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 Writ of Certiorari to the California Court of Appeal

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent blithely describes the law of California after the decision below in terms that cannot be reconciled with bedrock protections of due process and free speech. According to respondent, if a defendant's decades-old conduct plays even a "very minor force" in causing a present community-wide "nuisance," then that defendant can be forced to pay hundreds of millions of dollars to abate it—even if the conduct was lawful when it occurred and even if countless others were similarly "minor" (or even more major) "forces" in causing the alleged harm. Making matters worse, the requisite very minor force can result from long-ago speech that is "misleading" based only on contemporary facts not known when the speech was uttered. The imposition of such arbitrary and massive liability on the basis of protected speech cannot be justified by "community harms," a public nuisance label, or anything else. And if the decision is allowed to stand, countless industries will face comparable threats from this virulent strain of public nuisance law, as attested by the broad range of amici. The decision below is wrong and enormously consequential and demands plenary review.

I. There Is No Impediment To Jurisdiction.

Respondent's half-hearted attempt to dispute this Court's jurisdiction is meritless. Respondent suggests (at 4-5) that the decision below is not "final" under 28 U.S.C. §1257(a). But respondent does not dispute that no "other federal questions" are left on remand "that might also require review by the Court," or that reversal by this Court "would be preclusive of any further litigation on the relevant cause of action." *Cox*

Broad. Corp. v. Cohn, 420 U.S. 469, 477, 482 (1975). Nor does respondent dispute that the decision below represents the state courts' final word on the federal questions at issue. *See id.* at 482-83.

Instead, respondent asserts that because the size and allocation of the abatement fund have yet to be determined, the proceedings are not "final." BIO.5. This Court has never administered §1257's finality requirement in such a "mechanical fashion." *Cox*, 420 U.S. at 477. Indeed, in *Cox* itself, the Court granted certiorari of a decision reversing a summary judgment award and remanding for trial. *Id.* at 485. Here, a remand for the limited purpose of recalculating and reapportioning the amounts "to be deposited in an abatement fund" (BIO.5) that would not exist if the court below resolved the federal question in petitioners' favor is no obstacle to this Court's jurisdiction.[1]

II. The Decision Below Cannot Be Reconciled With This Court's Due Process Cases.

A. The Due Process Clause does not permit states to impose liability in the absence of meaningful proof of causation; nor does it allow states to hold defendants liable for harm they did not cause. Pet.20-23. Respondent's opposition confirms that that is exactly what happened here.

Respondent concedes that it did not prove that any particular person suffered any particular injury, because the courts below simply presumed that lead

[1] While petitioner NL is pursuing a settlement that is not yet final, *see* BIO.5 n.2, petitioner ConAgra is not. The remand proceedings thus do not affect this Court's jurisdiction.

paint in need of remediation exists inside "residential housing" in each of the relevant jurisdictions.[2] BIO.26-27; *see* Pet.18-19, 23. Respondent likewise concedes that it did not prove that any "particular individuals" actually relied on anything petitioners did or said, because the courts "credited" testimony that consumers generally rely on what product manufacturers tell them. BIO.28 n.8. Respondent nonetheless contends that "the California courts *did* require causation" as to "what really mattered," namely, "the impact" of petitioners' early-twentieth-century promotional activities "on the community at large" today. BIO.26, 28.

To be sure, respondent was required to show that petitioners' promotional activities "were a substantial factor in contributing to a … community-wide hazard." BIO.28. But due process is concerned not with "mere matters of form, but [with] the substance of what is required," *Crowell v. Benson*, 285 U.S. 22, 53 (1932), and the unprecedented version of the "substantial factor" inquiry applied below was hardly a substitute for showing that defendants caused specific injuries or that anyone actually relied on defendants' promotional statements. As even respondent acknowledges, *see* BIO.36, all the courts actually required was a showing that petitioners' early-twentieth-century promotion of a lawful use of their lawful products was a "very minor force" in

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[2] Respondent protests that the remediation fund will go toward "identifying *which* homes need remediation, not *whether* such homes—or the public nuisance—exist." BIO.13 n.4. But respondent identified literally zero homes in need of remediation. *See* Pet.18-19. Thus, those two questions are one and the same.

contributing to the current "community-wide" presence of lead paint on interior residential walls. And even that showing did not require actual evidence of a causal connection, but was instead based on mere supposition that some deteriorating paint that *might* trace back to petitioners would *probably* be found in at least one residence in each of the jurisdictions. Worse still, petitioners were not even permitted to try to prove otherwise. In short, the problem was not that petitioners "were not permitted to inspect all potentially affected residences," BIO.29, but that respondent did not have to prove that *any* such residences actually exist.

That approach is not remotely consistent with due process. States may not impose liability "without first providing [defendants] with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). And the most basic defense—that the defendant did not cause any identified individual's harm—cannot be eliminated by invoking harm to the community. Abstractions and statistical formulae are not substitutes for proof of a defendant's culpability. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011). And there *is* no defense available to a product manufacturer facing a claim for community harm on the ground that the manufacturer's promotion of a lawful product was a but-for cause of the product's existence in the "community as a whole." *See* BIO.28. Of course it was. The decision below thus allows the imposition of hundreds of millions in liability based on what amounts to an irrebuttable presumption. But this Court has long held that a presumption that "operates

to deny a fair opportunity to repel it violates the due process clause." *W. & Atl. R.R. v. Henderson*, 279 U.S. 639, 642 (1929).

Respondent believes the "community aspect" of public nuisance law excuses the need to prove traditional causation or reliance by actual victims. *See* BIO.27-28. But a "community" is nothing if not the aggregate of "many individuals," BIO.28, and aggregate liability may not be based solely on statistical evidence (let alone the supposition that sufficed here) that the defendant caused injury to some but not all the individuals. Pet.22. Invoking public nuisance or "community harm" does not repeal those basic constitutional requirements. While a legislature might be able to rely on tentative and generalized suppositions or likely causes, due process does not permit a court to order defendants to part with hundreds of millions of dollars without a demonstration that the defendants' own conduct actually caused the relevant harm. In the case of lead paint inside individual residences, that basic requirement demands actual proof of what particular harms resulted from each defendant's own conduct.

Respondent's efforts to distinguish this Court's "punitive damages cases," BIO.32, fare no better. The constitutional evil of an excessive punitive damages award is arbitrariness, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996), and arbitrary impositions of liability violate due process regardless of their precise form. WLF.Br.9; Chamber.Br.4-6. The ability of private lawyers suing in the name of the community to target any entity that was even a "very minor force" in contributing to a perceived community

problem and to force it to pay enormous "abatement" costs (with the private lawyers aiming to pocket a sizeable percentage before anything is abated) is as arbitrary as it gets.

Respondent suggests that this is as unobjectionable as joint-and-several liability. BIO.31-32. That could not be further from the truth. Joint-and-several liability follows proof that defendants actually caused identified individuals' injuries, and generally allows efforts to seek contribution from others causing those same injuries. But under the decision below, private lawyers suing in the names of governments are free to target anyone who played a "very minor role" in a perceived community harm and force them to fund the entire cost to abate a broad social problem without any clear mechanism to recover from the countless others who played a comparable or greater role. The decision below truly does combine the most troubling aspects of class actions, punitive damages, and CERCLA-like retroactive liability in one package.

B. Respondent denies the extreme retroactivity of the liability imposed below by suggesting it was imposed for "knowingly contributing to a public health hazard" based on defendants' knowledge "at the time of Petitioners' conduct." BIO.4, 33. That is wrong twice over.

First, while respondent *argues* that petitioners "hid[] from the public … that lead paint was a deadly poison," BIO.1-3, that argument depends on conflating the risks of *large-scale* lead exposure—known to be dangerous "since antiquity," WLF.Br.2—and *low-level* exposure, as to which respondent's own expert

conceded that no petitioner had "knowledge of any medical or scientific information … that was hidden from the public or public health community," RT5386. That should come as no surprise: Lead has been widely used and widely studied for millennia, and yet the scientific community did not recognize the risks of low-level lead exposure *until the 1990s*. App.401. And while the Court of Appeal ruled that petitioners "*must have known*" of such dangers before 1950, App.41, the sole basis for that conclusion was that those dangers are well-accepted *today*.

Second, while California's public nuisance statute has been on the books "since 1872," BIO.33, it had never been so loosely applied.[3] Whereas traditional public nuisance law "invariably involve[d] an element of wrongfulness beyond merely unreasonableness," NOAAH.Br.12; *see* NAM.Br.6-7, the courts here imposed massive monetary liability based entirely on *lawful* conduct. Moreover, while respondent calls petitioners "reprehensib[le]" because their promotions did not disclose the dangers of lead, BIO.32, that claim again depends on conflating the dangers of large-scale and low-level lead exposure, as respondent's own record evidence reveals. The former danger was known by the federal government when it specified lead-based paint for interior use (which it did until

[3] Indeed, *none* of the cases respondent cites (at 10 n.4) in support of the claim that the decision below "was well within the mainstream of decades of California public nuisance law" imposed *any* monetary liability based on conduct that was lawful at the time. Most cases resulted in only traditional injunctive relief; and those that resulted in monetary liability were imposed to abate ongoing conduct. The decision below is revolutionary, not mainstream. *See* RLC.Br.4-5; Chamber.Br.6-13.

World War II) and by California when it specified lead-based paint for use in new construction (which it did *until the 1970s*). Pet.4. In short, the novel variant of nuisance law applied below allowed respondent to "target[] individual entities for shared harms they neither caused nor reasonably could have foreseen," RLC.Br.10-11, in violation of due process. Pet.26-27.

III. The Decision Below Cannot Be Reconciled With The First Amendment.

Respondent goes to lengths to argue that the basis for liability was petitioners' "'nonspeech' actions," not their speech. BIO.17. The record contradicts respondent's claim and speaks for itself: The "basis for defendants' liability for the public nuisance created by lead paint is their affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards." App.33-34; *see also, e.g.*, App.21 ("[l]iability was premised on defendants' promotion of lead paint for interior use"); App.57 ("Defendants are liable for *promoting* lead paint for residential interior use."). Respondent's attempts to mask the court's unambiguous grounding of the basis of liability in lawful and truthful speech only highlight the obvious First Amendment problems.

Respondent's anodyne observation that states may constitutionally regulate misleading speech is equally unhelpful to its cause. Of course states may regulate misleading speech, and "speech can be misleading … even without containing express falsehoods." BIO.20. But this Court has never allowed speech to be penalized just because later generations discovered new facts about the world that

call into the question the wisdom of past pronouncements. For good reason: To judge what should have been said by reference to later-discovered facts, or to allow liability to be imposed because speakers "did not share" what they did not know, BIO.20, would obliterate the First Amendment's speech protections. To take just one example, scientists recently determined that drinking too much water can be fatal. *See, e.g.*, Coco Ballentine, *Strange but True: Drinking Too Much Water Can Kill*, Scientific American (June 21, 2007), https://bit.ly/2PMs7SC. Under respondent's theory, every drinking-water advertisement that failed to warn of the dangers of over-hydration would be "misleading" even if it ran decades before this discovery. That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013).[4]

Respondent lastly contends (at 23-24) that "this Court has never held that the First Amendment imposes any particular causation standard on state tort law." Respondent misses the point. This Court has long held that to recover in an action based on speech, a plaintiff must prove that he actually relied on the speech and suffered injury as a result. *See, e.g.*, *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3-4 (2010) (Scalia, J., in chambers) (granting stay pending

[4] No less absurd is respondent's contention (at 24-25) that "participat[ing] in" a promotional "campaign" is not conduct that the First Amendment protects. As Justice Alito has explained, "making contributions" to trade organizations plainly "enjoy[s] substantial First Amendment protection." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.). It should go without saying that "providing resources, information, and written materials," BIO.25, is protected all the more so.

certiorari where state court "eliminated any need for respondents to prove … that any particular plaintiff who benefits from the [state court] judgment (much less all of them)" actually relied on applicants' speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974) (no "legitimate state interest" extends beyond providing "compensation for actual injury" when it comes to claims based on speech); *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964) ("First Amendment freedoms cannot survive" where state law allows liability to be imposed "without the need for any proof of actual pecuniary loss"). As even respondent recognizes, the decision below dispensed with any such requirements. The resulting "lack of any requirement of injury or reliance … suffices to render the state law [judgment] incompatible with the First Amendment." Br. of the United States 25 n.12, *Nike, Inc. v. Kasky*, No. 02-575, 2003 WL 899100 (U.S. Feb. 28, 2003).

IV. The Questions Presented Are Too Important To Await Answers.

Respondent does not (because it cannot) contest the importance of the questions presented. Instead, it claims that there is no need to answer them now because "[t]here is no nationwide wave of public nuisance litigation." BIO.34-35. The facts are to the contrary, Pet.32-33, and if the decision stands, the pressures on other jurisdictions to follow suit—literally—will be difficult to resist. *See* Jennifer C. Braceras, *The Extortion of Big Pharma*, National Review Online (Aug. 24, 2018), https://bit.ly/2wnLol9 ("In 2014, Chicago and two California counties became the first government entities to sue the drug

companies for the public costs of the opioid-abuse crisis. Since then, hundreds of cities, counties, states, and Native American tribes have jumped on the bandwagon looking for big payouts from the drug industry.").

There is a reason "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). Departures from practices long settled bear all the hallmarks of arbitrary government action, and such concerns are amplified when free speech is involved. Parties that know what to expect from the law can order their conduct and speech accordingly; parties that find themselves saddled with massive liability based on newfangled legal theories first trotted out in a judicial opinion in their case obviously cannot. It is no hyperbole to recognize that, left unchecked, the novel theory of nuisance law endorsed below "threaten[s] to undermine the Anglo-American tradition of justice." Indiana.Br.1.

The novel theory endorsed below also threatens to chill speech and render this Court's cases enforcing due process limitations on aggregate litigation utterly insignificant. *See* Pet.32-35. If past speech is measured by today's standards, any industry can be targeted for suit. And every would-be class counsel can simply team up with government officials being offered a cost-free windfall and reframe separate harms to numerous separate individuals as "community harm," thus transforming aggregate liability by statistical proof, massively disproportionate monetary liability, and obvious retroactivity into "mainstream" public nuisance law.

Respondent dismisses those concerns, likening public nuisance actions to "criminal prosecutions" in that they "may *only* be brought by public officials, who are ultimately accountable to voters." BIO.37. But *unlike* criminal prosecutions, where "due process would not allow for a criminal prosecutor to employ private co-counsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution," *Cty. of Santa Clara v. Superior Court*, 235 P.3d 21, 26-27 (Cal. 2010), courts allow private attorneys not only to prosecute public nuisance actions, but to ask for millions of dollars in fees out of the supposedly "public" nuisance-remediation fund. And given that reality, "accountab[ility] to voters" is a catalyst, not a constraint. If the public fisc can be costlessly supplemented by suits like this one, voters will only demand more of them. That is precisely why defendants need protections, and why this Court should not delay its review.

CONCLUSION

For the foregoing reasons and those set forth in the petition and briefs of numerous amici, this Court should grant the petition.

Respectfully submitted,

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