured fairness for products liability defendants and to sidestep comprehensive statutory schemes created by state and federal legislatures that address the alleged problem.

Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 *MICH. ST. L. REV.* 941, 948 (footnotes omitted).

This was no "the sky is falling" alarm; the omnivorous public nuisance threat has since morphed into targeting manufactured products besides lead paint because "the allegations asserted in [public nuisance] claims are not unique to lead paint but can be applied generically . . . to virtually any product or conduct imaginable." *Id.* at 945. "From guns to lead paint to sub-prime mortgages to global climate change, use of the common law doctrine of public nuisance to recover damages [or, as here, monstrous abatement costs] allegedly caused by the actions of multiple parties over many years is rising." Henry N. Butler & Todd J. Zywicki, *Expansion of Liability under Public Nuisance* (2010) 18 *SUP. CT. ECON. REV.* 1.

Add to this growing list of stigmatized "bad guy" defendants now subject to public nuisance liability, pharmaceutical manufacturers and purveyors of fast food. "A rapidly growing series of lawsuits, which originated as public nuisance claims, involve governments suing pharmaceutical manufacturers, distributors, and pharmacies over the costs associated with treating and fighting prescription opioid abuse in

their communities." Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 *OKLA. L. REV.* 359, 382 (2018). "[B]y significantly interfering with public health, fast-food restaurants and others may constitute a *public* nuisance. . . Just as the public nuisance doctrine is now generally understood to protect the public's right to clean air and water, so too might courts extend public nuisance to protect the public's right to a nutritious environment." Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 *GEO. L.J.* 969, 1009 (2013).

This referenced "rising" in the panoply of perceived wrongs coming under the expansive umbrella of "public nuisance" has been, as previously remarked, boosted considerably through private contingent fee counsel's representation of governmental plaintiffs, a toxic combination responsible for "spearheading the effort to transmute public nuisance claims from a conduct-based tort into a harm-based tort." Predictably, public nuisance doctrine has become an increasingly attractive "alternative means to sue manufacturers in lieu of products liability actions." Faulk & Gray, *supra*, 2007 *MICH. ST. L. REV* at 969.

The unholy alliance between the ventriloquist-like Edgar Bergen private contingency fee counsel and Charlie McCarthy cash-strapped public entities "quickly spread to other [jurisdictions]. [It] reached its zenith in the late 1990s during the tobacco litigation that resulted in multibillion-dollar payouts to both states and their lawyers, and the creation of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private

lawyers aggressively pursuing litigation that . . . generate[s] hundreds of millions in contingent fees. Now many states no longer think twice about entering into contingency fee contracts with private plaintiff law firms." *Id*.[2]

Armed with an amorphous cause of action judicially emptied of constitutional moorings, as the opinion here has done with public nuisance, the result for petitioners and countless other businesses is catastrophic: "[A] lesson can be learned from asbestos and tobacco litigation — that despite causation issues, a single case can have a far-reaching effect, opening a floodgate of similar litigation and toppling an entire industry." Lisa A. Perillo, *Scraping Beneath the Surface: Finally Holding Lead-Based Paint Manufacturers Liable by Applying Public Nuisance and Market-Share Liability,* 32 *HOFSTRA L. REV*. 1039, 1041 (2004).

This unfortunate outcome understandably pleases "true believers" insistent on bypassing the legislative process and using litigation for social engineering to

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[2] Compare *e.g*., *People ex. rel. Clancy v. Superior Court*, 39 Cal.3d 740, 750 (1985) ("[T]he *contingent fee* arrangement between the [government] and the [private attorney] is antithetical to the *standard of neutrality* that an attorney representing the public must meet when prosecuting a *public nuisance* . . . action.") *with County of Santa Clara v. Superior Court*, 50 Cal.4th 35, 58 (2010) ("[R]etention of private counsel on a contingent-fee basis is permissible in [public nuisance] . . . cases [where the government's action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business] if neutral, conflict-free government attorneys retain the power to control and supervise the litigation.").

achieve wealth transference from private, deep-pocket defendants to the public fisc. As a recent environmental proponent boasted after the cities of San Francisco and Oakland sued five Oil Companies – Chevron, ConocoPhillips, ExxonMobil, Shell, and BP – for public nuisance:

> The [plaintiffs'] strategies . . . in these cases mirror those used in the tobacco company lawsuits of the 1990's, and those tobacco companies settled for a whopping $206 billion. Californians [now] have a decent chance at . . . holding malfeasant corporate polluters accountable for their actions and winning billions of dollars to help their communities adapt to climate change.[3]

A more sober and sounder explanation on the consequence of extrapolating public nuisance law to product manufacturers for contributing to climate change appeared in a major California newspaper: "The[se] unjustified lawsuits will add costs to energy manufacturers by forcing them to defend or settle the cases. Those costs will be passed on to consumers, other manufacturers and businesses that depend on fuel for transportation and production. Piling these new costs on top of the reasonable costs related to cap and trade could push production out of state along with their

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[3] Kimberly Willis, *Taking on the Fossil Fuel Industry: Why California's Public Nuisance Lawsuits May Succeed Where Others have Failed*, HASTINGS ENVIRONMENTAL L. J.: http://sites.uchastings.edu/helj/2017/10/16/taking-on-the-fossil-fuel-industry-why-californias-public-nuisance-lawsuits-may-succeed-where-others-have-failed-by-kimberly-willis/ (last visited August 5, 2018).

emissions." Dorothy Rothrock, *Shaking Down Manufacturers Doesn't Help California's Fight against Climate Change*, *THE SACRAMENTO BEE*, August 7, 2018.

SALIENT FACTS AND PERTINENT LAWS INFORMING THE ISSUES

In this case, the appellate court affirmed a trial judge's order holding three paint manufacturers liable for "assisting in," or "contributing to," a public nuisance by "promoting," more than 70 years ago, their paints through a paucity of newspaper advertisements and memberships in trade associations.

Specifically, in 1904, Sherwin-Williams (SW) paid for an advertisement that appeared once in two California newspapers touting its paints that contained a lead pigment; and donated $5000 to a trade organization between 1937-1941, which the organization used to promote lead paint for lumber products. That century-old advertising never mentioned lead, and SW paints intended and labeled for interior residential use did not contain lead pigments. SW Pet., p. 2.

ConAgra Grocery Products Company never sold lead paint itself, but was held liable on the basis that it acquired the liabilities of W.P. Fuller & Co. (Fuller) which sold lead paint in the first half of the 20th century. ConAgra Pet., p. 13. ConAgra was deemed liable for public nuisance based on a 1931 Fuller brochure instructing consumers to use its lead paint for interior residential use, and Fuller's participation in a trade association that ran promotional campaigns for paints in the 1930s and 1940s. NL was held liable

based on a handful of newspaper and magazine articles it ran during the first half of the 20th century and a salesman's manual and handbook that "encouraged the use of white lead paint on interior surfaces." *Id*. at 16.

All of these activities were indisputably legal at the time they occurred. Indeed, the State of California specified the use of white lead paint on residential interiors throughout the 1950s. SW Pet. at 7. By 1955, SW joined the American Standard Association's voluntary ban on residential interior lead-based paint and issued product warning labels against that use on its paints. *Id*. at 8.

It was not until 1977, however, that the federal government banned residential lead-based paint manufactured after February 1978. 15 U.S.C. §§ 2601-90. And it took until 1992 for the federal government to "set out a comprehensive scheme to regulate, and eventually eliminate, the risk of lead poisoning in children from lead paint appearing in pre-1978 structures." 42 U.S.C. § 4851a(1) and 15 U.S.C. § 2683.

California enacted its own laws in 1986 and 1991to fund childhood lead-poisoning prevention programs at the local level, imposing fees on those contributing to the presence of lead in the environment in proportion to their estimated contributions. Cal. H & S Code §§ 105275 et. seq. and § 124125 et. seq. The bulk of those fees – 85% – were assessed on gasoline producers, with paint manufacturers assessed for 14% of the total. Cal. Code Regs., Tit. 17, § 33001 et. seq.

These combined federal-state efforts to reduce the risk of lead poisoning have been remarkably successful, reducing the incidence of lead poisoning in the past

half-century by 90 percent as measured by the average blood levels of a statistically valid sample of people. ConAgra Pet., p. 7.

SUMMARY OF ARGUMENT

The challenged opinion unconstitutionally extrapolates public nuisance liability into an undefinable, amorphous blob. Specifically, as construed and applied here, the opinion violates due process by removing from that doctrine the bedrock requirements of "causation" and "reliance" common to all civil wrongs; and then uses this newly constituted vagarious wrong to impose excessive and retroactive liability on today's targeted defendants for conduct that was indisputably legal when it occurred more than 70 years ago.

In addition, the opinion's construction and application of its newfangled "public nuisance" doctrine violates the First Amendment by imposing liability on petitioners for promoting their products with a handful of truthful advertisements they placed directly and through two trade associations they joined. Rights to freedom of expression and association have been trammeled in the process and are deserving of the Court's review for correction.

ARGUMENT

I. THE OPINION'S CONSTRUCTION AND APPLICATION OF THE "PUBLIC NUISANCE" DOCTRINE RENDERS IT AN AMORPHOUS BLOB THAT VIOLATES THE CONSTITUTIONAL GUARANTEES TO DUE PROCESS, FREE EXPRESSION AND FREEDOM OF ASSOCIATION.

A. Judicial Construction of California's Public Nuisance Doctrine Rids it of any Guiding Standards.

California's public nuisance doctrine has undergone transformation from common law, to statute, to amendment through court interpretation. With each successive iteration it has become increasingly vague until, as interpreted and applied in this case, it now lacks any guiding standards.

California defines a public nuisance as "anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway. . .." *County of Santa Clara v. Superior Court*, *supra*, 50 Cal.4th at 52.

But the opinion here, after paying lip-service to ordinary public nuisance elements and requirements, then excises them from the doctrine. This is because the court understandably believes it is free to amend

the statute as it sees fit. After all, the state's high court holds that courts can amend statutes codifying common law because the legislature did not intend to restrict them from further development of concepts according to "evolving standards of duty, causation, and liability." *See*, *e.g.*, *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 833 (1975) ("The majority's altering the meaning of [the more than 100-year-old statute providing for the defense of contributory negligence to instead provide for pure comparative fault defense] . . . represents no less than amendment by judicial fiat."(Richardson, J, dissenting).

Accordingly, respondent here was excused by the appellate opinion from having to prove "reliance" by anyone based on petitioners' paint promotions; nor was it required to identify any residences containing petitioners' paints. As a corollary to this, petitioners were barred from conducting any discovery into individual properties to determine the presence of interior lead paint and how it got there. App. 155-59, 298. Neither was respondent required to prove "causation" by establishing a "nexus" or connection between individual petitioners' lead paint and homes alleged to contain it. Instead, the opinion simply jumps to the conclusion that the trial court "could reasonably infer that at least some of those who were the targets of [petitioners' promotions] heeded them," thus dispensing with any required proof of "causation" and "reliance."

B. The California Court's Construction and Application of "Public Nuisance" Law Violates Due Process Because it Renders it Void for Vagueness and Imposes Retroactive and Excessive Liability on Petitioners.

1. Void for Vagueness. After the appellate court removed essential justiciable standards from the law of public nuisance, petitioners were left saddled with liability for an unconstitutionally vague offense.

The principle animating the "void for vagueness" doctrine is that it is fundamentally unfair to punish those who do not and cannot have reasonable warning that the conduct at issue is illegal. People must be able to know with some realistic degree of certainty whether a particular act will violate the law. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of [prohibitory] statutes. All are entitled to be informed as to what the State commands or forbids."). This requirement prevents arbitrary punishment, which itself violates the constitutional prohibition against depriving a person of liberty without due process of law. *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

"[T]he 'void for vagueness' doctrine [is] applicable to *civil* as well as *criminal* actions." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) (applying vagueness doctrine to requirement that teachers take loyalty oaths' emphasis added); *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 666 (4th Cir. 1989) (applying vagueness doctrine to law determining sites for landfills). Civil statutes no less than criminal laws can impose severe

sanctions on individuals and businesses. Courts often have difficulty determining which punitive statutes qualify as "civil" and which qualify as "criminal." This confusion is even worse in the context of common law actions that are codified and later given an interpretive gloss by courts, such as the "public nuisance" law here.

Due process of law, as Daniel Webster explained almost two centuries ago, means "'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'" *Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (quoting *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819) (argument of Mr. Webster)). For the government to act arbitrarily or against specific persons, rather than pursuant to general, comprehensible, and pre-announced rules, would render the law an instrument of arbitrary will in the hands of government officials. Thus due process prohibits "acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power." *Id*. at 536.

Requirements of fair notice and warning, and the prohibition against the arbitrary and vindictive use of laws, are often simply called the rule of "fundamental fairness." *See*, *e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). They forbid the government from enforcing laws written "in terms so vague that men of common

intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Punitive laws must "employ words or phrases . . . well enough known to enable those within their reach to correctly apply them, or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ." *Id.*; citations omitted.

Vague laws involve three basic dangers. First, they "may trap the innocent" by failing to give people "a reasonable opportunity to know what is prohibited." Second, they encourage "arbitrary and discriminatory enforcement" because vague laws "delegate basic policy matters to policemen, *judges*, and juries for resolution on an ad hoc and subjective basis." Third, because citizens will try to "steer far wider of the unlawful zone" than necessary, vague laws "inhibit the exercise of . . . freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); citations and quotation marks omitted; emphasis added.

Vague statutes invite abuse by enforcement agencies – not only police officers, but particularly by government prosecutors or private plaintiffs. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 *VA. L. REV.* 189, 197 (1985) ("Prosecutors in this country have enormous discretion, and their decisions are largely unconstrained by law."). Vagueness gives plaintiffs and prosecutors leverage to make unfair demands of defendants, to threaten defendants with punishment for relatively minor infractions, or to exploit their positions of authority for improper motives. Indeed,

because vague laws are enforced in an ad hoc and subjective manner, they essentially give enforcement officials "the de facto power of determining what the . . . law in action shall be." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401,428 (1958).

Moreover, vagueness undermines the capacity of democratic institutions to control the operations of government. James Madison famously observed that it would "be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if . . . no man, who knows what the law is to-day, can guess what it will be to-morrow." *THE FEDERALIST NO. 62*, at 381 (James Madison) (Clinton Rossiter ed., 1961). When statutes are so vaguely worded that the public finds them incomprehensible, voters will not be able to predict, understand, or discipline the conduct of government officials, who can rationalize their arbitrary conduct by pointing to a statute that seems to authorize their actions in broad and imprecise terms. *See* Samuel W. Buell, *The Upside of Overbreadth*, 83 *N.Y.U.L. REV.* 1491, 1554 (2008).

Courts frequently apply the vagueness principle in the context of nuisance law. For example, in *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), the Third Circuit Court of Appeals held that Pennsylvania authorities could not use a public nuisance theory to prohibit an allegedly obscene film. The court acknowledged that the state could regulate obscenity, but "the standard of regulation [may not] be so vague and indefinite 'that men of common

intelligence must necessarily guess at its meaning.'" *Id*. at 87, quoting *Connally*, *supra*, 269 U.S. at 391. Terms like "injury to the public," and "unreasonableness," were "too elastic and amorphous a standard" to satisfy the requirement of definiteness; such terms were so "indefinite" that the "executive and judicial branches" were left with " 'too wide a discretion in its application.'" *Id*. at 88, quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). Accord, *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 713 (C.D. Cal. 1993); *Connick v. Lucky Pierre's*, 331 So. 2d 431, 434-35 (La. 1976).

2. Imposition of Retroactive and Excessive Liability absent Proof of Causation Violates Due Process. This Court has made clear that when, as here, the law imposes "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience," the red flag of a due process violation is raised. *Eastern Enterprises v. Aptel*, 524 U.S. 498, 501 (1998).

Whether legislatively or judicially made and imposed, such law "is contrary to fundamental notions of justice," for "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855-856 (1990) (Scalia, J., concurring). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should

not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

The opinion petitioners challenge here reaches back in time more than 70 years to impose upon them hundreds of millions of dollars in public nuisance liability for conduct that was completely lawful at the time it took place – the advertising and sale of paints they made that contained lead pigment. There is no way petitioners, or other potential defendants facing future "public nuisance" liability claims could have foreseen what has or can happen to them under the opinion's draconian sweep. "It presents problems of unfairness because it . . . deprive[s] citizens of legitimate expectations and upset[s] settled transactions." *Eastern Enterprises v. Aptel*, *supra*, 524 U.S. at 501.

What the opinion does is precisely what the guarantee to due process forbids: it imposes upon three businesses "targeted" by a retroactive interpretation and application of law, "a justified fear that a government once formed to protect expectations can now destroy them. Both stability of investment and confidence in the constitutional system . . . are secured by due process restrictions against severe retroactive" laws. *Id.* at 549 (Kennedy, J. concurring).

Due process also requires that plaintiffs prosecuting defendants for public nuisance liability satisfy the essential element of causation. Indeed, the basic guarantee of due process in a civil trial is that a defendant will not be held liable for damages without a meaningful opportunity to present every available defense to liability, including a defense based upon lack of causation. *See Philip Morris USA v. Williams*, 549

U.S. 346, 353 (2007). *Williams* holds that "the Constitution's Due Process Clause forbids a State to use a punitive damages award in a class action to punish a defendant for injury it inflicts upon nonparties." *Id*. The Court explained that "a defendant threatened with punishment for injuring a non-party victim has no opportunity to defend against the charge by showing . . . that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary." *Id*. at 353-54.

This Court applied similar reasoning outside the punitive damages context in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). There the Court relied upon the Due Process Clause in rejecting a putative class action where plaintiffs sought to establish a collective right to backpay from alleged sex discrimination, holding that the defendant was "entitled to *individualized determinations* of each employee's eligibility for backpay." *Id*. at 366; emphasis added. The Court explained that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Id*. at 367.

Likewise, Justice Scalia, sitting as a single Justice, granted a stay of a Louisiana appellate court ruling in a tobacco class action because that court had "eliminated any need for respondents to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions

and continued to smoke as a result." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1303 (2010) (Scalia, J.). Justice Scalia emphasized that "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process" by preventing the defendant from defending individual claims based on lack of causation 'is an important question' worthy of the Court's review." *Id*. *See also Ortiz v. Fibreboard Corp*., 527 U.S. 815, 845 (1999) (rejecting putative mandatory settlement class in asbestos litigation due to the "serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale").

In re Chevron, 109 F.3d 1016 (5th Cir. 1997) reached the same conclusion based on similar reasoning. In that case, a group of plaintiffs sought damages for personal injuries, wrongful death, and property contamination allegedly caused by the spread of crude oil from the defendant's waste pits to the plaintiffs' drinking water supply. Over defendant's objection, the trial court adopted a "plan" where defendant's liability to all the plaintiffs would be established through a single unitary trial involving 30 bellwether plaintiffs. *Id*. at 1017. The Fifth Circuit rejected the trial court's plan on both procedural and substantive due process grounds, holding that it violated the defendant's procedural due process rights because it was "devoid of safeguards designed to ensure that the claims against [defendant] of the non-represented plaintiffs as they relate to liability or causation [must be] determined in a proceeding that is reasonably calculated to reflect the results that would be obtained if those claims were actually tried." *Id*. at 1020. And the Court held that the plan violated the

defendant's substantive due process "based on the lack of fundamental fairness contained in a system that permits . . . the imposition of liability in nearly 3,000 cases based upon results of a trial of a non-representative sample of plaintiffs." *Id*.

Plaintiffs here succeeded in avoiding the causation requirement the aforementioned authorities found guaranteed by due process. The appellate court held petitioners liable for a claimed injury to the public from the legal sale and promotion of their paint 70 years ago without providing any evidence that their conduct caused injury to any particular individual. Instead, the existence of lead paint inside the residences in the 10 most populous jurisdictions in California was "presumed" and petitioners ordered to pay gargantuan amounts into a fund for the purpose of finding these homes and then removing any lead paint from them App. 156-159. What Justice Scalia stated in *Philip Morris USA Inc. v. Scott*, *supra*, 131 S. Ct. at 4 applies with even greater force to this case: "[P]reventing [petitioners] from defending individual claims based on lack of causation is an important question worthy of the Court's review."

C. Imposing Public Nuisance Liability Upon Petitioners Because they "Promoted" the Sale of their Lawful Paints through Decades-Old Advertisements they and Trade Associations Published Violates the First Amendment.

The First Amendment, applicable to the states through the due process clause of the Fourteenth Amendment, guarantees persons the right to freedom of expression and association. Both rights are violated by the appellate court's opinion.

To begin with, the opinion literally bristles with references to "promotion" by petitioners of their paints as the gravamen of what they did long-ago that now subjects them to public nuisance liability. *See*, *e.g.*, App. 2, 13, 29-30, 33, 45-48. The "basis for defendants' liability for the public nuisance created by lead paint is 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. 33; emphasis added. This "promotion" was done through a few advertisements petitioners placed directly with newspapers and were placed indirectly by trade associations to which petitioners belonged. Notably, all of these advertisements took place at least 70 years ago for paints that were then perfectly legal to make and sell, and no advertisement expressly stated that the paints were "safe" for human ingestion. Indeed, the opinion makes clear its view that "promotion of lead paint for interior residential use was *inherently misleading* because it *implicitly asserted* that it was safe for such use when it was not." App. 57; emphasis added. In other words, the appellate court

found petitioner's failure to expressly warn in these ads that their paints were not "safe" for human consumption constituted a misrepresentation when there was no legal duty to warn at that time and no ban on making or selling paints containing lead pigment.

But promotion though advertising the sale of one's lawful products that says nothing one way or the other about its "safety" for human ingestion is protected by the First Amendment's guarantee to freedom of expression. "[E]ven a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment." *See Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 762 (1976); Accord: *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). "Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. . .. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures." *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting).

The opinion declines to extend First Amendment protection to petitioners' promotional advertising that it attributes to their "creation" and "cause" of the public nuisance. It even goes so far as to discount giving any weight to this factor when it comes to the "public policy" considerations that go into defining "legal causation," asserting that petitioners' "lead paint *promotional advertise[ments]* . . . were not entitled to

any First Amendment protections." App. 48; emphasis added. It dismisses those ads as "commercial speech," stating that "the Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." (citing *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. Of New York* (1980) 447 U.S. 557, 562-563 (*Central Hudson*).)

But *Central Hudson* struck down as unconstitutional a New York law that banned any advertisement that at the time "promote[d] the use of electricity" by electrical utility companies. New York's Public Service Commission initiated the ban, which it declared promotional advertising "intended to stimulate the purchase of utility services," because such advertising was "contrary to the national policy of conserving energy." (*Central Hudson*, *supra*, 447 U.S. at 559.) Here, there was never a government ban on the use of lead pigment in paint until 1978 and that was never followed by either a federal or California prohibition on promotional advertising of lead paint or any requirement that manufacturers of lead paint disclose associated health risks from its use. The appellate opinion holding petitioner paint companies liable for creating or assisting in the creation of a "public nuisance" is thus premised entirely on the "minor force" of a few advertisements about lead paint that took place long before the use of interior lead paint was made illegal. App. 67.

Moreover, since *Central Hudson's* distinction between the degree of protection afforded commercial verus noncommercial speech, the Court has moved much closer to the position that where "government is

concerned about public health or safety, it is constitutionally authorized to regulate or even prohibit the actual activity itself," but it cannot, until that point, "achieve its regulatory goal furtively through suppression of [advertising] information and opinion." Coleen Klasmeier & Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection* (2011) *AM. J. OF LAW & MEDICINE* 315, 340. *See also City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 438 (1993) (Blackmun, J., concurring). Neither should government be permitted under the Constitution to furtively accomplish that goal by retroactively incorporating advertisements that were completely legal to run at that time as showing liability for public nuisance today.

As with the few ads placed directly by petitioners promoting the sale of their paints, those placed long ago by the two trade associations to which they belonged cannot constitutionally be used to show petitioners liability for creation of a public nuisance. "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 School Litigation*, 46 F.3d 1284, 1294 (1994). "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*." *Id.* at 1289; emphasis in original. Since plaintiffs should not, consistent with the First Amendment, be allowed to use ads that petitioners placed in a few newspapers to promote the sale of their legal products as evidence of

their creation of, and causation for, a public nuisance, neither should they be able to use ads for that purpose by trade associations to which petitioners belonged and financially contributed.

The record lacks any evidence that petitioners' memberships in the trade associations were for the specific intent to further illegal aims or that the trade associations themselves possessed unlawful goals. Both existed to promote sales of products that were then indisputably legal to make and to sell.

CONCLUSION

For all the aforementioned reasons, the Court should grant the petition.

Respectfully submitted,

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