

Nos. 18-84 and 18-86

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IN THE  
**Supreme Court of the United States**

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CONAGRA GROCERY PRODUCTS, *et al.*,  
*Petitioners,*

v.

CALIFORNIA,  
*Respondent.*

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THE SHERWIN-WILLIAMS COMPANY,  
*Petitioner,*

v.

CALIFORNIA,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
California Court of Appeal,  
Sixth District**

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**AMICUS BRIEF FOR  
THE AMERICAN COATINGS ASSOCIATION  
IN SUPPORT OF PETITIONERS**

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August 17, 2018

## TABLE OF CONTENTS

	Page
INTRODUCTION AND INTEREST OF AMICUS.....	1
ARGUMENT.....	6
I. BUSINESSES SHOULD NOT FACE THE RISK OF CIVIL LIABILITY FOR EXERCISE OF THEIR FIRST AMEND- MENT RIGHTS TO ASSOCIATION .....	7
II. THE RULING BELOW THREATENS TO CHILL ASSOCIATIONAL RIGHTS ACROSS MANY INDUSTRIES .....	15
CONCLUSION .....	16

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996).....	8, 9
<i>Central Hudson Gas &amp; Elec. Corp. v. Pub. Serv. Comm'n</i> , 447 U.S. 557 (1980).....	8, 11
<i>Citizens Against Rent Control / Coal. for Fair Hous. v. Berkeley</i> , 454 U.S. 290 (1981).....	9
<i>D.C. Citizen Publ'g. Co. v. Merchants &amp; Mfrs. Ass'n</i> , 83 F. Supp. 994 (D.D.C. 1949).....	5
<i>Hunt v. Air Prods. &amp; Chems.</i> , No. 052-9419, 2006 WL 1229082 (Mo. Cir. Apr. 20, 2006) .....	14
<i>In re Asbestos Sch. Litig.</i> , 46 F.3d 1284 (3d Cir. 1994) .....	12, 13, 14, 15
<i>In re Citric Acid Litig.</i> , 191 F.3d 1090 (9th Cir. 1999).....	5
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001).....	8
<i>Maple Flooring Mfrs. Ass'n v. United States</i> , 268 U.S. 563 (1925).....	5
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003).....	12
<i>Meyers v. Donnatacci</i> , 531 A.2d 398 (N.J. Super. Ct. Law Div. 1987).....	5

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Morgan v. W.R. Grace &amp; Co.</i> , 779 So. 2d 503 (Fla. Dist. Ct. App. 2000).	14
<i>NAACP v. Alabama ex. rel. Patterson</i> , 357 U.S. 449 (1958).....	9, 11
<i>NAACP v. Claiborne Hardware, Co.</i> , 458 U.S. 886 (1982).....	9, 11
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984).....	12
<i>Scales v. United States</i> , 376 U.S. 203 (1961).....	11
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011).....	8, 9
 OTHER AUTHORITIES	
EPA Sector Strategies Performance Report (March 2006) .....	2, 6

## INTRODUCTION AND INTEREST OF AMICUS

*Amicus curiae* the American Coatings Association (ACA) respectfully submits this brief in support of the Petitioners.<sup>1</sup> ACA is a voluntary, nonprofit trade association representing some 250 manufacturers of paints and coatings, raw materials suppliers, distributors, and technical professionals. As the preeminent organization representing the coatings industry in the United States, a principal role of ACA is to serve as an advocate for its membership on legislative, regulatory, and judicial issues at all levels. In addition, ACA undertakes programs and services that support the paint and coatings industries' commitment to environmental protection, sustainability, product stewardship, health and safety, corporate responsibility, and the advancement of science and technology. Collectively, ACA represents companies with greater than 90% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

ACA (formerly the National Paint & Coatings Association, Inc.) and its member companies have undertaken significant voluntary efforts, particularly in the area of environmental, health and safety to the benefit of industry and the professionals, communities, and customers they serve. This has included efforts to address the problems of lead arising from deterioration and the failure of property owners to maintain their property in lead safe condition. While

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief; blanket letters of consent have been lodged with the clerk.

intact lead paint is not a health hazard, a risk of lead exposure does arise where historically applied lead paint chips or deteriorates. ACA and its members have actively worked with many governments and nonprofit organizations to provide education and training on the dangers of childhood lead poisoning and the need to address lead-based paint hazards in residential housing.

As recognized by the U.S. Environmental Protection Agency, ACA has spearheaded a number of such initiatives, such as a 2003 landmark cooperative agreement with Attorneys General from 46 states, plus the District of Columbia and three territories, “which establishes a national program of consumer paint warnings, point-of-sale information, and education and training to avoid the potential exposure to [EPA-HUD] lead-dust hazards.” EPA Sector Strategies Performance Report (March 2006), at 64.<sup>2</sup> This program delivered significant benefits, including:

- Over 600 million gallons of consumer paints each year labeled with universal product sticker program and permanent product labeling to alert consumers that lead dust exposure may occur during the renovation and remodeling of buildings that may contain old, lead-based paint;
- Almost 5 million consumer information brochures on lead paint hazards, printed in English and Spanish, were distributed for counter display and distribution at

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<sup>2</sup> A complete copy of the report can be found at <https://archive.epa.gov/sectors/web/html/performance2006.html> (last visited August 1, 2018).

tens of thousands of paint outlets throughout the United States; and

- Sponsorship of a four-year voluntary cooperative National Lead-Safe Work Practices Training Program (English/Spanish), which trained 17,000 contractors, code officials, facility managers, landlords, homeowners, and children's health advocates on lead-safe work practices at 700 tuition free courses in all 50 states and the District of Columbia.

ACA, with the support of its membership, founded the Community Lead Education and Reduction Corps (CLEARCorps USA), an award-winning, landmark private-public partnership now providing lead hazard reduction support services across the U.S. Through a national network program, its affiliate sites are located in high-risk communities and are community-based and community driven. Utilizing a range of interventions, the program focuses on the elimination of childhood lead poisoning for those at most risk through directed education programs and on-the-ground assistance for property owners, families, and children. CLEARCorps remains an active and vital tool to combat childhood lead poisoning.<sup>3</sup>

Further, ACA, as Secretariat for the International Paint and Printing Ink Council, Inc. (IPPIC), continues to participate in the Lead Paint Alliance (LPA). LPA is a voluntary partnership formed by United Nations Environment and the World Health Organization to prevent exposure to lead, while promoting the phase-out of paints containing lead, including the

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<sup>3</sup> This and further information about CLEARCorps is available at <http://www.clearcorps.org> (last visited August 1, 2018).

promotion of international legislation and regulation restricting the use of lead in paints.<sup>4</sup> The LPA includes 50 organizations (non-governmental organizations, governmental agencies, intergovernmental organizations, and industry) that share an interest in lead risk reduction, including the U.S. EPA, Chair of the Technical Advisory Group for the LPA.

ACA and the IPPIC member associations support legal restrictions on lead use in paints where there is the potential for exposure and health risks, especially to children. The LPA is focused on developing countries that have not yet put in place controls on lead use in paint. This effort relies on the support of the national governments to engage with local industry and environmental groups to work constructively with the authorities to bring about positive change. ACA and IPPIC's participation includes establishing regional industry "champions" to align with the UN's target regions for engaging governments to act, conducting industry workshops as needed, and facilitating implementation of new rules by increasing awareness of restrictions and the technical measures to achieve compliance.

The efforts of ACA and its membership on behalf of those at risk to lead exposure from improperly maintained and deteriorating lead paint is indicative of the important role that trade associations serve in providing a venue whereby business enterprises can associate, communicate, and cooperatively work for the well-being of the public. This Court and other

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<sup>4</sup> This and further information about the LPA is available at <https://www.unenvironment.org/explore-topics/chemicals-waste/what-we-do/emerging-issues/global-alliance-eliminate-lead-paint> (last visited August 1, 2018).

courts have specifically recognized the array of important services that are provided by trade associations. Trade associations “often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services.” *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999) (citing *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 567 (1925)).

Such organizations serve many laudable purposes in our society. They contribute to the specific industry by way of sponsoring educational activities, and assisting in marketing, maintaining governmental relations, researching, establishing public relations, standardization and specification within the industry, gathering statistical data and responding to consumer needs and interests. Furthermore, trade associations often serve to assist the government in areas that it does not regulate.

*Meyers v. Donnatacci*, 531 A.2d 398, 404 (N.J. Super. Ct. Law Div. 1987); *see also D.C. Citizen Publ’g. Co. v. Merchants & Mfrs. Ass’n*, 83 F. Supp. 994, 998 (D.D.C. 1949) (trade associations “serve a useful purpose in the economic life of any community”).

The Environmental Protection Agency likewise has extolled the crucial role trade associations serve as liaison between industry and government regulators in protecting the environment.

[T]rade associations can play an important role in promoting environmental stewardship. For example, they can provide critical technical expertise in identifying and vetting innovative ideas to advance their sectors’

performance, and they can take on leadership positions to encourage the adoption of these ideas. Many trade associations promote changes that better prepare members to meet evolving market conditions, such as increasing preferences for greener products and production activities or certification to International Organization for Standardization (ISO).

(EPA Sector Strategies Performance Report (March 2006) at 1.)

ACA submits this amicus brief because the ruling below premises Petitioners' liability upon their membership in and contributions to a trade association. ACA has a significant interest in seeking to reverse this erroneous, damaging holding. The ruling below threatens an immediate and material chilling effect upon the First Amendment rights of all trade associations and their member companies by raising the specter that associational activities will impermissibly be used to establish liability for hundreds of millions of dollars in damages by filling evidentiary gaps where plaintiffs cannot identify defendant/member-specific evidence necessary to establish liability.

### **ARGUMENT**

In the decision below, the California Court of Appeal upheld (and the California Supreme Court refused to review) the trial court's decision to hold individual companies liable for a novel and overreaching form of "public nuisance" based exclusively on early 20th century truthful advertisements promoting lead paint for interior use – at a time when there was no legal restriction on the use of such paint. In finding Petitioners liable, the Court of Appeal particularly

relied on their contributions to two promotional campaigns sponsored by a trade association, Lead Industries Association (LIA) (not affiliated with ACA).

By basing liability substantially on individual companies' membership in and contributions to a trade association, the Court of Appeal disregarded Petitioners' First Amendment rights to association and this Court's precedents. Unless reversed by this Court, this ruling will have a substantial, immediate chilling effect on companies' participation in trade associations. The ruling below jeopardizes the continued participation of members in trade associations and progress toward many beneficial industry programs comparable to those noted above. The Court should grant the petition for certiorari review.

**I. BUSINESSES SHOULD NOT FACE THE RISK OF CIVIL LIABILITY FOR EXERCISE OF THEIR FIRST AMENDMENT RIGHTS TO ASSOCIATION.**

In a few short paragraphs, the California Court of Appeal dismissed Petitioners' First Amendment rights by construing truthful advertising about a lawful product for a lawful use as "inherently misleading." Sherwin-Williams Pet. App. 48a-49a, 57a. In doing so, the court did not address this Court's freedom of association jurisprudence, but instead held that Petitioners' "participation in trade-association-sponsored lead paint promotional advertising [was] not entitled to any First Amendment protections." Sherwin-Williams Pet. App. 48a. The ruling below, however, is patently contrary to this Court's precedent and in conflict with a holding by the Third Circuit Court of Appeals.

Commercial messaging is “protected expression” warranting “heightened judicial scrutiny.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). Such speech only falls outside the bounds of First Amendment protection if it is misleading or relates to illegal activity. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980). There is no dispute that the use of lead paint in residential interiors was lawful at the time of the promotions at issue. The court below also failed to point to any particular language in the advertising that was misleading or untruthful. Instead, the court declared that *all* promotions of lead paint for interior use were “inherently misleading” because such promotions “implicitly asserted that it was safe for such use when it was not.” Sherwin-Williams Pet. App. 57a.

This post-hoc re-characterization of truthful speech about a lawful product as “misleading” based on current ideas about the product’s safety disregards this Court’s free speech jurisprudence. “[A] State’s paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it[.]” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996) (plurality opinion). Thus, truthful speech about lawful products such as alcohol or tobacco receives First Amendment protection, although use of such products may, in some cases, result in harm. The fact that a lawful product may “pose[ ] some threat to public health . . . fails to provide a principled justification for the regulation of commercial speech about that activity.” *Id.* at 514 (plurality opinion); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570-71 (2001) (although tobacco use poses a “significant” public health threat, as long as it is lawful for adults, “the tobacco industry has a protected interest in

communicating information about its products”). Nor is it proper to “silence unwanted speech by burdening its utterance.” *Sorrell*, 564 U.S. at 566. And when a State burdens “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.” *44 Liquormart*, 517 U.S. at 501 (plurality opinion). Basing tort liability on historic, truthful advertising of a lawful product for a then-lawful use because the court now deems that use to be unsafe is a clear and unconstitutional burden on commercial speech. Basing liability on truthful promotions by a trade association compounds the injury by burdening and ultimately impairing the right to freedom of association.

This Court repeatedly has emphasized the central role of the First Amendment right to association in our constitutional democracy. “[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control / Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981)). “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *Id.* at 908 (quoting *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958)).

In this case, however, the Court of Appeal repeatedly pointed to generic promotional campaigns by trade associations – that did not even refer to any specific manufacturer of lead paint – as key evidence

of Petitioners' liability.<sup>5</sup> For example, when discussing how promotions "played at least a 'minor' role in creating the nuisance," the first thing the court noted is that "all three defendants participated in the LIA's Forest Products campaign." Sherwin-Williams Pet. App. 65a. In light of scant evidence that Petitioner the Sherwin-Williams Company specifically advertised the use of lead paint for interior residential use, the court highlighted that it "participated in LIA's Forest Products campaign from 1937 to 1941[.]" Sherwin-Williams Pet. App. 62a-63a. That participation was that, between 1937 and 1941, Sherwin Williams donated \$250 quarterly to the LIA promotional campaign. Sherwin-Williams Pet. App. 399a.

Thus, the State ruled that factually truthful promotion of lawful products by an association receives no First Amendment protection if those products are found to be or become hazardous in some way. The Court of Appeal accepted this unconstitutional gambit without question, agreeing that the three defendants were collectively liable because they "generically promoted lead paint for interior residential use" through their membership in a trade association. Sherwin-Williams Pet. App. 95a.

This Court has explained that the First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another" because allowing such actions would present

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<sup>5</sup> The court made quite clear that: "Defendants are liable for *promoting* lead paint for interior residential use. To the extent that this promotion caused lead paint to be used on residential interiors, the identity of the manufacturer of that lead paint is irrelevant. Indeed, the LIA's promotions *did not refer to any manufacturer of lead paint, but were generic.*" Sherwin-Williams Pet. App. 75a (additional emphasis added).

“a real danger that legitimate political expression or association would be impaired.” *Claiborne Hardware*, 458 U.S. at 918-19 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)). Moreover, “[i]n the domain of . . . indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.” *Alabama*, 357 U.S. at 461. Government action may be precluded where it “may induce members to withdraw from [an] Association and dissuade others from joining it.” *Id.* at 463.

“Civil liability may not be imposed merely because an individual belonged to a group.” *Claiborne Hardware Co.*, 458 U.S. at 920. “For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.” *Id.*

Here, there was no evidence that LIA had any unlawful purpose or that any Petitioner, by joining and contributing to LIA, had a specific intent to further an illegal goal. Instead, at the time Petitioners joined and contributed to LIA, lead paint use in residential interiors was both legal and widespread. *See* Sherwin-Williams Petitioner’s Br. at 7-8; ConAgra Petitioners’ Br. at 4. As this Court explained, to assess liability, the individual group member’s intent “must be judged according to the strictest law.” *Claiborne Hardware Co.*, 458 U.S. at 919. “In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Id.* at 920; *see also Central Hudson*, 447 U.S. at 565 (“the First Amendment

mandates that speech restrictions be narrowly drawn” (internal quotation marks & citation omitted)).

To the extent Petitioners’ liability was based on the funds they contributed to LIA rather than their membership, such contributions are no less deserving of First Amendment protection. This Court has stated “that ‘implicit in the right to engage in activities protected by the First Amendment’ is ‘a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.’” *McConnell v. FEC*, 540 U.S. 93, 256 (2003) (opinion of Scalia, J.) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). “That ‘right to associate . . . in pursuit’ includes the right to pool financial resources.” *Id.*

In accepting and endorsing the unconstitutional arguments pursued by the People of the State of California at trial, the ruling below disregards these fundamental principles. It also directly conflicts with a ruling by the Third Circuit Court of Appeals. In *In re Asbestos School Litigation*, the Third Circuit granted the extraordinary remedy of mandamus to reverse a district court opinion that would have allowed plaintiff school districts to proceed with concert of action claims premised on an asbestos manufacturer’s membership in and contributions to a trade association. 46 F.3d 1284, 1286-87 (3d Cir. 1994). As with the State here, the school district plaintiffs in *In re Asbestos School Litigation* argued that the manufacturer could be held liable due to the trade association’s alleged misleading conduct in disseminating information about the potential health impacts of the manufacturer’s products. *See id.* at 1287. The Third Circuit held that mandamus relief was necessary because even allowing the claims to

proceed would have imposed an intolerable restraint on the petitioner's First Amendment rights: "Mandamus has been found to be proper in these cases because the duration of a trial is an 'intolerably long' period during which to permit the continuing impairment of First Amendment rights." *Id.* at 1294. As then-Judge Alito, writing for the Third Circuit, explained:

[R]equiring [petitioner] to stand trial . . . predicated solely on its exercise of its First Amendment freedoms could generally chill the exercise of the freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate.

*Id.* at 1295-96.

In ordering a halt to the school district's claims, the Third Circuit held that the district court's opinion allowing the claims to proceed lay "far outside the bounds of established First Amendment law," was "clearly wrong," and had "implications that broadly threaten First Amendment rights." *Id.* at 1289, 1294. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. . . . But the district court's holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.* at 1294 (citations omitted).

A similar ruling was handed down in the welding rod products litigation, where plaintiffs sought to bring concert of action claims against members of two trade associations that had allegedly concealed or

misrepresented purported hazards of welding fumes. See *Hunt v. Air Prods. & Chems.*, No. 052-9419, 2006 WL 1229082 (Mo. Cir. Apr. 20, 2006). The court ruled that “[p]laintiffs’ reliance on the thread of membership in trade associations is patently insufficient to establish an actionable conspiracy. Obviously, defendants enjoy a constitutional right to form and maintain trade associations. Defendants likewise enjoy a constitutional right to disseminate information.” *Id.* at \*3. In dismissing plaintiffs’ claims, the court held: “Paramount is the burdening of fundamental rights of speech and association. . . . [D]efendants have an absolute right to associate and speak on matters of public importance.” *Id.* at \*5. “[P]laintiffs would impose substantial burdens on those rights if, by associating for the purpose of promoting their economic interests, the defendants thereby were exposed to liability.” *Id.*; see also *Morgan v. W.R. Grace & Co.*, 779 So. 2d 503, 505 (Fla. Dist. Ct. App. 2000) (rejecting claims against trade association based on its alleged marketing, promoting, and encouraging the sale of radioactive land “given the First Amendment concerns this would raise”).

The ruling below is as much outside the bounds of established First Amendment law as that reversed upon mandamus in *In re Asbestos School Litigation*. Much of the evidence admitted at trial in this case and highlighted by the ruling below is of exactly the type held impermissible by these other courts. For instance, one of plaintiffs’ experts was allowed to testify that “these Defendants, through their trade associations, downplayed the hazards of lead; and these Defendants, through their trade associations, fought the imposition of regulations.” Sherwin-Williams Pet. App. 31a. Plaintiffs also pointedly “relied on the LIA’s two promotional campaigns.”

Sherwin-Williams Pet. App. 51a. The Petitioners' lawful and constitutionally protected trade association activities clearly were the foundation upon which the court below framed its finding of liability. The ruling below impermissibly predicates Petitioners' liability upon association speech to conveniently fill evidentiary gaps and support an otherwise suspect theory of public nuisance.

## **II. THE RULING BELOW THREATENS TO CHILL ASSOCIATIONAL RIGHTS ACROSS MANY INDUSTRIES.**

Review in this case is warranted not just because the decision below is incorrect and disregards this Court's jurisprudence, but because it also threatens to chill the free association rights of companies in any industry where a lawful product may one day be deemed hazardous by a court. For example, Petitioner The Sherwin-Williams Company was found jointly and severally liable for hundreds of millions of dollars in damages not because its own products or messages were found to cause harm to any plaintiff, but because it contributed, decades ago, a total of \$5,000 to a trade association that was used to generally promote lead paint for then-lawful interior residential use. The stark premise of this ruling is that a company's contributions to a trade association used to promote a lawful product for a lawful use may one day be ample evidence of liability, raising no constitutional concerns. This broad, unprecedented, and unconstitutional form of liability can easily ensnare member companies across numerous industries, leading to a substantial chill on trade association activity. As then-Judge Alito cautioned in *In re Asbestos School Litigation*, allowing an individual company's liability to be based "solely on its exercise of its First

Amendment freedoms” could chill freedom of association activities for any company that would otherwise attend the meetings of, contribute to, or align with a trade group. 46 F.3d at 1295-96. Without membership support and participation, the laudable work of trade associations, such as those previously noted, will cease.

Unless the ruling below is reversed, a message will be sent that companies that participate in trade associations – even with regard to the sale of lawful products with no showing of intentionally misleading, untruthful, or unlawful conduct – do so at their peril. This sharp infringement on First Amendment rights should not be allowed.

### CONCLUSION

For the foregoing reasons, the American Coatings Association, *amicus curiae* herein, urges the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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August 17, 2018