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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: ***The People v. ConAgra Grocery Products Company et al.***
(Petitions for Review filed December 22, 2017)
Supreme Court, Case No. S246102
Sixth Appellate District, Case No. H040880
Superior Court, Santa Clara County, Case No. CV788657

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amicus curiae National Association of Manufacturers supports the Petitions for Review filed by ConAgra Grocery Products Company, Sherwin-Williams Company, and NL Industries, Inc., in the above referenced matter. (Cal. Rules of Court, rule 8.500(g)(1).)

QUESTION PRESENTED FOR REVIEW

> Should the Court of Appeal's version of public nuisance law, which creates standardless, indiscriminate liability on a manufacturer for lawfully selling and promoting a product that is determined to pose certain public health risks, here decades after the product was last sold, supplant established principles of public nuisance and product liability law?

INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Manufacturers represents more than 1,000 members in California with a substantial interest in ensuring that California's civil justice system is fair, follows traditional tort law rules, and promotes sound public policy. As explained in this letter brief, the Court of

Appeal's decision violated these core principles and opens the door to potentially unbounded government-sponsored public nuisance actions targeting product manufacturers. If the Court of Appeal's decision is allowed to stand, amicus curiae's members would be adversely impacted by tort lawsuits seeking industry-wide liability absent fundamental tort law requirements, including wrongful conduct and causation.

I. THE COURT SHOULD REESTABLISH THAT PUBLIC NUISANCE LIABILITY MUST BE PREDICATED ON A SUBSTANTIAL AND UNREASONABLE INTERFERENCE WITH A PUBLIC RIGHT.

The tort of public nuisance has centuries of history. More than twenty years ago, this Court outlined the elements of a public nuisance claim for the state of California in concert with this long-standing jurisprudence. (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090.) As this Court held, a public nuisance must involve a substantial, unreasonable interference with a public right. (*Id.* at pp. 1103-1105.) In order to subject someone to public nuisance liability, a plaintiff must prove a defendant unreasonably caused a "'real and appreciable invasion'" of a public right. (*Id.* at p. 1105 [quoting Rest.2d Torts, § 821F, coms. c & d, pp. 105-106].)

The Court should grant review because neither the trial court nor the Court of Appeal upheld these standards. Each time Plaintiffs could not meet a burden of proof under the Court's public nuisance jurisprudence, the lower courts reduced or eliminated that requirement. This letter brief focuses on two of the courts' errors, namely their failure to require either "unreasonable interference" or "causation," both of which are essential elements for public nuisance liability. The result is a cause of action lacking appreciable legal standards. As discussed below, the trial court's shortcuts here appear driven by the court's stated desire to do more about lead poisoning than the Legislature has done through its laws and programs. Allowing a trial court to make liability rulings seemingly to reach a judge's desired outcome of a case could subject

manufacturers and corporate defendants of all kinds to unprincipled and open-ended liability.

Further, courts should not be able to subvert product liability doctrines, such as design or warning defect, to subject an entire product category to liability. The notion of such category liability has long been rejected in any form. The tort of public nuisance, in particular, does not empower courts to order product recalls over private purchases of a product, including decades after a product was last sold. Public nuisance theory should remain focused on stopping unreasonable interferences with a public right. Also, as discussed below, a product must be viewed in its time, place and context. The products at issue here were lawful and seen as beneficial by governments and the public at the time they were sold. Public documents and studies the courts identified as available to Defendants, were also available to governments and the public. The courts' own subjective views must not override a product's risk-utility assessment in its time.

A. The Court of Appeal Removed Plaintiffs' Burden of Demonstrating that a Defendant Engaged in Wrongful Conduct.

This case has been in the California courts for nearly two decades. In 2006, the Court of Appeal lowered this Court's public nuisance standards to allow this case to go to trial. With respect to the wrongful conduct element, the court held that while it was not necessary for the defendant to have created the public nuisance, it must have at least engaged in "far more egregious" misconduct than selling and promoting a product that may cause harm. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292, 309.) At the time, the court suggested a manufacturer's misconduct must be "quite similar to instructing the purchaser to use the product in a hazardous manner." (*Ibid.*) Otherwise, this use of public nuisance would be "'essentially' a products liability action 'in the guise of a nuisance action,'" which would not be allowed. (*Ibid.*) The reprehensibility must be high and direct, such as selling chlorine to a water filtration plant and telling it to use known dangerous levels in abject disregard for public health.

The trial court in this case did not follow even this standard, and the Court of Appeal did not enforce its own assertions for when a product manufacturer could be subject to public nuisance liability. Rather than require objectively unreasonable conduct, the courts allowed public nuisance liability based on nothing more than (a) constructive knowledge that a substance is dangerous, and (b) general, non-misleading promotion of ordinary household products containing that substance. (See *People v. Atlantic Richfield Co.* (Super. Ct., Santa Clara County, Mar. 26, 2014, No. 100CV788657) 2014 WL 1385823, at pp. *15-24.) Proof that Defendants gave anyone actual instructions to engage in any unlawful, public nuisance conduct was not needed.

The trial court's words demonstrate its lack of any standards for unreasonable conduct. For example, it never required Defendants to know of the actual risk at issue here today. The trial court held that Plaintiffs need only show Defendants had "*constructive* knowledge" that lead can be harmful, not actual knowledge that lead-based interior paint could cause low exposure levels to lead and be harmful to children. (*People v. Atlantic Richfield Co., supra,* 2014 WL 1385823, at p. *9 [emphasis in original].) It also stated that the court could substitute "contemporary knowledge," as well as its own judgment about risk rather than assess the Defendants' conduct in their time and place, which here was before 1951: "All this says is medicine has advanced; shouldn't we take advantage of this more contemporary knowledge to protect thousands of lives." (*Id.* at p. *53.) The trial court could not have been more clear that it took these shortcuts to achieve a specific end-game; it did not want to "turn a blind eye to the existing problem" of lead poisoning. (*People v. Atlantic Richfield Co., supra,* 2014 WL 1385823, at p. *53)

This Court, though, requires unreasonableness to be assessed in its time, place, and context. (See *Flowers v. Torrance Mem. Hosp. Med. Ctr.* (1994) 8 Cal.4th 992, 997 ["the amount of care deemed reasonable in any particular case will vary, while at the same time, the standard of conduct itself remains constant, *i.e.*, due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances."].) With lead-based interior paint, a judgment was made that the product should no longer be on the market. There

are many products where specific risks are known, and government regulators and consumers deem the risks acceptable. A trial court should not be allowed to assert its own views of whether a risk is unreasonable, either in real time or decades later. The Court of Appeal gave short shrift to these issues, agreeing that the knowledge requirement could be satisfied by purely "circumstantial evidence." (See Slip Op., at pp. 25-26.) It listed public documents and studies discussing hazards with lead and lead-based paints, saying liability could rest "exclusively" on such circumstantial evidence because it can be inferred that Defendants "must have known" about them. (*Ibid*.)

The Court should grant review to stop lower courts from using evolving knowledge and subjective views of risk to find it was unreasonable for Defendants to have sold a product anywhere at any time. The lower courts' rulings put California law at odds with the other states to consider whether former lead paint and pigment producers, as well as other product manufacturers, can be subject to liability for creating a public nuisance because of their sale and promotion of lawful products for lawful uses.

B. The Court of Appeal Removed the Essential Element of Causation.

Labeling this case a representative public nuisance action, and not a personal injury or class action, does not absolve Plaintiffs of the fundamental tort law requirement to prove causation against each Defendant. Again, the Court of Appeal did not even abide by its own causation standards to allow the trial judge's verdict to stand. (Slip Op., p. 49 [citing *Melton v. Boustred*] (2010) 183 Cal.App.4th 521, 542 ["Causation is an element of a cause of action for public nuisance"].) It did not require any showing that each Defendant was a factual or legal cause of the alleged public nuisance. Instead, it allowed the trial judge to "reasonably infer" that some consumers must have "heeded" the defendants' general advertising for lead-based interior paints when using it on windows, doors, and other surfaces. (Slip Op., pp. 50-51.) Speculation is not causation.

The Court should grant review to make clear that causation in a public nuisance action is the same as in negligence and other tort claims. (See Dobbs,

The Law of Torts (2001) § 180, p. 443, fn.2 ["proximate cause limitations are fundamental and can apply in any kind of case"]; Harper et al., *The Law of Torts* (1986) § 20.2 ["Through all the diverse theories of proximate cause runs a common thread; almost all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability."].) A fundamental problem with attempts at industry-wide liability such as here is that the nexus between cause and effect for each defendant can be too attenuated to justify liability. (See *Merrill v. Navegar Inc.* (2001) 26 Cal.4th 465, 486.)

The legal deficiency of allowing the causation shortcut in this case is evident by its results. As Defendants point out, hundreds of companies sold lead pigment and paint in California, each with a distinct history of when it produced lead pigment or paint and in what forms. Yet, the three companies in this appeal are being forced to abate all lead-based paints from all homes in ten jurisdictions and all lead in soil coming mostly from myriad non-paint sources. (See Slip Op., p. 2, fn. 3 ["'Lead-based paint' is not the only source of childhood exposure. . . ."].) Thus, the overwhelming majority of the lead-based paint these three companies would be abating was sold by their competitors, sometimes after their own manufacture of lead-based paint had ceased. Plaintiffs must not be allowed to avoid establishing causation for each defendant by putting all paint and pigment manufacturers into a causation Cuisinart™ where factual and legal causation for the individual companies are blended together.

The causation test used in the case at bar is much lower than even burden-shifting theories such as market-share. (See *Sindell v. Abbott Labs*. (1980) 26 Cal.3d 588.) In *Sindell*, this Court reversed the burden of proof under the belief that each defendant was better positioned to determine whose product harmed the plaintiff. Unlike in *Sindell*, defendants here are not better positioned. They have never had any records of who bought lead paint, or when or where they bought it. To the extent that any such records exist, they would be held by property owners who purchased the paint, not the manufacturers. Thus, there is no causal nexus between Defendants and the alleged public nuisance and no way to exculpate oneself from liability. This ruling merely establishes joint and several industry-wide liability without any meaningful apportionment.

The Court should not allow "standardless" liability to be permitted in California. "[B]asic fairness dictates that a defendant must have caused the interference to be held liable for its abatement." (*State v. Lead Indus. Ass'n* (R.I. 2008) 951 A.2d 428, 451.)

II. PUBLIC NUISANCE LIABILITY WITHOUT UNREASONABLE INTERFERENCE AND CAUSATION EXPOSES MANUFACTURERS TO UNPRINCIPLED, OPEN-ENDED LIABILITY.

If the Court allows this ruling to stand, governments in California could sue private companies for making or selling products based solely on the fact that the product came with a risk of harm. This effort to gut the tort's standards and turn it into a "super tort" whenever a product creates external costs has been around for more than forty years. (See Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits* (2009) 44 Wake Forest L. Rev. 923.) In the past, California courts have been leaders in rejecting these efforts, including in litigation to clean up smog in Los Angeles. (See *Diamond v. General Motors Corp.* (1971) 20 Cal.App.3d 374.)

With respect to lead paint, the allegations in this suit have been tried and rejected in every other state in which they have been brought, including the New Jersey, Missouri and Rhode Island Supreme Courts. (See, e.g., *State of Lead Indus. Ass'n*, *supra*, 951 A.2d 428; *In re Lead Paint Litig.* (N.J. 2007) 924 A.2d 484; *City of St. Louis v. Benjamin Moore & Co.* (Mo. 2007) 226 S.W.3d 110; see also *City of Chicago v. American Cyanamid Co.* (Ill. Ct. App. 2005) 823 N.E.2d 126.) While these cases are not controlling here and did not apply California law, the Court may find this jurisprudence instructive because they discuss the long-standing public nuisance principles this Court adopted in *People ex rel. Gallo*, *supra*, 14 Cal.4th 1090.

Indeed, the overwhelming majority of courts that have looked at these novel applications of public nuisance theory for lead paint or other products, have recognized that removing the key elements of wrongful conduct and

causation here would be as extreme as removing breach and causation from negligence. (See *In re Lead Paint Litig.*, *supra*, 924 A.2d 484; *Benjamin Moore & Co.*, *supra,* 226 S.W.3d 110; *City of Chicago*, *supra*, 823 N.E.2d 126.) 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.* (8th Cir. 1993) 984 F.2d 915, 921.) Rather than sue under class action or products liability, plaintiffs' lawyers would go to public officials and, under contingency fee arrangements, use the power of the state to get around these laws. (See *City of Chicago v. American Cyanamid Co.* (Ill. Cir. Ct. Oct. 7, 2003) 2003 WL 23315567, at p. *4 [rejecting efforts by Chicago to "deliberately frame[] its case as a public nuisance action" to get around constraints of the American legal system], affd. (Ill. App. Ct. 2005) 823 N.E.2d 126.)

If review is not granted here, this novel "super tort" could be invoked at the whim of a county, state, or municipal attorney in California – and contingency-fee counsel they may hire – any time a product category was used, misused, or not properly maintained and became associated with a hazard affecting a certain number of people. (See *Johnson County, by and through Bd. of Educ. of. Tenn. v. U.S. Gypsum Co.* (E.D. Tenn. 1984) 580 F.Supp. 284, 294 [governments could "convert almost every products liability action into a nuisance claim"].) "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.* (N.Y. App. Div. 2003) 309 A.D. 91, 96.)

Companies would be thrust into the impossible role of policing customers to ensure that products are not used or neglected in ways that could create a public nuisance. This Court and American jurisprudence have soundly rejected the notion that a product manufacturer is an insurer of its products, let alone those of other manufacturers. (See *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362 [reaffirming that a manufacturer may not be held strictly liable for injuries caused by another's product]; see also Wade, *On the Nature of Strict Tort Liability for Products* (1973) 44 Miss. L.J. 825, 828 [an auto manufacturer

"would be liable for all damages produced by the car, a gun maker would be liable to anyone shot by the gun, anyone cut by a knife could sue the maker"].)

Many manufacturers make and sell products that can cause harm if improperly used or disposed of by end-users. The responsibility for manufacturers, and often government regulators, is to manage risk based on the state-of-the-art knowledge of the time. Federal and state agencies regulate maximum exposure levels for many chemicals and other products, including for blood lead levels. Companies that sell such 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, in selling their products. They cannot be subject to broad, category liability whenever a product becomes subject to increased restrictions, including when it is decided that a product should no longer be available for sale.

California is known as a generator of innovation, and the development of new technologies can and often are pursued with significant regulatory oversight. In these situations, legislators and regulators can react in real time when 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 these harms. It is not the role of courts under the guise of public nuisance theory "to mandate the redesign of" products or order a product recall, including decades after the product was last sold. (*Penelas v. Arms Tech., Inc.* (Fla. Dist. Ct. App. 2001) 778 So.2d 1042, 1045.) Courts should remain the place for safeguarding principles of justice when a plaintiff claims injury based on objective wrongfully caused conduct.

CONCLUSION

The desire to regulate an industry or, as here, create a revenue source can be a powerful motivator for a government attorney to bring these actions. These lawsuits should be allowed, unlike in this case, only when government lawyers can prove that a particular party wrongfully caused an unreasonable interference

with a public right and created an actual public nuisance. Amicus curiae respectfully requests that the Court grant the Petitions for Review in this matter.

Respectfully Submitted,

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