Nos. 18-84, 18-86

In the Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY, ET AL.,
Petitioners

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

THE SHERWIN-WILLIAMS COMPANY
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA

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

BRIEF OF *AMICI* NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, COALITION FOR LITIGATION JUSTICE, INC., AND PLASTIC PIPE AND FITTINGS ASSOCIATION IN SUPPORT OF PETITIONERS

Philip S. Goldberg
Counsel of Record
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400

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Of Counsel

Linda E. Kelly
Peter C. Tolsdorf
Leland P. Frost
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 Street, N.W., Suite 700
Washington, D.C. 20001
Counsel for National Association of Manufacturers

Elizabeth Milito
Karen Harned
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W. Suite 200
Washington, D.C. 20004
Counsel for NFIB Small Business Legal Center

Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
Counsel for Coalition for Litigation Justice, Inc.

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INTEREST OF *AMICI CURIAE*[1]

Amici have a substantial interest in ensuring that businesses sued under civil liability systems are guaranteed constitutional protections. As explained herein, *amici* believe the lower courts' decisions violated Petitioners' due process and First Amendment rights, opening the door to unbounded government-sponsored public nuisance actions targeting product manufacturers and sellers for doing nothing more than lawfully engaging in their spheres of commerce. If the rulings stand, *amici*'s members would be adversely impacted by tort lawsuits seeking massive, unprincipled, and often industry-wide liability.

The National Association of Manufacturers (NAM), the largest manufacturing association in the United States, represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all U.S. private-sector research and development. The NAM is the voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

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[1] Pursuant to Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The parties received timely notice of amici's intent to file the brief and have filed a blanket consent to the filing of *amici* briefs.

The NFIB Small Business Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Coalition for Litigation Justice, Inc. is a nonprofit association formed by insurers in 2000 to address and improve the toxic tort litigation environment.[2]

The Plastic Pipe and Fittings Association is a North American trade association comprised of member companies that manufacture plastic piping, fittings and solvent cements for plumbing and related applications, or supply raw materials, ingredients or machinery for the manufacturing process

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decisions below will change how local governments can manage public risks by allowing them to impose vast, new obligations on private parties in ways that violate the parties' constitutional rights. Specifically, the liability theory expressed here seeks to subject manufacturers and others in the stream of

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[2] The Coalition includes Century Indemnity Company; San Francisco Reinsurance Company; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

commerce to open-ended, industry-wide liability for harms associated with lawful, non-defective products. The risks that give rise to these harms are often inherent to the products, or created by product misuse, improper disposal, or, as here, deterioration after they outlived their useful lives. Because tort law does not impose manufacturer or seller liability in these situations, the courts took unconstitutional shortcuts to create liability. *Amici* urge the Court to grant the Petitions to address this injustice and because lawsuits with comparable constitutional deficiencies are already being filed around the country.

Here, the California courts subjected the few remaining companies involved in the lead paint industry some 70 to 100 years ago to liability for all lead paint applied in homes and other buildings in Plaintiffs' jurisdictions. Petitioners have been ordered to abate the old paint, regardless of whether they made the paint to be remediated, when the paint in a building was sold, or whether third party misconduct created a particular lead hazard. The lower courts held that so long as there was general knowledge that lead paint had risks, including for children, and Petitioners still promoted its sale for use in homes—a standard that could apply to many chemicals and lawful products—there is no defense to liability.

The California lower courts purported to ground this expansive liability in public nuisance theory, but tort law does not allow such unprincipled liability. As detailed below, when Plaintiffs could not meet their burdens of proof, including the core elements of causation and wrongdoing, the courts jettisoned the requirements. The resulting cause of action, therefore, lacks sufficient standards for ensuring Petition-

ers' constitutional due process rights. Further, the courts based their liability finding in part on truthful commercial speech and lawful participation in a trade association, which are protected under the First Amendment and not indicative of tortious conduct. The trial court's rationale for allowing these shortcuts was that it did not want to "turn a blind eye" to the problem of lead poisoning. *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014).

The allure of such a legal theory for local governments is understandable. As here, the lawsuits are generally funded by contingency-fee counsel and target unpopular products. Thus, they present little risk for government lawyers and elected officials who bring them with the potential to generate revenue for solving problems for their constituents. As detailed below, this type of "super tort" has long been sought, including under the tort of public nuisance. However, until this point, courts and legislatures broadly rejected attempts at such liability. The failure of the California Supreme Court to stop this lawsuit has already generated other end-game oriented litigations against manufacturers, including to pay for local infrastructure projects to address impacts of global climate change, remediation of water pollution caused by third parties, and societal costs associated with illicit use of opioids and heroin.

There is no legal, economic, or constitutional rationale for turning manufacturers and other employers into insurers for product externalities or downstream hazards. If, when, and under which circumstances these entities should be responsible for contributing to these costs is a determination best made

by legislatures, which can balance the interests involved and assign responsibility in targeted, principled ways. For these reasons, *amici* respectfully urge the Court to grant the Petitions.

ARGUMENT

I. THE LIABILITY THEORY ADOPTED BY CALIFORNIA'S LOWER COURTS VIOLATES THE CONSTITUTIONAL RIGHTS OF PETITIONERS

The Court should grant the Petitions because, under the law of this case, local governments would be empowered to sue businesses for making, marketing or selling products based solely on the fact that the products came with publicly known risks. Negligence and products liability were the focus of the initial attempts at such a "super tort." When these torts did not yield their desired results, the advocates turned to public nuisance, a little used and often misunderstood theory of liability. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 552-55 (2006).

A. There Has Been a Sustained Campaign to Turn Public Nuisance into a "Catch-All" Tort for Social and Environmental Issues

The tort of public nuisance has centuries of jurisprudence defining its purpose, elements and boundaries. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003). In general terms, a public nuisance is an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). For more than 200 years of American

jurisprudence, the tort has been applied to a narrow set of circumstances, namely when defendants engaged in common law crimes. *See Tull v. United States*, 481 U.S. 412, 421 (1987) (the tort provides "a civil means to redress a miscellaneous and diversified group of minor criminal offenses") (internal quote omitted); Restatement (Second) of Torts § 821 cmt. e (1979) (explaining public nuisances have no public benefit).

While common law courts have applied the tort in slightly different ways, the essence of public nuisance liability has remained consistent, requiring (1) the implication of a "public right"; (2) unreasonable conduct by the tortfeasor in interfering with that right; (3) control of the nuisance; and (4) proximate cause between defendant's unreasonable conduct and the public nuisance. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 452-53 (R.I. 2009) (calling these elements "essential" to a public nuisance claim).

In the 1960s, some attorneys sensed the power of public nuisance law and campaigned to transform the tort from a restrained government enforcement tort into a tool for requiring businesses to remediate environmental conditions, regardless of fault. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). They pursued changes to the Restatement (Second) Torts § 821B that would have, in their words, "[broken] the bounds of traditional public nuisance." *Id.* Most relevant here, they tried to eliminate the need to prove wrongful conduct so courts could establish liability even when federal, state and local laws permitted the conduct. *See id.* Although fully presented, none of their changes were

included in the black letter of the Restatement. The Restatement makes clear that "[i]f the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it." Restatement (Second) of Torts § 821A cmt c. (1979).

The first test case to try to expand the scope of public nuisance law failed. In *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), class action plaintiffs sued corporations that sold products or engaged in activities that were alleged to have caused smog to form around Los Angeles. The California court, in dismissing the claims, appreciated their inconsistency with traditional public nuisance law and the proper role of the legislature, not the judiciary, in making regulatory decisions. It determined that plaintiffs were "asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court." *Id.* at 645. Granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id*. at 644.

The strategy of trying to leverage governments to bring catch-all public nuisance actions began in the 1980s and 1990s. These cases were often generated through the aid and encouragement of contingency fee lawyers against manufacturers of products that were "unpopular" or could be used, misused, disposed of, or allowed to deteriorate in ways that could create harm. *See, e.g., Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984), *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *Tex-*

as v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) (tobacco); *City of St. Louis v. Cernicek*, 145 S.W.3d 37 (Mo. Ct. App. 2004) (guns).

The first such lead paint case was brought in 1999, when the personal injury law firm of Motley Rice convinced the then Rhode Island Attorney General to hire the firm to bring a government public nuisance action against former lead paint companies. By cloaking their claims in the force and legitimacy of the State's police power, plaintiffs sought to take advantage of the belief that "the participation of states and cities in a lawsuit brings credibility and a 'moral authority' to the cause." Bryce A. Jensen, *From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries*, 86 Cornell L. Rev. 1334, 1370 (2001). Armed with the power of the sovereign, Motley Rice took the litigation under a contingency fee agreement and sought the costs of abating lead paint in homes and buildings throughout the state, which it estimated at $4 billion. *See Paint Maker Seeks Ruling on Judge in Lead Case*, Providence J., Aug. 19, 2005, at B1.

Over the years, government public nuisance actions have had occasional successes. For example, a New York court allowed a public nuisance claim over water pollution against a business that neither contributed to the pollution, nor controlled the polluted land. *See State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (N.Y. Sup. Ct. 1983). The court admitted that determining responsibility was "a political question to be decided in the legislative arena," but stated candidly that "[s]omeone must pay to correct the problem." *Id.* at 977. The Ohio Supreme Court, in allowing the theory against gun manufacturers,

stated that by "allowing this type of litigation to go past the pleading stages," the companies could be forced to the negotiating table on regulatory changes. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1151 (Ohio 2002). Such end-game rulings undermine the judiciary's impartiality and due process protections against unprincipled liability.

Most courts have expressed these concerns, appreciating that removing wrongful conduct and causation from public nuisance theory would be as extreme as removing breach and causation from negligence. The result would "give rise to a cause of action . . . regardless of the defendant's degree of culpability." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (N.Y. App. Div. 2003).

Lead paint litigation has followed a similar pattern. Some courts, like here, initially allowed these theories to result in liability. *See*, *e.g.*, *State v. Lead Ind. Ass'n, Inc.*, 2001 WL 345830 (R.I. Super. Ct. Apr. 2, 2001); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888 (Wis. Ct. App. 2004). But, state high courts and legislatures have generally overturned these rulings. *See Lead Indus. Ass'n*, 951 A.2d at 428; *In re Lead Paint Litig.,* 924 A.2d 484 (N.J. 2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); Ohio Am. Sub. S.B. 117

(2006) (codified at Ohio Rev. Code Ann. §§ 2307.71 and 2307.73). The Rhode Island Supreme Court, in overturning a trial court victory for the plaintiffs, found that "basic fairness dictates that a defendant must have caused the interference to be held liable for its abatement." *Lead Indus. Ass'n*, 951 A.2d at 451. The New Jersey Supreme Court agreed, stating, "were we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it." *In re Lead Paint Litig.*, 924 A.2d at 501.

B. The Courts' Creation of a Standardless, "Catch-All" Tort Violates Petitioners' Due Process and First Amendment Rights

The California lower courts disregarded these cautions, allowing public nuisance liability to attach based solely on the lawful promotion of a product that had general publicly known, inherent risks. They held that, irrespective of regulatory approvals at the time, so long as there was general knowledge that lead paint could be harmful, including to children, it was unlawful for Petitioners to have promoted lead paint for interior use. *See People v. ConAgra Grocery Prods. Co.*, 17 Cal.App.5th 51 (Cal. Ct. App. 2017). Thus, liability is based on courts' judgment today that lead paint, categorically, should not have been sold for use in homes before 1950. The companies must now remove all lead paint applied before 1950. *See id.* at 119. It is irrelevant whether other companies made, sold or promoted the paint to be remediated or when, where and for how long Petitioners made, sold or promoted their paint.

The Court should grant the Petitions because the lower courts took unconstitutional shortcuts to reach these conclusions. The courts purported to ground the rulings in state public nuisance theory. But, because public nuisance is an activity-based tort, California has allowed a manufacturer to be subject to such liability only if it instructed the end-user to use the product in an unlawful way that created the nuisance. *See County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 309 (Cal. Ct. App. 2006). The courts did not apply this standard; they failed to require this wrongdoing or causation, depriving Petitioners of their due process rights.

First, the courts claimed that liability was premised on Petitioners' knowledge that lead paint was harmful to children, but allowed liability without requiring "that each defendant had *actual* knowledge of the hazard that was created by the use of lead paint on homes." *See Atlantic Richfield Co.*, 2014 WL 1385823, at *9 (emphasis in original). Under the "*constructive* knowledge" standard, the trial court found "there is ample authority to hold defendants liable." *Id.* (emphasis in original). It stated that it has been known "[s]ince antiquity" that lead is harmful and that public literature during the early twentieth century identified hazards in lead paint, including for children. *Id.* at *10. The Court of Appeal took issue with the constructive knowledge standard, but nevertheless allowed the trial court's determination to stand, stating its deferential standard of review "precludes us from drawing contrary inferences." *See ConAgra*, 17 Cal.App.5th at 88. It also cited to public documents to reach this conclusion.

Federal and state governments, therefore, had the same constructive or inferred knowledge of the risk of lead paint to children and did not make the regulatory decision to ban its use in homes. To the contrary, governments specified lead paint for interior use during this time because of its benefits, namely that it was washable, facilitated sanitation, and stopped the spread of disease. *See* Sherwin-Williams' Pet. for Writ of Cert., App. F at 385a-388a. Government use of a product with comparable knowledge as Petitioners undermines the notion that Petitioners tortiously disregarded public health in selling lead paint at that time. As risks of flaking and peeling lead paint became appreciated in the 1950s, the companies, medical community, and government took steps *together* to remove lead from interior household paint.[3]

The trial court set aside the developing understanding of lead paint risks as being "of no moment." *Atlantic Richfield Co.*, 2014 WL 1385823, at *9. It stated: "All this says is medicine has advanced; shouldn't we take advantage of this more contemporary knowledge to protect thousands of lives?" *Id.* at *53. Evolving scientific and societal knowledge and tolerance for risks are common to many products. The Court's guidance is needed because mere knowledge of risk does not provide sufficient notice

[3] *See* American Standards Ass'n, American Standards Specifications to Minimize Hazards to Children from Residual Surface Coating Materials (Z66.1-1955) (approved Feb. 16, 1955) (setting forth a voluntary standard worked on by industry and American Academy of Pediatrics that effectively removed lead pigments from interior paints).

for the liability sought here, raising serious due process concerns over this liability theory.

Second, the courts did not require Petitioners to provide instructions to homeowners to use or dispose of the paint unlawfully, which was the second prong of California's wrongful conduct test. Rather, the courts found this prong could be satisfied solely by Petitioners' "affirmative promotion of lead paint for interior use" and "participation in trade-association-sponsored lead paint promotional advertising." *ConAgra*, 17 Cal.App.5th at 91-93. The courts reasoned that promoting a product with known hazards is unreasonable because it "implies" the product is completely safe. *Id.* The courts also did not require Plaintiffs to show that anyone relied on this advertising, allowing the trial court to "reasonably infer" that some consumers must have heeded the advertising when deciding to use interior lead paint. *Id.* at 103.

This case, therefore, raises key First Amendment issues for the Court to consider in addition to the due process concerns with basing liability on truthful commercial speech. Many products, from alcohol to cars to candy, have inherent risks and are the subject of truthful promotion that do not catalogue their risks. If companies lawfully promote these products without mentioning known risks, including liver disease, car crashes, and diabetes, does that make the manufacturers responsible for all costs associated with these harms? This Court has already held that states do not have "broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995). The Court should

grant the Petitions because of the broad impact liability here would have on commercial speech.

Third, in redefining the tort of public nuisance the courts eliminated the bedrock principle that a person can be liable only for harms that he or she caused. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 380 (1996) (defining causation as but-for defendants' tortious conduct the alleged injuries would not have occurred, and the injuries must be closely related such that a reasonable person would see it as a likely result of her conduct); Dan B. Dobbs, *The Law of Torts* § 180, at 443 n.2 (2001) ("proximate cause limitations are fundamental and can apply in any kind of case"). Here, the Court of Appeal proffered that under its promotion-based liability theory, "the identity of the manufacturer of [any] lead paint is irrelevant." *ConAgra*, 17 Cal.App.5th at 108. Plaintiffs need not "identify the specific location of the nuisance or a specific product sold by each such Defendant." *Atlantic Richfield Co.*, 2014 WL 1385823, at *44. Petitioners are to be jointly and severally liable for remediating all lead paint regardless of who sold which lead paint, when, or where.

The due process concerns with putting all manufacturers into a causation Cuisinart, where causation for individual companies is blended together, is evident by the results. As Petitioners point out, hundreds of companies sold lead pigment and paint in California, each with a distinct history of when it produced and/or promoted their products and in what forms. Yet, Petitioners are being forced to abate all lead paint from all homes in Plaintiffs' jurisdictions, as well as all lead in dust coming mostly from non-paint sources. Thus, the overwhelming

majority of the lead Petitioners must abate was sold by competitors, sometimes after their own manufacture of lead paint ceased. The Court should ensure that any injury is traceable to a Petitioner and that Plaintiffs establish causation for each Petitioner.

Labeling this case a "representative public nuisance action" does not absolve Plaintiffs of the due process and First Amendment concerns this case raises. Industry-wide, retroactive liability for truthful promotion of an inherently hazardous product does not provide companies with sufficient notice of when regular commerce gives rise to liability or how to avoid such liability. *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness . . . dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). "[S]evere retroactive liability on a limited class of parties that could not have been anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience" stretches constitutional limits. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998). The result is the "arbitrary deprivations of property" this Court warned against when "well-established common-law protections" are compromised. *Honda Motor Co., LTD. v. Oberg*, 512 U.S. 415, 430 (1994).

The Court should grant the Petitions to provide a check on local governments who would violate constitutional protections of often out-of-state companies to make them pay for local concerns.

C. Basing Liability on Membership in Trade Associations Further Infringes on Petitioners' Constitutional Rights

Of additional concern to *amici* is the Court of Appeal's use of a trade association's promotional activities against its members. The Court of Appeal asserts that Petitioners can be subject to liability based on their participation in the Lead Industries Association's promotion of white lead paint. *See ConAgra*, 17 Cal.App.5th at 92-95. But the court does not properly define when such liability can attach, presuming the promotional activities were even actionable. They stated only that Petitioners attended meetings, received transcripts of meetings where lead poisoning was discussed, or funded promotional campaigns for lead paint. *See id.*

This liability theory contravenes the Court's longstanding doctrine that "[c]ivil liability may not be imposed merely because an individual belonged to a group" or had knowledge of the group's activities. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Id.*; *see also* The Law of Associations, Chapter 2B, Association Membership Issues (2017) ("Plaintiffs must demonstrate a 'specific intention' on the part of this Defendant to further the aims or adopt the actions of the association.").

The Court should grant the Petitions to enunciate standards for when it is constitutionally permissible to impute an association's activity to a member. Otherwise, this case will chill trade association

membership and activities. Trade associations have proven integral to businesses because they allow businesses to pool resources and take advantage of efficiencies. They also facilitate health and safety standards, educate members on regulatory compliance, and work with members to educate policymakers on the impact of legislation, as well as many other activities important to responsibly engage in today's marketplace. If businesses opt out of trade associations for fear of liability, the downsides will be felt by consumers, employees, and regulators.

II. THIS CASE HAS SPAWNED A NEW WAVE OF GOVERNMENT PUBLIC NUISANCE LITIGATION LACKING CONSTITUTIONAL FOOTING

The absence of clear standards for liability has created the exact type of "super tort" many courts cautioned against in rejecting similar litigation. *See Johnson County, by and through Bd. of Educ. of. Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (rejecting such liability because governments could "convert almost every products liability action into a nuisance claim"); *City of Chicago v. American Cyanamid Co.,* 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003) (appreciating that Chicago "deliberately framed its case as a public nuisance action" to try to get around constraints of the American legal system). Under these theories, litigation could be filed at the whim of any local, county, or state attorney–and contingency-fee counsel they may hire–any time a product has been used, misused, disposed of improperly, or not properly maintained and became associated with a hazard.

To this end, the California courts appeared to put out the welcome mat for such filings, taking "judicial notice of the fact that drugs, facilities, foods, and products of all kinds that were at one time viewed as harmless are later shown to be anything but." *Atlantic Richfield*, 2014 WL 1385823 at *53. Local governments have accepted this invitation, filing new public nuisance lawsuits in California and other states seeking money from businesses to address a variety of environmental or social concerns. *See* Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 379-388 (2017) (detailing this trend).

Since the trial court's ruling in this case, three major deep pocket public nuisance initiatives invoking comparable tort theories have been launched. In 2017, local governments began suing dozens of fossil fuel producers over lawful sales and promotions of oil, gas, and coal. *See* Manufacturers' Accountability Project, Manufacturers' Center for Legal Action (providing detailed background on this litigation).[4] The lawsuits claim that these companies can be subject to liability for knowingly selling and promoting a product that contributes to global climate change. Consequently, they must pay for seawalls and other infrastructure projects allegedly needed to abate the impacts of climate change. The lawsuits were first filed by eight California communities and now have been filed by New York City, Boulder, Colorado, and King County (Seattle) in Washington, among others. *See* John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, N.Y. Times, Apr. 18,

[4] http://mfgaccountabilityproject.org/.

2018.[5] The private organizers and funders of the litigation are actively recruiting other governments to file lawsuits, so more such litigation can be expected.

Several West Coast governments have sued Monsanto, a former manufacturer of polychlorinated biphenyls (PCBs), to pay to remove PCBs from local waterways. *See* John Breslin, *West Coast 'Super Tort' Against Monsanto Could Spread to Other States*, Forbes (Jan. 11, 2017).[6] Monsanto years ago manufactured and sold PCBs to other companies that used them in transformers, paint mixtures, and other products as fire retardants. As the part supplier, Monsanto did not control the final products, where they were sold, or how they were used or disposed. Also, as with lead paint, the appreciation for risks associated with PCBs developed over time and PCBs were banned in the 1970s. *See* Toxic Substances Control Act, 15 U.S.C. § 2605(e) (1976). Courts have echoed this case that public nuisances could be defined as the "production, marketing, and distribution" of a chemical, not the act of polluting which was done entirely by third parties. Order Granting in Part and Denying in Part Defendants'

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[5] *See* Complaint, *City of New York v. BP, P.L.C.*, No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, No. 2018 CV30349 (Colo. Dist. Ct. Apr. 17, 2018); Complaint, *King Cty. v. PB P.L.C.*, No. 18-2-11859-0 (Wash. Super. Ct. May 5, 2018); *see also* Climate Change Litigation Databases, Sabin Center for Climate Change Law, Columbia Law School, at http://climatecasechart.com (categorizing the litigation).

[6] https://www.forbes.com/sites/legalnewsline/2017/01/11/ west-coast-super-tort-against-monsanto-could-spread-to-other-states/#61da5db176.

Motion to Dismiss for Failure to State a Claim, *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164, at *20 (E.D. Wash. Oct. 26, 2016); *see also* Peter Hayes, *Is the Public Nuisance Universe Expanding*?, Bloomberg BNA (Jan. 31, 2017).[7]

A third series of claims involves governments suing pharmaceutical manufacturers, distributors, and pharmacies over costs associated with fighting prescription opioid abuse. *See*, *e.g.* Rachel Graf, *Ky. AG Hires Motley Rice, Others in Opioid Fight*, Law360 (Sept. 22, 2017).[8] Several years ago, individuals brought personal injury claims against opioid manufacturers, but courts concluded that responsibility for prescription drug abuse largely rested with physicians who overprescribed the painkillers and individuals who took the drugs illegally. *See* Max Mitchell, *Can Opiate Litigation Ever Be the New Mass Tort?*, Legal Intelligencer (Mar. 31, 2017).[9] In reframing the litigation under public nuisance theory, plaintiffs blamed manufacturers, distributors, and pharmacies for generating a marketplace in which opioid addiction could arise. *See id.* The lawsuits sought money for fighting opioid addiction and, in some cases, heroin addiction as well. *See, e.g., West Virginia v. McKesson Corp.*, No. 16-cv-01772, 2016 WL 843443 (S.D. W. Va. Feb. 23, 2016).

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[7] https://www.bna.com/public-nuisance-universe-n57982083122/.

[8] https://www.law360.com/articles/966930/ky-ag-hires-motley-rice-others-in-opioid-fight.

[9] http://www.law.com/thelegalintelligencer/almID/1202782732124.

As with here, the opioid lawsuits do not allege objective tortious misconduct. Richard Scruggs, a former plaintiffs' attorney, explained that governments should avoid fault-based theories, focusing on "only who should pay as between the general public and the industry whose otherwise legal products caused the epidemic." *See* Richard Scruggs, *Are Opioids the New Tobacco?*, Law360 (Sept. 18, 2017).[10] As with the other litigations discussed herein, these lawsuits started in California under the theories in the case at bar, but spread to governments around the country. *See* Scott Glover & Lisa Girion, *Counties Sue Narcotics Makers, Alleging 'Campaign of Deception'*, L.A. Times (May 21, 2014). There are more than sixty opioid lawsuits, with each aimed at some twenty manufacturers, more than a dozen distributors, and a few pharmacy chains.

There is nothing unique about these products. For example, what would stop a court from forcing a convenience store that sells drinks to abate all litter in a municipality solely because people, including those who bought drinks from other stores, improperly discarded bottles? Also, could a seller of sugar or candy products be subject to public nuisance liability for tooth decay? The Court should grant the Petitions so manufacturers and downstream companies are not ATMs, tapped whenever people used or neglected a product and created a risk of harm.

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[10] https://www.law360.com/articles/962715.

III. MANAGING PUBLIC RISKS ASSOCIATED WITH INHERENTLY HARMFUL PRODUCTS SHOULD REMAIN A LEGISLATIVE AND REGULATORY MATTER

The "public risk" cases discussed in this brief expose the weakness of the judiciary to administer cases where there is no objective wrongdoing. *See* 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). With lead paint and PCBs, the regulators acted and banned the products. There are many products, including fossil fuels and opioids, where risks are known and deemed acceptable. This case, therefore, implicates the balance among the branches of government as to how to regulate risk associated with the manufacture, sale and promotion of lawful, non-defective products.

A predicament arises for companies that manufacture chemicals and other products in reliance on government regulations setting acceptable exposure levels. Like blood lead levels for children in homes, government agencies regulate maximum exposure levels for many chemicals and other products. Companies that sell these products must be able to rely on the knowledge of the time and government guidelines, including when regulations evolve based on new scientific studies or public acceptance of known risks change. Category liability should not ensue, including when a product is subject to increased restrictions. Massive, uncertain retroactive liability in these circumstances would chill innovation and deprive the public of important new technologies.

With respect to lead paint, California has strong laws for old, lead-based interior paints that property owners and landlords must follow. These regulations

have been effective in managing risks posed by deteriorated lead-based paints. This is not to say that manufacturers may not have post-sale responsibilities. Legislators and regulators can make such decisions as public risks become known and validated. They can regulate a product's manufacture, sale, and use; remove a product from the market; or tax a product to generate revenues for programs to alleviate harms. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (setting aside federal public nuisance claims and deferring to Congress and regulators as "better equipped to [regulate emissions] than individual district judges issuing ad hoc, case-by-case" decisions).

It is understandable that the desire to regulate an industry or create a revenue source can be a powerful motivator for a local government to bring a catch-all public nuisance action. The Court should grant the Petitions to provide a needed check on this unprincipled liability. The lack of standards in this case transcends any state's tort law and infringes on the constitutional rights of Petitioners to due process, as well as free speech and association.

CONCLUSION

For these reasons, *amici curiae* respectfully request that this Court grant the Petitions.

Respectfully submitted,

Philip S. Goldberg
Counsel of Record
SHOOK, HARDY & BACON L.L.P.

1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400
pgoldberg@shb.com
Counsel for Amici Curiae

Of Counsel

Linda E. Kelly
Peter C. Tolsdorf
Leland P. Frost
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 Street, N.W., Suite 700
Washington, D.C. 20001
Counsel for National Association of Manufacturers

Elizabeth Milito
Karen Harned
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W. Suite 200
Washington, D.C. 20004
Counsel for NFIB Small Business Legal Center

Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
Counsel for Coalition for Litigation Justice, Inc.

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