Nos. 18-84 and 18-86

In The Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY, ET AL., AND THE SHERWIN-WILLIAMS COMPANY,

Petitioners,

v.

CALIFORNIA,

Respondent.

On Petitions For Writ Of Certiorari To The Court of Appeal of California, Sixth Appellate District

BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF AFRICAN AMERICANS IN HOUSING IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Organization of African Americans in Housing (NOAAH) is a national, nonprofit housing association that looks to improve conditions for all residents and foster the development of affordable housing and sustainable communities. NOAAH was formed to promote the interests of African Americans specifically, and people of color in general, working in the field of affordable housing; and to promote the interests of African Americans specifically, and people of color in general, living in affordable housing.

NOAAH fulfills this purpose by providing technical, operational, educational, and moral support to its membership by offering opportunities for professional-skills enhancement, economic betterment, educational and technical resources, and a nationwide bank of proactive assistance. Its members are NOAAH's advocates, cooperative partnerships with industry and government to design and implement fair housing policies and programs, to formulate innovative strategies that improve the quality of housing and services delivery, and to promote healthy, vibrant communities.

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae states that the author of this brief is not counsel in this case for any party and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. In accordance with Supreme Court Rule 37.2, amicus certifies that counsel of record for the parties have received notice of and consented to this filing.

NOAAH is interested in the significant issues raised by the lower courts' decisions in this case. African Americans, other minorities, and low-income families often live in older, deteriorating housing built before 1950, putting them right in the cross-hairs of the lower courts' unprecedented decisions and ill-conceived abatement plan. NOAAH believes that strong enforcement of existing laws against slum landlords is the best approach to maintaining healthy homes and communities. In addition, as a trade association, NOAAH values the First Amendment protections that allow it to advocate its position without putting its individual members at risk of liability for the association's views.

Courts across the country have wisely rejected similar lawsuits and left lead regulation to the proper governmental bodies, which have the expertise, experience, and ability to build programs based on scientific and societal consensus for best practices. California stands alone. The lower courts' decisions effectively designate affordable houses as public nuisances, are inconsistent with governmental policies beneficial to affordable-housing residents, and will exacerbate the lack of affordable housing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The judgments below rest on an aggregative tort theory that violates federal constitutional principles of

due process and freedom for truthful commercial speech. "Aggregative torts rely on non-traditional theories of liability in which collective, rather than individual interests are paramount." James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 329 (2005). In contrast to mechanisms such as the class action, aggregative torts involve both procedural and *substantive* aggregation. That is, collectivity is built into the elements of the torts themselves. *Id*. Large, informally defined groups of people are alleged to be the collective victims of the defendant's wrongdoing, and the defendant's conduct is wrongful in part because it adversely affects large numbers of people. *Id*.

As demonstrated in this brief, judgments resting on aggregative-tort theories, including the judgment below, exceed the bounds of federal due process of law. The decisions below applied new principles of liability retroactively, without notice at the time of the allegedly wrongful conduct, and without traditional limits set by duty and causation.

This Court has already signaled that if a corporation allegedly harms numerous, unidentified nonparty victims who are not before a court, it is not a matter that appropriately can be handled through private adjudication. In doing so, the Court has significantly altered the allocation of powers among the coordinate branches of government by reducing judicial power to effect general deterrence and by concomitantly increasing reliance on the legislature and administrative agencies to deter activities causing widespread harm.

Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 Ariz. St. L.J. 1109, 1155 (2012) (discussing *Morris USA v. Williams*, 549 U.S. 346 (2007)). In effect, the Court has recognized that in controversies like this one, "trial courts lack the competence to hear the facts and arguments of all affected individuals and to resolve the infinitely polycentric issues. . . ." *Id*. at 1163.

The lower courts' rulings in this case are a paradigmatic example of this illegitimate form of adjudicating liability by making up new rules of law as well as crafting new, untested policies for housing and lead hazard abatement. Hence, for the reasons offered by the Petitioners, the Court should grant certiorari and reverse the judgment of the California Court of Appeal.

ARGUMENT

1. The nature of aggregative tort theories.

The judgments below rest on what has been referred to as an "aggregative" tort theory. Aggregative torts are based on non-traditional liability theories (or new versions of traditional theories) in which collective, rather than individual, interests are paramount. *See generally* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329 (2005).

Traditionally, in most tort cases, individual rights are allegedly invaded, and the right to recovery is

personal to the individual claimant. *See generally* Prosser & Keeton on the Law of Torts § 1, at 5-6 (5th ed. 1984). To be sure, modern civil procedure systems allow for aggregation of similar individual claims via class actions and other modes of procedural consolidation. But while those mechanisms are designed to achieve consistent outcomes and economies of scale, the underlying substantive claims remain individual in nature.

Conversely, the expansive tort theory embraced by the lower courts involves substantive, as well as procedural aggregation; collectivity is built into the theory itself. Large, informally-defined groups of people—sometimes represented by the state acting as plaintiff—are deemed to be the collective victims, and the defendant's conduct is thought to warrant liability largely because it adversely affects large numbers of (often individually unidentifiable) people. Elements such as breach of duty, causation, and injury are dealt with collectively and statistically, based on aggregate probabilities regarding the present and future consequences of the defendant's conduct.

The injury for which monetary recovery is sought is typically pure economic loss, not necessarily flowing out of tangible harms. Or the plaintiff—such as "the People" represented by the city and county attorneys in this case—seeks massive forms of injunctive relief. Aggregative tort theories in their most breathtaking forms have only recently arrived on the American tort scene. Heretofore, tort law traditionally focused on the rights of individuals, or small groups, claiming to have

been harmed tangibly and individually. Public nuisance claims likewise focused on tangible interferences with common public resources, such as blocking a public highway or polluting a public lake—harms that have specific locations and that a judge or jury can inspect to determine their specific cause.

In recent years, however, a minority of American courts have used these expansive tort theories to justify massive judicial reallocations of economic resources. The purest forms of recently-devised aggregative torts are brought by governmental units against commercial actors whose activities allegedly have increased the costs of administering various public-welfare programs. This case is a variation on that theme. These theories often seek to use judicial injunctions to establish new rules that legislatures or regulatory agencies would not pass, such as firearms regulation or enhanced measures to stem climate change.

2. Expansive tort theories are inherently lawless.

These expansive, aggregative tort theories, such as that embraced by the lower courts, are inherently lawless and unprincipled to their core. The new rules are developed by courts and then applied retroactively to past conduct; liability is found without proof of causation; a few companies are selected to bear the entire liability created by hundreds if not thousands of actors over time.

Regardless of whether the defendant industries—the lead pigment industry in this case, for example—are considered "anti-social" by critics, judicially applying these new tort theories is not in the long-range best interests of a nation founded on principles or its judiciary charged with developing and applying these rules to resolve individual disputes fairly. All but the most ardent political activists cannot help but wince at the prospect of courts reallocating potentially billions of dollars in the name of unidentified consumers, most of whom have not suffered and will never suffer injury; or courts protecting government agencies from funding welfare expenditures that they are politically obligated to make under our traditional forms of government. The only interest group that would clearly benefit from broad acceptance of these theories would be the plaintiffs' lawyers who are conceiving, funding, and bringing these actions on a contingency-fee basis.

The lawlessness of these aggregative tort theories inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring recovery. These new torts enable judges and juries to exercise regulatory power at the macro-economic level that even the most aggressive administrative agencies could never hope to possess. In exercising these extraordinary regulatory powers via tort litigation, courts and juries exceed the legitimate limits of both their authority and competence. To be sure, state courts have the authority to develop and modify their tort law as they see fit, but only within the limits set

by federal constitutional principles. There is no doubt that the First Amendment and the Due Process clause set boundaries for the state courts.

Regarding the limits of judicial authority, it is traditionally understood that in a representative democracy, macro-economic regulation is accomplished most appropriately by elected officials and their lawful delegates. Of course, traditional tort law unavoidably involves economic regulation to a limited extent. But tort law ordinarily accomplishes its objectives by vindicating the rights of discrete victims of specifically-defined conduct that has caused discrete, identifiable harms by identified actors at known locations.

Because the decisions below disregard those traditional limits of tort law, they exceed the "well-established common-law protection[s] against arbitrary deprivations of property." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). The decisions below are "extreme applications" of state-law doctrines that are "inconsistent with a federal right that is fundamental in character." *See Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996) (quotation marks omitted). The result is "arbitrary and inaccurate adjudication," *Oberg*, 512 U.S. at 430, as well as "unjustified and unpredictable breaks with prior law . . . [through] judicial alteration of a common law doctrine." *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001); *Bouie v. City of Columbia*, 378 U.S. 347, 352-54 (1964) ("unforeseeable" and "retroactive" ruling that departed from prior precedent violated due process). When truthful promotion of common products for lawful uses is the foundation

for liability, when viewed in hindsight several decades after the promotion has ended, due process and First Amendment protections are severely threatened.

The risk of harm from these new aggregative tort theories is real; they are used to impose enormous liabilities on industries for allegedly having helped conditions that may be found—viewed collectively and probabilistically by courts and juries years later—to adversely affect the public interest, broadly defined. In this manner, aggregative torts involve self-conscious judicial regulation on such a breathtaking scale, abstracted from any commitment to vindicating the individual rights of claimants, that they depart from federal constitutional boundaries.

A second way these theories exceed the boundaries of the judicial franchise concerns the limits of courts' institutional competence to address open-ended problems of economic planning and resource allocation. *See generally* James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 Ind. L.J. 467 (1976). Like other governmental decisionmaking processes, adjudication assures that affected parties are allowed to participate in reaching outcomes at trial. Thus, litigants are afforded the opportunity to offer evidence and to invoke legal norms so that each side may respectfully insist on a favorable decision as a matter of right. *Id*. at 469-77. For this to occur, the governing legal rules must be specific enough to arrange the constituent elements into linear chains of logic so that each element may be considered more or less in isolation from the others and resolved, even if

sometimes only tentatively, before moving on to the next. Only when the rules of decision are sufficiently specific to support these logical structures can each party guide the judge or jury through the elements of the case to the conclusion indicated by that party's positions on the relevant facts and law.

Under aggregative tort theories, however, the law is so vague, as with the public nuisance rules below, that it makes no attempt logically to separate the relevant aspects for decision. Instead, open-ended legal standards leave it to the discretion of a single judge to "do the right thing" or "to do more" by creating new public policy and to require unpopular, often out-of-state companies to pay.

Because most of the elements relevant to these social-engineering decisions simultaneously relate to most of the other elements (writers have used the terms "polycentric" to refer to these complex problems), the litigants are unable to work their way through the linear chains of logic and insist on outcomes as a matter of right. *Id*. at 479, 484, 486, 492. Instead, the defendants are forced to become supplicants, begging for enough sympathy to cause that single judge to bless them with a favorable exercise of his or her boundless discretion. And when, as here, a court finds a public nuisance and orders the defendants to abate, the defendants may be justifiably confused as to what the court's order really means and on what legitimate basis they alone have been held liable.

Thus, the lawlessness that inheres in aggregative torts resides not simply in courts exceeding the bounds of their political authority by functioning as politically unaccountable regulatory bodies. It also resides in courts that ignore the procedures and rules that underlie their institutional competence and effectively deny defendants a meaningful opportunity to have their day in court.

3. The result here is a paradigm of the lawless application of an aggregative tort theory.

The lower courts' approach case is far more collective and far more extreme than the market-share approach that numerous courts, including then Chief Judge Breyer, have rejected as being too collective. *See*, *e.g.*, *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546 (1st Cir. 1993) (rejecting market share liability as applied to lead paint under Massachusetts law); *Skipworth v. Lead Indus. Ass'n, Inc.*, 690 A.2d 169, 173 (Pa. 1997) ("we find that application of market share liability to lead paint cases would grotesquely distort liability"). Liability was imposed on the defendants in this case because by their lawful promotions decades ago, they were "at least a 'very minor force' in leading to the current presence of interior residential lead paint in a substantial number of homes in the 10 jurisdictions." *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 103 (Cal. Ct. App. 2017).

Thus, even if a defendant never acted tortiously, or the defendant's pigment never actually harmed

anyone or even started to flake or otherwise become dangerous, the defendant still was held fully liable for the costly public abatement efforts in ten of California's largest counties and cities as mandated by the lower courts. The arbitrary and grossly disproportionate liability in this case is far more extreme than market share liability.

Contrary to the version of public nuisance adopted by the lower courts, traditional invocations of public nuisance invariably involve an element of wrongfulness beyond merely unreasonableness. Criminality, or something close to it, has traditionally been involved whenever courts have found public nuisances to exist. Moreover, the clearly wrongful conduct must involve the continuing use of land by one who is in control of the activity at the location alleged to be creating the public nuisance. And the defendant's activities must be shown to be invading specifically-identified rights shared by the public. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 543-48 (2005-2006). The California courts below did not require a single one of these elements to be proven, and they could not be proven.

The important point here is that the lower courts' definition of the tort in this case is so vague as to be unbounded, leaving a single judge free to impose liability simply because, exercising broad discretion based on hindsight, he or she did not approve of the business the defendants were engaged in decades ago, and believed that the legislature was not providing

enough funding through its fees imposed on former lead paint producers, among others, to prevent childhood lead exposure. Against this sort of charge, there is no fair chance to change one's conduct to prevent liability or to defend against the litigation.

The New Jersey Supreme Court, in a case similar to this one involving commercial sellers of lead paint pigments, reached a very different conclusion from the California courts:

> [P]laintiff's loosely-articulated assertions here cannot find their basis in this [public nuisance] tort. Rather, were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent limitations of the tort of public nuisance.
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> * * *
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> Although one might argue that the product, now in its deteriorated state, interferes with the public health, one cannot also argue persuasively that the conduct of defendants in distributing it, at the time when they did, bears the necessary link to the current health crisis. Absent that link, the claims of plaintiffs cannot sound in public nuisance. Indeed, the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary commercial products which,

> although legal when sold, and although sold no more recently than a quarter century ago, have become dangerous through deterioration and poor maintenance by the purchasers.

In re Lead Paint Litig., 924 A.2d 484, 494 & 450-52 (N.J. 2007); *see also State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007).

4. The lower courts' expansion of public nuisance law would destroy an institutionally-important constraint on product sellers' liability.

The New Jersey Supreme Court's comments reflect a judicial displeasure with the drastic effects that a broad expansion of public-nuisance law would have on the traditional law of products liability. By insisting that a plaintiff prove a specific product defect at the time of original commercial distribution, American courts have unanimously rejected what scholarly commentators have deemed "category liability." *See generally* Restatement (Third) of Torts: Products Liability § 2, cmt. d (1998); James A. Henderson, Jr. & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263 (1991).

Thus, American courts steadfastly refuse to impose tort liability on commercial product distributors merely because a broad product category—*e.g.*, handguns, tobacco products, or alcohol—might be found by

a judge or jury to present risks that, in the aggregate, outweigh their social benefits. For one thing, courts believe that risk-benefit decisions at the macro level should be left to consumers in the marketplace. More importantly, the legal-process reasons why courts have refused to impose product category liability are closely related to the legal-process reasons this brief advances for rejecting aggregative tort theories—imposing category liability on broad categories of products would exceed federal constitutional principle as well as the legitimate authority and institutional competence of courts.

The lower courts' abatement order reflects the problems that arise when courts make social policies in areas in which they lack competence. The abatement order will affect over a million property owners and residents. By labeling all interior lead paint in residential housing to be a public nuisance, the courts' order will adversely affect market value, the ability to sell and rent properties, and the supply and cost of affordable housing. The ruling conflicts with federal and state law and policy determining that intact lead paint is not a hazard and does not need to be abated.

Costs of abatement will rise with the requirement that all windows, doors, stairs, railings, and other friction surfaces with lead paint must be replaced or remediated. Owners may be less willing to allow inspections and abatement knowing that important features of their properties, many of historic or architectural value, must be ripped out. The abatement plan rewards slumlords first. Property owners with ten or

more housing code violations go to the front of the line to receive funding. These are the same property owners who should be punished under the law for repeatedly exposing children to chipping and peeling lead paint.

The abatement will create thousands of tons of lead waste for transport and disposal, raising concerns for environmental impact not addressed by the courts below. And the disruption of lead paint safely buried under many layers of non-lead paint may cause rather than prevent childhood lead exposure at many properties, all at a time when the prevalence of elevated blood lead levels in California children continue to decline.

In sum, the abatement order by the courts below, which the State Childhood Lead Poisoning Prevention Branch never reviewed or was even asked to review, raises many thorny issues affecting the availability and cost of safe affordable housing in ten of California's largest cities and counties. That is NOAAH's concern. NOAAH respectfully suggests that the courts should leave those issues of housing policy to the expert regulatory agencies. The courts should not reach out to create unprincipled, new theories of law whenever a single judge believes that the legislature or a regulatory agency is not doing enough.

CONCLUSION

The Court should grant the petitions for certiorari.

Respectfully submitted,

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