No. 18-55733

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF POMONA,
Plaintiff-Appellant,

v.

SQM NORTH AMERICA CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

Honorable R. Gary Klausner

No. 2:11-cv-00167-RGK-JEM
(Los Angeles – Roybal)

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, THE FERTILIZER INSTITUTE, CROPLIFE AMERICA, AMERICAN COATINGS ASSOCIATION, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby state that the Chamber of Commerce of the United States of America, National Association of Manufacturers, The Fertilizer Institute, CropLife America, American Coatings Association, International Association of Defense Counsel, and Coalition for Litigation Justice, Inc. have no parent corporations and have issued no stock.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than the *amici curiae*, their members, or their counsel — contributed money that was intended to fund the preparation or submission of the brief.

Pursuant to Circuit Rule 29-3, counsel for *amici* sought consent of all parties to the submission of this proposed brief. All parties responded, and there were no objections to the filing of this *amici curiae* brief.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a coalition of business groups, trade associations, defense counsel, and insurers that support the longstanding principle that whether a product is defective is evaluated based on the time of manufacture and sale. *Amici* are concerned that if this Court departs from this long-standing principle, its decision would create a new class of indefensible claims, created solely by technological or scientific advances occurring after the product's sale. Such a ruling would lead to a flood of lawsuits against companies that made products years or decades ago that could not have been designed to meet today's environmental or safety standards.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

[1] No counsel for any party authored this brief in whole or in part, and no entity or person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing 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 private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Fertilizer Institute is the leading voice in the fertilizer industry, representing the public policy, communication and statistical needs of its members, including producers, manufacturers, retailers and transporters of fertilizer.

Croplife America (CLA) is a non-profit trade association that represents companies that develop, register and sell pesticide products in the United States. CLA's member companies produce most of the crop-protection and pest-management products regulated by EPA under the Federal Insecticide Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq*., and Section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA), as amended, 21 U.S.C. § 346. CLA represents its members' interests by, among other things, monitoring federal

agency actions and related litigation of concern to the crop-protection and pest-control industry, and participating in such actions as appropriate.

The American Coatings Association (ACA) is a voluntary, nonprofit trade association representing some 250 manufacturers of paints and coatings, raw materials suppliers, distributors, and technical professionals. As the leading organization representing the coatings industry in the United States, a principal role of ACA is to serve as an advocate for its membership on legislative, regulatory, and judicial issues at all levels. In addition, ACA undertakes programs and services that support the paint and coatings industries' commitment to environmental protection, sustainability, product stewardship, health and safety, corporate responsibility, and the advancement of science and technology. Collectively, ACA represents companies with greater than 90% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants

are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. The IADC regularly advocates for the interests of its members in federal and state courts throughout the country.

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for toxic tort claims.[2] The Coalition has filed over 150 *amicus curiae* briefs in cases that may have a significant impact on the toxic tort litigation environment, including more than 25 briefs in the California appellate courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Pomona seeks a radical departure from products liability law. Rather than judge a product in its time, as products liability law requires, the City suggests that a product used 70 or more years ago can be deemed defective in design based exclusively on applying "present-day" science and technology to that product. Such a retroactive liability theory would subject manufacturers and others in the stream of commerce to open-ended liability for hazards that were not known, detectable, or foreseeable at the time of a lawful product's manufacture and use.

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

The City fully acknowledges the fundamental shortcoming of its claims: the defects in design it alleges were entirely unforeseeable when Defendant, SQM North America Corporation (SQMNA), sold the fertilizer at issue in the 1930s and 1940s. As the City stated, "the potential for the fertilizer to contaminate groundwater with a toxic chemical dangerous to human health" was "unknown at that point." Pl. Br. at 20-21. "[I]n the 1930s and 1940s, the risk that its concentrations of perchlorate could render groundwater undrinkable was still unknown or inadequately understood." Pl. Br. at 36. This "fact was more or less *undisputed* at trial." *Id.* (emphasis added). Indeed, it was not until 1997 that technology was developed to even measure low concentrations of perchlorate in drinking water, and 2007 that the State of California adopted the regulations leading the City to build its water treatment facility. Accordingly, the jury properly determined that the fertilizer was not defective at the time it was used.

In an effort to overcome this deficiency, the City argues the jury instructions should not have limited the jury's assessment to whether the benefits of the fertilizer's design outweighed its risks "at the time the product was in use." As products liability law makes clear, however, both in California and around the country, there is a clear defined temporal element to determining whether a product is defective, including under the risk-utility test in this lawsuit. As detailed in California's pattern jury instructions, this element is usually described as "at the

time of manufacture," which also was included in the instructions in this case. *See* Judicial Council of California Civil Jury Instructions (2019 ed.), No. 1204 Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof, at pp. 682.[3] To the extent "time of use" differs from "time of manufacture," it is of no consequence here.[4] Both were more than 70 years ago. Either way, products liability law does not allow, as the City implores, "applying present-day standards to the product of an earlier era." Pl. Br. at 26.

As this *amici* brief explains, the change in bedrock product liability law the City seeks is a bridge too far for this Court to endorse. The jury heard the evidence and fairly decided that SQMNA's fertilizer was not defective given the available science and technology of its time, and the Court should not disturb that determination.

[3] http://www.courts.ca.gov/partners/documents/caci_2019_edition.pdf.

[4] The district court may modify a pattern jury instruction to fit the facts and law presented in a particular case. *See Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 943 (9th Cir. 2011). In cases alleging defective product design, trial courts "may properly formulate instructions to elucidate the 'defect' concept in varying circumstances." *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 452 (Cal. 1978). The District Court properly followed these guidelines.

ARGUMENT

I. THE DISTRICT COURT PROPERLY INSTRUCTED THAT A PRODUCT MUST BE EVALUATED IN ITS TIME, NOT ON MODERN SCIENCE AND TECHNOLOGY

A. The Risk-Utility Test Creates Liability Only When Foreseeable Risks Are Preventable

It has long been the rule in California that a plaintiff seeking to establish that his or her injury was caused by a defectively designed product must establish that the defect existed at the time of manufacture and sale. In *Greenman v. Yuba Power Products, Inc.*, the California Supreme Court became the first court in the country to adopt strict products liability, finding liability can ensue when a plaintiff proves injury "as a result of a defect in the design and manufacture . . . that made the [product] unsafe." 377 P.2d 897, 901 (Cal. 1962). "Other decisions make clear that the plaintiff must show that the defect existed when the product was manufactured or sold." *Moerer v. Ford Motor Co.*, 129 Cal. Rptr. 112, 113 (Cal. Ct. App. 1976). California courts have consistently held that there can be no liability if there is "'no defect,' at the time of manufacture and original sale." *Hasson v. Ford Motor Co.*, 564 P.2d 857, 863 (Cal. 1977), *overruled on other grounds*, *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 313 (Cal. 1994).

Under California law, there are two tests for proving design defect—the consumer expectation test and the risk-benefit test—and this Court has already ruled that "Pomona did not meet its burden of showing entitlement to a consumer

expectation test instruction." *See City of Pomona v. SQM N. Am. Corp.*, 694 Fed. Appx. 477, 478 (9th Cir. 2017). Accordingly, the City must show that SQMNA's fertilizer that was manufactured, sold, and used in the 1930s and 1940s was defective under the risk-utility test, the elements of which were set forth in *Barker v. Lull Eng'g Co*., 573 P.2d 443 (Cal. 1978).

In *Barker* and subsequent rulings, the California Supreme Court held that a jury evaluates the adequacy of a design defect based on the risks and benefits at the time of manufacture so that it can determine whether the risk alleged was foreseeable and feasibly preventable. *Id*. at 455. The requirement that a product is to be judged based on what was foreseeable and feasible at the time of manufacture has never been controversial and remains firmly in place. *See, e.g., Wiler v. Firestone Tire & Rubber Co.*, 157 Cal. Rptr. 248, 252 (Cal. Ct. App. 1979) (finding a component part manufacturer can be liable only if the part "was defective at the time it left the component part manufacturer's factory"); *Hernandez v. Badger Constr. Equip. Co.*, 34 Cal. Rptr. 2d 732, 755 (Cal Ct. App. 1994) ("[T]he jury heard evidence when Badger sold the crane in 1981 industry standards did not require ATBD's as standard equipment. Thus, the jury could properly conclude the crane was not defective in 1981."); *Torres v. Xomox Corp*., 56 Cal. Rptr. 2d 455, 468 (Cal. Ct. App. 1996) ("[A] defendant is not liable for any defect that did not exist when the product left its possession.").

Earlier this year, the California Supreme Court further explained the concepts of foreseeability and feasibly preventable. *See Kim v. Toyota Motor Corp.*, 424 P.3d 290 (Cal. 2018). It stated that juries should assess the technology that was economical and available at the time of sale to determine whether the manufacturer should have reformulated the product to avoid the risks. *See id*. at 293. The purpose of the risk-utility test, the court continued, is to determine "what *can* be done" given the state-of-the-art technology or industry's standards at the time of manufacture. *Id*. at 296 (emphasis in original). Such evidence may aid the jury's understanding of the complexities and trade-offs in a design, and can assist in determining whether the manufacturer "balanced the relevant considerations correctly." *Id.* at 298. The Court further approved the trial court's rejection of the plaintiff's suggested jury instruction, which mirrors the City's argument here, that it should be "no defense" to design defect liability that the product's design "met the[se] standards . . . at the time [the product] was produced." *Id.* at 295 n. 4. Thus, the risk utility test is inextricably tied to the knowledge, science, and technology at the time of sale or, as here, use.

California's insistence that product risks and designs are assessed in their time is consistent with the how courts apply these requirements nationally. The California Supreme Court and the Judicial Council of California have borrowed from the *Restatement of Torts, Third: Products Liability* to elaborate on how the

risk-utility test is to be applied. *See id.* at 299 n. 5; Judicial Council of California Civil Jury Instructions (2019 ed.), No. 1200 Strict Liability – Essential Factual Elements, at pp. 697.[5] The Restatement explains that "a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided." Restatement of Torts, Third: Prods. Liab. § 2(b), Am. Law Inst. (1998). This "balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution." *Id.* Otherwise, "it may be difficult for the plaintiff to prove that an alternative design could have been practically adopted." *See id.* cmt d.

The risk-utility test, and its requirement that a product's risks and design are assessed at the time of manufacture, sale or, as here, use, gives juries a rudder for steering through battling expert testimony on the knowledge, risks, and what could have reasonably been avoided. The jury instruction that included this temporal requirement, along with the jury's finding against liability, were appropriate under well-established California law and should be upheld.

[5] http://www.courts.ca.gov/partners/documents/caci_2019_edition.pdf.

B. The Retroactive Liability the City Seeks Would Violate a Defendant's Constitutional Due Process Rights

The City seeks to obfuscate the clarity of the risk-utility test's longstanding temporal requirement by misappropriating the *Barker* court's use of the word "hindsight" in the context of a jury's design defect determination. In *Barker*, the California Supreme Court stated a jury could determine that a product was defective "if through *hindsight* [it] determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risks of danger inherent in the challenged design outweigh the benefits of such design." *Barker*, 573 P.2d at 454 (emphasis added). No court has ever interpreted this statement as changing the rule that a product must be defective at the time of sale.

The City wrongly argues that judging a design "in hindsight" means "applying present-day standards to the product of an earlier era." Pl. Br. at 26. But, *Barker's* reference to hindsight does not mean applying today's science and technology to yesterday's products. It refers to the jury's role of determining whether the manufacturer appropriately balanced the relevant considerations in the product's design based on objective factors, including the foreseeability of the risk, the state of the art technology, and industry custom and standards at the time of manufacture. Under this view, the evidence is not restricted to facts the manufacturer actually considered in designing and selling the product or the manufacturer's decision-making processes. This broader lens, though, still requires

that the risks were foreseeable and the harm was preventable through an alternative design feasible at the time of manufacture. If something were wrong with a design, the plaintiff must demonstrate how it could have been improved and corrected in real time.

The City's resistance to the common understanding of *Barker* is particularly perplexing given that when this case was before this Court in 2014, the Court adopted this very reasoning in support of the City. It found that Pomona was under no obligation "to reduce the perchlorate levels" because Pomona's "failure to act was reasonable at the time, given the scientific uncertainty regarding the safety of perchlorate in drinking water and the fact that Pomona relied on the [Maximum Contaminant Levels provided by the California Department of Public Health] as 'guideposts' for determining what levels of contamination were safe." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1052 (9th Cir. 2014). This foreseeability requirement holds true for SQMNA as well—it cannot be subject to liability today for not knowing to reformulate its product in the 1930s and 1940s.

Such liability would conflict with constitutional due process rights. As the U.S. Supreme Court has observed, constitutional limits are stretched by imposing "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Eastern Enters. v. Apfel*, 524 U.S. 498,

528-29 (1998). "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." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). When "well-established common-law protections" are undercut, as the City proposes here, the result is the "arbitrary deprivation[] of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).[6]

Here, SQMNA lawfully manufactured and sold a non-defective product that was alleged, only many decades later, to have unacceptable risks. It did not have fair notice that engaging in such lawful commerce could give rise to liability and, as importantly, did not have any opportunity to avoid such liability. Consequently, adopting the City's view of retroactive design defect liability would raise serious due process concerns.

C. The City Wrongfully Asserts that Retroactivity Is Needed to Distinguish Design Defect from Negligent Design

The City also seeks to draw a false distinction between strict design defect liability and negligent manufacturing as a main justification for eliminating the requirement to assess the design in its time. Specifically, it suggests that strict

[6] A new regulation may not be applied retroactively where it deprives a person of a vested right without due process of law. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7; *Strauss v. Horton*, 207 P.3d 48, 121 (Cal. 2009), *as modified* (June 17, 2009), *and abrogated on other grounds by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also As You Sow v. Conbraco Indus.*, 37 Cal. Rptr. 3d 399, 421-22 (Cal. Ct. App. 2005) (indicating rules regarding retroactivity of legislation apply equally to regulations).

liability should not require wrongdoing in order to differentiate it from negligent manufacturing. *See* Pl. Br. at 27 ("Maintaining this distinction between strict products liability and negligence theories is crucial."). The California Supreme Court, though, has fully appreciated that "the risk-benefit balancing does in some ways resemble traditional negligence inquiry." *Kim*, 424 P.2d at 300; *see also Lambert v. Gen. Motors*, 79 Cal. Rptr. 2d 657, 660 (Cal Ct. App. 1998) ("Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge.").

The court recognized these similarities as far back as *Barker*, in which the court stated that "most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the 'risk-benefit' standard, *e.g.*, the feasibility and cost of alternative designs are similar to issues typically presented in a negligence design case." *Barker*, 573 P.2d at 455. "The pertinent difference between the two inquiries," the *Kim* court explained, "is that strict liability marshals this evidence to illuminate the condition of the product, rather than the reasonableness of the manufacturer's conduct." *Id.* Instead of having to figure out which of the defendant's decisions or processes were in error, the jury looks at the product to determine whether its risks were foreseeable and there was a better way to make the product at the time. *See* Victor E. Schwartz & Rochelle M. Tedesco, *The Re-emergence of "Super Strict" Liability: Slaying the*

Dragon Again, 71 U. Cin. L. Rev. 917, 930 (2003) ("[T]he plaintiff is not required to specifically address a manufacturer's conduct or lack of 'reasonable care.'").

Courts and scholars have recognized that the similarities between the risk-utility test and negligence exist because, as with negligence, the "risk-utility analysis incorporates the concept of 'reasonableness.'" *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 (Ga. 1994). In this regard, design liability has long been recognized as not being truly "strict" liability in the same way as a manufacturing defect. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 744 (1996) ("While true strict liability has been adopted for manufacturing defects, a reasonableness standard, which includes the notions of optimality and balance, in fact prevails in the design and warning contexts."). By rooting this inquiry in the risks foreseeable at the time as well as the then-available technology, courts can prevent liability from being based on intuition, ad hoc speculation, or a pre-ordained outcome. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 Geo. L.J. 659, 661 (2000).

II. BASING DESIGN LIABILITY ON THE AVAILABILITY OF A REASONABLE ALTERNATIVE DESIGN PROMOTES RESEARCH AND INNOVATION

The public policy underlying the temporal requirement in products liability law is to encourage manufacturers to manage foreseeable risks in real time by

using available technology to design products in ways that enhance safety without compromising benefits. *See* Restatement Third § 2 cmt a; *see, e.g., Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 183 (Mich. 1984). The City's proposed new rule allowing a jury to apply "present-day standards to the product of an earlier era" would have the opposite effect. It could lead a jury to find that a manufacturer's failure to incorporate today's standards into an older product is in itself a design defect. Subjecting a manufacturer to liability over previous versions of a product would create the perverse incentive against developing new safety technologies. It would operate as a depressant upon the safety discovery process.

Assigning liability for yesterday's products based on today's scientific and societal knowledge and tolerance for risks is inconsistent with the way products are developed. New technology and product advancement happens gradually. *See Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013) (explaining the public interest is served when liability policies foster innovation). Many features that reduce risk and enhance safety are diligently researched and tested. Manufacturers learn from results and use their resources to continue researching ways to increase their products' safety. Thus, it is critical for the development of modern technology that the benefits of a product's design outweigh the risks of that design at the time of manufacture, or here, use. If

present-day knowledge can make earlier versions of a product defective, product liability would subject manufacturers to absolute liability over the older products.

For example, the U.S. Department of Transportation (DOT) has strategically encouraged automakers, at times, to pursue multiple designs to solve a problem so they can assess results and choose a path that maximizes safety. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000). *Geier* dealt with front airbags and DOT's decision at the time not to mandate airbags in all cars. *See id.* at 878-79. The Court favorably quoted DOT's explanation in its brief to the court that "a mix of [passive restraint] devices would help develop data on comparative effectiveness" for airbags, automatic seatbelts, or other passive restraints that automakers may develop for meeting DOT's performance standards. *Id.* at 879. Gradually phasing in requirements can give manufacturers valuable time to learn how to best use these safety devices for and in different types of crashes. *See id.* The fact that airbags are now required in passenger vehicles does not make earlier cars without airbags, even if still on the road, defective in design.

Further, if such retroactive standards applied in product liability litigation, it would put product manufacturers in an untenable situation. For example, many product risks are managed with legislative and regulatory oversight. Manufacturers of chemicals and other products must be able to rely on government regulations, including those setting acceptable exposure levels. They must be able to depend on

the knowledge and government guidelines at the time, as the Court previously held with the City of Pomona's obligations to reduce the perchlorate here, including when regulations evolve based on new scientific studies or public acceptance of known risks. In these situations, legislators and regulators can react in real time when external risks become known and validated. They can regulate a product's manufacture, sale, and use; remove a product from the market; or tax it with revenues spent on programs to alleviate the harms. Categorical liability should not ensue merely because a product is subject to any increased restrictions or subsequent innovation.

III. MANUFACTURERS ARE NOT INSURERS-OF-LAST-RESORT FOR ALL DOWNSTREAM HARMS ASSOCIATED WITH THEIR PRODUCTS

The City's effort to gut traditional liability standards here is part of a longstanding effort to blame product manufacturers whenever a product is used or misused in a way that creates downstream costs. In these lawsuits, companies are targeted to pay for these costs without any tie to wrongdoing, which has always been the lynchpin for tort liability. Courts have broadly rejected this type of unprecedented and unwise expansion of liability law. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009).

California courts have repeatedly found that there is no absolute liability for selling a product, merely because it has risks of harm. *See O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012) (reaffirming product manufacturers are not subject to absolute liability); *Sanchez v. Hitachi Koki, Co*., 158 Cal. Rptr. 3d 907, 912 (Cal. Ct. App. 2013) ("[S]trict liability has never been, and is not now, absolute liability."); *see also Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059 (Alaska 1979) ("[W]e think that 'scientific knowability' of the injurious nature of the product should be considered because, otherwise, imposition of liability for a design defect would effectively mean absolute liability even though there is no alternative way for the manufacturer to discover the risk and remedy it.")

Absolute liability is found only in specific areas of the law, namely, abnormally dangerous activities such as using explosives in populated areas. *See* Restatement (Second) of Torts §§ 519–520, Am. Law Inst. (1977). As the Rhode Island Supreme Court has explained, this liability does not apply to product manufacturers: "Absolute liability attaches only to ultrahazardous or abnormally dangerous *activities* and not to ultrahazardous or abnormally dangerous *materials*. . . . [I]f the rule were otherwise, virtually any commercial activity involving substances which are dangerous in the abstract automatically would be deemed as abnormally dangerous. This result would be intolerable." *Splendorio v.*

Bilray Demolition Co., 682 A.2d 461, 465 (R.I. 1996) (emphasis in original) (internal quote omitted).

There is no legal, economic, or constitutional rationale for turning manufacturers and other companies into insurers-of-last-resort for risks associated with their products. *See Kim*, 424 P.3d at 296 (stating a manufacturer is not "an insurer for all injuries which may result from the use of its product"). As Dean John Wade noted in 1973:

> Strict liability for products is clearly not that of an insurer. If it were, a plaintiff would only need to prove that the product was a factual cause in producing his injury. Thus, the manufacturer of a match would be liable for anything burned by a fire started by a match produced by him.

John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973). It is simply not viable to find that, based on *today's* knowledge, it was unreasonable for SQMNA to have sold its fertilizer *at all, ever*.

Finally, the fact that the plaintiff here is a government, and not a private person, does not change this basic civil-justice equation. Government attorneys are not to be bestowed near-limitless ability to impose liability on a manufacturer for product harms. If that were the case, litigation could be filed at the whim of any local, county, or state attorney—and contingency-fee counsel they may hire—whenever a product has been determined to have unforeseen risks and associated with a hazard. By affirming the lower court's ruling, the Court can provide a check

on governments that seek to violate constitutional due process protections of often out-of-state companies to make them pay for or subsidize local projects. If, when, and under which circumstances any entity should be responsible for costs associated with products or conduct of an earlier era is a determination best left to legislatures, which can balance interests and assign responsibility in light of broader public welfare considerations.

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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Dated: December 21, 2018