

No. 18-86

IN THE
Supreme Court of the United States

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

THE PEOPLE OF CALIFORNIA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

California's public nuisance decision, in the words of then-Judge Alito, "broadly threaten[s] First Amendment rights," makes association "unjustifiably risky," and "generally chill[s]" First Amendment activities. *In re Asbestos School Litig.*, 46 F.3d 1284, 1294, 1296 (3d Cir. 1994). Respondent does not dispute that California has held Sherwin-Williams liable for hundreds of millions of dollars, at least in part, because of its century-old commercial speech promoting lawful products for sale and its decades-old participation in a trade association. In so doing, California abdicated its "special obligation" to ensure that liability is not predicated on protected speech, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-17 (1982), and created a split of authority. The chilling effect from this decision is plain: no speaker could anticipate or tolerate the threat of massive retroactive liability on ordinary commercial speech because a court may disfavor its product decades later.

These First Amendment violations are exacerbated by California's failure to require evidence of any connection between the speech and the harms at issue. Although States have discretion to develop tort law and causation standards, they cannot, as California did here, flout causation altogether, and they certainly cannot do so based on new legal theories and scientific evidence that did not exist a century ago when the speech was published. The end result is a super-tort untethered from constitutional and evidentiary norms and contrary to basic notions of fairness.

This Court should act now to prevent further constitutional damage by California’s public nuisance theory. State and local governments have filed dozens of lawsuits across the country based on similar promotion theories. Pet. 4, 24-26. The widespread attention garnered by this case demonstrates its national importance and belies Respondent’s attempt to portray this case as factbound error correction. Nineteen entities—including five States; distinguished legal scholars; business, manufacturing, and affordable housing groups; and a national advertising organization—filed briefs supporting Petitioners. *Amici Curiae* represent over 600,000 individuals and businesses in all fifty States. This case has a fully developed trial record, and no factual disputes prevent this Court’s consideration of the Questions Presented. By granting this petition, the Court can resolve a split with the Third Circuit, prevent the chilling of speech and association, and stop the spread of California’s unconstitutional public nuisance theory.

ARGUMENT

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

1. Respondent first tries to evade First Amendment protections by erroneously claiming that this case does not involve commercial speech but rather “nonspeech’ actions” such as “manufacturing, selling, and distributing lead pigments and paints for interior use.” Opp. 17.

Respondent would have this Court disregard the Court of Appeal's own words. As the court wrote, "[h]ere, the alleged basis for defendants' liability for the public nuisance created by lead paint is their affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards." Pet. App. 33a (quoting *Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 328 (Cal. Ct. App. 2006) (*Santa Clara I*). Without further ado, the court declared: "Defendants' lead paint promotional advertising and participation in trade-association-sponsored lead paint promotional advertising were not entitled to any First Amendment protections." *Id.* 48a.

The court's sole basis for Sherwin-Williams' liability was (1) a 1904 advertisement and (2) \$5,000 in contributions to a trade association.¹ *Id.* 62a-63a; Pet. 11-14. The Court of Appeal did not cite any other "conduct" to justify liability, and had Sherwin-Williams not spoken, by the court's own terms, Sherwin-Williams would not have been liable. Imposing liability—even in part—on protected speech is unconstitutional. *Claiborne Hardware*, 458 U.S. at 915-17.

Respondent next asserts that the First Amendment does not protect "commercial conduct" that "furthers public acceptance of dangerous merchandise for hazardous use"—lest governments be prevented "from

¹ Respondent's suggestion that the Court of Appeal secretly held Sherwin-Williams liable based on uncited advertisements or other associational conduct is both baseless and irrelevant. Opp. 2. The First Amendment prohibits the Government from penalizing truthful commercial speech—no matter whether the speaker engages in a lot or a little speech.

regulating dangerous products.” Opp. 18. That argument misses the mark. Everyone agrees that the government may regulate—or prohibit—“dangerous products.” The question here is whether the government may choose to keep a “dangerous product” *lawful*, yet make speech about that dangerous product *unlawful*. This Court’s answer is no. If a State believes that a product is too unsafe to use, it should ban the product—not penalize the speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (plurality opinion); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001). Respondent’s misdirection cannot bypass this Court’s precedent.

2. Respondent contends that this Court’s review is unwarranted because the courts below “found” the advertisement was misleading. Opp. 19. The trial court, however, made no such “finding,” App. 309a-311a, and the Court of Appeal held the advertisement was “inherently misleading” because it “necessarily implied that lead paint was safe.” App. 48a-49a. The petition already explains why this *legal* conclusion is incorrect. Sherwin-Williams’ advertising did not include any false or misleading statement about the properties of lead paint, did not say that lead paint was safe to ingest,² and did not imply that paint did not need to be maintained. The advertisement was not for interior lead paint at all. Pet. 12. The ad merely offered to sell a then-lawful product for a then-lawful purpose.

² Respondent misstates the record in suggesting that Sherwin-Williams advertised interior lead paint as “safe.” Opp. 20. The cited 1902 ad is for exterior paint, and “safe” in context means durability, not safe to ingest. Reply App. 1a. No court concluded this ad was misleading or relied on it for liability.

By the Court of Appeal’s logic, any ad for a product with known hazards is “inherently misleading” if it does not identify those hazards. But as Respondent acknowledges, Opp. 19, under this Court’s cases, commercial speech does *not* become misleading because it promotes a product that has risks. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) (compounded drug advertising); *Reilly*, 533 U.S. at 566 (tobacco advertising); *44 Liquormart*, 517 U.S. at 503-04 (liquor advertising). And unlike this Court’s cases on professional advertising on which Respondent relies, Opp. 19-20, no regulation existing at the time of sale imposed disclosure requirements on consumer product advertising. Imposing one a century later, as California did here, would all-but eliminate commercial speech. Virtually every product, from fast food to bathtubs to tires, has some known hazards, particularly if not maintained or used as intended. Under California’s decision, every ad would need pages of warnings just to tell consumers where to buy a product.³

Moreover, under this Court’s cases, commercial speech is “inherently misleading” only if the government first proves “deception.” *Ibanez v. Fla. Dept. of Bus. & Prof’l Regulation*, 512 U.S. 136, 145-46 (1994). “[R]ote invocation” of the term “misleading”

³ Respondent concedes that Sherwin-Williams’ liability is not based on a failure to warn, Opp. 22 n.7, and Sherwin-Williams does not contest that States may regulate products by requiring warnings of known hazards. California, however, imposes liability on advertising, regardless of accompanying warnings on product labels or in product manuals, and without defenses that ensure commercial speech is not infringed, such as common knowledge, state of art, product misuse, and useful life. App. 49a.

does not suffice. *Id.* While Respondent tries to vilify Sherwin-Williams by stating that it knew that lead paint was dangerous, Respondent conceded at trial that Sherwin-Williams had no secret, unique knowledge; its knowledge admittedly was the same as the general public's.⁴ App. 363a-64a, 366a. As Respondent admitted, the risk of harm from low-level dust lead exposures from deteriorated paint that formed the basis of this case was not scientifically knowable until the late 1990s. *Santa Clara I* at 322, 346. This is not a case where the trial court found that Sherwin-Williams intended to or did deceive anyone.

3. Respondent would confine the First Amendment to “prospective bans on advertising,” but not retrospective liability. Opp. 21. Retrospective restriction of speech, however, is *more* troublesome. If a State may not prospectively restrict advertising of a lawful but unsafe product, it surely may not retrospectively impose crippling liability for publishing the very same advertisement. “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Moreover, as this Court has held, the First Amendment applies just as much to “restrictions ... seeking to exact a cost after the speech occurs” as it does to “outright ban[s].” *Citizens United v. FEC*, 558

⁴ Respondent's suggestion that lead paint hazards were “hidden from the public” is particularly disingenuous. Opp. 1. Respondent's expert specifically testified that he had “no knowledge of any medical or scientific information that was known by [Sherwin-Williams] that was hidden from the public.” App. 366a.

U.S. 310, 336-37 (2010) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)); see, e.g., *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (“A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech”).

California’s decision “seek[s] to exact a cost after the speech occurs” without providing notice that the speech may be penalized. *Citizens United*, 558 U.S. at 337. To avoid chilling speech through self-censorship, speakers must be able to determine in advance whether their speech is unlawful. The First Amendment would provide no protection at all if, a century after the speech is published, a court can proclaim an advertisement “inherently misleading” because the product, in hindsight, can be hazardous for a particular use.

4. Finally, Respondent denies the conflict with *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994). Respondent maintains that the defendant in that case “joined a trade association after that [defendant] stopped producing [the product at issue],” whereas Sherwin-Williams joined the trade association during the time that it produced lead paint. Opp. 25-26. To call this distinction a thin reed is an affront to the reed. As then-Judge Alito wrote in *Asbestos School Litigation*: “Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.” 46 F.3d at 1294. That “First Amendment protection” does not turn on whether the business joins the organization before or after it produces a lawful product.

Respondent, likewise, says that Sherwin-Williams' liability rests on its "participat[ion] in the trade associations' ... joint marketing campaigns." Opp. 24. But Sherwin-Williams' sole basis of "participation" was \$5,000 in contributions to one trade association. App. 62a-63a. There is no evidence and certainly no finding that Sherwin-Williams ever controlled, approved, distributed, or even saw the trade association's promotions. Likewise, there is no support that any of these promotions—*which were never introduced into evidence*—are misleading. If meager financial contributions eliminate First Amendment protections, then *Asbestos School Litigation* is illusory, and all trade association members are at risk of liability for their associations' activities.

Sherwin-Williams' point remains: In both *Asbestos School Litigation* and this case, a plaintiff sought to hold a business liable on account of its association with a trade group. The Third Circuit held that the First Amendment prohibited liability. In contrast, California held that the First Amendment permits liability. This Court should grant this petition to resolve that square conflict as well as California's disregard of this Court's First Amendment precedent.

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

1. Respondent incorrectly contends that the Constitution restricts “retroactive *legislation*,” but does not restrict retroactive judicial decisions. Opp. 33. In *Bouie v. City of Columbia*, 378 U.S. 347, 352-53 (1964), this Court held that the Due Process Clause prohibits arbitrary “judicial” retroactivity because an “unforeseeable and retroactive judicial [decision] ... operates precisely like an *ex post facto* law.” *See also Marks v. United States*, 430 U.S. 188, 191-92 (1977) (“[T]he notion that persons have a right to fair warning ... is protected against judicial action by the Due Process Clause[.]”).

Respondent also contends that “this case does not involve ‘retroactive’ liability” because Petitioners “were not held liable for damages arising from past harms, but for creating a nuisance that presently exists.” Opp. 33. Nonsense. The “creation” of the alleged nuisance occurred in the early twentieth century, when Sherwin-Williams placed two advertisements and contributed money to the LIA. As Respondent concedes, “the promotion and sale of lead paint *were not specifically proscribed by law* when Petitioners engaged in [this] conduct.” Opp. 33 (emphasis added). That concession confirms that Sherwin-Williams’ liability is retroactive.

2. Respondent contends that California requires causation, but then denies that causation-in-fact is required for community-wide harm. *See* Opp. 30. The Due Process Clause, however, prohibits holding people liable for harms that they did not cause. It is

“a well-established principle” that, “in *all* cases of loss, we are to attribute it to the proximate cause.” *Waters v. Merchant Louisville Ins. Co.*, 36 U.S. 213, 223 (1837) (emphasis added). This is particularly true in the First Amendment context. *Claiborne Hardware*, 458 U.S. at 918 (“Only those losses proximately caused by unlawful conduct may be recovered.”). And that principle applies more forcefully to aggregated community harms, which subject defendants to far greater liability than an individual case.

Moreover, there was no evidence that *Sherwin-Williams*’ alleged misconduct (a 1904 advertisement that ran twice and \$5,000 in donations) *caused* this wide-spread community presence of lead paint in any, let alone each, of the ten jurisdictions. Respondent’s own expert found no evidence that *Sherwin-Williams*’ or the LIA’s promotions had any effect on the interior use of lead paint in the ten jurisdictions. App. 284a, 344a. The courts below also failed to identify any evidence that *Sherwin-Williams*’ speech played any part, even a “minor” part, in the collective presence of interior lead paint in California. To be sure, California dispensed with even the veneer of causation when it held *Sherwin-Williams* liable for abating every home in eight jurisdictions where its 1904 advertisement never ran and for homes built nine years after *Sherwin-Williams*’ last contribution in 1941.

3. Grossly disproportionate liability is an inevitable consequence of imposing joint and several liability without requiring evidence of causation. Pet. 33-34. California held *Sherwin-Williams* liable for an entire industry’s sale of lead paint without any proof that *Sherwin-Williams*’ minor speech activities had

any effect on the presence of lead paint anywhere. If a court cannot impose punitive damages disproportionate to a defendant's conduct, it surely cannot impose initial liability that is devoid of any causality or proportionality. Minuscule speech activities in two jurisdictions having no connection to the presence of lead paint in any jurisdiction cannot be the basis to inspect and abate every manufacturer's lead paint in all homes in all ten jurisdictions.

III. Respondent's Additional Arguments For Denying Review Are Incorrect.

1. Respondent mistakenly asserts this Court lacks jurisdiction because there is no final judgment. California's judgment is final for purposes of certiorari because the courts have "finally determined" the "federal issue" in the case, and that federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 480 (1975). The First Amendment and due process issues will survive and require decision irrespective of what state courts do in further proceedings, which only concern the amount of the abatement fund and implementation of the abatement order.

Respondent also notes that "the trial court is presently deciding whether to approve the People's recent settlement with NL." Opp. 5. But a settlement with *NL* does not affect *Sherwin-Williams'* entitlement to seek review of the constitutional violations underlying its liability. If anything, NL's settlement, if approved, would increase *Sherwin-Williams'* share of the liability, extinguish *Sherwin-Williams'* contribution rights, and exacerbate the impact of the unconstitutional decision. Cal. Civ. Code

§ 877.6. The *in terrorem* effect of multi-million dollar liability premised on protected speech is a powerful reason to grant review now.

2. Respondent finally tries to portray Sherwin-Williams' petition as a case-specific "disagreement with the trial court's findings and application of well-established state law." Opp. 37-38. Not so. California adopted a novel legal theory: If a company truthfully promotes a lawful product, and a court later concludes that the product is unsafe, the State retroactively may hold the company liable for all harms associated with that type of product, without any showing that the company's promotion caused any of those harms. This theory has universal appeal for cash-strapped governments and has spread to other States and industries. Pet. 24-26. It eliminates most traditional elements of proof and many defenses. Every product, particularly if misused or not maintained, has a known hazard. And promotion is part of every product's distribution. By its very terms, California's theory applies to virtually every product manufacturer and provides the opportunity for a massive payday without having to meet the standards of a collective action.

Nor is Respondent a collection of disinterested public servants. Unlike criminal prosecutors who must maintain strict neutrality, here the public entities stand to gain hundreds of millions of dollars, and they are represented by private counsel who front the costs of the litigation and aim to receive a substantial percentage of any recovery. The protection of commercial speech and due process of law cannot be left to the whim of financially interested lawyers and elected public officials who may benefit

politically from suing often unpopular companies or persons.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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