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Honorable Chief Justice
Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: Amicus Letter of National Federation of Independent Business Small Business Legal Center in Support of Petition for Review of *The People of the State of California v. Atlantic Richfield Co., et al.*, Court of Appeal Sixth Appellate District Case No. H040880, Supreme Court of the State of California Case No. S246102

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, the National Federation of Independent Business Small Business Legal Center ("NFIB") submits this amicus letter in support of the petition for review by defendants and petitioners ConAgra Grocery Products Company, NL Industries, Inc., and The Sherwin-Williams Company ("the Companies" or "Petitioners").

NFIB represents nearly 23,000 California small businesses. The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the NFIB. NFIB has a substantial interest in ensuring that California's civil justice system is fair, follows traditional tort law rules, and promotes sound public policy.

The decision of the Court of Appeal opens the door to potentially unbounded public nuisance actions targeting product manufacturers and sellers, many of which may be small businesses, for products sold long ago. The decision, if allowed to stand, will create unreasonable risks over important, every day aspects of running a small business, including managing risks inherent to a product despite its overall benefits, purchasing insurance for litigation exposure to create a stable work place, and joining trade associations to gain the benefit of collective resources.

Why This Court Should Grant Review

Many products, including household cleaners and other chemicals, carry some risk, particularly when misused, disposed of improperly, or allowed to deteriorate after outliving their useful product lives. Promoting these products, even based on the knowledge of such a risk, has never created tort liability, particularly under a public nuisance theory. If there is no design or warning defect, the risk is often mitigated, as here, through regulating the conduct of end-users, not imposing liability on sellers. To this end, 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. Shifting liability to sellers undermines these regulations by allowing users to avoid responsibility.

Liability for a manufacturer or seller must be based on more than promoting a lawful product that has inherent risks. Here, the hazard associated with lead-based paint was ultimately deemed unacceptable, and the industry largely withdrew the product on its own. Certainly, appreciation of a product's risk can change with science and social acceptance norms, but such changes should not be the foundation for retroactive liability. (*See People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014) [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."].) Many highly responsible businesses could be sued under these theories even when engaging in proper sales and promotions or making decisions to curtail a product or service based on new information. The Court should grant review to clarify the standards that must be met before one can be exposed to such broad liability.

If courts follow the expansive theories in the Court of Appeal's opinion, they could force a business to pay the costs of remediating a site regardless of wrongdoing or whether the site ever contained that business's products. What would stop a court from forcing an independent convenience store that sells drinks to abate all litter in a municipality solely because it is foreseeable that

people, including those who bought drinks from other stores, will improperly discard empty bottles? Could a seller of sugar or candy products be subject to public nuisance liability for general tooth decay? Would a car dealer or auto mechanic be able to advertise new or used cars knowing the brakes will eventually fail? Any such liability would be unprincipled, unbounded, and unavoidable for businesses engaged in many economic sectors. Yet, plaintiffs' lawyers can argue they are logical extensions of the theories underpinning liability in this case.

Many small businesses cannot afford this type of far-reaching liability exposure. Small businesses, in particular, rely on commercial general liability ("CGL") insurance policies to cover their liability risks. Affordable insurance allows them to create a stable workplace for employees while safeguarding against potential injury. The liability exposure under the theories advanced here, though, may not be insurable. Some insurers assert that CGL policies do not cover liability for remediating public nuisances: a public nuisance is not an "accident" as defined in CGL policies, the non-physical injury alleged in a public nuisance claim does constitute "loss of use" as defined in CGL policies, or public nuisance liability could fall under the pollution exception included in many CGL policies.

The joint and several liability aspect of the Court of Appeal's opinion is particularly troubling from an insurance perspective. Such industry-wide liability runs afoul of basic insurance principles. The "insurer is no longer merely insuring the risk created by his insured individual (which he can still control), but also the risk caused by all others. Joint and several liability then amounts to a system where insurers can no longer accurately calculate premiums and may have difficulties in correctly calculating the amount of reserves to be set aside. The problem especially arises [as here] where no recourse is possible because other contributing tortfeasors cannot be found or are insolvent and therefore judgment proof." (Michael Faure, *Attribution of Liability: An Economic Analysis of Various Cases*, 19 Chi.-Kent L. Rev. 603 (2016).)

Finally, of particular concern to NFIB and its members is the Court of Appeal's use of a trade association's promotional activities against its members. The Court of Appeal asserts that defendants can be subject to liability based on their participation in the Lead Industry Association's promotion of white lead paint. But the court does not clearly define when such liability can attach, stating only that Defendants attended board meetings or received transcripts of meetings where lead poisoning was discussed or funded or otherwise "participated" in the promotional campaigns. (See Slip Opn., pp. 39-48.) This position contravenes long-standing legal doctrine that an association is a distinct legal entity from its members. To impute an association's activity (even if the activity is actionable) to a member, that member must have specifically authorized or ratified the association's tortious conduct. (See *Chavers v. Gatke Corp.* (2003) 107 Cal.App.4th 606.)

The U.S. Supreme Court has been clear that "[c]ivil liability may not be imposed merely because an individual belonged to a group. . . . 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." (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 920.) Indeed, even knowledge of illegal activity does not make the member liable. "Plaintiffs must demonstrate a 'specific intention' on the part of this Defendant to further the aims or adopt the actions of the association." (See The Law of Associations (2017) Chapter 2B, Association Membership Issues.) This Court should make clear the standards that must be met to establish liability based on trade association conduct.

If the Court of Appeal's ruling is allowed to stand, the result could very well lead to chilling trade association membership and activities. Trade associations have proven to be integral to businesses, large and small, because they allow businesses to pool resources to take advantage of efficiencies. In addition to paying for industry promotions, as discussed in this case, trade associations facilitate health and safety standards, educate members on regulatory compliance, and work with members to educate policy-makers on the practical impact of legislation, as well as many other activities important to

responsibly engaging in today's marketplace. If small businesses opt out of trade association participation out of fear of expansive liability, the downsides will be felt by consumers and employees alike.

For the aforementioned reasons, this Court should grant the Defendants' Petitions for Review.

Respectfully Submitted,

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