Nos 18-84 & 18-86

IN THE
Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY AND NL INDUSTRIES, INC.,

Petitioners,

v.

THE PEOPLE OF CALIFORNIA,

Respondent.

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

v.

THE PEOPLE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Sixth Appellate District

BRIEF OF DISTINGUISHED LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Richard A. Epstein
800 North Michigan Avenue
Apartment 3502
Chicago, IL 60611

Daniel H. Bromberg
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Dr., 5th Fl.
Redwood Shores, CA 94065
(650) 801-5000
danbromberg@quinnemanuel.com
Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Richard A. Epstein is the Laurence A. Tisch Professor of Law at NYU Law School, the Peter and Kirsten Bedford Senior Lecturer at the Hoover Institution at Stanford University, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago. Professor Epstein has taught torts to generations of law students around the country, both personally and through his widely used textbook, CASES AND MATERIALS ON TORTS.

Amicus Aaron D. Twerski is the Irwin and Jill Cohen Professor of Law at Brooklyn Law School and was the co-reporter for the RESTATEMENT OF THE LAW (THIRD) TORTS: PRODUCTS LIABILITY. Professor Twerski has taught torts and products liability law for more than three decades. In recognition of his contribution to tort law, he has received the William L. Prosser Award from the American Association of Law School's Torts and Compensation System Section, and the Robert B. McKay Law Professor Award from the American Bar Association's Tort Trial & Insurance Practice Section.

Amicus Donald G. Gifford is the Jacob A. France Professor of Torts at the University of Maryland Carey School of Law, where he was dean from 1992

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored any part of this brief, and no person other than the named *amici* and their counsel made any monetary contribution to the preparation and submission of this brief.

through 1999. Professor Gifford has taught torts and products liability law for over three decades, and he is the editor of a casebook on torts as well as a current co-author of supplements to the treatise HARPER, JAMES, AND GRAY ON THE LAW OF TORTS.

Amicus Henry N. Butler is the Dean of the Antonin Scalia Law School at George Mason University as well as a professor of law at the school. Previously, Professor Butler was the executive director of the Law & Economics Center at the Antonin Scalia Law School and of the Searle Center on Law, Regulation, and Economic Growth at the Northwestern University School of Law, as well as director of the Judicial Education Program at The Brookings Institution.

Amicus John S. Baker, Jr., Ph.D., is Professor Emeritus at the Louisiana State University Law Center, where he previously was the Dale E. Bennett Professor of Law. Professor Baker has taught over a dozen subjects, including comparative law, and is a co-author of AN INTRODUCTION TO THE LAW OF THE UNITED STATES.

Amicus Michael I. Krauss is a professor of law at the Antonin Scalia Law School at George Mason University. A member of the American Law Institute, Professor Kraus has taught torts and products liability law for over two decades, and he is the author of a leading monograph on products liability, PRINCIPLES OF PRODUCTS LIABILITY.

Amici have a strong interest in the proper understanding of tort law and the principles underlying it. They agree with both the ConAgra petition (in No.

18-84) and the Sherwin-Williams petition (in No. 18-86) that the decision of the California Court of Appeal below adopts an extreme variant of public nuisance law whose application here violates both the Due Process Clause and the First Amendment. The purpose of this brief is to underscore how completely this decision departs from the principles governing the relevant areas of tort law—public nuisance, products liability, and misrepresentation—and why the constitutional questions raised by this mishmash of misapplied principles warrant review.

INTRODUCTION AND SUMMARY

As both petitions show, the "public nuisance" theory adopted by the California Court of Appeal abandoned traditional causation requirements. Most critically, the decision below dispensed with the requirement of tracing any public harm to petitioners' alleged misconduct. Indeed, respondent failed to identify any specific location injured by the alleged nuisance. ConAgra Pet. 20–25; Sherwin-Williams Pet. 33. In addition, while respondent's claim is based on simple speech acts—petitioners' promotion of the then-lawful use of lead-based paint—the Court of Appeal did not require proof of reliance on petitioners' statements *by anyone*. Nor did it require that these routine statements were knowingly or even negligently false. ConAgra Pet. 28; Sherwin-Williams Pet. 21–22.

These remarkable departures from traditional tort principles are just the tip of the iceberg. The so-called "public nuisance" theory adopted by the decision below is in fact a grotesque misapplication of

tort principles, which bears no resemblance to traditional public nuisance law.

The contrasts are evident. Traditionally, public nuisance claims have been limited to invasions of publicly shared rights. Typically, most if not all members of the public suffer only limited injury from such invasions. Those who suffer more serious special harms are entitled to bring actions. This case, however, does not fit into the historical pattern. It does not involve any invasion of a publicly shared right: to the contrary, it involves exposure to lead in paints used in the interior of residences, a quintessentially private area. Nor does it involve any tortious invasion, but rather lawful advertisements about lawful products brought into homes voluntarily. In short, the "public nuisance" theory adopted by the decision below bears no resemblance to traditional public nuisance claims—which is no doubt why similar theories have been rejected by virtually every prior decision to consider them.

Respondent's exotic public nuisance theory cannot be salvaged by blending it with wholly inadequate tort theories of product liability and misrepresentations. Respondent's claim violates fundamental principles in both areas. As to the former, there is no claim of the sale by defendants of a defective product. As to the latter, there is no claim of any false or untrue statement. By twisting these two theories into an unrecognizable form, the decision below is hopelessly in conflict with the central objective of tort law, which is to maximize social welfare, by assigning liability so as to minimize both the cost of accidents and the cost of prevention.

On the products liability side, these objectives are not served by imposing liability on persons who may have exercised no control over a product or the misuse that eventually may have caused injury because they promoted its lawful use years and even decades before any injury.

On the misrepresentation side, the decision below misses the fundamental point that any valid misrepresentation claim presupposes: that the defendant had private knowledge about which the plaintiffs were ignorant. Here, however, it is undisputed that none of the petitioners had hidden knowledge concerning the dangers of lead paint, which were publicly known when petitioners promoted their use. Under those circumstances, petitioners could not have deceived the public by simply promoting the use of lead paint (which had considerable advantages in terms of durability and moisture resistance). Imposing liability years later, absent proof of reliance by any specific individual, creates a threat of indeterminate liability for an indeterminate time to an indeterminate class, which, as Justice Cardozo recognized long ago, is inimical to tort law.

ARGUMENT

I. CALIFORNIA'S DECISION ADOPTS AN UNPRECEDENTED THEORY THAT DEPARTS RADICALLY FROM THE PRINCIPLES OF PUBLIC NUISANCE LAW

Public nuisance claims traditionally have dealt with publicly shared rights. At common law, public nuisance claims typically involved blocking access to the commons, such as public roads or waterways,

see, e.g., *Anonymous*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536); *James v. Hayward*, Cro. Car. 184, 79 Eng. Rep. 761 (K.B. 1631); *Harrower v. Ritson*, 37 Barb. 301 (N.Y. Gen. Term 1861); *Willard v. City of Cambridge*, 85 Mass. (3 Allen) 574 (1862); *Piscataqua Nav. Co. v. New York, N.H. & H.R. Co.*, 89 F. 362 (D. Mass. 1898); *Carver v. San Pedro, L.A. & S.L.R. Co.*, 151 F. 334 (C.C.S.D. Cal. 1906); *David M. Swain & Son v. Chicago, B. & Q. R. Co.*, 97 N.E. 247 (Ill. 1911); *Pilgrim Plywood Corp. v. Melendy*, 1 A.2d 700 (Vt. 1938), or the pollution or damage to such roads and waterways, *see, e.g.*, *Smith v. City of Sedalia*, 53 S.W. 907 (Mo. 1899); *State ex rel. Wear v. Springfield Gas & Electric Co.*, 204 S.W. 942 (Mo. Ct. App. 1918); *Berry v. Shell Petroleum Co.*, 33 P.2d 953 (Kan. 1934). Modern forms of pollution are often novel, but even with these, public nuisance claims are still limited to invasions of "public rights", that is, rights to indivisible resources that are shared in common by members of the public. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

In cases involving invasions of public rights, a public body is tasked with removing the public nuisance, or with charging a private party to abate it. Vigorous public enforcement developed at an early time because everyone understood that the transaction costs of an individual suit overwhelmed the value of the remedy to any single plaintiff, even when the aggregate value to all members of the public sharing the right in question exceeded such costs. *See, e.g.*, Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141, 148 (2015). For example, if a public

highway is obstructed, all users of the highway suffer injury from the resulting delay or the need to take an alternative route; however, that injury typically will be so small for each individual that the cost of bringing suit far exceeds any damages recoverable. To remedy this problem, a public body is given the right to sue, and to fine or otherwise punish the wrongdoer. Only when a private person suffers a special injury—*e.g.*, property damage or bodily injury—is the relationship between the cost of the suit and the extent of recovery reversed, and the private person is allowed to bring suit. *See* RESTATEMENT (SECOND) OF TORTS § 821C, cmt. a (1979).

Because public nuisance claims imitate and backstop private nuisance claims, *see* Epstein, *From Common Law to Environmental Protection*, *supra*, at 148, the traditional elements of public and private nuisance overlap. For example, under California law, there is a single definition of nuisance, with public nuisances differing from private nuisances only in that the public nuisance cause of action belongs to the entire community. *See* Cal. Civ. Code §§ 3479–3481. Even more important, both public and private nuisance generally require proof of a "nontrespassory invasion" of the damaged property. *See, e.g.*, *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689 (N.C. 1953). And trespasses, of course, require an even more tangible invasion. *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959).

The California Court of Appeal's decision is a radical departure from the traditional understanding of public nuisance. *First*, this case does not involve a publicly shared right. There is no suggestion that any dust from lead paint used in the interiors of

individual homes escaped into a public area and polluted it. Instead, the alleged property damage and personal injuries were suffered inside the individual homes where lead paint was used, a quintessentially private place, and thus no public right shared in common is implicated. It makes no difference that the public has a general interest in health. Were such a broad and pervasive interest enough, the concept of a public nuisance claim would be subject to no meaningful restriction and would swallow virtually all tort law.

Second, there was no invasion by poisons, fumes, odors, or any less dangerous substance, as in a typical nuisance case, because the paints at issue here were brought into individual homes voluntarily and lawfully. Nor was there any activity on a different property that then impacted the property in question, such as in cases where illegal activities conducted on one property have harmful spillovers to adjacent properties. In this case, the alleged property damage and personal injuries were instead exclusively the result of goods lawfully brought onto a single property. No nuisance claim has ever been based on such conduct.

Respondent's unprecedented public nuisance theory is not saved by the fact that it is based on some ill-defined notion of "promotion." The lawful sale of a product cannot be transformed into a nuisance claim by alleging that it misleadingly promoted some activity that was legal at the time of its promotion.

The point becomes still clearer given that, at common law, public nuisances generally were also criminal wrongs. *See, e.g.,* WILLIAM L. PROSSER,

HANDBOOK OF THE LAW OF TORTS § 88 (4th ed. 1971). Nothing of the sort occurred here. To the contrary, defendants are charged with having engaged in truthful and lawful advertising of a lawful product years before anyone was injured by faulty maintenance of the product—which, rather than the mere presence of lead paint, is what exposes children to lead (*see In re Lead Paint Litig.*, 924 A.2d 484, 501 (N.J. 2007); *see also* Cal. Health & Safety Code §§ 17920.10, 17980(c)(1), (3) (requiring proper maintenance of lead paints))—during a time when lead paint was endorsed in educational materials and included in specifications issued by the government of California. *See* 155 AA 46033 ("Lead pigments are among the most important pigments used in the manufacturer of paints," and "[w]hite lead" is "the fundamental ingredient in many interior and exterior finishes"); 155 AA 46806 (listing specifications); *accord* 45 RT 6703–6704. Far from being criminal, such conduct is protected by the First Amendment. *See* ConAgra Pet. 28–32; Sherwin-Williams Pet. 15–22.

It should come as no surprise that courts in other states have resoundingly rejected the public nuisance theory adopted by the California Court of Appeal. *See City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484; *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008). In some instances, liability was denied because of an utter absence of evidence that the defendants' actions caused the purchase of the lead paints in individual houses (*see City of Chicago*, 823 N.E.2d at 134; *City*

of St. Louis, 226 S.W.3d at 116)—a defect present here as well. Other courts stressed that the claims fail absent any showing that they involve an invasion of a public right. *See In re Lead Paint Litig.*, 924 A.2d at 501–502; *Lead Indus. Ass'n,* 951 A.2d at 454. Still other courts have pointed to the lack of control that the defendants have over the maintenance of the premises on which the danger lurked. *See In re Lead Paint Litig.*, 924 A.2d at 502; *Lead Indus. Ass'n,* 951 A.2d at 449.

The common thread in all these cases is the radical departure of these lead paint claims from traditional public nuisance theory. For example, the Rhode Island Supreme Court characterized this novel public nuisance theory as an "enormous leap" that is "antithetical to the common law" because public nuisance cases require an invasion of a public right in an indivisible resource such as air, water or a public right of way. *See Lead Indus. Ass'n,* 951 A.2d at 453, 455. The New Jersey Supreme Court similarly insisted that such a public nuisance theory "would far exceed any cognizable cause of action" for public nuisance. *In re Lead Paint Litig.*, 924 A.2d at 501. That court feared that if that new theory were accepted, "nuisance law would become a monster that would devour in one gulp the entire law of tort." *Id.* at 505 (internal quotations omitted).

II. CALIFORNIA'S DECISION ALSO DEPARTS FROM BASIC PRINCIPLES GOVERNING PRODUCT LIABILITY AND THE LAW OF MISREPRESENTATION

Respondent's "promotion" claim also implicates the law of products liability and misrepresentation.

The "public nuisance" theory adopted by the decision below violates basic principles governing these torts as well.

A. The Decision Below Violates Basic Principles Governing Products Liability

As the trial court and the New Jersey Supreme Court recognized, *see Cty. of Santa Clara v. Atl. Richfield Co.*, No. CV788657, 2001 WL 1769999, at *1 (Cal. Super. Ct. May 31, 2001); *In re Lead Paint Litig.*, 924 A.2d at 503, a claim based on the health risks created by lead-based paint products sounds in products liability rather than nuisance. The decision below, however, contradicts basic principles of products liability law.

Historically, products liability claims have been brought only against parties in the chain of distribution, generally those who either made or distributed defective products. *See, e.g.*, RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 4–7, 10 (1980); 5 OSCAR S. GRAY ET AL., HARPER, JAMES AND GRAY ON TORTS § 28.1 (3d ed. 2008). Products liability claims have never been brought against third parties such as trade associations or health experts that merely promoted the product. Moreover, California courts have "never held that a manufacturer's duty to warn extends to hazards arising exclusively from *other* manufacturers' products." *O'Neil v. Crane Co.*, 266 P.3d 987, 997 (Cal. 2012) (emphasis in original).

In the proceedings below, the California Court of Appeal oddly asserted that the "mere manufacture" of a dangerous product is far less important than the

affirmative promotion of the product. *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 529 (Ct. App. 2017) (quoting *Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 328 (Ct. App. 2006)). This assertion turns the entire field upside down. Quite simply, there is no way that tort law can discharge its essential accident prevention rationales by going after parties who are not, and may never have been, in possession of the dangerous instrumentality that caused harm. To maximize social welfare is to minimize the sum of accident costs and their prevention. *See* Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J. TORT L. art. 6, 1, 3–4 (2010); *see also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 19–28 (1960); G. WILLIAM LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 7 (1987). The California Court of Appeal's novel theory does neither. Ordinarily, the cost of accidents and their prevention is minimized, and social welfare maximized, only if liability is imposed on parties who have had or do have control over the harm causing product. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1, cmt. c (1998). In addition, in some cases liability is properly assigned to a downstream distributer because of its greater knowledge and control over the product in question and consequent ability to avoid defects—as with the proper storage of meat or dairy products. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A, cmts. b, h (1965); *see also Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J.,

concurring); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916) (Cardozo, J.).

Product liability law offers no possible justification for imposing liability on persons who merely promoted the use of a product, especially where, as here, that promotion occurred years and even decades before any injury. Such a promoter may have had no control over the product at the time of injury or, indeed, at any time. In addition, the promoter had in all likelihood *less* knowledge of local conditions and hence *less* ability to avoid the injury than the injured person—especially as all these injuries resulted from maintenance failures rather than the simple presence of the product, *see supra* p. 9.

Nor is there any way to limit the huge number of possible promoters who can be sucked into the vortex that liability for promotion would create. As noted above, *see supra* p. 9, the record in this case shows that, like countless other organizations, for many years the State of California promoted lead paint and, indeed, used it in the California State Capitol. *See* 155 AA 46806–46087. It is inconceivable that all these entities would be sued jointly, and wholly improper to arbitrarily identify one or even a few to bear the burdens for all. A clear rule of no liability is the only workable solution.

This conclusion is supported by additional considerations. As this case demonstrates, promotion of a product may be separated by vast stretches of time from the concrete sale, application or improper maintenance of the supposedly harmful products. Ordinarily, to impose and apportion liability, courts

must engage in expensive (and unreliable) inquiries into joint and multiple causation, which invite potential suits for contribution and indemnity. Unfortunately, by foregoing any causation requirement, the decision below subjects a huge range of parties—newspapers, governments agencies, charities, rating agencies—to arbitrary and disproportionate liability that may deter them from engaging in useful activities altogether.

B. The Decision Below Violates Basic Principles Governing The Law Of Misrepresentation

The decision below is equally flawed in explaining how its novel theory of liability meets the requirements of the tort of misrepresentation when there were no false statements, express or implied, about the safety of lead paint.

By hornbook law, the law of misrepresentation requires that a defendant made a false and material statement of fact to the plaintiff and that the plaintiff relied on that statement to his detriment. *See, e.g.*, RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 1051-52 (11th ed. 2016); Fleming James, Jr. & Oscar S. Gray, *Misrepresentation—Part I*, 37 MD. L. REV. 286, 289 (1977). A typical illustration is where a defendant decides to invest in worthless stock based on the seller's fraudulent misstatements, frequently made in face-to-face or phone conversations that were intended to, and did induce, prompt and immediate detrimental reliance.

Alternatively, these false statements may be made to the public at large, rather than to particular individuals, either as part of an initial public offering or in private sale over an exchange. In that context, the Supreme Court has held that reliance may be established based on a fraud-on-the-market theory. *See Basic Inc. v. Levinson*, 485 U.S. 224, 241–247 (1988). In addition, under modern securities law, federal and state governments have the right to stop publication of misrepresentations or issuance of shares to protect the integrity of the market. *See, e.g.*, 15 U.S.C. § 77h(b), (d); Uniform Securities Act 2002 § 306(a)(1), 7C U.L.A. 95 (2006).

None of the advertisements or circulars at issue in this case satisfies the law of misrepresentation because none contains false statements. Petitioners never denied that lead can be injurious to health or represented that lead paint poses no health risk at all. To the contrary, they merely encouraged the use of lead paints, which was legal at the time. For example, they participated in industry promotional campaigns by persuading lumber manufacturers to distribute brochures that recommended the use of lead paints, and door and window frame manufacturers to include labels recommending "the use of white lead and high-grade prepared paint." *ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d at 537 (internal quotations omitted). They also distributed brochures encouraging consumers and painters to use lead paints, *id.* at 538, advertised (truthfully) how well lead paints protect and beautify interior walls and wood work, *id.* at 540, and described their lead paint as "durable economical paint," *id.* at 541 (internal quotations omitted).

The California Court of Appeal found that petitioners were either aware or should have been aware of the dangers of lead paint, but did not disclose that fact, thereby suggesting that they implicitly misled consumers to whom, it must be stressed, the communications often were not directed. *Id*. at 536. But the gist of any misrepresentation claim is that the defendant has private knowledge on a matter on which the plaintiff is ignorant. That did not happen here. As the People's own expert conceded, petitioners had no hidden knowledge of the dangers of lead paint. 36 RT 5386. Moreover, the same public information concerning the dangers of lead paint that the decision attributed to petitioner was fully available to the California legislature, as well as everyone else, at the same time that it was available to petitioners. *See People v. Atl. Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *15 (Cal. Super. Ct. March 26, 2014) (discussing medical and scientific literature dating back to the early 1900s); *see also Pigeon v. W.P. Fuller & Co.*, 105 P. 976 (Cal. 1909) (upholding judgment that paint manufacturer failed to warn employee of danger of white lead used in paint). Indeed, as the trial court noted, one paint manufacturer in the early 1900s promoted its product on the ground that it "did *not* contain 'poisonous' white lead pigments." *Atl. Richfield Co.*, 2014 WL 1385823, at *16. If, in spite of this information, California did nothing to regulate the use of lead paint at the time, and in fact recommended its use, defendants cannot be deemed to have made actionable misrepresentations by a general commendation of their wares, without raising any health or safety issues.

No authority was ever cited for the contrary proposition.

There was no actionable misrepresentation here for another reason: respondent failed to present—and was not required to present—any proof of reliance. The California courts instead found that petitioners' statements were at least "a very minor force" in leading to the use of residential lead paint. *ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d at 544. That quoted phrase was ripped out of context: previously it has been applied only where the plaintiff had been admittedly *exposed* to defendants' products. *See, e.g.*, *Bockrath v. Aldrich Chemical Co., Inc.*, 980 P.2d 398, 403–404 (Cal. 1999). The contrast between the physical injury and misrepresentation cases is even more stark because, as the ConAgra petition points out (at 28), respondent stipulated that it had no evidence that any individual used lead paint in reliance on any promotional activity by any of the petitioners.

Nor was there any fraud on the market. That theory presupposes that the prices of publicly traded securities fully reflect all material and publicly available information about the securities. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. at 246. That is poles apart from this case where defendants did not put any false information into any market, and where information concerning the question at issue—the danger of lead—was already firmly in the public domain. Thus, imposing liability on petitioners here, in the absence of any false statement or reliance, contradicts basic principles of the law of misrepresentation.

The court below also departed from the established principles of misrepresentation by refusing to make any effort to cabin in the potential scope of liability. In his famous opinion in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), Benjamin Cardozo refused to hold accountants liable for damages caused to third parties by a negligent misrepresentation out of fear that accountants who received modest compensation for their work would be subjected to liability "in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 444. No market can survive when potential liabilities are so great that they could never be covered by any sustainable market rate of fees.

This case presents an even greater threat of indeterminate liability. Here, petitioners collected no fees. They committed no negligence, they uttered no falsehood, and no one detrimentally relied on their statements. Nevertheless, the decision below held them responsible for abating every home constructed before 1951 containing lead paint made by any one of hundreds of lead paint manufacturers, which, even in the ten cities and counties comprised in this action, will cost hundreds of millions of dollars.

III. THE CALIFORNIA DECISION'S RADICAL DEPARTURE FROM BASIC PRINCIPLES OF TORT LAW RAISES IMPORTANT CONSTITUTIONAL QUESTIONS THAT WARRANT REVIEW

Amici agree that the misapplied mishmash of nuisance, products liability and misrepresentation employed by the decision below is unconstitutional.

As both petitions demonstrate, imposing massive liability for conduct that is decades-old and was lawful when it occurred, without proof of any traceable injury or, indeed, any specific injury at all, violates due process. ConAgra Pet. 20–28; Sherwin-Williams Pet. 31–33. In addition, far from being justified by the fact that the decision imposes this liability for statements promoting the use of lead paint rather than its manufacture or sale, imposing this unprecedented liability based on speech absent any proof of reliance or of any knowing or negligent falsehood violates the First Amendment. ConAgra Pet. 28–32; Sherwin-Williams Pet. 21–22.

These constitutional violations are symptomatic of an even more profound error. The decision below is essentially a naked command that private parties contribute hundreds of millions of dollars to a government abatement project. This is inimical to the very governmental structure established by our Constitution. A fundamental aspect of that structure is embodied in the Takings Clause, whose core purpose is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the people as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). The decision below turns this organizing principle on its head. Rather than ensuring that government efforts to solve broad social problems are financed by the people as a whole, the decision allows courts and local government officials to impose the burden of such efforts on a small group of individuals or entities by merely proving that the group

was, only metaphorically, a "very minor force" in creating a problem. Even apart from violations of the specific guaranties in the Due Process Clause and First Amendment shown in the petitions, this naked assertion of state power violates our constitutional structure.

The assertion of this power in connection with lead is ironic because our constitutional structure has been especially successful in dealing with this problem. As the ConAgra petition notes (at 7), an epidemiologist at the California Department of Public Health characterized the current lead mitigation program as "one of the most significant health successes of the last half of the 20th century." 33 RT 4921. Although state and federal regulation mandated the use of lead-based paints in the early twentieth century, as scientific and medical knowledge developed and disclosed the dangers that exposure to lead poses to children, state and federal governments took effective action. In 1971, Congress passed legislation discouraging residential use of lead-based paint, *see* Lead-Based Paint Poisoning Prevention Act, Pub. L. No. 91-695, 84 Stat. 2078 (codified at 42 U.S.C. 4801 *et seq*.), and in 1978 the Consumer Products Safety Commission banned altogether the use of residential lead-based paint, *see* 42 Fed. Reg. 44192–44201 (Sept. 1, 1977). In 1992, Congress enacted legislation that created a comprehensive scheme to "eventually eliminate … the risk of lead poisoning in children from pre-1978 structures." *In re A Cmty. Voice*, 878 F.3d 779, 782 (9th Cir. 2017) (discussing 42 U.S.C. § 4851 *et seq*.). Moreover, states enacted legislation dealing with lead exposure and lead-based paint in particular, *see,*

e.g., Cal. Health & Safety Code § 105275 *et seq.*; *id.* §§ 17920.10, 17980; *id.* § 124125 *et seq.*, often financed by taxes and fees imposed on industries producing lead, *see id.* § 105310. Plainly, there is no need to depart from our basic constitutional structure and impose on a small group of companies the burden of dealing with lead-based paint on an unprecedented and unconstitutional mishmash of misapplied tort principles.

Nevertheless, if the novel public nuisance theory adopted by the decision below is permitted to stand, state and local governments will face virtually irresistible political pressure to use it. Because the cities and counties that brought this case acted through contingency counsel, they faced little cost in pursuing their novel "public nuisance" theory. The ConAgra petitioners are undoubtedly correct in observing (at 33) that few politicians would or could resist the temptation of avoiding the difficult and often politically costly task of increasing taxes by securing such funds through litigation against a small of group of businesses, many of which may be based out of state. Indeed, once the California Court of Appeal allowed respondent's public nuisance claim to proceed, numerous cities and counties joined the suit, ConAgra Pet. 11 n.1, and copycat suits seeking to force industry groups to fund solutions for climate change and other problems already have been brought, ConAgra Pet. 32–33; Sherwin-Williams Pet. 25–26. If the unprecedented public nuisance theory adopted by the decision below is allowed, it will be used.

Thus, our constitutional structure can be restored only by declaring that theory unconstitutional, and that should be done now before more industries are ensnared in expensive and wasteful decade-long litigation threatening to bankrupt them.

CONCLUSION

The petitions should be granted.

Respectfully submitted,

Richard A. Epstein
800 North Michigan Ave.
Apartment 3502
Chicago, IL 60611

DANIEL H. BROMBERG
Counsel of Record
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
555 Twin Dolphin Dr.
5th Floor
Redwood Shores, CA 94065
(650) 801-5000
danbromberg@
quinnemanuel.com

Counsel for Amici Curiae

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