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January 12, 2018

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

Re: Amicus Letter of National Organization of African Americans in Housing 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 Organization of African Americans in Housing ("NOAAH") 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").

Statement of Interest of Amicus

NOAAH is a national non-profit housing association that looks to improve conditions for all residents and foster the development of affordable housing and sustainable communities. NOAAH was formed to promote the interests of African Americans specifically, and people of color in general, working in the field of affordable housing; and to

promote the interests of African Americans specifically, and people of color in general, living in affordable housing. NOAAH fulfills this purpose by providing technical, operational, educational, and moral support to its Membership by offering opportunities for professional skills enhancement, economic betterment, educational and technical resources, and a nationwide network of pro-active assistance. Its members are NOAAH's advocates, cooperative partnerships with industry and government to design and implement fair housing policies and programs, to formulate innovative strategies that improve the quality of housing and services delivery, and to promote healthy, vibrant communities.

NOAAH is interested in the significant issues raised by the Sixth Appellate District's ("Sixth District") decision (the "Decision"). African American, other minorities, and low-income families often live in older, deteriorating housing built prior to 1950, putting them right in the cross-hairs of the court's unprecedented Decision and ill-conceived abatement plan. Courts across the country have wisely left lead regulation to the proper governmental bodies and have rejected similar lawsuits. California stands alone. This Court should grant the Petition for Review to resolve the conflicts between the Decision and California statutory law and to address the critical policy issues raised by the court's Decision.

Discussion

Public officials know what the problem is today – failure to enforce housing standards in some of our most troubled communities. The mayors, city councils, supervisors, city and county attorneys who brought this lawsuit nearly twenty years ago likely never considered that the outcome would be to reward slumlords at the expense of responsible, law abiding property owners, and to threaten the ability of lower income families to remain in or find safe and healthy homes. This Court should grant the Petition for Review for the following reasons:

The Decision conflicts with California's comprehensive state legislative and regulatory framework to address blood-lead levels in children and hazards from deteriorated lead-based paint. The legislature has determined that only "deteriorated lead-based paint" is a

"lead hazard." Cal. Health & Safety Code ("H&S") § 17920.10. The court's Decision, however, creates a new standard -- one that makes even intact lead paint on certain friction and impact surfaces a public nuisance. Millions of properties that comply with state law are suddenly public nuisances subject to criminal penalties and enforcement orders. *See* H&S, §§ 17920.10, 17980, subds. (b)(1) & (e), 17985, 17992, 17995-17995.2; Cal. Code Regs., tit. 17, § 35037.

There is no public health emergency that warrants such an expansive departure from the remedy already developed by the legislature. In 1986, California developed a comprehensive program to reduce childhood lead exposures from all sources. The Childhood Lead Poisoning Prevention Program ("CLPPP") has helped to reduce the average blood lead level for California's children to below the national average. The court's abatement plan, however, which orders the abatement of even intact lead paint on windows, doors, stairs, floors, railings, and other friction and impact surfaces, will indeed create a public health emergency. The court's plan would actually expose children to more lead dust, not less. The vast majority of states around the country and the U.S. Department of Housing and Urban Development and the Environmental Protection Agency, favor keeping lead paint covered rather than removing it. California was one of those states before this Decision.

The Decision rewards slumlords. The California legislature decided that property owners are responsible for preventing and abating lead hazards on their properties. *See* Civ. Code §§ 1942.4(a), 3483; H&S §§ 17980-17992, 105256. And for good reason, since property owners are in the best position to inspect and repair their properties and also to benefit from good maintenance. Yet the abatement plan ordered by the court rewards slumlords – owners of properties "with repeated notices of non-compliance with existing lead poisoning prevention laws" and those with "ten or more code violations in the past 4 years" – putting them to the front of the line to receive abatement funds before responsible property owners. *See* Amended Judgment of the California Superior Court (Santa Clara County) ("Trial Court Order") at 5. This creates an

incentive for owners to neglect maintenance, knowing they can shift responsibility to the paint manufacturers.

The Decision places a target on the backs of responsible property owners. The "voluntary" nature of the court's abatement plan is illusory -- maintaining a public nuisance is illegal under California law. Federal, state and local rules make owners responsible to prevent and abate all lead hazards from any source on their properties. *See, e.g.*, H&S § 17980(a) ("If any building is ... in violation of any provision of ... the building standards ... or if a nuisance exists in any building ... the enforcement agency *shall*, after 30 days' notice to abate the nuisance or violation ... institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance."); Los Angeles, Ca., County Code tit. 11, ch. 11.02.190 ("Whenever a nuisance ... shall be ascertained to exist on any premises ... the director *shall* notify in writing the person having control of ... such premises ... to abate or remove such nuisance or condition within a reasonable time"); *id.* 11.02.190 ("Upon the neglect or refusal of such person to comply with such notice, the director may abate such nuisance or condition, and the person having control of such house ... in addition to the penalties ... *shall* be liable to the county of Los Angeles for the cost of such abatement, to be recovered in a civil action in any court of competent jurisdiction.") (emphasis added). The declaration of a public nuisance condition makes property owners immediately liable under California law for maintaining a nuisance. They are immediately subject to mandatory abatement or enforcement proceedings and suits from tenants.

Property owners who choose not to participate in the court-ordered abatement plan are subject to mandatory abatement or criminal penalties in the future. Cal. Penal Code § 372. And public officials searching for law-breakers need look no further than the "naughty list" of property owners who chose not to participate in the court-ordered abatement plan.

The Sixth District magnified that target when it expressly contemplated –as the law permits– future suits by The Companies against property owners: "Furthermore, nothing precludes a defendant from testing the lead paint at specific locations during the remediation process and seeking to hold a fellow defendant liable for a greater share of the

responsibility. The same is true of evidence that the hazardous condition is 'the owner's fault' or that it is not hazardous." Decision at 73.

The repercussions to property owners is even more stark when considered against the fact that property owners had no notice or opportunity to participate in proceedings. Now their properties are deemed nuisances, and if they decline to participate in the abatement plan, they expose themselves to tort liability, fines, criminal penalties, and dramatically reduced property value for maintaining a known public nuisance on the property.

The Decision creates a new burden for all property owners of residences built between 1950 and 1980. The Sixth District held that there was "no evidence in the record that supports an inference that the promotions of defendants prior to 1951 continued to cause the use of lead paint on residential interiors decades later." The court therefore concluded that the Companies could not be required to abate homes built after 1950. Decision at 55. The court never disturbed the finding that lead paint is presumed to exist in homes built before 1981 or that "interior residential lead paint interferes with the community's 'public right' to housing that does not poison children." *Id.* at 63. Because California law prohibits maintenance of a nuisance, *see supra* at 3, property owners will be left responsible for the costs of abatement.

The Decision will lead to increased homelessness and a shortage of affordable housing. As a result of the Decision, owners may withdraw housing from the market, decreasing the already inadequate supply of affordable housing in many communities, rental units will be deemed uninhabitable, and families will be displaced during abatement. The Sixth District held that "interior residential lead paint interferes with the community's 'public right' to housing that does not poison children." But what about the community's public right to affordable housing, period? As the Sixth District acknowledged "[m]ost members of the 'public' reside in residential housing, and … without residential housing, it would be nearly impossible for the 'public' to obtain access to water, electricity, gas, and sewer services." The federal government permits children to live in Section 8 housing with well-maintained lead-based paint because well-maintained lead-based paint

even on windows, doors and other friction surfaces is considered to be safe.

In addition, a property containing a lead hazard or a nuisance is "untenantable" under California law. *See* Cal. Civ. Code § 1941.1(a). Declaring buildings "untenantable" has severe consequences for owners and tenants. *See id.* §§ 1942(a) (permitting a tenant to repair and deduct cost from rent, or to vacate premises), 1942.4 (landlord who fails to address violation of Health & Safety Code section 17920.10 within 35 days is liable for general and special damages). The legislature, when it developed the CLPPB and the housing codes, carefully balanced the interest in addressing childhood lead exposure with preserving an adequate supply of affordable housing. Neither the Trial Court or the Sixth District addressed the impact the Decision would have on affordable housing.

Enforcement is still the most effective and most cost-effective way to prevent lead exposure in children. The CLPPB calls its program "a public health success." The Trial Court expressly acknowledged that success. Amended Statement of Decision at 97 ("the CLPP programs have been successful in reducing these cases [of high BLLs]"). Instances of continuing blood-lead levels in children are best remedied through rigorous enforcement of current law.

NOAAH urges this Court to review the case in order to restore order and predictability for California's property owners and tenants, and to put law making on the critical issues of housing and public health back in the hands of the legislature.

Very truly yours,

/s/ Kevin Marchman

Kevin Marchman
Board Chairman and Managing Director, National Organization of African Americans In Housing

PROOF OF SERVICE

STATE OF COLORADO, COUNTY OF DENVER

At the time of service, I was over 18 years of age and not a party to this legal action. I am employed in the County of Denver, State of Colorado. My business address is 2580 Monaco Parkway, Denver, Colorado, 80207.

On January 12, 2018, I served true copies of the following document(s) described as **AMICUS LETTER OF NATIONAL ORGANIZATION OF AFRICAN AMERICANS IN HOUSING IN SUPPORT OF PETITIONER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with The National Organization of African Americans in Housing's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service electronically, I transmitted the document(s) via e-mail or electronic transmission via the Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), as indicated on the attached service list.

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

Executed on January 12, 2018, at Denver, Colorado.

/s/ Kevin Marchman
Kevin Marchman

SERVICE LIST

The People of the State of California v. Atlantic Richfield Company; Conagra Grocery Products Company; E.I. Du Pont De Nemours and Company; NL Industries, Inc.; and The Sherwin-Williams Company

California Supreme Court Case No. S246102

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