Nos. 18-84, 18-86

IN THE
Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY, ET AL.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petitions for Writs of Certiorari to the California Court of Appeal, Sixth District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a trial court from holding three lead paint and lead pigment manufacturers liable for having "created or assisted in the creation" of a public nuisance under California's long-standing public nuisance statutes, based on extensive factual findings that those companies had actual knowledge that lead paint was a cumulative and deadly poison, especially for children, yet manufactured and sold enormous amounts of lead-based paint and lead pigment for interior residential use and actively promoted and advertised lead paint for interior use throughout California in the first half of the 20th century.

2. Whether the Due Process Clause prohibits a trial court from holding three of the largest manufacturers of lead paint and lead pigment in the 20th century jointly and severally responsible for remediating the current "clear and present danger" to public health and safety caused by the "pervasive" presence of deteriorating lead dust in residential interiors throughout California, based on substantial evidence that each manufacturer's conduct was a "substantial factor" in creating or assisting in creating that public nuisance through its extensive manufacture, sale, and misleading promotion of lead-based paint as safe for use on residential interiors, when the manufacturers failed to present any factual basis for apportioning their liability.

PARTIES TO PROCEEDINGS BELOW

In addition to Petitioners ConAgra Grocery Products Company ("ConAgra") and NL Industries, Inc. ("NL," formerly National Lead Company) in No. 18-84 and Petitioner The Sherwin-Williams Company ("Sherwin-Williams") in No. 18-86, each of which were defendants-appellants below, and Respondent People of the State of California in Nos. 18-84 and 18-16 (acting through the Santa Clara County Counsel, the San Francisco City Attorney, the Alameda County Counsel, the Los Angeles County Counsel, the Monterey County Counsel, the Oakland City Attorney, the San Diego City Attorney, the San Mateo County Counsel, the Solano County Counsel, and the Ventura County Counsel), which was the plaintiff and respondent below, Atlantic Richfield Company ("ARCO") and E.I. DuPont De Nemours and Company ("DuPont") were defendants in the California Superior Court proceedings but found not liable after trial and are no longer parties to this action.

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INTRODUCTION[1]

Since 1872, California's public nuisance statutes have authorized public prosecutors to bring representative actions for prospective abatement on behalf of the People of California against persons whose conduct was a substantial cause of an existing public nuisance, defined as an "actual obstruction of public right" that "affects at the same time an entire community or neighborhood, or any considerable number of persons…." Cal. Civ. Code §§3479, 3480, 3490. The obstruction of public rights must be "'substantial and unreasonable,'" meaning it must be "caus[ing] significant harm" and "its social utility [must be] outweighed by the gravity of the harm inflicted." Pet. 191a (quoting *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1105 (1997) (public nuisance injunction against gang activity)).

In this case, filed by ten county counsel and city attorneys, Petitioners ConAgra and NL (No. 18-84) and Sherwin-Williams (No. 18-86) were found jointly and severally liable after a six-week bench trial for having created a public nuisance, based on substantial evidence that they each manufactured, sold, and promoted as safe for interior residential use many tons of lead paint and lead pigments for paint in California during the first half of the 20th century, while having actual, contemporaneous knowledge (hidden from the public, *see* Pet. 13a-14a, 215a-216a) that lead paint was a deadly poison that

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[1] Respondent files this Brief in Opposition in Nos. 18-44 and 18-46, which arise from the same state court proceedings and present the same issues. Respondent's citations to "Pet." and "Pet. _a" refer to Sherwin-Williams' Petition and Appendix in No. 18-86.

caused irreversible, cumulative neurological harm, especially to children. The trial court's ruling, affirmed in principal part by the Court of Appeal, ordered Petitioners to abate the public nuisance they were each a "substantial factor" in creating, Pet. 321a, finding that the pervasive presence of deteriorating lead paint on residential interiors throughout the ten California jurisdictions covered by this action (the counties of Santa Clara, Alameda, Los Angeles, Monterey, San Mateo, Solano, and Ventura, the City and County of San Francisco, and the cities of Oakland and San Diego) posed a "clear and present danger" to children, Pet. 310a, and substantial and unreasonable harm to the "community at large," Pet. 198a. The remedy was prospective only, with Petitioners ordered to establish an abatement fund to prevent further injury from the public nuisance they created.

Petitioners frame their disagreement with the California courts' factual findings and resulting conclusions in constitutional terms. But that framing is not supported by the record, and Petitioners' Questions Presented are not fairly raised by the facts. ConAgra and NL were not held liable "[b]ased solely on ... decades-old speech," ConAgra Pet. 16, any more than Sherwin-Williams was liable simply for "running two advertisements over a century ago and donating a small sum to a trade group many decades ago." Pet. 36. Petitioners' constitutional arguments rest on false factual predicates, and the state courts' application of state law to the *actual* facts does not merit review.

Petitioners complain that the California courts violated their free speech rights by holding them liable for advertising a product not banned until

1978. In fact, Petitioners' liability rested on proof of their *conduct* in manufacturing and selling lead paint, coupled with their *misleading* promotion of lead paint as safe for interior residential use despite contemporaneous, actual, undisclosed knowledge of its deadly nature. Pet. 34-45a, 319a-321a. Petitioners' freedom-of-association claim depends on their assertion that their liability rested on their mere membership in two industry trade associations, but in fact the lower courts relied on evidence that each Petitioner actively participated, supported, and coordinated with those trade associations' misleading campaigns to promote lead paint for interior residential use. Pet. 296a; *see also* Pet. 51a, 55a-56a, 62a-63a.

Petitioners' due process arguments similarly rest on factual assertions rejected by the lower courts. Petitioners argue that the People could not make a constitutionally sufficient causation showing without establishing specific reliance by individuals who used their products and proving which houses each Petitioner caused to be painted with its products. But in a California public nuisance case under Civil Code section 3480, where the injury is community-wide, remediation (the only available remedy) may only be required from a defendant whose conduct was a "substantial factor" in creating or assisting in the creation of the public nuisance—defined as a "substantial and unreasonable" interference with public rights enjoyed by the community at large. Petitioners also contend that their abatement obligations are "grossly disproportionate" to their legal responsibility. But tort law has long held joint tortfeasers liable for the foreseeable consequences of their actions, and

Petitioners failed to establish any factual basis for apportionment. Pet. 91a-93a. Finally, Petitioners argue that the case imposes retroactive liability. But it was unlawful to knowingly contribute to a public health hazard at the time of Petitioners' conduct, and prospective abatement actions brought by California public entities have never been subject to a statute of limitations. *See* Cal. Civ. Code §3490.

When Petitioners' mischaracterizations of the record and the lower courts' analysis are unmasked, it becomes clear that their constitutional questions are not actually presented. In addition, there is no final judgment and no conflict among the lower courts or with decisions of this Court. Petitioners' alarmist predictions about the future of public-nuisance litigation are also overblown, as the lower courts conscientiously applied long-standing public nuisance statutes that codified common law principles dating back centuries. *See United Steelworkers of Am. v. United States*, 80 S.Ct. 177, 186 (1959) (Frankfurter, Harlan, JJ. concurring) ("The judicial power to enjoin public nuisance at the instance of the Government has been a commonplace of jurisdiction in American judicial history."). Certiorari should be denied.

JURISDICTION

Sherwin-Williams asserts jurisdiction under 28 U.S.C. section 1257(a) but fails to address the lack of a state court final judgment. Pet. 1. ConAgra/NL relies on an exception to the final judgment rule under *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). ConAgra Pet. 17 n.2.

No such exception applies because Petitioners' obligation to fund the abatement program is as yet

uncalculated: The Court of Appeal remanded for re-calculation of the amount to be deposited in an abatement fund (with unused funds reverting to Petitioners), Pet. 73a n.46, 336a, and the trial court has not yet issued a new abatement order. Moreover, the trial court is presently deciding whether to approve the People's recent settlement with NL and the resulting $115 million offset to the other Petitioners' abatement obligations. *See* Santa Clara Super. Ct. Dkt. No. 1-00-CV-788657).[2] Until those remand proceedings and any subsequent appeal are concluded, Petitioners' argument that their remediation obligation is "grossly disproportionate" to "'the actual harm [they] inflicted,'" Pet. 33-34, is premature, and this Court lacks jurisdiction to entertain it.

STATUTES INVOLVED

California Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

California Civil Code section 3480 provides: "A public nuisance is one which affects at the same time

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[2] NL's $80 million proposed cash settlement would offset the remaining defendants' liability by $115 million, due to certain non-monetary aspects. If the Superior Court's tentative ruling setting the abatement fund at $409 million is adopted, and the NL settlement approved, Sherwin-Williams and ConAgra's liability would be reduced to a combined $294 million.

an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

California Civil Code section 3490 provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."

California Code of Civil Procedure section 731 provides in part: "A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in section 3480 of the Civil Code, by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists."

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Since the early 20th century, Petitioners have known that lead-based paint in residential interiors poses serious health risks. Pet. 35a-45a, 201a-202a, 207a, 216a-218a, 243a; *see also* 173AA51545-56; 179AA53356-57 (1900 Sherwin-Williams publication acknowledging that "white lead is a deadly cumulative poison [whose] noxious quality becomes serious in a paint that disintegrates …."). By the 1920s, Petitioners knew that those risks included irreversible brain damage to children. Pet. 35a; 32RT4811, 4814-17; *see also* 175AA51949-53, 175AA51972-176AA52240. Ordinary consumers did not have this information, 35RT5367, but relied on Petitioners' assurances that lead paint was well-suited for residential use, 37RT5574-75.

Petitioners—"all leaders in the lead paint

industry"—nonetheless promoted, manufactured, and sold staggering amounts of lead pigments and paints for interior use in the jurisdictions throughout the 20th century. Pet. 10a-13a; *see also* Pet. 225a-241a. ConAgra's South San Francisco plant, for example—the largest paint factory west of the Mississippi—shipped an average of 200 tons of lead paint to California retailers for residential use *daily*, Pet. 233a, while Sherwin-Williams distributed more than three million pounds of lead pigment to its California warehouses and factories during a single four-year period, Pet. 239a. These efforts substantially contributed to the prevalence of lead paint in the jurisdictions today. *See* Pet. 53a, 59a, 63a-69a, 210a-211a, 228a-230a, 233a-234a, 237a-241a, 317a-321a.

Lead-based paint is among the greatest, if not the greatest, public health hazard facing children in the jurisdictions. Pet. 16a-21a; *see also* Pet. 203a, 212a. It "remains the leading cause of lead poisoning of children who live in older housing," Pet. 204a, with "disproportional[] impacts [on] low income and minority children," Pet. 207a. Approximately 35% of pre-1978 homes contain lead paint, 31RT4584-85, and the percentage of pre-1951 homes is even higher, because "[t]he older the housing stock ... the more concentrated and more prevalent lead-based paint is," 34RT5087. "Even intact lead paint poses a potential risk of future lead poisoning to children because lead paint surfaces will inevitably deteriorate," Pet. 5a, "leaving behind lead-contaminated chips, flakes, and dust," Pet. 207a. "As a result, children in the[] jurisdictions are continuing to be exposed to lead from lead paint even though residential lead paint was banned in 1978."

Pet. 25a; *see also* Pet. 209a, 310a. Communities whose residents have been exposed to lead, including in deteriorating lead paint, suffer higher medical and education costs, lower tax revenues, increased crime, behavioral issues, and other adverse social and economic effects. *See* Pet. 206a, 311a.

B. THE LITIGATION

Respondent brought this state court action for public nuisance (and, initially, other claims) against Petitioners and two other companies in 2000. 2AA1-34. The trial court sustained Petitioners' demurrers to the public nuisance claim, 3AA353, granted defendants summary judgment on the remaining claims, Pet. 189a-90a, and entered judgment, 3AA398-99.

The Court of Appeal reversed the demurrer, explaining that "'[p]ublic nuisances are offenses against, or interferences with, the exercise of rights common to the public'" that are "'substantial and unreasonable,'" and that the People adequately pleaded "the existence of a public nuisance" by alleging "that lead causes grave harm, is injurious to health, and interferes with the comfortable enjoyment of life and property." *County of Santa Clara v. Atlantic Richfield Co.,* 137 Cal.App.4th 292, 305-06 (2006) (*Santa Clara I*) (emphasis removed). Rejecting the argument that manufacturers of products that create health hazards can *only* be subject to product liability claims, the court held that public nuisance and product liability claims serve different purposes, arise from different harms (public and common versus private and individual), trigger different remedies (prospective abatement

versus compensatory damages), are asserted by different parties (the People versus individuals), and involve different conduct (affirmatively creating or assisting in the creation of the nuisance, for example by distributing and promoting a product for a use they knew was dangerous, versus negligently manufacturing and/or failing to warn). *Id.* at 309-10. The California Supreme Court denied review. Pet. 191a.

Following a second set of appeals on an unrelated issue, *see County of Santa Clara v. Superior Court*, 50 Cal.4th 35, 55-56 (2010) (*Santa Clara II*), *cert. denied sub nom. Atlantic Richfield Co. v. Santa Clara County*, 131 S.Ct. 920 (2011), the case proceeded to trial.

C. THE TRIAL COURT'S DECISION

After a six-week bench trial involving "voluminous evidence," Pet. 171a, including 450 exhibits, 22 binders of deposition excerpts, and testimony from 18 experts, the trial court ruled that lead paint on residential interiors is a public nuisance under Civil Code sections 3479 and 3480 that substantially and unreasonably interferes with rights common to the public, including the rights to public health and safe housing. Pet. 82a-83a; *see also* Pet. 123a, 198a, 298a. The court further found each Petitioner's "conduct" was a "substantial factor" in creating or assisting in the creation of that public nuisance, based on substantial evidence that each Petitioner manufactured, sold, and actively distributed and promoted lead pigment and lead-based paint for interior residential use despite actual knowledge, never disclosed to customers or the public (who, according to expert testimony, were

often unaware of the dangers of lead paint or which paint brands contained lead, *see, e.g,* 35RT5646-47; 36RT5367; 37RT5578-81) that the paint it manufactured and sold was a deadly poison that was particularly hazardous for children when used on residential interiors. Pet. 319a-321a.[3]

The trial court made detailed findings regarding the deadly, cumulative, and irreversible damage caused by ingestion of even tiny amounts of lead paint dust, Pet. 203a-210a, 310a-311a, the prevalence of lead paint in residential interiors throughout the jurisdictions, Pet. 210a-211a, 292a, the resulting economic, social, behavioral, and health-related harms "to the community at large" and its members' right to safe, poison-free housing for their children, Pet. 292a; *see also* Pet. 203a-209a, 212a, 310a-311a, and the "clear and present danger" to public health and safety presented by the prevalence of deteriorating lead paint in residential interiors throughout the jurisdictions, Pet. 310a; *see also* Pet. 207a-212a. The court's conclusion that these facts established a public nuisance under Civil Code section 3480 was well within the mainstream of decades of California public nuisance law.[4]

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[3] The court did not require Petitioners to abate lead paint on residential *exteriors*, Pet. 197a, and found defendants ARCO and DuPont *not* liable because there was insufficient evidence of their knowledge and/or causation, Pet. 244a-267a, 317a-319a.

[4] *See, e.g., Acuna*, 14 Cal.4th at 1100 (neighborhood disturbances caused by gang members); *Eaton v. Klimm*, 217 Cal. 362, 368-70 (1933) (smoke that prevented neighbors from ventilating homes or using yards); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 146-52 (1884) (contamination of river by mining debris); *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1548 (2009) (secondhand smoke in private

Applying the "substantial factor" test derived from the Restatement (Second) of Torts section 435, Pet. 224a-225a, the court next found that each Petitioner (and/or its predecessor companies, *see, e.g.,* Pet. 186a-189a) manufactured and sold massive amounts of lead paints and pigments in the jurisdictions throughout the 20th century. Pet. 184a, 213a-214a, 233a-234a, 237a-241a, 317a-321a; *see also* 37RT5641, 5643-44; 112AA33098-99; 14SRA3529, 3531. The court also found that each Petitioner had contemporaneous knowledge that lead paint in homes would inevitably deteriorate and harm young children. Pet. 215a-220a, 222a-225a, 313a-314a, 317a-321a; *see also* 32RT4782-83, 4792-93, 4798; 46RT6740-41.[5]

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common areas of condominium complex); *People v. Mason*, 124 Cal.App.3d 348, 352-53 (1981) (public nuisance that affected multiple homes in subdivision); *City of Modesto Redev. Agency v. Superior Court*, 119 Cal.App.4th 28, 37-43 (2004) (solvent manufacturers' liability for encouraging dry cleaners to discharge toxic solvent into sewers); *Newhall Land & Farming Co. v. Superior Court*, 19 Cal.App.4th 334, 342 (1993) (contamination of water supply); *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal.App.3d 116, 123-29 (1971) (emissions interfering with enjoyment of private homes); *People v. City of Los Angeles*, 83 Cal.App.2d 627, 633-34 (1948) (ocean contamination); *see also* Rest. 2d Torts §821B, com. g.

[5] ConAgra says it "never itself sold lead paint," ConAgra Pet. 2, but its liability was based on its predecessors' extensive manufacture, sale, and promotion. Pet. 162a-168a, 189a, 317a. Sherwin-Williams' assertion that the paint it "intended and labeled for interior residential use" did not contain lead, Pet. 2, ignores the substantial evidence and factual findings that Sherwin-Williams and its predecessors manufactured, sold, and promoted lead paint and pigments for home use and "instructed consumers in [the] Jurisdictions to use lead paint

The trial court further found that each Petitioner affirmatively distributed and promoted lead paint and pigments (its own, and in general) for interior residential use in the jurisdictions, including through advertisements and by instructing customers to use lead paint on their homes (including specific lines of paint that contained lead, without revealing their lead content), directing customers to stores where brochures featuring lead paint were provided, offering sales incentives, and urging customers to patronize dealers who sold the "full line" of their paints. Pet. 202a, 225a-230a, 233a-234a, 237a-241a, 253a-254a, 317a-321a; *see also* 35RT4496-501; 28RT4155-56, 4230, 4243, 4256; 30RT4496; 35RT5261, 5284; 46RT6770; 78AA22970-76 [¶¶8-9, 39-49, 50-61].

The record contains many examples of Petitioners' advertisements, brochures, and booklets promoting lead paint for interior home use. *See, e.g.,* Pet. 225a-226a, 233a-234a, 239a-241a; 28RT4239-40, 5230; 35RT5244-46, 5261; 37RT5579-80; 180AA53616-181AA53703. But those are only a partial sampling, as the People's expert historians reviewed *thousands* more as a basis for their expert opinions about the scope of Petitioners' promotional activities. Pet. 226a, 253a; *see also* 27RT4112-13; 35RT5235-36, 5242-43, 5244-46 5318; 30RT4483-84. Each Petitioner also funded and actively participated in one or more massive joint marketing campaigns coordinated by the Lead Industries Association ("LIA") and/or National Paint, Varnish, and Lacquer Association ("NPVLA") "to sustain,

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on interior and exterior surfaces of their homes." Pet. 238a-241a, 319a-320a.

increase, and prolong the use of lead paint." Pet. 226a-230a. Those cumulative, coordinated promotional efforts were enormously successful, resulting in sustained, increased, and prolonged use of lead paint in residences throughout the jurisdictions. Pet. 228a-230a; 28RT4164; 29RT4351.

The trial court, after finding Petitioners liable for their role in creating a public nuisance, "crafted a very limited order requiring abatement of only deteriorated interior lead paint, lead paint on friction surfaces, and lead-contaminated soil [because it] is only under these limited circumstances that lead paint poses an immediate threat to the health of children." Pet. 87a. That abatement plan includes education, inspection, and remediation components, and is limited to residences that require it and owners who choose to participate. Pet. 321a-336a. All unused funds will be returned to Petitioners. Pet. 336a.[6]

D. THE COURT OF APPEAL'S DECISION

The Court of Appeal unanimously affirmed the trial court's judgment as to pre-1951 homes but reversed as to post-1950 homes. Pet. 2a, 70a-73a. The court held that the pervasive presence of deteriorating lead paint on residential interiors throughout the jurisdictions interferes with a public right because it permanently contaminates

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[6] ConAgra repeatedly misrepresents that $400 million is for determining whether a public nuisance even exists. That figure was the original judgment's estimate of costs for identifying *which* homes need remediation, not *whether* such homes—or the public nuisance—exist. Pet. 333a. The Superior Court's recent tentative ruling would reduce this amount to $142 million.

"residential housing"—an "essential community resource" "like water, electricity, natural gas, and sewer services"—and substantially and unreasonably interferes with rights common to the public, including "the safety of children in residential housing." Pet. 83a; *see also* Pet. 16a-21a, 79a-82a, 123a. Applying substantial evidence review, Pet. 26a-32a, the court agreed that each Petitioner had actual, contemporaneous knowledge "that (1) 'lower level lead exposure harmed children,' (2) 'lead paint used on the interiors of homes would deteriorate,' and (3) 'lead dust resulting from this deterioration would poison children and cause serious injury,'" the proof required by California public nuisance law. Pet. 35a; *see also* Pet. 5a-14a, 34a-45a.

In concluding that each Petitioner's "wrongful conduct [was] a substantial factor, and thus a legal cause," of the public nuisance, Pet. 63a-69a, 75a, the Court of Appeal cited evidence that Petitioners were "among the handful of companies that manufactured white lead carbonate pigments during the 20th century [and used it] to make paint," "knew at that time that lead dust was poisonous" and that "lead paint 'powders and chalks'" and "routinely produces lead dust after a couple of years," Pet. 10a, yet continued to manufacture, sell, and promote lead paint for residential use throughout the jurisdictions, Pet. 11a-14a, 49a-63a. The court further found that Petitioners' promotional activities substantially increased residential use of lead paint, Pet. 64a-67a, and were "misleading" and thus not immunized from liability by the First Amendment because they falsely implied that lead paint was safe for home use. Pet. 46a-49a, 57a. The

court also concluded that Petitioners' liability could rest in part upon LIA and NPVLA campaigns with which Petitioners actively participated, supported, and coordinated. Pet. 51a, 55a-56a, 62a-63a.

The court affirmed Petitioners' joint-and-several liability for remediating the existing public nuisance in pre-1951 homes because their "wrongful promotions were a substantial factor in the creation of that public nuisance," Pet. 76a, and because they failed to meet their burden of proving that the harms they created could be apportioned. Pet. 91a-94a (citing Rest.2d Torts, §840E, coms. b, c). The court then remanded for further proceedings relating to abatement. Pet. 73a n.46.

E. SUBSEQUENT COURT PROCEEDINGS

After the Court of Appeal unanimously denied rehearing and the California Supreme Court denied review, Pet. 338a-339a, the case returned to the trial court, which is now considering a proposed settlement between NL and the People, re-calculating the amount required to fund the more limited abatement program, and selecting an alternative receiver to administer the abatement fund. Pet. 159a-161a.

REASONS FOR DENYING THE PETITIONS

The state court rulings are not sufficiently final to confer jurisdiction. *See supra* at 4-5 & n.2. Petitioners' First Amendment and Due Process arguments rest on a series of factual mischaracterizations that are contradicted by the lower courts' opinions and the extensive factual record. Petitioners identify no conflict among the lower courts (besides a manufactured "conflict" with a single federal circuit), and their warning that this

case will trigger an explosion of abusive litigation if not reviewed is belied by the state courts' careful application of well-established statutory and common law principles.

A. THE DECISIONS BELOW PRESENT NO FIRST AMENDMENT ISSUE WARRANTING CERTIORARI.

Petitioners seek certiorari to clarify that the First Amendment precludes liability for "truthful promotion of lawful products" or for mere "membership" in trade associations that engage in such promotion. Pet. 5, 15-24; ConAgra Pet. 28-32. Neither issue is presented on these facts. Petitioners' liability rested on substantial evidence that they manufactured, sold, distributed, and *misleadingly* promoted lead paint for residential use as safe, despite knowing otherwise. *See* Pet. 219a-220a, 222a-224a, 238a-239a, 320a-321a; 28RT4230; 37RT5545-47, 5579-81. Because Petitioners' responsibility for abating that public nuisance was grounded in their course of commercial "conduct," *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), and because the First Amendment has never been construed to prohibit regulation of "misleading" commercial speech, Pet. 49a; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976), this case presents no significant free speech issues. Petitioners also have no freedom-of-association claim warranting review, because they were each found liable based on their *active* participation in and support for the trade associations' campaigns to promote lead paint for interior residential use. There is also no lower court division on any of these First Amendment issues.

1. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see also Giboney*, 336 U.S. at 502. This longstanding principle prevents federal courts from subjecting the entire policymaking work of the states and political branches to constitutional review and trampling the states' police power to regulate economic activity. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389-90 (1992); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring). When conduct achieved in part through language is regulated, "the unprotected features of the words [used to achieve the conduct] are, despite their verbal character, essentially [considered] ... 'nonspeech.'" *R.A.V.*, 505 U.S. at 386; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity").

The rulings below are fully consistent with these established principles. The conclusion that Petitioners' commercial activities were a "substantial cause" of the public nuisance rested not only on Petitioners' "nonspeech" actions (manufacturing, selling, and distributing lead pigments and paints for interior use), but also on a range of other "nonspeech" activity, including their successful promotional efforts through strategic partnerships with lumber manufacturers, builders, product discounts, usage labels, and other means of increasing the demand for lead paint for interior household use. *R.A.V.*, 505 U.S. at 386; *see also* Pet. 219a-220a, 222a-224a, 238a-239a, 320a-321a;

28RT4230. The trial court defined "promotion" as "the *act* of furthering the growth or development of something; especially: the *furtherance* of the acceptance and sale of merchandise through advertising, publicity, or discounting"—i.e., as a particular kind of conduct that *can*, but need not, be achieved through words. Pet. 193a n.9 (quoting Merriam-Webster Dictionary (2013)) (emphases added). Although Petitioners' manufacturing and sales activities directly and proximately caused the proliferation of deteriorating lead paint in residential interiors throughout the jurisdictions, Petitioners were found liable for creating that public nuisance because (unlike ARCO and DuPont, *see supra* at 10 n.3) they *also* knowingly and successfully promoted lead paint for that hazardous use—thus causing it to proliferate throughout the jurisdictions. *See Santa Clara I*, 137 Cal.App.4th at 309 ("Liability is not based merely on production of a product or failure to warn[,]" but on "far more egregious" promotion activities akin "to instructing the purchaser to use the product in a hazardous manner").

Regulation of commercial conduct that furthers public acceptance of dangerous merchandise for hazardous use does not offend the First Amendment. *Ohralik*, 436 U.S. at 456; *cf. Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006). Expanding the First Amendment to immunize such conduct would prevent federal and state governments from regulating dangerous products, a result this Court has repeatedly rejected. *See, e.g.*, *Sorrell*, 564 U.S. at 567; *R.A.V.*, 505 U.S. at 389; *Ohralik*, 436 U.S. at 456; *Giboney*, 336 U.S. at 502. If the First Amendment prohibited states from

imposing liability on manufacturers for introducing a dangerous product into the stream of commerce and knowingly inducing consumers to use it in a harmful manner, "[n]umerous examples … of [other] communications that are [currently thought to be] regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees" would no longer be subject to regulation. *Ohralik*, 436 U.S. at 456 (citing, among other authorities, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921)).

2. This case would not warrant certiorari even if Petitioners' liability rested solely on their commercial speech. The First Amendment protects "accurate and *nonmisleading* commercial messages," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion) (emphasis added), but this Court has consistently held that governments may prospectively restrict "false, deceptive, or misleading" commercial speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985); *see also Va. State Bd. of Pharmacy*, 425 U.S. at 771.

Petitioners do not challenge these principles but argue that their commercial promotions were neither "false" nor "misleading." Pet. 17; ConAgra Pet. 29. However, the California courts found that Petitioners knowingly misled the public by "promot[ing] lead paint for interior residential use while knowing that such use would create a public

health hazard." Pet. 48a-49a. Those promotions were "misleading" because they "implied that lead paint was safe for such use." *Id.*; *see also* Pet. 202a; 37RT5545-47, 37RT5579-81 (expert testimony explaining why Petitioners' advertising was deceptive and misleading); Exh. P005__009 ("The Safe Paint to use is the Sherwin-Williams Paint. It is a pure linseed oil, lead oil zinc paint of the greatest durability."). While Petitioners may disagree with these factual findings, this is not "a court for correction of errors in fact finding [and it] cannot … review concurrent findings of fact by two courts below" without "a very obvious and exceptional showing of error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (internal quotations omitted); *see also* Sup. Ct. Rule 10.

Commercial speech can be misleading and thus subject to regulation even without containing express falsehoods, *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72, including when it "hold[s] out the promise of ... relief without alerting consumers to its potential cost." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250-51 (2010). That is precisely what the state courts concluded. Petitioners' advertisements deceptively represented that lead paint was suitable for interior use without disclosing—as Petitioners knew but did not share—that such use was extremely hazardous. Pet. 48a-49a; *see also Donaldson v. Read Magazine*, 333 U.S. 178, 188 (1948) ("Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said….").

Petitioners cite cases about hazardous product advertising, Pet. 17-18; ConAgra Pet. 31, but those

cases all involved *prospective bans* on advertising that the parties agreed was *truthful* and *non-misleading*. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 368, 371 (2002) ("prohibition on advertising compounded drugs"; government did not argue advertisement was misleading); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556, 566 (2001) (ban on certain outdoor and point-of-sale advertising); *id.* at 577-578 (Thomas, J., concurring) (parties assumed advertisements were "truthful" and "nonmisleading"); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 176, 184 (1999) (ban on gambling advertisements that parties agreed were not misleading); *44 Liquormart*, 517 U.S. at 493, 503-04 (ban on "truthful, nonmisleading" price advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483 (1995) ("labeling ban" on disclosure of "truthful, verifiable, and nonmisleading factual information about alcohol content"); *Bigelow v. Virginia*, 421 U.S. 809, 811, 838 (1975) (ban of publications encouraging abortion; state did not argue advertisements were "deceptive or fraudulent").

This case, by contrast, involves no speech prohibition, and no prospective speech restriction of any kind. *See Santa Clara II*, 50 Cal.4th at 55 (case will not "enjoin[] current or future speech"). The abatement remedy is not punitive, but simply requires Petitioners to remediate the present hazards that were caused by their conduct. And critically, unlike the speech in Petitioners' cases, Petitioners' advertising campaigns *were* misleading, and knowingly so.

If holding Petitioners liable for misleading commercial speech violated the First Amendment,

no state could impose tort liability for failure to disclose known hazards when promoting a product for a specific, dangerous use—depriving public entities of critical police power authority. *Cf. Wyeth v. Levine*, 555 U.S. 555, 581 (2009) (state "failure-to-warn claims" not preempted by federal law; no suggestion First Amendment implicated); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 501 (1996) (same).[7] Likewise, Petitioners' view of the First Amendment would require applying heightened scrutiny to "federal and state labeling requirements" for pesticides and other deadly products, even those that merely require manufacturers not to make fraudulent or deliberately deceptive claims. *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442 (2005) (states may impose liability for violations of federal and state labeling requirements; no suggestion First Amendment implicated). Indeed, almost every currently permissible law "requir[ing] disclosures" and "intended to combat the problem of inherently misleading commercial advertisements" would be subject to strict scrutiny. *Milavetz*, 559 U.S. at 250.

3. ConAgra/NL further argues that the First Amendment "require[s] a link—indeed, a substantial link—between [misleading] speech and a resulting injury," i.e., "proof of reliance on the

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[7] Petitioners are correct that this case does not involve liability premised solely on "failure to warn." But if Petitioners could not be held liable for misleadingly promoting hazardous lead paint for interior residential use, neither could they be held liable for failure-to-warn violations. *See Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2464 (2018) (compelled speech implicates even more serious First Amendment concerns than speech restrictions).

allegedly false speech" and "causation." ConAgra Pet. 29, 30. But the assertion that the lower courts imposed liability without causation rests on another mischaracterization. The Court of Appeal held that "[c]ausation is an element of a cause of action for public nuisance," Pet. 64a, and the trial court found and the Court of Appeal affirmed that Petitioners' conduct was a "substantial factor" in causing the public nuisance. Pet. 75a, 320a-321a; *see also, e.g.*, 28RT4164; 29RT4351.

In any event, this Court has never held that the First Amendment imposes any particular causation standard upon state tort law. ConAgra's 19th century authorities, *Smith v. Richards*, 38 U.S. 26, 30, 39 (1839), and *Stewart v. Wyoming Cattle-Ranche Co.*, 128 U.S. 383 (1888), focused exclusively on the elements of state tort or contract claims; neither mentions the First Amendment. Nor does *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), hold that the Constitution requires reliance or causation. Moreover, in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), this Court expressly "reject[ed] any suggestion that the incremental harm doctrine"—i.e., a "factual inquiry into the reputational damage *caused* by" allegedly defamatory statements about a public figure—"is compelled as a matter of First Amendment protection for speech." *Id.* at 523 (emphasis added). As the Court explained, the First Amendment does not require a particular causation showing because that issue "does not bear upon" the sole constitutional inquiry: "whether a defendant has published a statement with knowledge … or reckless disregard" of its falsity. *Id.* Thus, while "*state tort law doctrines of injury, causation, and damages*

calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation," there was no need to analyze those doctrines as a *constitutional* matter. *Id.* (emphases added).

Petitioners cannot constitutionalize their disagreement with the state courts' application of state tort principles to the specific facts of this case. Because (1) there is no basis for ConAgra/NL's novel assertion that the First Amendment requires some particular level of causation, (2) the state courts found that Petitioners *did* cause the public nuisance at issue, and (3) there is no conflict with decisions by this Court or other courts, Petitioners' free-speech argument does not merit review.

4. Petitioners' argument that the California courts violated their freedom of association also rests upon serial mischaracterizations. Pet. 19-24; ConAgra Pet. 31 n.3. As the trial court expressly stated, "[l]iability in this case is not premised on any Defendant's membership," Pet. 296a, nor on mere association. The record contains abundant evidence that Petitioners actively supported and participated in the trade associations' highly successful joint marketing campaigns "to sustain, increase, and prolong the use of lead paint." Pet. 226a-230a; *see also* Pet. 64a-67a. In particular, Petitioners each participated in the NPVLA's Save the Surface campaign, which encouraged consumers to use lead paint to protect household surfaces, Pet. 227a, 229a-230a; 138AA41011-12, and the LIA's Forest Products Better Paint campaign, which promoted lead paint use on lumber and resulted in lumberyards' distribution of two million leaflets with "painting instructions" directing consumers to

use lead paint on residences, and the distribution of 20 million labels recommending white lead by manufacturers of doors and window sashes (where dangerous lead dust is most commonly produced), Pet. 12a-13a, 65a, 227a-228a; *see also* 28RT4168-69, 4176-87; 62AA18046 [¶¶217-19]). NL and ConAgra also participated in the LIA's White Lead campaign, which promoted lead paint use in homes through direct outreach and millions of advertisements designed to refute allegations that lead paint was hazardous and to improve lead paint's "reputation." Pet. 13a, 228a-229a; *see also* 28RT4159, 4166-69, 4189-90, 4193, 4207, 4208-09, 4216; 30RT4474-75. Petitioners' participation in these campaigns was not limited to simple funding, but included providing resources, information, and written materials to the campaigns, identifying themselves as part of the campaigns, providing brochures and instructions to the campaigns about how to use lead paint in homes, and coordinating their own individual promotions with the campaigns. 28RT4159-64; 28RT4166-69, 4222, 4387-91; *see also* Pet. 12-14a, 213a-216a, 226a-230a.

Sherwin-Williams contends that the California decisions conflict with *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994). But in that case, the plaintiffs' conspiracy and concert-of-action claims were based on a former asbestos manufacturer having joined a trade association years after that manufacturer (and others) stopped producing asbestos. *Id*. at 1290. The trade association did not exist until 1984, while the defendant's manufacture and distribution of asbestos products had stopped in the 1970s. *Id*. The Third Circuit held that liability could not rest upon

the manufacturer's subsequent membership, attendance at a few meetings, or generic contributions that may have been used for unchallenged, permitted activities. *Id.* Here, the California courts found that Petitioners actively participated in and provided financial and other material support for specific, misleading campaigns to promote lead paint for interior use. Under these circumstances, there is no basis for certiorari.

B. THE DECISIONS BELOW RAISE NO DUE PROCESS CONCERNS WARRANTING CERTIORARI.

Petitioners contend that the lower courts' imposition of joint-and-several abatement responsibility violates the Due Process Clause in three ways: by requiring them to fund remediation of a hazard they did not "cause," by imposing disproportionate liability, and by imposing retroactive liability. Pet. 29-34; ConAgra Pet. 20-27. Each argument rests on further mischaracterizations and would require dramatic intervention into long-settled state law principles.

1. Petitioners contend the People did not show that the public nuisance was "causally linked" to their misconduct. ConAgra Pet. 20; *see also* Pet. 31. In particular, they argue that causation could not be established without individualized proof linking each Petitioner's conduct to particular patches of hazardous paint or individual customers. Pet. 32-33; ConAgra Pet. 21-22. But the California courts *did* require causation.

Petitioners' argument misses the point that the hallmark of public nuisance actions has always been their "*community* aspect"; they redress interference

with the "enjoyment of life or property by an entire *community or neighborhood*." *Acuna*, 14 Cal.4th at 1100, 1104-05 (emphases in original) (gang activity inflicted community-wide harm beyond harm inflicted on individual victims); *see also Gold Run Ditch & Mining Co.*, 66 Cal. at 146-52 (1884) (contaminated river inflicted community-wide harm). Such community-wide injuries are crucially distinct from injuries suffered by particular individuals, though both may arise from the very same conduct.

Here, the trial court concluded that the prevalence of lead paint throughout the jurisdictions constitutes a public nuisance because it permanently contaminates "residential housing"—an "essential community resource." Pet. 83a. To be sure, lead paint also inflicts irreversible neurological damage on poisoned children, and those individual harms could be compensable in a different type of case. But this statutory public-nuisance action exclusively addressed the distinct communal injury caused by Petitioners: heightened medical and education costs, lower tax revenues, increased crime, and other social harms to "the community at large." Pet. 292a; *see also* Pet. 203a-209a, 212a, 310a-311a.

This community-wide injury was appropriately proved by community-wide evidence. The trial court rested its public nuisance finding on the considerable evidence (including the state's database identifying children with significant lead exposure, Pet. 210a-211a, 216a-217a, undisputed census data, Pet. 214a-216a, and results of home inspections, Pet. 211a) demonstrating the "clear and present danger" to community health and safety,

Pet. 310a; *see also* Pet. 207a-212a. Petitioners' reliance on compensatory damages class action cases like *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), where the injuries were *past* harm to many individuals rather than *current and ongoing* harm to a community as a whole, is thus misplaced.

Once the community aspect of the public-nuisance injury is recognized, the nature of the required causation showing becomes clear. California courts, like many others, have adopted the "substantial factor" test of Restatement (Second) of Torts section 435, *see* Pet. 224a-225a, which Petitioners cannot challenge without inviting massive disruption of settled state law. To prove causation, the People had to show that Petitioners' activities were a substantial factor in contributing to a substantial, unreasonable, community-wide hazard. The evidence demonstrated just that: Petitioners' efforts were enormously successful, dramatically increasing the use of lead paint in residences throughout the jurisdictions, Pet. 227a-230a, and causing much of the neurological damage to children that plagues the jurisdictions today, Pet. 320a-321a. Requiring proof that particular customers relied on particular promotions in using lead paint in particular homes would have been far less probative of what really mattered: the impact of Petitioners' conduct on the community at large.[8]

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[8] ConAgra repeatedly asserts that Respondent stipulated that reliance could not be proven, but the cited stipulation refers only to reliance by particular individuals, 78AA22969-70[¶3], and is not inconsistent with the evidence, credited by the courts, that consumers relied on Petitioners to tell them whether to use lead paints in homes, 37RT5574-75, and mistakenly understood that Petitioners' lead-based "house

Petitioners complain that they were not permitted to inspect all potentially affected residences. But Petitioners never contended that inspections could differentiate their own lead paint from their competitors'. Pet. 95a. Moreover, the trial court found that each Petitioner had promoted the use of lead paint *generally*—not just its own brands. *Id.* Petitioners' inability to conduct disruptive, expensive, and legally irrelevant site inspections thus cannot give rise to a due process violation. Besides, Petitioners waived any right to conduct home inspections by not moving to compel after the People objected, 61AA17720-17722; 61AA17727-17729; 61AA17764, and then waiting until less than a month before trial, long after discovery had closed, to file an ex-parte motion to inspect individual properties, 60AA17666-17674; 61AA17763-17764. Nothing in the Constitution relieves a defendant from the consequences of its own litigation choices. *See Currier v. Virginia*, 138 S.Ct. 2144, 2151 (2018).

In any event, this Court has never held that the Due Process Clause imposes a stricter causation requirement than the courts applied below. Petitioners' cited cases say *nothing* about due process, focusing instead on the causation requirements of specific federal statutes. *Paroline v. United States*, 134 S.Ct. 1710 (2014); *Bank of America Corp. v City of Miami, Fla.*, 137 S.Ct 1296 (2017); *Lexmark Intern., Inc. v. Static Control*

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paints" could safely be used in residential interiors. *See* 29RT4385-86; 30RT4465; 36RT5382; 37RT5545, 5580-5582, 5616-5618. Accordingly, the Court of Appeal concluded it could be "reasonably infer[red]" that "at least some of those who were the targets of these recommendations heeded them." Pet. 66a.

Components, Inc., 134 S.Ct. 1377 (2014).

Paroline is particularly instructive. There, a child pornography victim sought restitution from one individual for emotional harms resulting from widespread dissemination of an image that many individuals possessed. 134 S.Ct. at 1717-18. This Court acknowledged that "a showing of strict but-for causation" could not be made, *id.* at 1722, 1727, but explained: "[T]ort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes. It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm." *Id.* at 1724.

That is precisely the situation here. Petitioners' insistence on individualized discovery, besides mischaracterizing how public nuisances have always been defined and adjudicated, is simply an objection that but-for causation is a poor fit for public nuisance cases. But if the victim in *Paroline* was not constitutionally required to show how a single defendant's possession of her image independently contributed to her trauma, the People cannot have been required to trace the prevalence of lead paint on residential interiors to specific instances of Petitioners' widespread promotional activities. In *Paroline*, the victim's trauma (resulting from knowledge that her image was being circulated) was held to be a direct and foreseeable result of the defendant's possession crime, despite the absence of strict causation-in-fact. *Id.* at 1722, 1727. The prevalence of lead paint in the jurisdictions—and the ongoing danger that it poses to children—is a far more foreseeable and direct

result of Petitioner's wrongful conduct in promoting a product use they knew presented a deadly hazard.

2. Petitioners further argue that their joint-and-several abatement responsibility amounts to disproportionate liability. Pet. 33-34; ConAgra Pet. 25, 27. Here, too, they distort the record and case law.

Settled tort principles establish that tortfeasors bear the burden of proving that liability is apportionable. *See* Rest.2d Torts, §840E, com. b. Only Sherwin-Williams submitted evidence to support apportionment, but the lower courts found that evidence inadequate for reasons that included Sherwin-Williams' promotion of lead paint generally (not just its own brand) and its conceded inability to differentiate the sources of particular paint through inspection. Pet. 91-94a. Substantial evidence thus supports the lower courts' conclusion that the abatement remedy for pre-1951 houses was indivisible and so joint-and-several-liability was appropriate. *Id.*

This result is hardly surprising. As this Court has recognized, "[n]ot all harms are capable of apportionment," and in such cases joint-and-several liability is the norm. *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009). Even if apportionment were feasible, the "well-established principle" of joint-and-several liability "can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220-21

(1994).[9]

Petitioners ignore the facts and applicable law, instead relying on punitive damages cases the Court of Appeal properly held inapposite. Pet. 33-34; ConAgra Pet. 27; Pet. 96a-97a. These cases hold that penalties awarded for punitive purposes must bear some rational relationship to the compensable harms caused by a defendant's conduct. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 563, 565, 580 (1996); *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 412, 416 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). None involves equitable abatement or any other non-damages remedy, nor supports due process limitations on a defendant's responsibility to remediate harms it helped cause. The judgment here serves no punitive (or even compensatory) purpose, merely abatement of ongoing harm.

Even so, to the extent those cases identify reprehensibility as the principal factor affecting the propriety of an award, *see, e.g.*, *BMW*, 517 U.S. at 575; *State Farm*, 538 U.S. at 419; *Philip Morris*, 549 U.S. at 355, Petitioners' conduct easily suffices. Petitioners knew that lead paint in residential interiors posed serious health risks as early as the 1910s, *see* 173AA51545-56, 51550-51; 179AA53364-65, and by the 1920s knew that those risks included irreversible brain damage to children, Pet. 35a; 32RT4811, 4814-17; *see also* 175AA51949-53, 175AA51972-176AA52240. Despite that knowledge, they persisted for decades in successfully promoting

[9] The Court of Appeal emphasized that Petitioners may *still* apportion liability among themselves if they obtain evidence that supports apportionment when fulfilling their abatement obligations. Pet. 95a-96a.

lead paint for interior use. Pet. 49a-64a.

3. Finally, this case does not involve "retroactive" liability. *See* Pet. 30-31; ConAgra Pet. 25-27. Petitioners were not held liable for damages arising from past harms, but for creating a nuisance that presently exists. Although the promotion and sale of lead paint were not specifically proscribed by law when Petitioners engaged in their wrongful conduct, Civil Code sections 3491-94 have been in effect since 1872, and knowingly contributing to a public health hazard has long been grounds for civil and criminal liability. Pet. 97a; Cal. Penal Code §372. Any claim that Petitioners lacked notice is meritless.

Petitioners' authorities each concern the constitutionality of retroactive *legislation*. *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *United States v. Carlton*, 512 U.S. 26 (1994); *William Danzer & Co. v. Gulf & S.I. R. Co.*, 268 U.S. 633 (1925). Although Petitioners sometimes suggest that the retroactivity here was judicial in nature, *see* ConAgra Pet. 9; Pet. 30, "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982); *see also Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96-97 (1993). Besides, the lower courts applied settled law to the facts, and issued no new rule of decision.

Stripped of inapposite authority, Petitioners' retroactivity arguments rest on a generalized objection to being held liable for conduct that occurred long ago. *See* Cal. Civ. Code §3490. But limitations periods for state causes of action are

exclusively the province of state law. *See, e.g.*, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 110 (1945). Whether the Due Process Clause imposes its own statute of limitations on state causes of action is not a question Petitioners present, and there is no justification for interfering with long-standing state practice.

Altogether, Petitioners ask too much of this Court. Their arguments call for abandonment of well-established causation principles. They demand the eradication of joint-and-several liability, even where defendants fail to demonstrate that apportionment is possible. And they propose to prohibit states, as a constitutional matter, from deciding when their own prosecutors may pursue prospective equitable relief for past conduct causing present harm. Indulging these arguments would not only radically alter American tort law; it would untether the Due Process Clause from its traditional and procedural moorings. *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.").

C. CERTIORARI IS NOT NEEDED TO PREVENT ANY UNDUE EXPANSION OF PUBLIC NUISANCE LITIGATION

Petitioners raise the specter of a "brave new world" of unrestrained public nuisance law absent certiorari. ConAgra Pet. 33; Pet. 4. But public nuisance cases brought by public entities are far from common and are routinely resolved under well-established general tort principles.

There is no nationwide wave of public nuisance

litigation. Every other lead-paint public-nuisance case has been dismissed on the facts or for failure to state a claim as pleaded under other states' laws. *See, e.g., State of Rhode Island v. Lead Industries Assn., Inc.*, 951 A.2d 428 (R.I. 2008); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007); *City of Chicago v. American Cynamid Co.*, 823 N.E.2d 126 (Ill. 2005).

The California courts' application of public nuisance doctrine in *Santa Clara I*, 137 Cal.App.4th at 305-11, did not extend or create new law. Even if it had, there has been no great outpouring of public nuisance suits since 2006. While Petitioners cite three other California public nuisance cases, one was dismissed for failure to state a claim (*City of Oakland v. BP P.L.C.*, No. 17-cv-06011, 2018 WL 3109726, *1 (N.D. Cal. Jun 25, 2018)), and two have yet to progress past the pleading stage (*City of Long Beach v. Monsanto Co.*, No. 2:16-cv-03493 (C.D. Cal. filed May 19, 2016), and *Cty. of Mariposa v. Amerisourcebergen Drug Corp.*, No. 1:18-cv-00626 (E.D. Cal. filed May 7, 2018)). Hardly "impossible to defend against," ConAgra Pet. 34, the handful of public nuisance suits now pending are being effectively managed, just as public and private nuisance cases have always been. And far from being "an amorphous and novel common-law action," ConAgra Pet. 30, California public nuisance law rests upon a statute codified in 1872 and subsequently applied in a variety of factual contexts. *See supra* at 10-11 n.4; *City of Merced Redevelop. Agency v. Exxon Mobil Corp.*, 2015 WL 471672, *22 (E.D. Cal. Feb. 4, 2015) (dismissing [public-nuisance] suit against manufacturers of MTBE-

containing gasoline). Moreover, if public nuisance law were truly spiraling out of control, there would be ample opportunity for these issues to percolate and for any true conflict to reveal itself, making certiorari unnecessary here.

Petitioners also contend that the California courts have abandoned two important elements of public nuisance claims: that the conduct at issue be "performed in a location within the actor's control," and be more than a "minor force'" in the creation of the public hazard. ConAgra Pet. 33-34. Petitioners do not explain why the Constitution would impose a locus-of-control requirement for public nuisance actions but not for other torts.[10] California courts apply the same causation standard in public nuisance actions that has been adopted by many states for a wide variety of torts: the "substantial factor" test, which imposes no such requirement. Rest.2d Torts, §834, com. e (liability does not rest on continued control); *see also South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal.4th 291, 298 (2015); *compare* Pet. 69a (trial court reasonably could have concluded defendants' conduct was "not too remote to be considered a legal cause of the current hazard"); *In re Firearm Cases*, 126 Cal.App.4th 959, 988 (2005) (citing Rest.2d Torts, §824(b), com. a, at 116) (dismissing suit against firearms manufacturers for failure to show

[10] Besides, California has never had a locus-of-control requirement under public *or* private nuisance law. *See City of Modesto*, 119 Cal.App.4th at 38 (citing cases dating back to 1896; nuisance liability does not depend on defendant's ownership, possession or control of property, nor being in position to abate nuisance, but whether it "assisted in the creation of the nuisance").

causation).

Petitioners' warning that the California public nuisance statute will be construed to impose liability on all hazardous product manufacturers is unfounded. California courts have consistently held that public officials cannot maintain public nuisance actions based on product manufacture and distribution alone, and that the dangerous nature of the defendant's product or conduct must be known at the time. *See, e.g., Santa Clara I*, 137 Cal.App.4th at 306-10; *City of San Diego v. U.S. Gypsum Co.*, 30 Cal.App.4th 575, 578-79 (1994); *City of Modesto*, 119 Cal.App.4th at 39; *see also Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 674 (9th Cir. 2011).

Like criminal prosecutions, public nuisance suits that are brought on behalf of the People of California may *only* be brought by public officials, who are ultimately accountable to voters. *See* Cal. Civ. Proc. Code §731. Damages are never available in such cases, only equitable abatement. Cal. Civ. Code §3491; *People ex rel. Van de Kamp v. American Art Enterprises, Inc.*, 33 Cal.3d 328, 333 n.11 (1983). Nor may public officials seek reimbursement for remediation efforts already undertaken. *County of San Luis Obispo v. Abalone Alliance*, 178 Cal.App.3d 848, 852 (1986). Thus, such actions may *only* be brought where an ongoing hazard exists and will expose defendants *at most* to liability for the cost of abating the ongoing harms caused by the hazardous conditions they created.

CONCLUSION

In short, Petitioners' disagreement with the trial court's *findings* and application of well-established

state law do not warrant review. This Court should respect California's lawful exercise of its police power to regulate and abate public nuisances and deny the petitions.

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