Nos. 18-84, 18-86

In The Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY, ET AL.
Petitioners,

v.

CALIFORNIA,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

CALIFORNIA,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization whose members include

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of the intention of *amicus* to file this brief.

many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 100 cases.

The RLC and its members have a significant interest in the outcome of this case. The California Court of Appeal upheld a trial court's verdict against petitioners based on century-old advertisements promoting legal paint products and petitioners' participation in a trade association. Despite the absence of evidence that petitioners' or the trade association's advertisements caused any injury, petitioners were held jointly and severally liable for what the court deemed to be an "indivisible public nuisance" of lead paint in tens of thousands of homes.

The RLC's members regularly contribute to trade associations (including the RLC itself) and promote the sale of lawful products, as petitioners did in this case. Some RLC members also produce some of the products that they promote and sell. If the California Court of Appeal decision stands, the RLC's members could face liability on the basis of this lawful activity in a wide variety of unforeseen and unforeseeable circumstances, potentially far into the distant future. Accordingly, the RLC has a strong interest in the Court's intervention in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imagine the United States in 2118. Climate change has worsened. Flooding and extreme weather events threaten personal health and infrastructure, as well as public and private property.[2] Imagine further that scientists have proven conclusively that farming of livestock, particularly cows, contributed substantially to rising temperatures thereby causing climate change.[3] Blaming cattle and dairy farmers for the effects of climate change, Congress has outlawed livestock operations.

In an effort to shift the costs of remediating climate change to out-of-state defendants, a group of California municipalities endeavors to hold meat and dairy producers liable for the effects of livestock farming that occurred well before Congress outlawed the practice. After failed attempts to recover under strict liability and other traditional tort doctrines, the municipalities try a new tactic: pursuing those who merely "promoted" beef, milk, ice cream, and other products from livestock under a nuisance theory.

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[2] *See* Katja Frieler, *This Is What Will Happen to the Climate in the Next 100 Years*¸ THE CONVERSATION, Dec. 11, 2015, https://theconversation.com/this-is-what-will-happen-to-the-climate-in-the-next-100-years-52051.

[3] *See Methane Emissions From Cattle Are 11% Higher Than Estimated*, THE GUARDIAN, Sept. 29, 2017 (noting that methane contributes to warming temperatures to a greater degree than carbon dioxide), https://www.theguardian.com/environment/2017/sep/29/methane-emissions-cattle-11-percent-higher-than-estimated#img-1.

Singling out the few meat and dairy producers still in business 100 years later (mostly successors-in-interest), as well as some of the grocers from that era, the plaintiff municipalities rely on century-old advertisements endorsing "grass-fed beef" and "organic milk." They argue that those ads—promoting then-lawful products for then-lawful uses—were "inherently misleading" because they described milk and beef as healthy and nutritious without informing the public of the connection between livestock operations and climate change. The plaintiffs fail to show that anyone specifically relied on the ads, that the promotions were causally linked to any damage claimed, or that the defendants possessed any information not known to the general public and scientific community about climate change. Yet a handful of beef and milk producers and a grocery store that sold their products are required to pay a trillion dollars to abate the "indivisible" public nuisance of climate change effects throughout California.

***

This extreme example follows naturally from the extreme decision in this case. The California Court of Appeal determined that petitioners could be held responsible for abating the "public nuisance" of lead paint in tens of thousands of homes. It did so not because of any link between petitioners' conduct and the ongoing harm attributable to lead paint, but merely because petitioners promoted certain paints many years before those products were prohibited. In so holding, the court permitted a new theory of liability based exclusively on speech and association in a legal realm already awash with plaintiff-friendly

doctrines, including strict liability and theories that relax traditional causation requirements to their legal limits.

This new theory of liability based on speech disconnected from causation is light years removed from fundamental tort law principles. Untethered to those principles, California's theory is no more than a sleight of hand to hold individual producers (or potentially retailers) responsible for harms they did not cause and could not predict.

California has been on the vanguard of pushing strict liability and alternative theories of causation in the area of products liability for many years. But this innovation—that lawful promotion of legal products without any meaningful showing of causation may suffice for liability decades in the future—goes too far. This Court should not let it stand.

ARGUMENT

The RLC agrees with petitioners that California's public nuisance theory violates the First Amendment and due process. The RLC submits this brief in order to emphasize that the novel theory also flouts traditional tort law precepts—including broad products liability doctrine—that ensure that liability is not foisted on parties that, as a matter of law and fairness, cannot be held responsible. By predicating liability on century-old, legal promotional activities devoid of meaningful connection to the harm claimed, the California courts' public nuisance theory does just that.

A. Existing Products Liability Doctrines Stretch Liability To Its Legal Limit

Products liability is among the most plaintiff-friendly areas of law. Manufacturers (and others in the stream of commerce) may be held liable for defective products even if they exercise appropriate care in designing, producing, or selling those products. In addition, although plaintiffs are required to show causation, courts have found that element established even in the absence of proof that a particular defendant is responsible for the harm the plaintiff suffered. Both alone and in combination, these forgiving standards materially ease plaintiffs' paths to recovery in products liability cases relative to other torts.

Yet plaintiffs could not satisfy them here. That is because even the most lenient of products-liability standards adhere to basic tort principles cast aside in the present case.

1. Strict liability is an established part of products liability law. Since "its first enunciation in California, [strict liability] has been adopted or approved in nearly all other jurisdictions, as a matter of common law, or by statute." AMERICAN LAW OF PRODUCTS LIABILITY § 16.1 (3d ed. 2018) (footnotes omitted); *see also Greeman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963). In effect, strict liability permits a plaintiff to recover against a defendant even where the defendant was not negligent. Rather, as long as the plaintiff demonstrates that her injury is traceable to the defendant's product, liability will attach whether or

not the defendant could have prevented or foreseen the defect causing the injury.

This lenient standard is designed to ensure that "the costs of injuries resulting from defective products are borne by those" who produce and sell them. AMERICAN LAW OF PRODUCTS LIABILITY § 16.4. As described by the drafters of the Second Restatement, "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon" those that place goods in the stream of commerce, and "treated as a cost of production against which liability insurance can be obtained." RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

In addition to relieving plaintiffs of their obligation to establish breach of a duty of care in some circumstances, courts have permitted products liability plaintiffs to recover on creative theories of causation—with California courts again paving the way. Drawing on the notion that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury," the California Supreme Court allowed claims by plaintiffs who suffered birth defects as a result of their mothers' ingestion of certain drugs during pregnancy, even though they were unable to discern which of several manufacturers produced the drug that caused their injuries. *See Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980). With the goal of shifting costs away from consumers, the court premised potential liability on the defendants' respective market share. *See id.*

2. Despite strict liability and forgiving (even questionable) causation standards, plaintiffs have struggled to recover against producers for injuries caused by lead paint. Indeed, in this very case, respondents initially relied unsuccessfully on such theories (including strict liability for design defect and failure to warn). S-W Pet. 9.

As petitioners explain (ConAgra Pet. 8), many cases were dismissed on statute-of-limitations grounds as the conduct at issue occurred decades before claims were filed. Still others failed because plaintiffs could not connect their injuries to lead paint producers even under relaxed causation standards. Because lead paint was used over a period of many years—making it impossible to determine which manufacturers made up the market at any given time—courts deemed market-share theory inapplicable to lead paint claims. *See Skipworth by Williams v. Lead Indus. Ass'n*, 690 A.2d 169, 172-174 (Pa. 1997); *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 551 (1st Cir. 1993). Indeed, one court observed that the use of market share to approximate costs would "grotesquely distort liability," given that no defendant's responsibility for the damage caused could be determined to a reasonable degree of certainty. *Skipworth by Williams,* 690 A.2d at 173; *see also City of Phila. v. Lead Industries Ass'n*, 994 F.2d 112, 115 (3d Cir. 1993) (rejecting market share theory because Pennsylvania Supreme Court would not recognize it); *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245 (5th Cir. 1997) (affirming dismissal of all claims based on Louisiana law).

Compounding the difficulty of identifying the applicable lead paint producer, plaintiffs often could not show that paint was applied at the time the defendants manufactured it, rather than after its production was discontinued. As the First Circuit noted, that fact "raise[d] a substantial possibility that the[] defendants not only could be held liable for more harm than they actually caused, but also could be held liable when they did not, in fact, cause any harm to plaintiff at all." *Santiago*, 3 F.3d at 551. Recognizing that, "[u]nder plaintiff's theory, *** tortfeasors and innocent actors would not be adequately separated," the court found that allowing the plaintiff to recover would "do violence to the [principle] *** that wrongdoers [should] be held liable only for the harm they have caused." *Id.*

B. No Law or Policy Justifies A De Facto Expansion Of Products Liability Based On Promotion Alone

Unable to recover against petitioners under existing tort rules (even those relaxed to the legal limit), respondents and the California courts simply made up new ones. Their effort to sidestep the limits of existing doctrines cannot be justified as a matter of law or policy.

Even the expansive theories of liability and causation described above are grounded in fundamental tort principles: breach of duty, injury, and causation. Here, those concepts are unrecognizable.

To start, petitioners were found liable for merely *promoting* legal products for legal uses. Such pure speech is far afield from the conduct that typically

forms the basis for damages in products liability cases—namely, designing and manufacturing products found to be defective. Moreover, because liability was premised exclusively on product advertisements (*i.e.*, speech), the theory adopted by the California courts could apply to entities—such as retailers—that have nothing whatsoever to do with creating the products later determined to be dangerous. That reliance on speech-related activities pushes even the most forgiving tort standard beyond its moorings.

In addition, the California Court of Appeal dispensed with any meaningful causation requirement. The court did not predicate liability on a showing that petitioners' paint was used in particular residences, or even that anyone relied on the petitioners' advertisements to purchase and use any manufacturer's lead paint. Instead, the court upheld liability based on the notion that petitioners' promotions were at least "a very minor force" in the presence of lead paint in residences throughout the plaintiffs' jurisdictions. That hand-waving lowers the causation standard to the point that it is no standard at all.

If California's all-but-nonexistent causation standard were not problem enough, the court found that petitioners could be jointly and severally liable for an "indivisible" public nuisance. In other words, on the paper-thin basis of century-old advertisements, petitioners were held responsible today for abating a potential hazard in any residence within the ten plaintiff jurisdictions—a task estimated to cost hundreds of millions of dollars.

Liability of this nature is at odds with the foundational tort precept that "wrongdoers [should] be held liable only for the harm they have caused." *Santiago*, 3 F.3d at 551; *see also, e.g.*, *Paroline v. United States*, 134 S. Ct. 1710, 1725 (2014) (noting "bedrock principle that restitution should reflect the consequences of the defendant's own conduct, not the conduct of thousands of geographically and temporally distant offenders acting independently"). Divorced from that norm, the California courts' public nuisance theory is merely a means of unfairly targeting individual entities for shared harms they neither caused nor reasonably could have foreseen. This Court's intervention is warranted to right that wrong.

CONCLUSION

The petitions for certiorari should be granted and the judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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