No. ____

IN THE

Supreme Court of the United States

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

THE PEOPLE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari To The California Court of Appeal, Sixth District

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. CARVIN
VIVEK SURI
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001

JENNIFER B. FLANNERY
JONES DAY
1420 Peachtree Street, N.E.
Atlanta, GA 30309

LEON F. DEJULIUS, JR.
Counsel of Record
PAUL M. POHL
CHARLES H. MOELLENBERG, JR.
JONES DAY
500 Grant Street
Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
lfdejulius@jonesday.com

Counsel for Petitioner

QUESTIONS PRESENTED

The California courts held petitioner The Sherwin-Williams Company, together with two other companies, jointly and severally liable for creating a public nuisance, because it advertised lead paint for then-lawful uses over 70 years ago. The California courts have declared that the presence of interior residential lead paint is a public nuisance. Although lead paint was lawful to use in residential interiors at the time of promotion, the courts deemed that Sherwin-Williams' decades-earlier truthful promotions were "misleading," because they "necessarily implied that lead paint was safe." The courts, accordingly, held that Sherwin-Williams' advertising, though factually truthful, was not entitled to First Amendment protections for freedom of speech and freedom of association and applied a new standard of public nuisance liability premised only on product promotion to hold Sherwin-Williams liable. The courts did not require any evidence that anyone had relied on Sherwin-Williams' promotions to use lead paint inside residences or any evidence that Sherwin-Williams' products remained in any residence. As a result, the courts held Sherwin Williams liable to pay to inspect and abate more than a million privately-owned houses and apartment buildings in ten of California's largest cities and counties.

The California courts imposed this massive liability solely because (1) in 1904, when lead paint was legal, Sherwin-Williams ran an advertisement once in two California newspapers promoting a line of paints that included exterior, but not interior, lead paint, and (2) between 1937 and 1941, again when lead paint was legal, Sherwin-Williams contributed a total of $5,000 to a trade association that it used to promote "better paint," including lead paint.

The petition presents two questions:

1. In conflict with decisions of this Court and the Third Circuit, does the First Amendment permit California to impose tort liability for truthfully promoting a lawful product that it finds to be hazardous in some uses?

2. Does the Due Process Clause allow a state to impose retroactive and grossly disproportionate public nuisance liability to inspect and abate millions of residences based on decades-old promotions without evidence that consumers relied on those promotions or that petitioner's lead paint is in any residence?

PARTIES TO PROCEEDINGS BELOW

The Sherwin-Williams Company is the petitioner here and was defendant-appellant-cross-complainant below. ConAgra Grocery Products Company and NL Industries, Inc. are petitioners and were defendants-appellants. The People of the State of California, acting through Santa Clara County Counsel, San Francisco City Attorney, Alameda County Counsel, Los Angeles County Counsel, Monterey County Counsel, Oakland City Attorney, San Diego City Attorney, San Mateo County Counsel, Solano County Counsel, and Ventura County Counsel, are the respondents and were plaintiffs-respondents-cross-defendants.

CORPORATE DISCLOSURE STATEMENT

Petitioner The Sherwin-Williams Company has no parent corporations and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

The California Court of Appeal's opinion is reported at 17 Cal. App. 5th 51 and reproduced at App. A. The trial court's unreported amended statement of decision is available at 2014 WL 1385823 and reproduced at App. B.

JURISDICTION

The California Court of Appeal entered judgment on November 14, 2017. App. 1a. It denied a petition for rehearing on December 6, 2017. App. 338a. The California Supreme Court denied review on February 14, 2018. App. 339a. Justice Kennedy extended the time for filing a petition for certiorari to and including July 14, 2018. This Court has certiorari jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the First and Fourteenth Amendments to the United States Constitution and California statutes are reproduced at App. I.

INTRODUCTION

Using inherently vague public nuisance law to enact social policy, the California courts retroactively have imposed sweeping, unprecedented, and unconstitutional liability on Sherwin-Williams' truthful commercial speech and its lawful participation in a trade association. More than a century ago, like hundreds of other paint manufacturers and sellers in California, Sherwin-Williams advertised lead paints for residential and other uses—products that were lawful and commonly used at the time to paint residential interiors.

To hold Sherwin-Williams liable, the California Court of Appeal relied on an advertisement that Sherwin-Williams ran once in 1904 in the *Los Angeles Times* and the *San Diego Union* and $5,000 in donations to a trade organization between 1937-1941 that the organization used to promote better paint, including lead paint for lumber products. App. 62a. The 1904 advertisement read, in full (App. 403a-04a):

> Put *S.W.P.* on your house and you will get satisfaction and save money every time.
>
> *The Sherwin-Williams Paint, Prepared (S.W.P.)* for painting buildings, outside and inside, costs just as much as good paint ought to cost—if you pay more you get too much, if you pay less you won't get as good paint. Made in 48 good shades; also black and white.

That century-old advertising never mentioned lead, and SWP paints intended and labeled for interior residential use did not have white lead pigments. Moreover, the interior residential use of lead paint was lawful at the time of Sherwin-Williams' and the trade association's advertising. Nevertheless, because lead paint is now considered potentially hazardous for residential use, the California courts held that Sherwin-Williams' commercial speech over 70 years ago was "inherently misleading"—not because any ad said that lead paint was safe to ingest, but because any promotion "necessarily implied that lead paint was safe." App. 48a-49a. As a matter of law, California thus has ruled that factually truthful promotion of lawful products receives no First Amendment protection if those products are found to be or become hazardous in some way.

This case creates a direct conflict with this Court's precedents and the Third Circuit. Unquestionably, the First Amendment prevents legislatures from retroactively imposing liability on truthful advertisements for then-lawful products. The same is true for the courts. This Court repeatedly has held that the First Amendment protects truthful commercial speech and association for lawful goals—even when related to hazardous products. And the Third Circuit in an opinion written by then-Judge Alito, in direct conflict with the California courts here, has held that the First Amendment protects corporate donations to trade organizations unless the company had the specific intent to advance illegal goals. There was no evidence here that the trade association had any illegal goal or engaged in any illegal activity, much less that Sherwin-Williams intended to support an unlawful goal. At all relevant times, lead paint was a legal product for interior residential use.

The California ruling poses an immediate, chilling effect on product advertising and trade association membership. The threat arises from the virtually unlimited liability imposed on lawful promotion of products. The California rule tells manufacturers and trade associations that their compliance with laws and regulations at the time of product promotion for a common use will not protect them from substantial liability if the product use later becomes hazardous. California's rule encourages the most insidious government regulation of speech: state and local government officials can use vague public nuisance standards at their whim to fill government coffers by declaring historically lawful product promotion "necessarily" misleading.

The First Amendment issues warrant immediate review or summary reversal. Plaintiffs, including cash-poor or policy-driven state and local governments in California and elsewhere, are using the decision below as a model to assert public nuisance liability based on truthful speech and lawful association. Government officials have brought similar public nuisance claims against dozens of companies for promoting and selling fossil fuels, pharmaceuticals, polychlorinated biphenyls (PCBs), and MTBE additive for gasoline—all at a time when those products were lawful.[1] Without this Court's intervention, California's extreme mutation of public nuisance liability based on product promotion will continue to propagate and not only become the "monster that would devour in one

[1] *See, e.g., City of San Jose v. Monsanto Co.*, No. 5:15-cv-03178, 2016 WL 4427492, at *1 (N.D. Cal. Aug. 22, 2016) (PCBs); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 379 F.Supp.2d 348, 361 (S.D.N.Y. 2005); *City of Oakland v. BP P.L.C.*, No. 17-cv-06011, 2018 WL 3109726, at *1 (N.D. Cal. Jun. 25, 2018) (fossil fuels).

gulp the entire law of tort," *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993), but also devour the constitutional guarantees of free speech, association, and due process of law.

This trend profoundly threatens the rights of American businesses to speak and to associate with each other. In then-Judge Alito's words, it makes commercial speech and association "unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." *In re Asbestos School Litigation*, 46 F.3d 1284, 1294 (3d Cir. 1994). This Court's intervention is necessary now to address this growing, intolerable threat to "indispensable" commercial speech essential to a "free enterprise economy." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

This Court also should grant certiorari to decide whether California's liability standards comport with the Due Process Clause. Sherwin-Williams' truthful promotion of lawful products has resulted in liability decades later without fair notice under a novel theory of public nuisance liability first announced in 2006 in this case. *County of Santa Clara v. A. Richfield Co.*, 40 Cal. Rptr. 3d 313, 328 (Cal. Ct. App. 2006) (*Santa Clara I*). Moreover, Sherwin-Williams' miniscule, purported promotion has led to its joint and several liability for millions of residences without evidence connecting Sherwin-Williams' promotion to any residence or any lead paint found in them. In California's view, neither proof of reliance on Sherwin-Williams' advertising nor product identification is relevant or required. In fact, California has ordered Sherwin-Williams to pay to inspect and remediate tens of thousands of homes for which Sherwin-Williams' promotion could not have caused the presence of interior lead paint, because the houses were built years after Sherwin-Williams' one ad and minor contributions ended, years after Sherwin-Williams stopped selling any interior lead paint, and in eight cities and counties in which its ads did not appear. It even must pay to find where the nuisance is.

The Due Process Clause prohibits a state from imposing arbitrary and irrational liability. A state further violates due process by imposing severe, retroactive liability; liability for harms that the defendant did not cause; and grossly disproportionate liability. California has violated *all* of these constitutional restrictions. As this Court has recognized, the specter of severe, retroactive, disproportionate liability is a critically important, recurring issue to a wide range of American businesses. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 548-49 (1998) (opinion of Kennedy, J.).

This Court's intervention is necessary now. To allow these issues to go unaddressed will encourage further proliferation of public nuisance lawsuits based on constitutionally protected speech without minimal due process protections. The lawsuits raise special policy issues more appropriate for legislative consideration. Yet, pegging public nuisance liability to prior product promotion offers a tempting, facile way to shift responsibility from government policymakers and budgets onto corporations. The problem is heightened, as in this case, when a single trial judge, sitting in one county and given great deference by the appellate courts, creates new statewide housing and public health standards, in conflict with existing federal and state policies and regulations, and a huge remedial program because he believes that more should be done. App. 336a-37a. This case—with a full trial record—is the ideal vehicle to address the important constitutional questions presented.

STATEMENT

A. Interior Lead Paint Was Used Widely Before World War II.

Lead, a naturally occurring mineral, has been used to make white lead pigments since antiquity. The ancients used white lead to paint ships. *See* Pliny the Elder, The *Natural History*, bk. XXXV, ch. 19 (79 AD). Medieval scribes used it when preparing illuminated manuscripts. William H. Pulsifer, *Notes For A History of Lead*, at 220-221 (1888) ("Pulsifer"). Master artists such as Rembrandt and Vermeer made copious use of white lead in their paintings.

In the United States, the use of white lead to paint housing began during colonial times. Pulsifer at 313. White lead was a luxury good and the "gold standard" for paint. App. 383a. White lead paint was used for the Capitol, the White House, and Mount Vernon. Government agencies, including in California, specified the use of white lead paint on residential interiors through the 1950s. App. 385a-88a.

Lead also has been known since antiquity to harm human health, particularly miners, factory workers, plumbers, printers, and painters, when ingested in large amounts over time. Through most of the twentieth century, however, lead was used in dozens of everyday products, ranging from gasoline to water pipes to solder in food cans to cosmetics. As the United States Public Health Service acknowledged in 1931, lead paint, despite its known toxicity, had "wide fields of usefulness." *Lead Poisoning From Toys*, Child Welfare (June 1931).

Plaintiffs conceded that Sherwin-Williams did not have any secret, unique research on lead health risks; it knew no more than the government and the public health and medical communities. App. 363a-64a, 366a. Working with public health officials, Sherwin-Williams addressed risks to children as they became known. In 1955, it joined the American Standard Association's voluntary ban on residential interior lead-based paint and issued product warning labels against that use. App. 401a. Until the late 1990s, however, no one understood that very low doses of lead could harm adults and children with no apparent symptoms—the harms underlying the public nuisance alleged here. *Santa Clara I* at 321, 331 (tolling the statute of limitations "until approximately 1998 when scientific studies were published disclosing the dangers of low-level lead exposure"). As the trial court acknowledged: "All this says is that medicine has advanced; shouldn't we take advantage of this more contemporary knowledge to protect thousands of lives?" App. 314a.

The federal government first regulated residential use of lead-based paint in 1971 and banned that use in 1978, decades after Sherwin-Williams' last purported promotion of interior lead paint. This legislative ban did not require the removal of lead paint already in houses. 42 Fed. Reg. 44199-44201. Even today, no California or federal law prohibits the presence of well-maintained lead paint in residential interiors; intact lead paint is not considered to be a hazard. App. 414a-16a, 360a. Federal and California law only requires property owners to prevent and to abate lead hazards from deteriorating lead paint. App. 341a, 357a, 374a-75a.

B. Respondents Sue Several Former White Lead Pigment Companies.

In 2000, Santa Clara County sued only a handful of the companies (including Sherwin-Williams) that made white lead pigments decades ago. Nine other counties and cities (the remaining respondents here) later joined as plaintiffs.

Respondents at first relied on traditional tort theories, such as fraud, negligence, and strict product liability for design defect and failure to warn. *Santa Clara I* at 319. They sought to pursue these claims as a class action and alleged damage to their own buildings. *Id.* at 319, 321. Respondents soon found, however, that traditional defenses barred these tort theories.

Respondents then turned to a representative "public nuisance" claim, which they argued has fewer defenses. *See* Cal. Civ. Code § 3490; Cal. Code Civ. Proc. § 731. Traditionally, a public nuisance is defined as "an unreasonable interference with a right common to the public." Restatement (Second) of Torts § 821B(1) (1979); *see* Cal. Civ. Code § 3480. Examples of public nuisances include the "obstruction of a public highway," "maintenance of a pond breeding malarial mosquitoes," and the "shooting of fireworks in the public streets." *Id.* § 821B, comment (b). All of these activities involve an "interference with the interests of the community at large" at identified locations that the court or jury can inspect. *Id.* In such cases, the defendants must end the nuisance for the public's benefit.

This case is very different. The collective presence of lead paint inside millions of separate, unidentified, private houses and apartment buildings across ten cities and counties is the public nuisance. Defendants never have controlled these properties. The risk is that children may be exposed to lead dust from, among other sources, interior paint deterioration. App. 35a. Further, a company is liable solely because it "promoted" lead paints for interior use—even though the particular risk to children from very low blood lead levels resulting from ingesting lead dust was not then known or knowable, and intact lead paint is not a hazard. App. 75a. And a company is jointly and severally liable for all pre-1951 residences. The presence of lead paint is presumed, and neither reliance on any company's promotion nor product identification is relevant. App. 292a.

Two key features of California's public nuisance theory deserve emphasis. First, liability rests entirely on "promotion of lead paint for interior use." *Santa Clara I* at 328. Whether a company provided an adequate warning is irrelevant: "Liability is not based on … failure to warn … [but] on defendants' promotion of lead paint for interior use." *Id.* (emphasis in original). And it does not matter whether the promoted use was lawful at the time: "The fact that the pre-1978 manufacture and distribution of lead paint was in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance." *Id.* at 329. While defendants had many defenses to conduct-based products liability theories, virtually no defense remains to California's new speech-based public nuisance action.

Second, the theory unabashedly contemplates grossly disproportionate liability by dispensing with proof of actual causation. The California courts held that—even though thousands of individual homeowners, architects, and contractors made thousands of individual decisions to use lead paint in millions of individual residences—the lead paint in those residences constitutes an "indivisible" public nuisance. App. 94a. Notwithstanding that hundreds of paint manufacturers and sellers promoted lead paint in California over the last 150 years, so long as a defendant's promotion was a "very minor force" in creating this supposedly "indivisible" nuisance, the defendant is liable for abating every company's lead paint. App. 67a. And a "very minor force" does not require evidence of actual causation in any residence. *Id.* This lax standard makes disproportionate and erroneous liability inevitable.

C. California's Application Of Its New Public Nuisance Theory To Sherwin-Williams Demonstrates The Threat To Manufacturers' Constitutional Freedoms Of Speech And Association.

California's application of its public nuisance theory to Sherwin-Williams shows how extreme this theory is and the threat it presents to the commercial speech of product manufacturers and trade associations. In the late nineteenth and early twentieth century, Sherwin-Williams developed innovative ready-to-use mixed paints, offering a specific paint for each purpose. App. 380a-81a. The parties stipulated that interior paints for Sherwin-Williams' flagship brand—SWP—were not lead-based. App. 392a-95a. And with trivial exceptions,[2] Sherwin-Williams did not make white lead paints for interior residential use.

Because white lead paint was the "gold standard," Sherwin-Williams had to fight government specifications and regulations just to sell paints without white lead pigments. App. 383a. As respondents' expert admitted, no manufacturer did more to develop and promote non-lead paints than Sherwin-Williams. App. 370a-71a.

Unsurprisingly—as one of respondents' historians acknowledged—Sherwin-Williams never ran a single advertisement in California specifically promoting the use of lead paint in residential interiors. App. 369a. Another of respondents' historians likewise testified that Sherwin-Williams "didn't really have an interest in promoting leaded paint" and "didn't have a horse in the race." App. 347a. Plaintiffs presented no evidence that any Sherwin-Williams' promotion caused lead paint to be present in any residence.

Sherwin-Williams' 1904 advertisement promoted a line of paints—"SWP"—that included exterior paints (some of which included white lead) and interior paints (none of which included white lead). App. 392a-395a. The Court of Appeal held that this advertisement—which never mentioned lead, which did not

[2] Plaintiffs stipulated that Sherwin-Williams' only interior white lead-based paints were Inside Floor paint (6 of 15 colors from 1910-1913), Enameloid (1936 only, when one color had less than 1% lead), and Family Paint (7 colors between 1941-1947). App. 390a-91a.

involve interior lead paints, and which never urged interior use of exterior lead paint—nevertheless promoted lead paint for interior use.[3]

The California courts additionally relied on nominal contributions that Sherwin-Williams made to the Lead Industries Association ("LIA"), a trade association. The LIA represented dozens of member companies that mined, smelted, and refined lead or that made lead products. App. 12a-13a. Between 1937 and 1941, Sherwin-Williams donated $250 quarterly to a LIA promotional campaign, to which many members contributed, urging lumber products manufacturers to endorse better paint, including lead paint. App. 399a. However, the LIA was not Sherwin-Williams' agent. App. 337a. And no court found that Sherwin-Williams ever saw, approved, or intended to fund any LIA advertisement encouraging the use of lead paint inside residences. Nevertheless, the Court of Appeal concluded that Sherwin-Williams' donations to the LIA made it liable as a promoter of lead paint for interior residential use. App. 62a-63a.

These thin, twin reeds demonstrate the miniscule promotion and "very minor force" sufficient for liability under California's novel public nuisance theory. Sherwin-Williams' truthful, common advertising for a then-lawful use, which advertising plaintiffs' expert could not say increased the use of lead paint in residential interiors, App. 344a, resulted decades later in liability to pay to abate not just its paint (none

[3] Sherwin-Williams' labels identified the intended exterior or interior use. App. 405a-07a.

proven), but all lead paint in every residence built before 1951 within all ten cities and counties.[4] App. 180a.

D. California Gives Short Shrift To Sherwin-Williams' Constitutional Objections.

Sherwin-Williams argued that the liability finding and abatement order violated its First Amendment and federal due process rights. The Court of Appeal, however, cursorily rejected its arguments.

The Court of Appeal held that the "lead paint promotional advertising and participation in trade-association-sponsored lead paint promotional advertising were not entitled to any First Amendment protections." App. 48a. The court reasoned that the promotion of lead paint was "misleading," because it "necessarily implied that lead paint was safe." App. 48a-49a. Therefore, in the court's view, the promotion of lead paint for interior use, "while knowing that such use would create a public health hazard," deprived the speech of "any First Amendment protection." App. 49a.

The Court of Appeal then rejected Sherwin-Williams' argument that the judgment imposed arbitrary, retroactive, and disproportionate liability. Although the court assumed that Sherwin-Williams' speech was

---

[4] The court stopped liability after 1950 because respondents failed to show that any defendant had promoted the use of lead paint in residential interiors after that date. App. 70a. Although Sherwin-Williams' last attributed promotional activity was its final contribution to the LIA promotional campaign in 1941, the court, without discussion, held Sherwin-Williams liable through 1950.

"a very minor force" in creating the nuisance, it declared without further analysis that requiring Sherwin-Williams to "clean up the hazardous conditions that [it] assisted in creating … is not disproportional to [its] wrongdoing." App. 97a.

The Court of Appeal affirmed the trial court's judgment of joint and several liability for all pre-1951 housing. The court remanded to the trial court to recalculate the abatement fund—which the parties have estimated between no more than $409 million and $730 million—and the appointment of a receiver to oversee the fund. App. 180a.

E. The California Supreme Court Denies Review.

Sherwin-Williams filed a petition for review before the California Supreme Court, emphasizing the serious free speech, free association, and due process problems. But a divided California Supreme Court denied review. Two of the court's six voting justices—Justices Kruger and Liu—would have granted review. App. 339a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve The Conflicts Over Whether The First Amendment Allows State Tort Liability For Truthful Commercial Speech And Lawful Association When A Court Later Determines The Lawful Product Is Hazardous.

The Court should review now the California Court of Appeal's decision, because it conflicts with decades of this Court's settled First Amendment precedents and with the Third Circuit. Plaintiffs and government lawyers increasingly have sought to impose massive liability on commercial speech with which they disagree. *See Nat'l Inst. Of Family and Life Advocates v. Becerra*¸ 138 S.Ct. 2361, 2374-75 (2018). This trend poses a grave threat to the freedom of American businesses to speak individually and through trade associations. The record is robust and further percolation would only leave American businesses and trade associations in intolerable jeopardy over the scope of their First Amendment rights.

A. California's Theory Of Public Nuisance Liability For Truthful Speech And Lawful Association Conflicts With This Court's Precedents And Creates A Split Of Authority.

1. The First Amendment protects the right to advertise goods and services. Advertising has been "a part of our culture" since before the Founding. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (plurality opinion). Benjamin Franklin's "early defense of a free press" concerned "his decision to print, of all things, an advertisement for voyages to Barbados." *Id.* at 495.

Commercial speech is protected so long as it "is neither misleading nor related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980); *see, e.g.*, *Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002) (First Amendment protects speech that concerns a "lawful activity" and is "not misleading"); *44 Liquormart*, 517 U.S. at 504 (plurality opinion) (First Amendment protects "truthful, nonmisleading speech about a lawful product").

California imposed liability on Sherwin-Williams for advertising in 1904 its SWP product line, which had no interior lead paints. This advertising truthfully promoted a lawful product for a lawful use. Nowhere did the ad mention lead, make any false or misleading statement about the properties of lead paint, say that lead paint was safe to ingest, or suggest using lead paint inside residences. Yet the California Court of Appeal held that the speech was "not entitled to any First Amendment protections." App. 48a. Because the court determined that lead paint is not "safe" for interior residential use, the court held that the advertisement a century earlier was "inherently misleading." App. 57a.

California's rule directly contradicts this Court's precedent and creates a split of authority. This Court's cases hold that truthful speech about lawful products is protected irrespective of whether a court considers the products "safe." For example, the First Amendment protects liquor advertising, even though liquor contributes to drunk driving and alcoholism. *44 Liquormart*, 517 U.S. at 504 (plurality opinion); *accord id.* at 520 (Thomas, J., concurring in the judgment). The First Amendment likewise protects tobacco advertising, even though tobacco use can lead to cancer and heart disease. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001). So, too, the First Amendment protects the advertising of compounded drugs (customized medications prepared to fit individual patients' needs), even though compounded drugs can cause serious side effects and risks of overdose. *Thompson*, 535 U.S. at 367.

This Court, accordingly, has rejected the notion that "legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995). The principle underlying these precedents is unmistakable: If a state believes that a product is too unsafe to use, it should ban the product—not the speech. *44 Liquormart*, 517 U.S. at 511 (plurality opinion). States may ban lead paint for interior residential use, but they may not keep interior lead paint legal (as it was in 1904 and 1941) and then hold a company liable for advertising it. That the courts, not the legislature, imposed the liability is of no import.

Moreover, truthful advertising does not become "misleading" because the product is thought to be unsafe. Every product has some known risk, particularly if not used or maintained as intended. Consequently, California's standard of a known health risk does nothing to safeguard speech protected by the First Amendment.

To be sure, a state may require (with proper notice) a manufacturer to disclose hazards associated with its product. This case, however, "is not premised on a … failure to warn." App. 33a. A defendant facing a failure to warn claim could assert numerous defenses that would protect it from unbounded liability: useful life, obvious danger, common knowledge, causation, and product misuse, to name a few. In contrast, under California's rule, any advertisement for a potentially harmful product—indeed, any advertisement for a product that a court sitting a century later deems unsafe—is automatically "misleading" and thus unprotected, regardless of whether the risk is common knowledge or the manufacturer provided adequate warnings. California's rule thus has the impermissible effect of affording more protection to a defendant's conduct than to a defendant's speech. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193 (1999) ("[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.").

2. The "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of … freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This freedom is "deeply embedded" in American history and culture. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982). Free association is essential to liberty, because "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id.* at 907–08.

The right of association includes the right to participate in organizations that promote "business or economic activity" (*Thomas v. Collins*, 323 U.S. 516, 531 (1945); and the right to associate to advance "economic" ideas is just as sacrosanct as the right to associate to advance "political," "religious," or "cultural" ones (*Patterson*, 357 U.S. at 460). Moreover, this freedom includes the right to make monetary contributions to expressive organizations. "The freedom to associate with others for the dissemination of ideas—not just by singing or speaking in unison, but by pooling financial resources for expressive purposes—is part of the freedom of speech." *McConnell v. FEC*, 540 U.S. 93, 255 (2003) (opinion of Scalia, J.); *see, e.g.*, *Citizens Against Rent Control/Coalition for Fair Housing v. City of*

Berkeley, 454 U.S. 290, 296 (1981) ("the freedom of association is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective").

In *NAACP v. Claiborne Hardware Co.*, this Court held that freedom of association precludes punishing a speaker (or donor) for the illegal acts of a group with which he or she associates, unless the state shows that the group had unlawful aims and the speaker (or donor) had the specific intent to further those unlawful aims. *Id.* at 920. The Court explained that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id.* at 908.

Claiborne Hardware follows this Court's litany of cases prohibiting guilt by association. This Court has explained that a "blanket prohibition of association with a group having both legal and illegal aims" would endanger "legitimate" association, and that the Government may enforce the prohibition only where the individual "specifically intend[s] to accomplish" the illegal aims. *Scales v. United States*, 367 U.S. 203, 229 (1961). In another case, the Court held that this intent element "must be judged strictissimi juris"—by the strictest law—"for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish [the illegal objectives], might be punished for his adherence to lawful and constitutionally protected purposes." *Noto v. United States*, 367 U.S. 290, 299–300 (1961). In a third case, the Court held that "guilt by association alone … is an impermissible basis upon which to deny First Amendment rights," and that "the government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy v. James*, 408 U.S. 169, 186 (1972).

The decision below is irreconcilable with *Claiborne Hardware*, *Scales, Noto,* and *Healy*. The California courts have not found that "the group itself [LIA] possessed unlawful goals and that the individual [Sherwin-Williams] held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920. Nor could the courts make those necessary findings. To start, neither the LIA nor the specific advertising campaign to which Sherwin-Williams and others contributed had "unlawful goals." Neither promoting lead paint nor promoting its use on lumber, window frames, and doors (which had many exterior and non-residential uses, too) was unlawful at the time of Sherwin-Williams' meager donation (1937–41).

Nor has any California court found that Sherwin-Williams had the specific intent to advance the particular objective of promoting interior residential use of lead paint. Sherwin-Williams did not make any interior white lead paints between 1937 and 1940 (and made only small amounts of general utility white lead paints from 1941 to 1947). App. 390a-91a. Unsurprisingly, therefore, no court has made any finding—much less a finding "strictissimi juris"—that Sherwin-Williams donated money to the LIA with the specific intent to encourage the use of lead paint on interior surfaces, which is the only use that the courts below deemed a nuisance over 70 years later. Imposing liability on Sherwin-Williams in the absence of any finding of its intent to further an unlawful goal violates this Court's precedents. "Misleading" advertising is neither the test for freedom of association nor the same as inciting unlawful activity.

B. California's Decision Creates A Split With A Third Circuit Decision Written By Then-Judge Alito.

The California decision also conflicts with *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994)—an opinion by then-Judge Alito. There, school districts sued former manufacturers of asbestos-containing building products. They claimed that one defendant was liable because it had donated $50,000 to "a trade organization called the Safe Buildings Alliance," which in turn "had disseminated misleading information about the danger of asbestos in schools." *Id.* at 1287; *see id.* at 1290. After the district court refused to grant that defendant summary judgment, the Third Circuit issued a writ of mandamus overturning the district court's decision. *Id.* at 1296.

The Third Circuit ruled that the imposition of liability amounted to a "clear and indisputable" violation of the First Amendment—the stringent standard necessary to secure mandamus. *Id.* at 1289. The court considered it "abundantly clear that the strict standard set out in *Claiborne Hardware* cannot be met." *Id.* at 1290. "Even if it [were] assumed for the sake of argument … that some of the [Safe Buildings Alliance's] activities were unlawful," there was "simply no evidence" that the defendant "specifically intended to further such wrongful conduct." *Id.* The district court's contrary decision was "clearly wrong" (*id.* at

1294) and lay "far outside the bounds of established First Amendment law" (*id.* at 1289).

The Third Circuit added that the district court's approach had "far-reaching" implications that would "broadly threaten First Amendment rights." *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.* Making anyone who engages in these activities responsible for the illegal acts of the group, irrespective of specific intent to commit those illegal acts, "would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.*

California's decision directly conflicts with *Asbestos School Litigation*. There, a company donated $50,000 to a trade group that allegedly disseminated misleading information about asbestos; here, a company donated $5,000 to a trade group that allegedly disseminated misleading information about the use of lead paint. There, no evidence showed that the company specifically intended to promote the group's illegal acts; here, too, there is no finding that Sherwin-Williams intended to promote any illegal acts—in fact, the interior residential use of lead paint was legal then. Yet there, the Third Circuit held that the First Amendment forbade holding the company liable for the group's actions; here, by contrast, California held that the First Amendment permits holding the company liable for the LIA's actions, which was not its agent. This Court should resolve this conflict with the Third Circuit's understanding of the "clear" and "indisputable" meaning of the First Amendment. *See also Am.-Arab Anti-Discrimination Comm. v. Reno*, 70

F.3d 1045, 1058 (9th Cir. 1995) (agreeing with *In re Asbestos* and holding that joining organizations and making contributions enjoy substantial First Amendment protection).

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

1. The First Amendment questions presented by this case are recurring. Private plaintiffs and government officials throughout the country increasingly are seeking to impose mass-tort liability on the basis of disfavored corporate speech. This case further creates a split of authority with the Third Circuit as to constitutional protection for lawful associational activities.

Government officials have tried before to hold paint companies liable for their speech promoting lead paint when it was legal. Private plaintiffs in Wisconsin successfully argued for the adoption of a risk-contribution theory of liability in part by alleging that paint companies "magnified the risk" posed by lead paint "through their aggressive promotion of white lead carbonate." *Thomas ex rel. Gramling v. Mallett*, 701 N.W. 2d 523, 564 (Wis. 2005). Government officials in Illinois, Rhode Island, and New Jersey likewise argued for liability "under a theory of public nuisance for the … promotion—decades ago—of products containing lead pigment." *City of Chicago v. Am. Cyanamid Co.*, 823 N.E. 2d 126, 129 (Ill. App. 1st Dist. 2005); *see also State v. Lead Indus. Ass'n*, 951 A.2d 428, 440 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484, 487 (N.J. 2007).

Similarly, in many pending cases plaintiffs and government officials are seeking to impose tort liability for the "promotion" of PCBs—a chemical that was used widely, and lawfully, in industrial and commercial products until banned in 1979. A typical complaint alleges that the companies are liable because they published "brochure[s]," ran "advertise[ments]," "proudly espoused" the product, hired "salesmen to market" the product, and "affirmatively encouraged" the use of the product. First Amended Complaint ¶¶ 76–79, *City of Seattle v. Monsanto Co.*, No. 2:16-cv-107 (W.D. Wash 2016); *see also City of Long Beach v. Monsanto Co.*, No. 2:16-cv-03493 (C.D. Cal.); *City of San Jose v. Monsanto Co.*, 39, 2016 WL 4427492, at *1 (N.D. Cal. Aug. 22, 2016).

So, too, plaintiffs and government officials have filed public nuisance lawsuits claiming that energy companies are liable for the costs of climate change because they "marketed … massive quantities of fossil fuels," "employed large-scale, sophisticated advertising campaigns to promote pervasive fossil fuel use," ran "promotions claiming that [fossil fuel use] is 'responsible' or even 'respectful' of the environment," and "engaged in advertising and communications campaigns [that] downplay[ed] the harms and risks of climate change." Complaint ¶¶ 1–77, *City of New York v. BP PLC*, No. 18-cv-182 (S.D.N.Y. 2018); *see also State of Rhode Island v. Chevron Corp. et al.*, PC-2018-4716 (R.I. Sup. Ct. Jul. 2, 2018). This complaint further claims that the oil companies are liable on account of their affiliation with "their main U.S. trade association, the American Petroleum Institute." *Id.* ¶ 6. *See also People of the State of Cal. v. BP P.L.C.*, Nos. 3:17-CV-06011 & 3:17-CV-06012 (N.D. Cal.); *City of Oakland v. BP P.L.C.*, 17-cv-06011, 2018 WL 3109726, at *1 (N.D. Cal. Jun. 25, 2018). Other products similarly are in the crosshairs. *See, e.g*, *Cty. of Mariposa v. Amerisourcebergen Drug Corp.*, No. 1:18-cv-00626 (E.D. Cal.) (opioids); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 379 F. Supp. 2d 348, 361 (S.D.N.Y. 2005). The Court should make clear that courts, just like legislatures, are prohibited from imposing liability on truthful speech promoting lawful products for common uses with known hazards.

2. The First Amendment questions are important. Advertising is "indispensable" to our "free enterprise economy," because it is essential to ensuring that "private economic decisions" are "intelligent and well informed." *Virginia State Board of Pharmacy*, 425 U.S. at 465. It also promotes "the formation of intelligent opinions as to how [our economy] ought to be regulated or altered." *Id.* Indeed, "a consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political debate." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011). Imposing liability on advertisers, even though their products are lawful and their advertisements are truthful, would not only inhibit businesses from exercising their First Amendment rights, but undermine our economy and democracy.

Association likewise is indispensable to our society. Businesses today join and donate money to a wide range of trade groups—such as the Asian and Hispanic Chambers of Commerce, the National Federation of Independent Businesses, and Business Roundtable. These "respected groups" play a vital role "in public life." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 696 (1990) (Kennedy, J., dissenting). Imposing liability for joining or donating money to a trade group would, in then-Judge Alito's words, "broadly threaten [these] First Amendment rights." *Asbestos School Litigation*, 46 F.3d at 1294. A business "could be held liable … for all of the allegedly tortious acts committed by" an organization, "based solely on its limited and (as far as the record reflects) innocent association with" that organization. *Id.* This expansive liability would make "joining organizations [and] making contributions … unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.* Such liability thus "could generally chill the exercise of the freedom of association by those who wish to contribute to … trade groups." *Id.* at 1296.

3. This case is an ideal vehicle to address these recurring and important questions. The case comes to this Court after a full trial. The detailed record shows both the nature of the speech and the advertised products. Moreover, the facts well illustrate the dangers to freedom of speech and association posed by California's extreme theory of public nuisance liability. It is bad enough to subject a company to liability for truthful advertisements of a lawful product; here, however, California has imposed that liability a century after the fact. And it is bad enough to subject a company to liability for $5,000 in contributions to a trade group; here, however, that $5,000 contribution is the basis for liability over 70 years later amounting to hundreds of millions of dollars without evidence linking the purportedly misleading promotion to the nuisance.

4. The Court should address these issues now. The issues presented are clear, and the pertinent legal arguments have been amply aired in decades of this Court's commercial-speech precedents. Further percolation is unlikely to add to the debate. Indeed, the self-evident conflict with this Court's precedents warrants summary reversal.

While nothing would be gained by deferring review, much would be lost. "There runs through [this Court's] First Amendment theory a concept of immediacy, the ideas that thoughts and pleas and petitions must not be lost with the passage of time." *Hill v. Colorado*, 530 U.S. 703, 792 (2000) (Kennedy, J., dissenting). For this reason, this Court has intervened immediately to redress any "ongoing chill upon speech that is beyond all doubt protected." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). The decision below and the similar, current attacks on corporate speech impose such an "unwarranted inhibiting" chill. *Asbestos School Litigation*, 46 F.3d at 1294. The Court should act at once; "every momen[t] … amounts to a flagrant, indefensible, and continuing violation of the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) (opinion of Black, J.).

This case also warrants immediate review because mass-tort cases of this kind take decades to work through the courts. This case started in 2000. It may be years before another case presents these issues to the Court on a full trial record. Making matters worse, the many pending speech-based mass-tort lawsuits will clog judicial dockets, consuming tremendous amounts of court and party resources. Delay would compromise judicial economy. In sum, this Court's immediate intervention is imperative to preserve the First Amendment rights of businesses and associations against the serious threat posed by this and many other lawsuits seeking to impose enormous liability for truthful speech about lawful products.

II. This Court Should Review Whether The Due Process Clause Allows Retroactive And Disproportionate Tort Liability For Harms A Defendant Did Not Cause.

The California Court of Appeal created a new theory of public nuisance liability based on product promotion and applied its new theory to promotions that were done over 70 years earlier. Because the court also held Sherwin-Williams liable as a "very minor force" in contributing to the presence of interior lead paint, it held Sherwin-Williams liable to inspect and abate hundreds of thousands of properties not connected to its miniscule promotion of lead paint. In fact, plaintiffs' expert could not find any discernible effect on interior residential use of lead paint from Sherwin-Williams' 1904 ad or the LIA's "better paint" campaign from 1937-41. App. 344a. The Court should review California's decision because it conflicts with this Court's due process precedents and is a recurring issue of national importance.

A. By Permitting Retroactive Liability Without Proof Of Actual Causation, California's Public Nuisance Theory Conflicts With This Court's Due Process Precedents.

The Due Process Clause prohibits "arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). A state can violate this prohibition by imposing severe, retroactive liability, liability for harms that the defendant did not cause, or disproportionate liability. The decision below conflicts with this Court's precedents by violating *all* of these constitutional restrictions.

1. The Constitution prohibits "arbitrary" or "harsh" "retroactive" liability. *United States v. Carlton*, 512 U.S. 26, 30 (1994). "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 2 Joseph Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891). They "raise particular concerns" of "arbitrary and vindictive" liability and of "retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

This Court has held, in "numerous decisions," that "severe retroactive" liability violates the Due Process Clause. *Eastern Enterprises*, 524 U.S. at 548-49 (opinion of Kennedy, J.); *see, e.g.*, *Landgraf*, 511 U.S. at 266 ("the Due Process Clause … protects the interests in fair notice and repose that may be compromised by retroactive statutes"); *William Danzer & Co. v. Gulf & S.I. R. Co.*, 268 U.S. 633, 637 (1925) ("retroactively to create liability … would be to deprive defendant of its property without due process of law").

In conflict with this Court, California has imposed severe, retroactive liability. No industry standard restricted the use of lead paint inside houses until 1955, and no federal statute until 1971. No judicial decision in place at the time of promotion defined the collective presence of interior lead paint as a "public nuisance." No science then identified the microscopic blood or dust lead levels at issue here as a hazard. Nor did any court, until the decision below, identify the promotion of lead paint for interior residential use (or the promotion of any lawful, but hazardous, product) as speech that would create public nuisance liability. Decades after Sherwin-Williams' speech, the courts have imposed new legal consequences on it.

The liability also is severe. This Court has described "$50 to $100 million" in liability "30 to 50 years" after the relevant events as a "severely retroactive burden." *Eastern Enterprises*, 524 U.S. at 536 (plurality opinion); *see also id.* at 549 (opinion of Kennedy, J.) ("severe … retroactive effect of unprecedented scope"). This case involves hundreds of millions of dollars in liability imposed 70 to 110 years after the relevant events. The liability in this case is "far outside the bounds of retroactivity permissible under our law." *Id.* at 550 (opinion of Kennedy, J.). Courts are not exempt from due process protection of fair notice, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 559 (1996), and do not have free rein to impose severe legal consequences decades after the last product sale.

2. The Due Process Clause prohibits holding people liable for harm that they have not caused. For centuries, it has been "a well-established principle" of tort law that, "in all cases of loss, we are to attribute it to the proximate cause." *Waters v. Merchant Louisville Insurance Co.*, 11 Pet. 213, 223 (1837). This principle protects against arbitrary deprivations of property by imposing "a necessary limitation on liability." *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996). Absent that limitation, the state could hold any person responsible for every misfortune in the world resulting from a type of product it once made or promoted.

This Court's cases reflect this bedrock principle. For example, in *Western & A.R.R. v. Henderson*, 279 U.S. 639 (1929), the Court held that the Due Process

Clause prohibited a statute that made railroads presumptively liable for all rail collisions. The Court explained that presuming the railroad's negligence "is unreasonable and arbitrary, and violates the due process clause." *Id.* at 644. Similarly, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court held that the Due Process Clause prohibits subjecting a defendant to punitive damages for policies that did not cause any harm to the plaintiff. "Condemn[ing]" a defendant for conduct that is not "directed toward" the plaintiff amounts to "an arbitrary deprivation of property." *Id.* at 417, 420. Again, in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), the Court held that the Due Process Clause allows a state to subject a defendant to punitive damages only for "harm caused to" the plaintiff, not for "harm caused strangers to the litigation." *Id.* at 356-57.

All of these cases stand for an ironclad due process principle: "defendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others." *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014); *see also Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1305 (2017); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). The causal connection between a particular defendant's conduct and a particular victim's harm must be established through "individualized determinations"; a court may not simply *assume* causation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011). And to preserve this due process right, a defendant must have the opportunity to present every available defense. *Lindsey v. Normet,* 405 U.S. 56, 66 (1972).

California has violated these bedrock due process principles. It is stipulated that Sherwin-Williams made very few lead-based paints for interior residential use, and it did not advertise those paints in California. App. 390a-91a, 395a, 400a. The court made no finding that Sherwin-Williams' SWP brand advertisement in 1904 and LIA donations from 1937-41 caused a single homeowner, architect, or contractor to decide to use interior lead paint at any time anywhere; indeed, respondents' experts conceded that they had no evidence that the advertisements had any effect. App. 344a. California held Sherwin-Williams liable for the collective presence of lead paint inside all housing in the ten jurisdictions by concluding its advertising was "a very minor force" in contributing to the collective public nuisance. App. 67a; *see id.* at 64a ("more than negligible or … infinitesimal"). But at a minimum, a "very minor force" requires some evidence of some force somewhere. By assuming without any evidence that Sherwin-Williams' speech contributed to the collective presence of interior lead paint, and not linking any promotion to any paint in any location, the courts below eliminated causation as a limitation on liability. Aware that plaintiffs could not prove the traditional elements of duty, breach of duty, and causation, California relieved its government officials of their burden, exacerbating the First Amendment error and violating due process.

3. The Due Process Clause prohibits liability that is "wholly disproportioned to the offense." *Gore*, 517 U.S. at 575. This principle, engrained in the Magna Carta, "is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983).

To enforce this fundamental principle, this Court has held that disproportionate punitive-damages awards violate due process. *See, e.g.*, *Gore*, 517 U.S. at 575; *Campbell*, 538 U.S. at 419; *Williams*, 549 U.S. at 354. A disparity between the size of the award and "the actual harm inflicted" as a "result" of "the defendant's conduct" can demonstrate a denial of due process. *Gore*, 517 U.S. at 580–81.

The imposition of liability in this case is even more grossly disproportionate than *Gore* and *Campbell*. The award in this case may reach into the hundreds of millions of dollars, and joint liability makes Sherwin-Williams responsible to pay to abate everyone's interior white lead paint, though it promoted none. The liability in this case is disproportionate and unconstitutional under this Court's precedents.

B. The Question Presented Is Of National Importance.

1. The due process question presented is recurring. There always is a "tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. This temptation has led to efforts to impose retroactive, disproportionate, causation-free liability in virtually every area of mass-tort litigation. *See* Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 Wash. & Lee L. Rev. 873 (2005).

In recent years, plaintiffs have started "tak[ing] advantage of the vagueness of the concept of public nuisance … to circumvent the requirements of more well-defined and mature bodies of law governing products liability actions." *Id.* at 926. Under California's novel theory, a defendant can be held liable for harming the public as a whole without any evidence that the defendant's product or promotion injured anyone. Plaintiffs have pursued this type of collective public nuisance theory against targeted companies that promoted tobacco, lead paint, handguns, pharmaceutical drugs, subprime mortgages, and fossil fuels, among others. *See, e.g.,* Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 940 (2009).

2. The due process issue is critically important. The "whole purpose" of the Due Process Clause is to prevent "arbitrary deprivations of liberty or property." *Oberg*, 512 U.S. at 434. The principle that nobody should be punished for conduct that was lawful when it occurred "dates from the ancient Greeks" and is "one of the most widely held value-judgments in the entire history of human thought." *Rogers v. Tennessee*, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting). The principle that one should be liable only for harms one caused "reflects ideas of what justice demands." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). And the principle that liability should be proportionate to wrongdoing "is deeply rooted and frequently repeated in common-law jurisprudence." *Solem*, 463 U.S. at 284.

The due process requirements of fair notice, causation, and proportionality all serve to confine liability within rational bounds. To lift these limits is to "invite extreme results," as in this case. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991). And confidence in our constitutional system will suffer, because "[g]roups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them." *Eastern Enterprises*, 524 U.S. at 549 (opinion of Kennedy, J.).

3. This case is, again, an ideal vehicle to address the due process question. The case comes to this Court after a full trial with a detailed record. The stark facts—hundreds of millions of dollars in collective liability across ten of California's largest cities and counties, imposed a century after the fact using a novel rule of law, simply for running two advertisements over a century ago and donating a small sum to a trade group many decades ago, without proof that Sherwin-Williams' speech caused harm at any property to any person or had any effect on interior residential use of lead paint—illuminate the dangers posed by California's new theory of public nuisance liability. Without this Court's intervention, businesses like petitioner—and their shareholders and consumers—will continue to face the consequences of retroactive, disproportionate, multimillion-dollar judgments for harms they did nothing to cause.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

LEON F. DEJULIUS, JR.
Counsel of Record
PAUL M. POHL
CHARLES H. MOELLENBERG, JR.
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
lfdejulius@jonesday.com

MICHAEL A. CARVIN
VIVEK SURI
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001

JENNIFER B. FLANNERY
JONES DAY
1420 Peachtree Street, N.E.
Atlanta, GA 30309

Counsel for Petitioner

JULY 16, 2018