No. 20-___

IN THE

Supreme Court of the United States

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

v.

COUNTY OF DELAWARE, PENNSYLVANIA; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fundamental in this Court's Article III jurisprudence is the principle that the federal courts are open to hear federal claims for declaratory and injunctive relief when plaintiffs face a genuine threat of adverse government action. Yet, Petitioner The Sherwin-Williams Company was rejected at the courthouse door for lack of Article III standing after filing such an action to resolve ongoing and imminent violations of its federal constitutional rights. The claims derive from Respondent Delaware County's use of contingency-fee counsel to bring a public nuisance lawsuit premised on Petitioner's First Amendment protected activity.

The County's suit is part of a growing trend where governments delegate police power to financially-interested counsel, creating bias or an appearance of bias in government decision-making. It also reflects a wave of litigation hinging liability on First Amendment protected activity, such as lawful advertising and participation in trade groups. Both trends have confounded the courts and evaded federal review. The questions presented are:

1. Whether the Third Circuit violated clearly established precedent, in conflict with other Circuits, in denying Article III standing by considering the merits of Petitioner's due process claim; and

2. Whether an alleged injury-in-fact is established for purposes of Article III standing where, as this Court and other Circuits have held, the government's genuine threat to impose liability on a specific target based on its prior First Amendment conduct chills constitutionally protected speech.

PARTIES TO THE PROCEEDING

Petitioner is The Sherwin-Williams Company ("Sherwin-Williams").

Respondents are County of Delaware, Pennsylvania; Brian P. Zidek, in his official capacity as Chair of the County Council of the County of Delaware, Pennsylvania; Dr. Monica Taylor, in her official capacity as Vice Chair of the County Council of the County of Delaware, Pennsylvania; Kevin M. Madden, in his official capacity as member of the County Council of the County of Delaware, Pennsylvania; Elaine P. Schaefer, in her official capacity as member of the County Council of the County of Delaware, Pennsylvania; Christine A. Reuther, in her official capacity as member of the County Council of the County of Delaware, Pennsylvania (together, "Delaware County" or "the County").*

Pursuant to Rule 12.6, Petitioner has notified the Clerk and all additional defendants listed here of its belief that each no longer has an interest in the outcome of the Petition for a Writ of Certiorari and for that reason has been omitted from the Petition as a respondent: County of Erie, Pennsylvania; County of York, Pennsylvania; Dr. Kyle W. Foust, in his official capacity as County Council Chairman of the Erie County Council; Fiore Leone, in his official capacity as County Vice Chairman of the Erie County Council; Kathy Fatica, in her official capacity as Finance

* Pursuant to Rule 35.3, Petitioner has notified the Court that individuals sued in their official capacity who no longer hold office have been automatically substituted with their successors in office.

Chairwoman and member of the Erie County Council; Carol J. Loll, in her official capacity as Finance Vice Chairwoman and member of the Erie County Council; Andre R. Horton, in his official capacity as Personnel Chairman and member of the Erie County Council; Carl Anderson, III, in his official capacity as member of the Erie County Council; Scott R. Rastetter, in his official capacity as member of the Erie County Council; Susan Byrnes, in her official capacity as President of the Board of Commissioners for York County, Pennsylvania; Doug Hoke, in his official capacity as Vice President of the Board of Commissioners for York County, Pennsylvania; Chris Reilly, in his official capacity as a member of the Board of Commissioners for York County, Pennsylvania.

CORPORATE DISCLOSURE STATEMENT

Sherwin-Williams is publicly traded and does not have any parent corporation. No publicly held company owns 10% or more of the stock in Sherwin-Williams.

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INTRODUCTION

This Court has held time and again that the federal courts are open to hear federal claims for declaratory and injunctive relief when plaintiffs face a genuine threat of adverse government action. Yet, Petitioner The Sherwin-Williams Company was rejected at the courthouse door for lack of Article III standing after filing such an action to resolve ongoing and imminent violations of its First and Fourteenth Amendment rights. Sherwin-Williams' claims derive from Respondent Delaware County's use of contingency-fee counsel to bring a public nuisance lawsuit seeking to protect a purported public right. The lawsuit, which will premise liability on Petitioner's First Amendment protected activity and other decades-old lawful conduct, already has caused injury, including a chill of Sherwin-Williams' First Amendment activity.

The County's imminent suit represents a growing trend where governments impermissibly delegate their police power to private contingency-fee counsel, whose financial interest in the outcome of the government's action may influence or, at least, create the appearance of bias in government decision-making. It also reflects a wave of litigation seeking to hold companies liable for protected First Amendment activity, such as lawful advertising and participation in trade groups. Both trends have confounded the courts and created risks that drive many meritless cases to settlement before resolving the constitutional rights at stake.

The constitutional concerns that arise in these lawsuits are on full display in this case. In mid-2018,

a Philadelphia-based law firm approached Delaware County about representing the County on a contingency-fee basis to bring a public nuisance action against Sherwin-Williams and others. On a mission to represent all 67 of Pennsylvania's counties in separate actions, the firm pitched a pre-packaged lawsuit that it already has filed against Sherwin-Williams on behalf of two other counties. It developed the legal arguments and identified the defendants, and all that Delaware County had to do was sign up. Delaware County did just that, and approved the suit.

To remedy existing harms and prevent ongoing injuries that derive from the County's imminent lawsuit, Sherwin-Williams sued in federal court for declaratory and injunctive relief. The Complaint alleges that Delaware County's retention of financially-interested counsel to use the government's police power to prosecute a public nuisance action violates due process. That is so, regardless of whether county officials work together with outside contingency-fee counsel and maintain authority to control the litigation. The Complaint also alleges that the County's already approved lawsuit violates Sherwin-Williams' First Amendment rights in seeking to hold Sherwin-Williams liable for its prior truthful promotion of lawful products, its petitioning the government, and its association with trade groups. Finally, the Complaint alleges that the threatened lawsuit would impose arbitrary and retroactive liability on Sherwin-Williams in violation of due process.

The District Court dismissed the action for lack of Article III standing. The Third Circuit then affirmed in a decision that departs from this Court's well-

established precedent and conflicts with other Circuits' decisions. Two material errors warrant this Court's review.

First, in considering whether Sherwin-Williams has standing to bring a due process claim challenging the County's retention of contingency-fee counsel to pursue a public nuisance action, the Third Circuit concluded Sherwin-Williams could not have suffered an injury-in-fact because, in its view, the contingency-fee agreement executed by Delaware County did not violate due process. The standing discussion focused on the Third Circuit's factual determination that the County will control the litigation, and on its legal determination that such control defeats Sherwin-Williams' ability to establish an injury from its due process claim. But whether the County would actually maintain control and whether, in any event, such control alleviates due process concerns are issues that go to the *merits* of the due process right at issue, not whether Sherwin-Williams has *standing* to have a federal court adjudicate the merits of the claim. *See Bell v. Hood*, 327 U.S. 678, 684-85 (1946). Whether the County purports to maintain paper control was not material to Sherwin-Williams' claim. *See* Pet.App.77a-79a (Compl. ¶¶ 94-96). The Third Circuit's reasoning effectively means that no claimant will have standing to pursue constitutional challenges to the government's use of financially-interested outside counsel, so long as the agreement with the firm states that the government entity will control the litigation.

Second, the Third Circuit contravened this Court's well-established precedent that a plaintiff need not wait for the government to file a threatened action

before challenging the basis for that threat and seeking a remedy for existing and imminent future harm in federal court. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). That is especially so where the threatened action has chilled speech and burdened associational rights. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 155, 158 (2014).

These errors created conflict among the Circuits and are critically important in light of the recent trends in litigation where local and state governments use financially-interested private counsel to employ their police power and premise liability on prior First Amendment protected activity.

Worse yet, the Third Circuit's decision has implications far beyond this case. Its decision undermines fundamental principles espoused in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which held that civil rights activists and organizations could not be held liable to local businesses affected by a boycott, simply because of the activists' association with individuals who engaged in violence. *Id.* at 888-89, 920. The Third Circuit's decision, if allowed to stand, would leave individuals and organizations with no affirmative recourse from a genuine threat of litigation by government actors seeking to suppress protected speech and association.

These errors call for summary reversal, or at a minimum for this Court's review, to ensure that individuals, organizations, and businesses in Sherwin-Williams' position have a full and fair opportunity to have their federal constitutional claims heard in federal court.

OPINIONS BELOW

The District Court's opinion granting Delaware County's motion to dismiss (Pet.App.25a-33a) is unpublished, but is available at 2019 WL 4917154. The Third Circuit's decision affirming the District Court (Pet.App.8a-23a) is published at 968 F.3d 264.

JURISDICTION

The Third Circuit issued its decision on July 31, 2020. Sherwin-Williams timely filed this petition in accordance with the Court's general order dated March 19, 2020, which extended the time to file the petition to December 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article III, Section 2, Clause 1 of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. Amendment I of the U.S. Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. Amendment XIV of the U.S. Constitution provides:

> "No State shall … deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. Sherwin-Williams is an Ohio-based corporation that manufactures and distributes paints, coatings, and other related products. Pet.App.11a. At the time of its founding in 1866, and for decades thereafter, white lead carbonate pigments were common ingredients used to make paints durable and washable. Pet.App.57a, 59a-60a (Compl. ¶¶ 45, 50-51). In fact, federal, state, and local government paint specifications often *required* the use of lead-based paints in government housing and public buildings through the 1960s and early 1970s. Pet.App.63a-65a (Compl. ¶¶ 56-59). Like numerous other paint manufacturers, Sherwin-Williams promoted its then-lawful products with truthful advertising and participated in trade associations that promoted lead-based paints. Pet.App.49a-50a, 70a-72a (Compl. ¶¶ 13, 15, 74, 79). Sherwin-Williams also worked cooperatively with national organizations and public health officials to develop national safety standards

and appropriate product warnings. Pet.App.66a-67a (Compl. ¶¶ 61-63).

Following new research reporting the hazards of deteriorated paint, the federal government banned lead-based paints for residential use in 1978. *See* Pet.App.71a-72a (Compl. ¶ 77). It is well-recognized, however, that intact, well-maintained lead-based paints do not present a health risk and do not require abatement. Pet.App.57a-59a (Compl. ¶¶ 45, 47, 48). Only deteriorated lead paint must be abated. Pet.App.48a-49a (Compl. ¶ 12). Such a hazard arises when "private property owners, the County, and other public entities have failed to maintain their properties and the lead-containing paint within them." *Id.*

2. In 2018, a Philadelphia-based law firm developed a plan to approach all 67 Pennsylvania counties and represent them in 67 separate public nuisance lawsuits in state court against Sherwin-Williams and other former lead pigment and paint manufacturers. Pet.App.11a; Pet.App.45a-46a, 67a (Compl. ¶¶ 7, 64). In Pennsylvania, when the government acts to abate a perceived public nuisance allegedly affecting its constituency, it is exercising its police powers. *See Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 885 (Pa. 1974) ("The power of the Attorney General to abate public nuisances is an adjunct of the inherent police power of the Commonwealth."). The proposed lawsuits, therefore, sought to use the government's police power to shift the cost of lead-paint abatement from property owners.

The lawsuits are designed to maximize financial recovery. They allege that the presence of lead paint

in residences is in itself a public nuisance, and that Sherwin-Williams should be jointly and severally liable for paying to inspect all pre-1978 properties and abate all lead paint, regardless of whether the paint is in good repair and poses no hazard. Pet.App.11a; Pet.App.41a-42a, 48a-49a, 75a, 78a (Compl. ¶¶ 1, 12, 86, 95). The lawsuits allege that Sherwin-Williams caused this nuisance by promoting the use of lead-based paints decades ago, and through its "membership and involvement in trade organizations" that ended decades ago. Pet.App.127a, 141a, 156a-57a (Montgomery Cnty. Compl. ¶¶ 39, 68, 107).

Lehigh and Montgomery Counties hired the law firm on a contingency-fee basis to prosecute the public nuisance litigation against Sherwin-Williams, and each filed a separate lawsuit in its county's state trial court. Pet.App.11a. The firm solicited other counties in Pennsylvania, and Respondent Delaware County retained it on a contingency-fee basis and approved the filing of the same public nuisance action. *Id.*; Pet.App.67a-68a (Compl. ¶¶ 64, 65). The law firm also approached former Defendants Erie and York Counties. Pet.App.11a; Pet.App.67a (Compl. ¶ 64).

3. As a result of Delaware County's retention of financially-interested counsel and the threatened public nuisance litigation, Sherwin-Williams already experienced financial harm, as well as a chill of its First Amendment rights. *See* Pet.App.50a, 74a-77a (Compl. ¶¶ 14, 85, 90). In light of those harms, and anticipating a flood of litigation filed in separate counties across the Commonwealth, Sherwin-Williams filed an action in the U.S. District Court for the Eastern District of Pennsylvania on October 22, 2018, against Respondents Delaware County and

members of the Delaware County Council (together, "Delaware County"), as well as against Defendants Erie and York Counties, members of the Erie and York County Councils, "John Doe Counties," and "John Does." Pet.App.11a. The Complaint seeks declaratory and injunctive relief under 42 U.S.C. § 1983 to remedy existing and ongoing violations of Sherwin-Williams' federal constitutional rights. Pet.App.12a; Pet.App.57a (Compl. ¶ 43). Defendants Erie and York Counties responded that they would not hire private outside counsel nor sue Sherwin-Williams, and Sherwin-Williams therefore dismissed those counties and their county council members. Pet.App.11a.

The Complaint raises three claims for relief. Starting with Count III, Sherwin-Williams alleges that Delaware County's agreement to retain private outside counsel on a contingency-fee basis to bring a government public nuisance claim to enforce a purported public right violates due process. Pet.App.13a-14a. Sherwin-Williams maintains that "[t]he Constitution prohibits vesting the prosecutorial function in someone who has a financial interest in using the government's police power to hold a defendant liable." *Id.* (quoting Pet.App.77a-78a (Compl. ¶ 94)).

The Complaint alleges that, although Sherwin-Williams did not have the exact terms of the agreement at the time of filing, it is likely that the agreement provides for outside counsel to receive 33 1/3% of any recovery, plus expenses. *See* Pet.App.12a (quoting Pet.App.67a-68a (Compl. ¶ 65)); Pet.App.77a (Compl. ¶ 93a). The Complaint further alleges that the financial incentive inherent in that contingency-

based agreement creates a due process violation, even where a county "act[s] together with [its] trial lawyers" in bringing a public nuisance abatement action. Pet.App.78a (Compl. ¶ 95). Before a suit is even filed, "merely defining the nature and scope of the public nuisance and determining who should be sued is an inherently discretionary function." Pet.App.77a-78a (Compl. ¶ 94). The financial incentive inherent in contingency-fee agreements "tip[s] the scales in favor of additional regulation and restriction or toward particular defendants." *Id.* Then, once a lawsuit is filed, the "financial arrangement … will unlawfully interfere with the Count[y's] decision-making." Pet.App.78a-79a (Compl. ¶ 96).

In Count I, the Complaint alleges that the lawsuit approved by Delaware County violates the First Amendment, because the County seeks to hold Sherwin-Williams liable for its protected First Amendment activity. Pet.App.12a-13a. The threatened lawsuit violates the First Amendment by seeking to hold Sherwin-Williams "liable for '(i) its membership in [trade associations]; (ii) the activities of the [trade associations], including those that Sherwin-Williams did not join, fund, or approve; (iii) Sherwin-Williams' purported petitioning of federal, state and local governments; and (iv) Sherwin-Williams' commercial speech.'" *Id.* (quoting Pet.App.70a (Compl. ¶ 73)). The Complaint alleges that the threatened suit already has "'impermissibly chill[ed] [Sherwin-Williams'] speech and associational activities.'" *Id.* (quoting Pet.App.50a (Compl. ¶ 14)). As an example, out of a concern that its present First Amendment protected activity will subject it to future

liability if cases like Delaware County's are able to move forward, Sherwin-Williams alleges it "has reconsidered and continues to question its membership in various trade organizations and its petitioning to the government on any issues." *Id.* (quoting Pet.App.50a (Compl. ¶ 14)).

Finally, in Count II, the Complaint alleges that Delaware County's approved public nuisance action would seek to impose liability on Sherwin-Williams "(i) that is grossly disproportionate; (ii) arbitrary; (iii) impermissibly retroactive; (iv) without fair notice; (v) impermissibly vague; and (vi) after an unexplainable, prejudicial and extraordinarily long delay, in violation of the Due Process Clause." Pet.App.13a (quoting Pet.App.73a (Compl. ¶ 83)). It further alleges that "the imminent threat of such allegations imposes a severe financial hardship on Sherwin-Williams." Pet.App.74-75a (Compl. ¶ 85). "The immediate and uniform judicial review of the Counties' actions is warranted to ensure stability and the well-being of Sherwin-Williams and its employees, retirees, and shareholders." Pet.App.76a-77a (Compl. ¶ 90). In contrast, "[w]aiting years for the inevitable inconsistent opinions to work their way through the various trial courts throughout the Commonwealth and the appellate courts would have a detrimental, irreparable effect on Sherwin-Williams and those who depend on it." *Id.*

4. Delaware County moved to dismiss the Complaint, and the District Court granted the motion, holding that the "'complaint fail[ed] to state facts sufficient to show an actual case [or] controversy.'" Pet.App.13a-14a (quoting E.D. Pa. Op., Pet.App.32a). Sherwin-Williams filed a timely appeal. Pet.App.14a.

On July 31, 2020, the Court of Appeals for the Third Circuit affirmed. Pet.App.3a, 10a, 23a. With respect to the due process claim based on the delegation of police power to financially-interested counsel, the Court of Appeals held that Sherwin-Williams "cannot establish an existing injury based on [the] agreement's specific terms." Pet.App.20a. Delaware County had executed an amended retainer agreement with the law firm one week after Sherwin-Williams filed the Complaint. *Id.* The new agreement provides that Delaware County "retain[s] complete control over the course and conduct of the litigation." *Id.* (internal quotation marks omitted). Considering that language in the amended agreement, which was in the appellate record by virtue of a separate motion for partial summary judgment, the Court of Appeals concluded that, because the County agreed to maintain control over the litigation "and does not stand to benefit from the contingent-fee arrangement, … Sherwin-Williams's claims of impending injury were (and are) unfounded." Pet.App.21a. The Court then held that Sherwin-Williams "fails to show an irreparable injury justifying pre-suit relief." *Id.* "Sherwin-Williams will suffer no harm if the County decides not to sue. And if it does sue, an injury may arise only if the County violates its own agreement and cedes control to outside counsel." *Id.*

With respect to the First Amendment and due process claims challenging the threatened lawsuit, the Court of Appeals held that "Sherwin-Williams failed to allege an existing injury or one that was 'certainly impending' as a result of the anticipated litigation from Delaware County." Pet.App.17a (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158

(1990)). It concluded that Sherwin-Williams' First Amendment claim constituted "'generalized allegations' of chilled speech," *id.*, and that the claims were too speculative because "Sherwin-Williams asks [the court] to assume not only that the County will sue, but also its theory of liability, its litigation tactics, and that the County will prevail." Pet.App.18a. The court again found that Sherwin-Williams' injuries were not "irreparable," *id.*, and faulted Sherwin-Williams for raising "affirmative defenses it could raise in response to any suit that might be filed." Pet.App.19a.

Finally, the Court of Appeals concluded that the claims were not ripe for review, "largely for the same reasons they fail to satisfy the injury-in-fact requirement—they require speculation about whether the County will sue and what claims it would raise." Pet.App.23a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION TO BRING THE THIRD CIRCUIT IN LINE WITH DECADES OF SUPREME COURT PRECEDENT, AND DECISIONS OF OTHER CIRCUITS, HOLDING THAT ARTICLE III STANDING DOES NOT DEPEND ON THE MERITS OF A CLAIM.

A. The Article III Standing Requirement Does Not Depend On The Merits Of A Claim.

This Court repeatedly has held that Article III "standing in no way depends on the merits of the plaintiff's contention that particular conduct is

illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968); *see also Bell*, 327 U.S. at 683 ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) ("[O]ne must not 'confus[e] weakness on the merits with absence of Article III standing.'" (quoting *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011)); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (same).

The distinction between the standing and merits inquiries derives from the fundamental power and role of the federal courts in resolving disputes. A court has no authority to adjudicate the merits of a claim when it has no jurisdiction. As the Court explained in *Steel Co. v. Citizens for a Better Environment*, an assessment of subject-matter jurisdiction—unlike the existence of a claim for relief—goes to "the courts' … constitutional *power* to adjudicate the case." 523 U.S. 83, 89 (1998). A court "act[s] ultra vires" where it "pronounce[s] upon the … constitutionality" of a law or government action "when it has no jurisdiction." *Id.* at 101-02. Therefore, in most circumstances, a court must determine whether it has jurisdiction before announcing a decision on the merits. *Id.* 89, 101-02.

Because the jurisdictional inquiry must come before the merits, "uncertainty about whether a cause of action exist[s]" does not inform the court's

jurisdiction. *Id.* at 96. Rather, whether a complaint states a claim for relief "calls for a judgment on the merits." *Bell*, 327 U.S. at 682. And for good reason. Where a court dismisses a claim for lack of standing because it believes the plaintiff has not stated a claim or will lose on the merits, the court short-circuits development of the law and deprives the litigant of its day in court.

In *Bell v. Hood*, for example, the district court "dismissed the case on *jurisdictional* grounds because it believed that (what we would now call) a *Bivens* action would not lie." *Steel Co.*, 523 U.S. at 96 (discussing *Bell*). The Court reversed, holding that, even though the "question ha[d] never been specifically decided by this Court," it had "sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it." *Bell*, 327 U.S. at 684. The claim turned on "a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law." *Id.* at 685. The Court explained that, as long as "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," the Court has jurisdiction and should decide the claim on the merits. *Id.* Only if a "claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous'" should a court decline jurisdiction. *Steel Co.*, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 682-83).

B. The Decision Below Contravenes This Court's Precedent And Conflicts With Other Courts Of Appeal.

1. Contrary to this Court's well-established precedent, the Third Circuit dismissed for lack of Article III standing Sherwin-Williams' claim that federal due process prohibits counsel who are financially-interested in the outcome of a case from exercising the government's police power. The decision is based on the Third Circuit's perception of the merits: "Sherwin-Williams's claims of impending injury were (and are) unfounded" because Delaware County "retained full control over potential litigation and does not stand to benefit from the contingent-fee arrangement." Pet.App.21a. In other words, in the Third Circuit's view, Sherwin-Williams has not alleged an *injury* because the court determined as a factual and legal matter that there is no due process violation under Delaware County's contingency-fee agreement. Whether a due process violation exists, however, goes to the "scope of the … [Constitution's] protection from … deprivations of liberty without due process of law." *Bell*, 327 U.S. at 685. It does not go to the question whether Sherwin-Williams has experienced an injury sufficient to establish Article III standing. *See id.* The Third Circuit's decision directly contradicts this Court's decision in *Bell*.

Moreover, this case does not fall within the narrow exception where a court may decline jurisdiction if the merits of a claim are "wholly insubstantial and frivolous." *Id.* at 682-83. Sherwin-Williams' due process claim has far more than "sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it." *Id.* at

684. The Complaint alleges that, when bringing a government action to abate a public nuisance, the financial incentive created by a contingency-fee agreement *alone* establishes a due process violation—regardless of whether the County "act[s] together with [its] trial lawyers." Pet.App.78a (Compl. ¶ 95). There is ample support for Sherwin-Williams' allegations in this Court's case law.

The Court often has held that a governmental entity violates due process when it fails to ensure access to an impartial tribunal. That due process principle extends to judges and other arbitrators who have a pecuniary interest in a case over which they preside, *see Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); as well as to government attorneys, *see Berger v. United States*, 295 U.S. 78 (1935). In *Berger*, the Court explained that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 88. The Court later elaborated that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810-11 (1987) (opinion of Brennan, J.).

The public nuisance claim approved by Delaware County invokes these same due process concerns.

Public nuisance actions by their nature are designed to protect public rights and interests. They seek to remedy "quasi-sovereign interests," as opposed to protecting a government's own financial interests. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *see also Blue Mountain Pres. Ass'n v. Twp. of Eldred*, 867 A.2d 692, 704 (Pa. Commw. Ct. 2005) (providing that under Pennsylvania law, an alleged nuisance must "affect[] the general public" and not "merely some private individual or individuals"). Attorneys pursuing public nuisance actions on behalf of the government, therefore, must have a paramount interest in ensuring that justice is done—not in maximizing financial recovery and not in winning the case or coercing a settlement. *Berger*, 295 U.S. at 88. Delaware County's retention of financially-interested counsel to pursue its public nuisance action is at odds with these fundamental principles of due process. That is especially so on the facts of this case, given that private counsel made key decisions regarding the legal theories, the definition of the alleged public nuisance, the defendants, and the remedies before approaching Delaware County about filing suit. The County's purported after-the-fact control over the litigation does not remedy the taint to the proceedings that already occurred.

In dismissing the claim, the Third Circuit did not grapple with these issues in any meaningful sense. It made a cursory factual determination that, because the County's agreement *says* it will maintain control, it will actually direct the litigation in a manner that would alleviate any due process concerns. It did not give Sherwin-Williams the opportunity to establish, on the facts of this case, that due process is violated

where financially-interested counsel made key decisions before the County even considered the litigation, and will continue to influence the County's decision-making. The Third Circuit's decision to dismiss based on lack of standing stunts the development of the law on this issue of increasingly critical importance. *See infra*, Section I(C).

2. The decision below also conflicts with other Courts of Appeals' decisions considering whether allegations of due process violations suffice to establish an injury-in-fact for purposes of Article III standing. For example, in *Kanuszewski v. Michigan Department of Health & Human Services*, 927 F.3d 396 (6th Cir. 2019), the Sixth Circuit considered, among other issues, whether the plaintiffs had standing to bring a substantive due process claim based on parental rights to direct the medical care of children. *Id.* at 407-08. The court explained that its "standing analysis does not consider the merits of Plaintiffs' claims; instead, we must assume that 'if proved in a proper case,' Defendants' alleged practices 'would be adjudged violative of the [Plaintiffs'] constitutional rights.'" *Id.* at 407 (quoting *Warth*, 422 U.S. at 502). The court then held that the plaintiffs had standing to seek damages for harms stemming from the alleged due process violation that occurred when the defendants drew blood from children without first obtaining parental consent. *Id.* Likewise, "assum[ing] that Defendants violated the children's substantive due process rights when they tested the blood samples for various diseases," the court concluded that the plaintiffs had standing to seek damages, injunctive, and declaratory relief for "ongoing injuries and the threat of further injuries

resulting from" that alleged due process violation. *Id.* at 410-11. Here, by contrast, the Third Circuit did not assume that Delaware County violated Sherwin-Williams' due process rights by entering into a contingency-fee agreement when assessing standing; it denied standing because it summarily determined that no violation took place.

The Seventh and Eighth Circuits similarly have rejected attempts to deny Article III standing based on consideration of the merits of a due process claim. *See Booker-El v. Superintendent, Ind. State Prison*, 668 F.3d 896, 899 (7th Cir. 2012) (rejecting argument that the plaintiff failed to establish an injury-in-fact to bring a due process claim because the "argument conflates standing with the merits of the case"); *Hughes v. City of Cedar Rapids*, 840 F.3d 987, 993-94 (8th Cir. 2016) (reversing dismissal of a procedural due process claim for lack of standing because the district court erroneously "addressed the substance of the due process argument as part of the standing analysis" and holding that the "allegations that the procedure is inadequate … sufficiently establishes an injury in fact for Article III standing"); *cf. Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (noting that "the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim").

Absent this Court's review, the Third Circuit's decision will upend this Court's settled precedent that other Courts of Appeals consistently have applied.

C. This Question Warrants The Court's Immediate Review.

When the Third Circuit dismissed Sherwin-Williams' due process claim for lack of Article III standing, it closed the courthouse doors on an issue of federal constitutional law of increasing and far-reaching national importance.

1. More and more, governments are taking advantage of a gray area surrounding the use of financially-interested outside counsel. The Court has never defined "with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function." *Marshall*, 446 U.S. at 250. As a result, municipalities have walked that line with increasing frequency and little to no accountability. Without the possibility of seeking recourse in the federal courts, companies are forced either to litigate cases across multiple jurisdictions over many years—after which it is nearly impossible to unring the bell—or to settle high-stakes cases to avoid the financial consequences facing a publicly traded company in reporting such litigation and even greater draconian financial risk of incurring unfavorable (even if incorrect) decisions. It is imperative that the federal courts hear the claim on the merits so that they may answer the constitutional question once and for all.

In the past two decades, there has been a surge in public nuisance and other lawsuits brought by government entities using contingency agreements with private counsel to enforce public rights and the government's police powers. In addition to lead-pigment and tobacco litigation, states and local municipalities have entered into contingency-fee

arrangements to "'su[e] businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills.'" Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 82 (2010) (citation omitted); Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times (July 9, 2007) (discussing how, "[i]n courts around the nation, in cases involving tobacco, lead paint and guns, state attorneys general have been outsourcing government power to private lawyers"). Private attorneys representing cities and counties on a contingency-fee basis in the opioid litigation, for example, wield enormous power in determining whether, and under what financial terms, the actions will reach resolution. *See, e.g.*, Jeff Overley, *Opioid Settlements Stymied By Atty Fee Demands, AGs Say*, Law360 (Oct. 20, 2020) (reporting that "[m]assive fee demands from plaintiffs attorneys in multidistrict opioid litigation are the main reason settlements haven't been finalized with major drug companies in a broader wave of opioid cases"), *available at* https://www.law360.com/articles/1321299/opioid-settlements-stymied-by-atty-fee-demands-ags-say.

2. The lack of clarity on the due process limitations on such contingency-fee agreements has confounded the courts and government entities, leading to diverse and conflicting outcomes.

The federal government, for its part, has barred the use of contingency-fee agreements altogether in representations on behalf of the United States in order "[t]o help ensure the integrity and effective supervision of the legal and expert witness services."

Protecting American Taxpayers from Payment of Contingency Fees, Executive Order 13,433, 72 Fed. Reg. 28,441 (May 16, 2007).

The U.S. District Court for the Southern District of Ohio held in a case much like this one that certain retention agreements "were unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body." *Sherwin-Williams Co. v. City of Columbus*, No. C2-06-829, 2007 WL 2079774, at *1 (S.D. Ohio July 18, 2007). The court ordered the municipal defendants to amend the agreements or face injunctive relief, *id.*, and allowed discovery on Sherwin-Williams' due process claims, *see Sherwin-Williams Co. v. City of Columbus*, No. 2:06-CV-829, 2008 WL 1756331, at *3 (S.D. Ohio Apr. 16, 2008).

The Rhode Island Supreme Court held that a government's use of contingency-fee counsel complies with due process in some circumstances but noted that, "[g]iven the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 475 n.50 (R.I. 2008). The California Supreme Court has forbidden use of contingency-fee counsel in some public nuisance actions, *see People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985) ("[T]he contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action."), but not in others, *see*

Cnty. of Santa Clara v. Superior Court, 235 P.3d 21, 39 (Cal. 2010) (permitting use of contingency arrangement "when public entities have retained the requisite authority in appropriate civil actions to control the litigation and to make all critical discretionary decisions").

3. The uncertainty often leaves defendants with no practical option for challenging a state or local government's use of outside counsel with a financial interest in targeting a particular business. Given the uncertainty over how state courts will assess the constitutional question, businesses are often pressed to hedge their losses through settlement instead of pursuing the issue through the state appellate process, with little prospect for this Court's ultimate review. *See* U.S. Chamber Institute for Legal Reform, *Big Bucks and Local Lawyers: The Increasing Use of Contingency Fee Lawyers by Local Governments* 8-10 (Oct. 2016) (discussing a $16 million settlement agreement between Toyota and the Orange County District Attorney's Office over allegations relating to the safety of gas pedals, resulting in $3.2 million award to private contingency counsel, despite subsequent findings that there was no link between the gas pedals and accidents or injuries). In other areas of the law, Congress has recognized the potential for injustice in circumstances like this, where "companies [are] … forced to enter 'extortionate settlements' in frivolous cases, just to avoid the litigation costs—a burden with scant benefits to anyone." *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1752 (2019) (Alito, J., dissenting). To date, however, there is no similar recourse in the context of

the government's delegation of its police powers to financially-interested counsel.

The calculus whether to pursue this constitutional claim in state court is even more fraught, because public nuisance actions can take years, if not an entire decade or more, to resolve, if they survive dismissal on state law grounds. This almost ensures that any injury cannot be undone even if the defendant ultimately were to prevail on its due process claim. For example, it took almost two decades to resolve the public nuisance action in *County of Santa Clara v. Superior Court*, and over ten years for the state supreme court to address the due process issue. *See* Compl., *Cnty. of Santa Clara v. Atl. Richfield Co.*, No. CV788657 (Cal. Super. Ct. Mar. 23, 2000), 2000 WL 34016249; *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21 (issuing decision on July 26, 2010); Joshua Schneyer, *Paint makers reach $305 million settlement in California, ending marathon lead poisoning lawsuit*, Reuters (July 17, 2019) (noting that the parties settled "[a]fter a 19-year legal struggle"), *available at* https://www.reuters.com/article/idUSKCN1UC26J. The public nuisance action in *State v. Lead Industries Association, Inc.* spanned over eight years before the Rhode Island Supreme Court held that the government could not state a claim. *See* Sherwin-Williams Service of Process, *State v. Lead Indus. Ass'n, Inc.*, No. 99-5226 (R.I. Super. Ct. Oct. 18, 1999); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (issuing decision on July 1, 2008).

4. The threatened actions below exemplify these concerns. The contingency-based firm that approached Delaware County and was retained seeks

to represent all 67 counties in Pennsylvania and to file separate state court lawsuits against Sherwin-Williams in every county. Pet.App.45a-46a, 67a (Compl. ¶¶ 7, 64). In defending itself against each individual suit, Sherwin-Williams would suffer severe financial consequences, affecting its employees, retirees, and shareholders. Pet.App.76a-77a (Compl. ¶ 90). Despite the strong defenses Sherwin-Williams could present in the threatened suits, the risks of obtaining adverse—or conflicting—decisions poses a real concern that the government's goal, reinforced by its financially-interested outside counsel, is to magnify the cost and risk of litigation to force Sherwin-Williams (and other similarly situated businesses) into settlement agreements that would result in a windfall to their private counsel.

This case is an excellent vehicle to address the question presented, because a conclusion that the Third Circuit erred would permit the lower federal courts to develop the scope of due process limitations on the government's use of contingency-fee counsel in cases intended to protect public rights and interests. It is immaterial that the Third Circuit also concluded that Sherwin-Williams' claims are not ripe, because the ripeness inquiry turned on the same errors as the Third Circuit's injury-in-fact analysis. *See* Pet.App.23a; *MedImmune*, 549 U.S. at 128 n.8 ("[S]tanding and ripeness boil down to the same question in this case.").

Summary reversal is appropriate where a decision is "incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012). The Third Circuit's decision here falls squarely in that

category of case. The Court should summarily reverse, to bring the Third Circuit in line with this Court's Article III standing precedent, or at a minimum grant the petition.

II. THE COURT SHOULD GRANT THE PETITION TO REAFFIRM ITS ARTICLE III STANDING PRECEDENT AND RESOLVE A CONFLICT IN THE CIRCUITS REGARDING WHETHER CHILLED SPEECH FROM A THREATENED GOVERNMENT ACTION ESTABLISHES AN INJURY-IN-FACT.

A. The Decision Below Conflicts With This Court's Article III Standing and First Amendment Precedent.

The Court long has understood that, "where threatened action by government is concerned, [courts] do not require a plaintiff to expose [itself] to liability before bringing suit to challenge the basis for the threat." *MedImmune*, 549 U.S. at 128-29 (emphasis omitted). Especially where a threatened government action has chilled protected speech and burdened associational and petitioning rights, and promises to continue to chill those fundamental rights, a plaintiff satisfies the Article III injury-in-fact requirement when it is "subject to such a threat." *Susan B. Anthony List*, 573 U.S. at 155, 158. So long as the threatened action is "genuine," *MedImmune*, 549 U.S. at 129, it is irrelevant to the injury-in-fact analysis that the plaintiff could have brought the same challenge as an affirmative defense in future litigation, *id.* at 127 n.7.

Under these well-established principles, Sherwin-Williams has alleged an injury-in-fact. Delaware County is actively preparing and has approved

litigation that seeks to hold Sherwin-Williams liable for its First Amendment protected activity. *See* Pet.App.46a, 50a (Compl. ¶¶ 8, 15); Pet.App.176a-77a. The Complaint alleges that the imminently threatened action already has chilled and will continue to chill Sherwin-Williams' speech. Pet.App.12a (quoting Pet.App.50a (Compl. ¶ 14)); Pet.App.70a-71a, 73a (Compl. ¶¶ 74, 80). The threatened lawsuit has chilled present speech because of Sherwin-Williams' serious concern that the lawful, First Amendment protected speech and associational activity it engages in *today* may form the basis of liability in the *future*. The possibility that actions like Delaware County's will move forward forces Sherwin-Williams to decide whether to engage in present-day protected activity at risk of future litigation, or to curtail that activity to prevent future harm. *See In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.) (noting that holding companies liable for previous First Amendment activities "would make the[] activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them"). The threatened lawsuit also has affected Sherwin-Williams' shareholders, pensioners, and employees who depend on the company's publicly-traded stock and are harmed when funds are diverted to prepare for the defense of litigation seeking to impose liability based on Sherwin-Williams' decades-old First Amendment activity. Pet.App.51a, 69a (Compl. ¶¶ 16, 71).

Delaware County's threat is genuine and targeted at Sherwin-Williams. The County has entered into a contingency-fee agreement with private counsel that authorizes litigation against Sherwin-Williams

"relating to the County's claims for Declaratory relief, public nuisance and the equitable remedy of abatement resulting from the manufacturing, marketing and use of lead paint." Pet.App.176a-77a. In contrast to Erie and York Counties, which informed Sherwin-Williams after the filing of the Complaint that they had no plan to file a lawsuit (prompting Sherwin-Williams to dismiss the suit against them and their councilmembers), Delaware County has moved full steam ahead, has not renounced its authorized lawsuit or contingency-fee agreement, and, ironically, even has used its outside contingency-fee counsel to defend against Sherwin-Williams' Complaint. *See* Pet.App.20a (noting that Delaware County signed its current agreement with private outside counsel *after* Sherwin-Williams filed the Complaint). There also is undisputed evidence of "past enforcement," *Susan B. Anthony List*, 573 U.S. at 164, as Delaware County's private outside counsel already has filed materially identical litigation on behalf of two other Pennsylvania counties as part of their strategy to represent all 67 counties in such litigation, Pet.App.11a; Pet.App.45a-46a, 67a (Compl. ¶¶ 7, 64); *see Carney v. Adams*, No. 19-309, 2020 WL 7250101, at *7 (U.S. Dec. 10, 2020) (noting that evidence of past activity is relevant in establishing that a plaintiff's challenge is not a generalized grievance). Together, these circumstances are sufficient to satisfy Article III's injury-in-fact requirement. *Susan B. Anthony List*, 573 U.S. at 158.

In reaching its contrary conclusion, the Third Circuit misapplied the Court's precedent. The Third Circuit faulted Sherwin-Williams for pleading "generalized allegations" of chilled speech, relying on

this Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972). But *Laird* involved alleged chill stemming from the "existence and operation of [an] intelligence gathering and distributing system," without any allegation that the chilling effect was caused "by any specific action … against [the plaintiffs]," or any genuine threat of such an action. *Id.* at 3, 9 (internal quotation marks omitted). *Laird* recognized that Article III standing may be satisfied where—as in this case—the plaintiff is "presently or prospectively subject to" the conduct or the statute it is challenging. *Id.* at 11.

The Third Circuit also incorrectly cast aside Sherwin-Williams' allegations of existing and ongoing harms and held that Sherwin-Williams failed to allege an injury-in-fact because the Complaint "asks [the court] to assume not only that the County will sue, but also its theory of liability, its litigation tactics, and that the County will prevail." Pet.App.18a. But the other two lawsuits brought by Lehigh and Montgomery Counties dispel the need for any assumption, and Delaware County has retained the same outside counsel and authorized the identical public nuisance action. A plaintiff need not be "literally certain that the harms they identify will come about," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013), so long as the threat of action is "substantial." *Susan B. Anthony List*, 573 U.S. at 164.

The Court also never has required a plaintiff to show that it will not prevail in the subsequent threatened action to satisfy Article III's injury-in-fact requirement. Indeed, the entire purpose of pre-enforcement or pre-liability standing is to ensure a plaintiff need not take that "risk." *MedImmune*, 549

U.S. at 129; *cf. Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (holding the "controversy [was] plain" between a plaintiff-insurer and a defendant-insured, even where the insurer would only experience harm if a third party "obtaine[d] a final judgment against the insured which the latter does not satisfy within thirty days after its rendition"). The Third Circuit's reasoning, if permitted to stand, would undermine this Court's standing jurisprudence and relegate persons targeted by the government and its contingency-fee counsel to defending their federal constitutional rights in what promises to be protracted, expensive, multiplicitous state court litigation.

B. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals.

The Third Circuit's decision conflicts with decisions of the Fifth, Sixth, and Eleventh Circuits. All of these Circuits have found an injury-in-fact where the plaintiffs brought a declaratory lawsuit alleging that an unlawful investigation or threatened government action chilled protected First Amendment activity, even though the investigation or threatened suit was not sure to materialize. Indeed, Delaware County's retention of contingency-fee counsel and approval of the litigation shows that it is farther along in its plan than the threatened government actions that established standing in these other cases.

The Fifth Circuit recognized Sherwin-Williams' right to seek federal declaratory relief under nearly identical circumstances to the case at hand. *See Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 387 (5th Cir. 2003). In *Holmes*, after one school

district had sued, Sherwin-Williams faced the prospect of serial litigation in numerous counties by other Mississippi school districts seeking to shift lead-paint abatement costs. Other school districts had announced publicly or discussed in meetings their intent to sue. Like here, Sherwin-Williams sought to litigate in a single forum questions of federal declaratory relief, including that the First Amendment precluded liability for protected associational activities, lobbying, and commercial speech. *Id.* at 386-87. The Fifth Circuit directed the case to proceed, affirming that the "district court properly concluded that Sherwin-Williams presented a justiciable claim; there was an actual controversy among the parties." *Id.* at 387. Unlike the Third Circuit, which held there was no injury-in-fact because the action depended on Delaware County actually filing suit, Pet.App.18a, the Fifth Circuit decision noted that "the purpose of declaratory judgment actions … is to resolve outstanding controversies without forcing a putative defendant to wait to see if it will be subjected to suit." *Holmes Cnty.*, 343 F.3d at 398 n.8.

The Sixth Circuit in *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), also concluded that a plaintiff had standing to pursue a declaratory action alleging that investigations and threatened prosecution chilled First Amendment speech, despite the fact that any such prosecution was not sure to occur. *Id.* at 765. The plaintiff, a student organization, alleged that investigations conducted by the university's "Bias Response Team" resulted in chilled speech because of the "implicit threat of punishment and intimidation to quell speech." *Id.*

The response team investigators had authority to refer "bias incidents"[1] to the police or the university, and the court held that the investigative process "itself is chilling even if it does not result in a finding of responsibility or criminality." *Id.*

Finally, the Eleventh Circuit in *Smith v. Meese*, 821 F.2d 1484 (11th Cir. 1987), held that a group of nine Black individuals had standing in a declaratory action to challenge discriminatory investigations of electoral fraud because the investigations chilled First Amendment protected activity, even though the investigations were not likely to lead to prosecution. *Id.* at 1487-88. The court held "[i]t is clear that a direct target of a discriminatory investigation or prosecution has standing to attack the violation." *Id.* at 1493. That is so, even though the plaintiffs could have raised a selective prosecution claim as a defense in the event of an actual indictment. *Id.* at 1489.

C. This Question Is Important.

Businesses are facing an onslaught of litigation seeking to hold them liable for First Amendment protected activity, including for their truthful marketing, their petitioning of government, their public expressions of opinion on significant social and political issues, and their associations with trade groups. Government agencies, in addition to

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[1] A "bias incident" is defined as "conduct that discriminates, stereotypes, excludes, harasses or harms anyone in our community based on their identity (such as race, color, ethnicity, national origin, sex, gender identity or expression, sexual orientation, disability, age, or religion)." *Speech First*, 939 F.3d at 762.

individual plaintiffs, have sought to hold companies liable for protected activity in cases as diverse as climate change remediation,[2] products liability,[3] and the opioid crisis.[4] Absent the ability to challenge the constitutionality of these actions in a federal declaratory action, companies like Sherwin-Williams will have limited to no recourse to protect their First Amendment rights. An investigation into the filing of such a lawsuit alone causes a First Amendment chill, as was alleged in this case. Pet.App.50a (Compl. ¶ 14). That chill is then exacerbated when the lawsuit actually is filed and a company is forced to defend itself through years of litigation before having its rights vindicated.

As then-Judge Alito recognized in *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994), "[t]he

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[2] *See, e.g.*, Complaint ¶¶ 5, 190, 250, 264, 269, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. CV 08 1138), 2008 WL 594713 (seeking to hold companies liable for contributions to global warming based on their association with trade organizations); *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558, at *1 (Tex. Ct. App. June 18, 2020) (discussing Exxon Mobil Corporation lawsuit alleging that California counties and cities, and their private outside counsel, filed lawsuits seeking to "suppress Exxon's Texas-based speech and associational activities regarding climate change").

[3] *See, e.g.*, *Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 207 (Ct. App. 2003) (rejecting attempt to hold company liable for asbestos injuries based on the company's association with industry trade groups); *In re Asbestos Sch. Litig.*, 46 F.3d 1284 (same).

[4] *See, e.g.*, *Mobile Cnty. Bd. of Health v. Sackler*, No. CV 1:19-01007-KD-B, 2020 WL 223618, at *6 (S.D. Ala. Jan. 15, 2020) (discussing claim seeking to hold companies liable for product marketing).

implications of … holding" a company liable "based solely on its limited and … innocent association with [a trade association]" "are far-reaching." *Id.* at 1294. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection." *Id.* Holding companies liable for those activities "would make the[] activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.* Public nuisance actions are particularly problematic, as "nuisance standards often are 'vague' and 'indeterminate.'" *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987). The Court has recognized that "[t]he vagueness of such [laws] raises special First Amendment concerns because of [their] obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

Making matters worse, the consequences of imposing liability on prior First Amendment protected activity extend far beyond the speech and associational activities at issue in cases involving corporations like this one. The Third Circuit's ruling fundamentally undermines principles established in decisions like *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In *Claiborne*, the Court considered whether civil rights activists and organizations could be held liable for damages to local businesses affected by a boycott on white merchants in the area, simply because some participants in the boycott committed criminal acts of violence. *Id.* at 888-89, 920. In reversing the finding of liability, the Court reiterated that "[t]he First Amendment … restricts the ability of the State to impose liability

on an individual solely because of his association with another." *Id.* at 918-19. Yet, that is precisely what Delaware County intends to do. The Third Circuit's decision, if it remains in place, would mean that activists or organizations facing threats of litigation in response to their prior First Amendment activity—like those who were sued in *Claiborne*—would have no affirmative recourse to prevent or remedy a chill of their First Amendment freedoms that results from a genuine threat of litigation, however meritless the threatened claims against them may be. Individuals may resolve to curtail their speech or associations now to avoid the possibility that they may face litigation in the future seeking to hold them liable for their protected activity.

The Third Circuit's decision also stunts the development of the law regarding the extent to which the rule announced in *Claiborne* extends to other contexts. This Court recently considered that question in *McKesson v. Doe*, noting that when an injury allegedly results from "activity protected by the First Amendment, that provision mandates 'precision of regulation' with respect to 'the grounds that may give rise to damages liability' as well as 'the persons who may be held accountable for those damages.'" No. 19-1108, 2020 WL 6385692, at *2 (U.S. Nov. 2, 2020) (quoting *Claiborne*, 458 U.S. at 916-17). The Court ultimately did not address the merits of that case (because state law may render the constitutional issue moot). *Id.* at *3-5. The decision nevertheless shows that the underlying constitutional issues that the Third Circuit side-stepped in this case are "undeniably important." *Id.* at *2.

For these reasons, the Court should intervene and prevent a ratcheting up of Article III standing requirements, particularly in the context of First Amendment chill. Organizations and individuals should not have to endure lengthy litigation before having their federal constitutional claims decided by a court, with scant prospect of this Court's or any federal court's review. Such an outcome would walk back decades of Supreme Court precedent and create confusion in the federal courts as to the proper standard for assessing Article III standing in declaratory actions raising First Amendment claims.

Moreover, as discussed *supra* at 26, this case presents an ideal vehicle to address the question presented. And, because the Third Circuit's holding contravenes "clear instruction" in this Court's precedent assessing Article III standing in the context of First Amendment chill, summary reversal is warranted. *Marmet Health Care Ctr.*, 565 U.S. at 532. At a minimum, the Third Circuit's untenable analysis creating conflict among the Circuits calls for this Court's review.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari and, if it deems appropriate, summarily reverse.

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