No. 18-84

IN THE

Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY AND NL INDUSTRIES, INC.,

Petitioners,

v.

THE PEOPLE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented are:

1. Whether imposing massive and retroactive "public nuisance" liability without requiring proof that the defendant's nearly century-old conduct caused any individual plaintiff an injury violates the Due Process Clause.

2. Whether retroactively imposing massive liability based on a defendant's nearly century-old promotion of its then-lawful products without requiring proof of reliance or injury violates the First Amendment.

Although both questions warrant review, we address only the first.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF has appeared as *amicus curiae* before this Court in important Due Process Clause cases involving arbitrary deprivations of property. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

The removal of cause and effect transforms tort law into a vehicle for arbitrary results. Look no further than this case. Three companies have been ordered to pay hundreds of millions of dollars to find and abate every lead-paint hazard in every home built in ten California jurisdictions before 1951. The many other companies responsible for the presence of lead paint in these homes are off the hook. So too are the many landlords and homeowners who let their lead paint become a hazard. The burden of fixing a widespread problem—a problem with many antecedents—has been cast on just a few shoulders.

It is imperative, WLF believes, that this form of judicial scapegoating not be allowed to spread.

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified each party's counsel of record of WLF's intent to file the brief. Each party's counsel of record has filed a blanket consent to the filing of *amicus curiae* briefs.

STATEMENT OF THE CASE

"Lead is among the most revered and the most maligned of elements." Ellen R. Shell, *An Element of Doubt*, The Atlantic, https://perma.cc/59VD-AHZP (Dec. 1995). The danger of large-scale exposure to it has been known for a long time—since antiquity. E.g., Vitruvius, *Ten Books on Architecture* 246 (15 BC) (Trans. M.H. Morgan, 1914) ("Lead is * * * hurtful to the human system."). For equally long it has been extraordinarily useful. See Shell, supra.

For centuries lead was a key ingredient in paint. It made paint washable and durable. As society's understanding of the risks of lead paint grew, however, the paint industry began, in the 1940s, voluntarily to reduce the amount of lead in its product. Shell, supra. The danger of limited exposure to lead remained hotly debated well into the 1990s. Pet. App. 292-93, 401; Shell, supra.

In 1978 the federal government banned the use of lead paint in residences. 16 C.F.R. § 1303.4. To this day, however, neither federal nor California law requires the removal of intact lead paint. In 2002 California declared deteriorating lead paint—but not intact lead paint—hazardous. Cal. Health & Safety Code § 17920.10.

Great progress has been made in reducing the blood-lead levels of children. As recently as the late 1970s, more than eighty percent of American children under six had blood-lead levels that today would be considered potentially harmful. Pet. App. 22. The number is now less than half a percent. *Id.*

The dangerous blood-lead level of this half a percent of children—ten micrograms per deciliter of blood—is less than half the *average* blood-lead level of all American children in the early 1960s. Shell, supra.

In 2000 Santa Clara County sued a few of the many companies that had sold (or had merged with some other company that had sold) lead paint in California. What started as a traditional products liability action by one county transmogrified, over the years, into a public-nuisance action by ten of California's largest cities and counties on behalf of the People. See Pet. Br. 9-11.

In 2014 the trial court found three of the companies—Sherwin-Williams, NL Industries (which once sold Dutch Boy paint), and ConAgra (which, the court held, is a successor to a paint company called W.P. Fuller & Co.)—jointly liable for any lead-paint hazard inside any residence in the ten jurisdictions built before 1980. The trial court based liability not on the companies' having made or sold lead paint, but on their having promoted lead paint in advertisements. Pet. App. 195-98, 229. The People were not required to identify the residences, if any, that contain lead paint because of the advertisements. Pet. App. 298. The trial court ordered the three companies to pay $1.15 billion into an abatement fund. Pet. App. 341-44. The companies were ordered to spend $400 million of the fund searching for the lead-paint hazards for which they had already been found liable. Pet. App. 329-36, 339.

On appeal the companies argued, among other things, that the trial court erred in ordering abatement in the absence of causation. The Court of

Appeal acknowledged that "causation is an element of a cause of action for public nuisance." Pet. App. 64. But the need to establish a causal connection between the companies' advertisements and even a single actual lead-paint hazard could be discarded, the court assumed, if all private home lead-paint hazards constituted a single "public" harm. Pet. App. 76, 83.

A single "public" harm the Court of Appeal proceeded to find. The court declared that private homes are "a shared community interest." Pet. App. 84. So too, it said, is the safety of children living in those homes. Pet. App. 83. The companies stood accused, therefore, not of contributing to a hazard in the home of any discrete child, but of contributing to the presence of hazards in the homes of "the community's" children. Pet. App. 83. With the children thus collectivized, liability turned on whether the companies had harmed 'it.'

The Court of Appeal said that even "a very minor force" can establish causation. Pet. App. 65. As framed by the court, however, the pertinent question was not whether the companies' advertisements were a "very minor force" leading to the presence of a lead-paint hazard in this or that home, but whether they were a "very minor force" leading to the presence of home lead-paint hazards in general. Pet. App. 65-68. "Certainly," the court reasoned, the companies' advertisements caused the use of lead paint in "at least some" houses—although the People could not identify even one—in the ten jurisdictions. Pet. App. 67. The companies, therefore, were at least "a very minor force" causing the presence of a lead-paint hazard in "at least some"

houses with children. And because a lead-paint hazard in *a* child's home places *the* children at risk, the companies must, the court concluded, pay to abate *all* lead-paint hazards in the ten counties' and cities' oldest homes. Pet. App. 92-93.

Because no evidence suggests the companies promoted lead paint for interior residential use after 1950, the Court of Appeal reversed the imposition of liability for houses built between 1951 and 1980. Pet. App. 70-71. Otherwise it affirmed. No one disputes that the abatement program, as narrowed by the Court of Appeal, will still require hundreds of millions of dollars to fund. Pet. Br. 17.

The Supreme Court of California denied review. Pet. App. 184. Justices Liu and Kruger dissented. *Id.*

SUMMARY OF ARGUMENT

The way restaurants bill is simple, orderly, and fair. You pay for the food you order. But imagine that late one evening, around closing time, after dinner with a friend, the waiter hands you a bill for $5,000. You object. The host arrives and explains that the other patrons left without paying. The restaurant cannot track them down. You, however, are here. You, therefore, shall pay—for everyone. You protest at how preposterous this is. Not at all, the host coolly replies. After all, you ate at the restaurant, didn't you? You consumed some of its food. You are part of the problem.

The three defendants in this case have been stuck with the bill. Many companies made, sold, or

advertised lead paint in California. Many builders and painters applied lead paint. All homeowners are legally responsible for ensuring that their lead paint does not deteriorate into a hazard. Yet the three defendants alone have been ordered to pay hundreds of millions of dollars to find and abate every lead-paint hazard in every home in ten California jurisdictions—including Los Angeles, San Diego, San Francisco, and Oakland—built before 1951. Liability was imposed because, in the far half of *last century*, the defendants advertised lead paint for interior residential use.

In normal conditions a number of obvious defenses would have applied—laches, for instance. But the People and the courts below used an avant-garde form of public-nuisance law to sweep those protections aside. Above all, they dispatched one of the basic requirements of establishing a tort claim: proving that the defendant caused the harm alleged. The People were not required to identify a single lead-paint hazard caused by the defendants' advertisements.

In removing the element of causation from tort law, the courts below violated the Due Process Clause. The violation can be viewed from at least three angles:

1. This Court has said repeatedly that an arbitrary award of punitive damages deprives a defendant of property without due process of law. Although it involves abatement damages, this case is logically indistinguishable from the Court's punitive-damages precedents. Awarding abatement damages

in the absence of causation is arbitrary, and thus a violation of due process.

2. Even if the Court had not previously applied the Due Process Clause to punitive damages, the due-process violation here would persist. The Due Process Clause protects deeply rooted fundamental rights. The decision below violates two such rights: (a) the right to be free of arbitrary damages and (b) the right to be free of tort liability in the absence of causation.

3. The courts below went beyond resolving a case or controversy; they crafted public policy. They did not resolve a dispute between paint companies and a group of homeowners with lead-paint hazards; they created new rules requiring three companies to canvass the land, find as yet unidentified lead-paint hazards, and fix them. This "big picture" approach to resolving social ills is beyond the courts' institutional capacity. It is bound to result—as it did here—in the arbitrary treatment of the select few litigants handed the bill for achieving cosmic justice.

The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Violates Due Process By Arbitrarily Awarding Tort Damages In The Absence Of Causation.

Common sense dictates that an arbitrary tort award violates the Due Process Clause. So too does the logic of this Court's punitive-damages

jurisprudence. The Court has repeatedly struck down arbitrary punitive awards that violate the Due Process Clause. The Court reversed these awards not because they were punitive, but because they were arbitrary.

It is difficult to imagine a surer way to generate arbitrary tort awards than to remove the element of causation from tort law. This case proves the point. The decision below violates due process by imposing hundreds of millions of dollars in liability without a showing that the defendants caused the harm for which they must pay.

A. A Court May Not Award Tort Damages Arbitrarily.

"The point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm*, 538 U.S. at 418 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)). Accordingly, "a person [should] receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Arbitrary—and thus unpredictable—tort punishments therefore violate due process. *State Farm*, 538 U.S. at 416.

In accord with these principles, the Court has repeatedly struck down excessive punitive damages awards as "arbitrary deprivation[s] of property without due process of law." *BMW*, 517 U.S. at 586 (Breyer, J., concurring); *State Farm*, 538 U.S. at 429 (striking down a $145 million punitive award as "an irrational and arbitrary deprivation of the property

of the defendant."); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (striking down a $79.5 million punitive award because it arbitrarily punished the defendant for its conduct toward non-parties).

Nothing in logic distinguishes an arbitrary award of punitive damages from an arbitrary award of compensatory or abatement damages. Just as an award of punitive damages may not punish a defendant "for harming persons who are not before the court," *Williams*, 549 U.S. at 349, an award of compensatory or abatement damages may not impoverish a defendant that has not harmed a person to begin with, cf. *State Farm*, 538 U.S. at 416 ("Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of *the defendant's* wrongful conduct.") (emphasis added). Irrational punitive, compensatory, and abatement awards all foster undue "arbitrariness, uncertainty, and lack of notice." *Williams*, 549 U.S. at 354. Even some of the justices who have dissented from the Court's punitive-damages jurisprudence recognize as much. See *BMW*, 517 U.S. at 607 (Scalia, J., joined by Thomas, J., dissenting).

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW*, 517 U.S. at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). The same can be said of punishing a person for what he has *not* done. Awarding tort damages in the absence of causation violates due process.

B. The Decision Below Awards Damages Arbitrarily By Removing The Element Of Causation From Tort Law.

If there is one self-evident principle in our law, it is that liability is imposed only on those who cause a harm, punishment only on those who commit a wrong. Sons do not bear the sins of their fathers. Cf. Const. Art. III, sec. 3, ¶2 ("no attainder of treason shall work corruption of blood").

Remove the element of causation and, so far as due process goes, all bets are off. There is little point in providing process, in fact, if liability can be applied without regard to causation. Permission to present an alibi is useless if proving the alibi will not change the verdict. A trial conducted heedless of causation proceeds by the Queen of Hearts' rules: sentence first—verdict afterwards.

The companies here, it is true, are not entirely unconnected to the harm at issue. The courts below did not order that lead paint be removed by IBM. But this hardly makes the outcome any less arbitrary. The companies were found merely to have contributed—indirectly, through advertisements—to the existence of some unknown fraction of the unknown number of home lead-paint hazards remaining in California. But, treating private property as a "shared community resource," Pet. App. 84, the Court of Appeal ordered the companies to find and remove all pre-1951 home lead-paint hazards remaining in California. By this logic, someone who litters by Washington Square Arch has harmed "the community's" cleanliness and may be

held responsible for every piece of mislaid trash in New York.

The result here is "so arbitrary" that it cannot be squared with "the Constitution's assurance, to every citizen, of the law's protection." *BMW*, 517 U.S. at 596 (Breyer, J., concurring).

II. The Decision Below Violates Due Process By Departing From Deeply Rooted Fundamental Rights.

A court is not a democratic body. It is tasked not with crafting public policy, but with enforcing existing law—including, especially, deeply rooted fundamental rights. The courts below violated due process by ignoring the longstanding fundamental right to be free of (1) arbitrary damages or (2) tort liability in the absence of causation.

A. The Due Process Clause Protects Deeply Rooted Fundamental Rights.

The common law was once constrained by the legal fiction "that judges merely 'discovered' rather than created" it. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* at 10 (1997). Today it is constrained by an awareness of "the uncomfortable relationship of common-law lawmaking to democracy," *id.*, and by the Constitution—especially the Due Process Clause. These constraints limit judges' discretion to push the common law beyond its traditional boundaries.

"As th[e] Court has stated from its first due process cases, traditional practice provides a touchstone of constitutional analysis." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). "The Due Process clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Unelected judges, in particular, must not "infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

The elimination "of a well-established common-law protection against arbitrary deprivations of property" carries with it "a presumption" that it "violate[s] the Due Process Clause." *Honda Motor Co.*, 512 U.S. at 430. Justice Breyer, for one, has explicitly raised such novelty as a reason for striking down a punitive award:

> I cannot find any community understanding or historic practice that this award might exemplify and which, therefore, would provide background standards constraining arbitrary behavior and excessive awards. [This] punitive damages award * * * is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times.

BMW, 517 U.S. at 594 (concurring opinion). See also *Williams*, 549 U.S. at 354 (striking down a punitive award where the Court could "find no authority

supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others").

The abatement damages imposed here are much more radical and innovative than the punitive damages criticized by Justice Breyer. Justice Breyer agreed to strike down an award of punitive damages because nothing in history supported the award's size. Here, by contrast, nothing in history supports even the *award* of damages. To the contrary, deeply rooted fundamental rights prohibit awarding (1) arbitrary damages or (2) damages for harm not caused by the defendant.

B. The Decision Violates Deeply Rooted Fundamental Rights.

1. *Arbitrary Damages*. The right to be free of arbitrary damages is fundamental and deeply rooted. It "harken[s] back to the Magna Carta," signed in 1215. *BMW*, 517 U.S. at 587 (Breyer, J., concurring). Magna Carta "protect[ed] the personal * * * property of all freemen, by giving security from * * * arbitrary spoliation." Henry Hallam, *View of the State of Europe During the Middle Ages*, Vol. II at 38 (7th ed. 1840). Article 20, for example, declares that "a free man shall be fined only in proportion to the degree of his offense." British Library, *English Translation of Magna Carta*, https://perma.cc/HRR2-TWEU (July 28, 2014).

The property rights in Magna Carta were repeatedly confirmed. A 1332 statute, for instance, states that neither a man's "lands, tenements, goods, nor chattels" could be "seized into the king's hands,

against the form of the Great Charter." Charles E. Shattuck, *The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property,'* 4 Harv. L. Rev. 365, 372 (1890). Citing similar fourteenth-century statutes for support, Parliament in 1627 declared that "no person should be compelled to make any Loanes to the King against his will because such Loanes [a]re against reason." Legislation.gov.uk, *The Petition of Right [1627]*, https://perma.cc/26BD-QMGL. The Bill of Rights of 1688 again denounced the King's imposition of excessive fines. *Id.*, *Bill of Rights [1688]*, https://perma.cc/989W-8ZXJ.

There is, in short, an ancient right against arbitrary deprivations of property. The right is strongest, moreover, when the depriver of property acts without the legislature's approval. See *Dent v. W. Va.*, 129 U.S. 114, 123 (1909) ("[T]he terms 'due process of law' * * * come to us from the law of England, * * * and their requirement was there designed to secure the subject against the arbitrary action *of the crown*.") (emphasis added). The right has passed into this Court's jurisprudence. See, e.g., *State Farm*, 538 U.S. at 416 ("grossly excessive or arbitrary punishments o[f] a tortfeasor" violate due process); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (grossly excessive fines violate due process); see also *Nollan v. Cal. Coastal Com'n*, 483 U.S. 825, 837 (1987) (use of a permit process to extort property from permit applications violates the Takings Clause).

The courts below were creative, to say the least. They transformed a group of discrete alleged

harms—none of which could be causally tied to a defendant—into a single "communal" harm. They did this by treating houses and children as communal articles. Pet. App. 83-84. This enabled them to scrutinize how the defendants affected "the community's" houses and "the community's" children. The radical and novel liability that followed from this radical and novel line of reasoning violated the deeply rooted fundamental right to be free from arbitrary damages awards.

2. *Tort Causation*. The decision below discards many aspects of public-nuisance law. Historically, for example, public-nuisance law protected only public rights connected to land use. See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 815-817, 831 (2003). The Court of Appeal treated a public *interest*, which it labeled the "social interest in the safety of children in residential housing," Pet. App. 83, as a public *right* akin to the right to travel a public highway, see Gifford, supra, at 815-17. Of course, almost every product affects some "social interest" or other (cars affect the "social interest" in road safety, food affects the "social interest" in health, etc.). Almost every product is, therefore, now a ripe target for California's brave new statute-of-limitations-free public-nuisance law.

Be that as it may, the key constitutional problem with the decision below is its disregard for the causation element of tort law. To be found liable in tort, a defendant needs to have caused an injury. See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). This requirement is even more fundamental than the

requirement that the defendant be human. See Oliver Wendell Holmes, Jr., *The Common Law* at 7-12, 17-19 (1881) (discussing Greek, Roman, Germanic, and Anglo-Saxon law's imposition of liability on animals and inanimate objects that cause injury).

For about as long as there have been trials, the point of a trial has been to determine whether the defendant did it—whether he caused the harm at issue. It is doubtful whether any liberty is more "deeply rooted" in our "history and tradition," *Glucksberg*, 521 U.S. at 720-21, than the right of a defendant who caused no harm to be exonerated. Down to this day, "no injury, no tort, is an ingredient of every state's law." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (Easterbrook, J.). Public-nuisance law is no exception. A causal connection must exist between a defendant's conduct and the nuisance the plaintiff seeks to abate. See, e.g., *City of Cincinnati v. Deutsche Bank Nat'l Trust Co.*, 863 F.3d 474, 480-81 (6th Cir. 2017) (Sutton, J.); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113-16 (Mo. 2007).

The element of causation is as old and as fundamental as it gets. A proper trial cannot proceed without it. Discarding it, the courts below violated due process.

III. The Courts Below Violated Due Process By Departing From The Judicial Role.

A court is not a legislative committee, a university department, or a think tank. Its capacity

to generate sound policy is limited. This is another reason why a court that drastically expands liability is unlikely to do so within the boundaries set by the Due Process Clause. Without a good grasp of the many factors at play outside the confines of the case at hand, a court creating radical new rules is almost certain to act ineptly and capriciously.

The courts below violated due process by roving far outside the judicial role in order to push an arbitrary "solution" to a complex societal problem.

A. A Court May Not Decide Matters Vastly Outside Its Traditional Competence.

It hardly needs saying that the courts are not society's designated public policy-crafting body. When they create radical new forms of tort damages, they roam far beyond their traditional function. The legislature and the executive are better equipped to consider all viewpoints, to see the big picture, and to address structural or society-wide issues.

The problem of judicial mission creep has been recognized even by two of the justices who have dissented from the Court's punitive-damages jurisprudence. In *Brown v. Plata*, 563 U.S. 493 (2011), Justice Scalia, joined by Justice Thomas, dissented from an opinion upholding a prison-release injunction. Justice Scalia argued that the injunction took "federal courts wildly beyond their institutional capacity." *Id.* at 550. The issuance of a structural prison-release injunction, he explained, "force[s] judges to engage in a form of factfinding-as-

policymaking that is outside the traditional judicial role." *Id.* at 555.

A court acting beyond its capacity will invariably impose irrational conditions on private entities.

B. The Decision Below Takes The Courts Vastly Beyond Their Proper Role.

The consequences of a large public-policy reform will be complex and hard to predict. A court is ill-equipped to study the incentives that such a reform will create. It is likely, therefore, that major reforms implemented by a court will be not just ham-handed, but arbitrary. Such institutional infirmities pervade this case.

To begin with, a legislature is better equipped to determine who, as between homeowners and a handful of companies, can most cheaply address the lead-paint problem. Imposing strict liability on the companies for the presence of lead-paint hazards, if the homeowners are in fact the least cost avoider, harms both (1) the companies' customers (many of them homeowners), employees, and shareholders, and (2) the society-wide interest in efficiency. Richard A. Posner, *Strict Liability: A Comment*, 2 J. Legal Stud. 205, 216 (1973).

Actually, saying that the companies might be inefficiently suffering "strict liability" for the presence of lead-paint hazards understates the problem. A *few* companies are being subjected to liability for *all* lead-paint hazards in old homes in

ten California jurisdictions. A rational system of liability will seek to incentivize companies to invest the optimal cost-justified amount on safety. Forcing a few paint companies (or, in ConAgra's case, a paint-company successor) to pay for other companies' lead paint is no way to do this. The issue is not so much that such a practice will spur the companies to overspend on safety—although that is a possibility—but rather that "estimation of the benefits of accident prevention implies foreseeability." Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 42 (1972).

"Foreseeability" in this context typically means the foreseeability of the product's causing harm. But foreseeability of the scope of liability is just as important. Removing such foreseeability introduces massive additional uncertainty into the cost-benefit analysis of developing a product. And if the uncertainty of the cost of producing products rises, the incentive to produce products in the first place falls. True enough, companies faced with arbitrary and unpredictable liability might just "continue making and selling their wares, offering 'tort insurance' to those who are injured." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 217 (7th Cir. 1990) (Easterbrook, J., concurring). But if "the judgment bill becomes too high," they are more likely to throw up their hands and leave the pertinent market. *Id.* "Products liability law as insurance is frightfully expensive." *Id.* Removing foreseeability—imposing liability arbitrarily, without attention to causation—will result in less innovation and a net loss to society.

A court cannot know whether a radical new tort rule will make a large problem better, or make it worse, or instead create some new even larger problem. A court cannot know whether it is wise, notwithstanding the many other problems facing society (including the problem of maintaining economic growth), to divert resources to the one problem before it. A court cannot know whether a given problem is best addressed through litigation rather than legislation or executive action (the massive expense of adversarial litigation should give any judge pause). A court that creates a radical new tort rule must, almost by definition, proceed in defiance of these blind spots. Such a court is likely to make a hash of things. On its way to constructing an inefficient and harmful "solution," it is likely to impose arbitrary penalties and trample over the Due Process Clause.

That is what has happened here. "Defendants," the trial court wrote, "rely on statistics and percentages. When translated into the lives of children that is not a persuasive position." Pet. App. 321. This statement ignores that in this country, with its right to due process, ends do not automatically justify means. In addition, though, the statement reveals a kind of keyhole thinking—indeed, a kind of affective thinking—likely to arise when an arbiter has before it only a small piece of a much larger puzzle.

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416

(1922) (Holmes, J.). It is not for the courts to do "good," rules and data be damned.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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