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 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'S PETITION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT PURSUANT TO RULES 26.1 AND 29

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 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 this 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.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are business groups, trade associations, defense counsel, and insurers that support the longstanding principle that product defect determinations must be based on the knowledge that was available at the time of sale and not based on 20/20 hindsight. *Amici* are concerned that the panel's departure from this long-standing principle will create a new class of indefensible claims solely through post-sale technological or scientific advances. Such a ruling could lead to a flood of lawsuits against companies that made products decades ago that were state-of-the-art then, but do not meet today's environmental or safety standards.

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, 7 U.S.C. § 136 *et seq*., and Section 408 of the Federal Food, Drug and Cosmetic Act, 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 invitation-only, peer-reviewed membership organization of approximately 2,500 in house and outside defense attorneys and insurance executives. 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 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.[1] The Coalition has filed over 150 *amicus curiae* briefs in cases that may have a significant impact on the toxic tort litigation environment.

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[1] 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel's ruling authorizes a radical departure from products liability law that raises major due process concerns. Rather than judge a product in its time, as California and other states have required, the panel held that a product used more than 70 years ago can be defective in design based *exclusively* on "modern-day knowledge." The panel misread a 40-year-old California court opinion that referenced "hindsight" as authorizing jurors to "consider risks that were not, and could not have been, known to the manufacturer at the time of manufacture" even though "it was undisputed that the harmful effects of [the product] were unknown at the time of manufacturer and use." As the dissent points out, there is not "a single California state court ruling" finding "a party [to be] liable based on scientific knowledge that was unknowable at the time of the incident."

The panel stepped far outside its limited role under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938), to interpret and apply state law. California has long had a defined temporal element for determining whether a product is defective, including under the risk-utility test applied here. In fact, California's pattern jury instructions—which were used in this case—state that the jury's reference shall be "the time of manufacture" when considering whether an alternative design was feasible. *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. Here, the City alleges that a fertilizer from the 1930s and 1940s was defective because technology developed in 1997 can measure low concentrations of perchlorate in drinking water and in 2007 the State promulgated regulations that led the City to build a water treatment facility. The jury properly concluded this product was not defective in its time.

The Court should grant the Petition for Rehearing *En Banc*. This case is of exceptional importance. If today's knowledge is applied to old products, liability—here and in the plethora of cases no doubt to come—would be entirely unprincipled. Manufacturers and other businesses must not be subject to open-ended liability for hazards that were not knowable, detectable, or foreseeable when their products were made and sold.

ARGUMENT

I. THE PANEL DECISION IMPROPERLY HOLDS THAT A DECADES-OLD PRODUCT CAN BE DEFECTIVELY DESIGNED BASED SOLELY ON TODAY'S "MODERN KNOWLEDGE"

A. Contrary to the Panel's Ruling, the Risk-Utility Test Creates Liability Only When Foreseeable Risks Are Preventable

The panel decision disregards longstanding California law 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 sale. In *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1962), the California Supreme

Court became the first court in the country to adopt products liability, finding liability can ensue when a plaintiff proves injury "as a result of a defect in the design . . . that made the [product] unsafe." As courts have subsequently held, "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 (Cal. 1994).

California courts employ two tests for proving design defect, both of which are inconsistent with the panel's ruling because they are fixed at the time of sale: consumer expectations when purchasing the product and the risk-benefit test based on foreseeable harm that can be feasibly prevented. *See Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978); *Wiler v. Firestone Tire & Rubber Co.*, 157 Cal. Rptr. 248, 252 (Cal. Ct. App. 1979) (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.").

In 2018, the California Supreme Court underscored the temporal component to the risk utility test in *Kim v. Toyota Motor Corp.*, 424 P.3d 290 (Cal. 2018). The court explained that juries must assess the technology available at the time of sale to determine whether the manufacturer should have redesigned the product to avoid those risks. *See id.* 293. The risk-utility test determines "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). The jury's responsibility is to determine whether the manufacturer "balanced the relevant considerations correctly." *Id.* at 298. Accordingly, the court *approved* the trial court's rejection of the plaintiff's suggested jury instruction, which like here, argued 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. Manufacturers cannot balance considerations that do not exist.

California's insistence that product risks and designs must be 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 Kim*, 404 P.3d at 299 n.5; Judicial Council of California Civil Jury Instructions (2019 ed.), No. 1200 Strict Liability – Essential Factual Elements, at 697. As the Restatement explains, "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) (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.* (emphasis added).

The panel misappropriates the *Barker* court's use of the word "hindsight." The California Supreme Court in *Barker* stated that a jury can determine that a product was defective "if through hindsight [it] determines that the product's design embodies 'excessive preventable danger.'" *Barker*, 573 P.2d at 454. As the dissent in the case at bar observes, no court has ever interpreted this statement as changing the rule that a product must be defective based on information attainable at the time of sale. To the contrary, in the same sentence, the *Barker* court underscored that the test is applied only to *preventable danger*. *See id*. The panel's ruling misses this critical context. Plaintiff must demonstrate, through the lens of hindsight, how Defendant could have improved and corrected the danger at the time of sale. Risks based on futuristic, unattainable knowledge are unpreventable.

The jury instruction in this case, which included this long-standing requirement, along with the jury's finding against liability, followed well-established California law. Subjecting companies to liability based on knowledge that was not even attainable at the time of sale is contrary to California law.

B. Retroactive Application of Liability Based on Modern Knowledge Raises Constitutional Concerns

The rule adopted by the panel allowing retroactive liability based solely on modern knowledge for unpreventable harms at the time of sale raises serious due process concerns. The U.S. Supreme Court has explained that 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 here, the result is the "arbitrary deprivation[] of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).[2]

For these reasons, design liability is not 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

[2] A regulation may not be applied retroactively where it deprives a person of a vested right without due process. 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) (rules regarding retroactive legislation apply to regulations).

(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."). As the California Supreme Court has explained, "the risk-benefit balancing does in some ways resemble traditional negligence inquiry." *Kim*, 424 P.2d at 300. "The pertinent difference between the two inquiries . . . is that strict liability marshals this evidence to illuminate the condition of the product, rather than the reasonableness of the manufacturer's conduct." *Id.* By rooting this inquiry in the foreseeable risks and available technology, courts can prevent liability from being based on speculation, hindsight bias 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).

Here, Defendant manufactured and sold a product that many decades later was alleged to have unacceptable risks. No defendant could anticipate that a lawfully sold product that was state-of-the-art at the time of sale could give rise to liability decades later. *En banc* review would allow the court to consider due process issues that were not addressed by the panel.

II. BASING DESIGN LIABILITY ON UNATTAINABLE KNOWLEDGE RISKS CREATING ABSOLUTE LIABILITY OVER OLDER PRODUCTS AND UNDERMINING TORT LAW'S PROMOTION OF INNOVATION

The panel's ruling, even though unpublished, would facilitate a new class of indefensible claims, created solely by technological or scientific advances after a product's sale. The panel did not explain any limitations on its new liability theory or how the duty would apply to developments in technology that manufacturers pursue to improve products. The current temporal requirement in products liability law encourages manufacturers to manage foreseeable risks by using available technology to design products in ways that enhance safety without compromising benefits. *See* Restatement Third § 2 cmt a; *cf. Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 183 (Mich. 1984). By contrast, the panel's rule allowing juries to apply present-day standards to old products could have the opposite effect. It could depress the safety discovery process to avoid liability.

A. The Panel's Ruling for Retroactive Liability Is Inconsistent With the Importance of Developing Product Advancements

If present-day knowledge can make earlier versions of a product defective, product manufacturers could expect a flood of lawsuits over products made decades ago that could not have been designed to meet today's safety or environmental standards. New technology, product advancements and safety improvements happen regularly. Tort law's focus on foreseeable risks and

available technology fosters that innovation. *See Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013).

Further, many product risks are managed with legislative and regulatory oversight, meaning that applying new safety standards retroactively could put manufacturers in an untenable position with government regulators. 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 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. Those manufacturers were properly following DOT's guidance.

Similarly, manufacturers of chemicals and other products must be able to rely on modern scientific knowledge and government regulations, including when it comes to setting acceptable exposure levels. New regulations are enacted, as in the case at bar, or evolve based on new scientific technology and studies or, in some cases, changing attitudes toward public acceptance of certain risks. In these situations, legislators and regulators can react when these risks become known and validated. They can regulate a product's sale, require a label change, or remove a

product from the market. *En banc* review will allow the court to decide whether unprincipled, retroactive liability will be applied when restrictions are increased or products are improved.

B. The Panel's Ruling Risks Turning Manufacturers Into Insurers-Of-Last-Resort for Downstream Harms

En banc review is also merited because the panel's decision will spur similar lawsuits seeking to hold manufacturers liable whenever a product is used or misused in ways that create downstream costs that were unknowable at the time of sale. In these suits, just like here, companies will be targeted to pay costs without any culpability. Many courts have properly rejected such unprecedented and unwise expansions 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).

In fact, courts in California, as well as elsewhere in the Ninth Circuit, have repeatedly found against absolute product 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, 1063-64 (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.").

There simply is no sound 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 (a manufacturer is not "an insurer for all injuries which may result from the use of its product"). It is simply not proper to hold that, based on *today's* knowledge, a company should be held liable for risks that were unknown when its product was sold *decades ago*.

CONCLUSION

The Court should grant the Petition for Rehearing *En Banc* and reverse the panel's decision.

Respectfully submitted,

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Dated: March 2, 2020

CERTIFICATE OF COMPLIANCE

I certify that this *amici curiae* brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2). The brief contains 3156 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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Dated: March 2, 2020