SHOOK
HARDY & BACON

November 26, 2025

Court of Appeal
Second Appellate District
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: Letter of *Amici Curiae* Supporting the Petition for Writ of Mandate in The People of the State of California v. Pepsico, Inc., et al., Second Appellate District Case No. B350585

Dear Honorable Justices of the Second Appellate District:

Amici curiae, the Chamber of Commerce of the United States of America (U.S. Chamber) and the California Chamber of Commerce (CalChamber), urge this Court to grant the petition for writ of mandate filed by Pepsico, Inc. et al., on November 21, 2025, in the above referenced matter. We respectfully ask permission to file this letter on behalf of *amici*.

The writ petition seeks review of the Superior Court's novel, inexplicable theory of liability that would subject Defendants to public-nuisance liability merely for producing and selling a lawful, commonly used product with obvious benefits—plastic bottles. The petition correctly emphasizes that the Superior Court did not require the County to state a viable cause of action, including the essential elements of public nuisance liability, in denying Defendants' demurrer. The Court should grant the petition to correct this ruling and reinforce the core elements of a public nuisance claim in this State.

Amici also submit this letter to explain that this litigation raises complex questions of public policy, not a matter for tort liability to resolve at all. In its essence, the Complaint takes issue with the desirability of plastic packaging and the effectiveness of the State's recycling program. The proper means to raise these concerns is to through the legislative and regulatory processes, not to target a few of the many companies that sell these products in an effort to regulate the products—including, as under this ruling, out of existence through the back door of civil tort liability. Thus, in addition to misstating State law, the ruling contravenes State policy. The ruling should be reversed.

Authority for Permitting this *Amici* Letter

California Rules of Court, Rule 8.487(e)(1) expressly permits the filing of *amicus* briefs after an appellate court issues an alternative writ or order to show cause. The Advisory Committee comment to the rule makes clear that

amicus letters are also permissible before a court issues an alternative writ or order to show cause. Specifically, the Advisory Committee comment states:

> Subdivisions (d) and (e). These provisions do not alter the court's authority to request or permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause or when it notifies the parties that it is considering issuing a peremptory writ in the first instance.

Accordingly, California Courts of Appeal have considered the filing of *amicus* letters in connection with a writ petition in deciding whether to issue an order to show cause. (*See, e.g., Regents of Univ. of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557-558 ["based on the *amicus curiae* submissions we have received," the matter "appears to be of widespread interest" warranting writ review]; *Los Angeles County Board of Supervisors v. Superior Court* (2015) 235 Cal.App.4th 114 [noting the filing of *amicus curiae* letters "in support of issuance of the writ"], *rev'd. on other grounds* (2016) 2 Cal.5th 282; and *Gilead Sciences, Inc. v. Superior Court* (2024) 98 Cal.App.5th 911 [*amici* filed in support of writ].)

We ask the Court to respectfully consider this *amici* letter in support of granting the petition for writ of mandate filed by Defendants in this case.

Interest of *Amici Curiae*

The U.S. Chamber is the world's largest business federation. It represents approximately 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—including throughout the State of California. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and federal and state courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community. The U.S. Chamber routinely files *amicus curiae* briefs in cases pending before California courts, including cases involving tort and public-nuisance liability.

The CalChamber has approximately 12,000 members, both individual and corporate, representing virtually every economic interest in the State. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues.

No party or counsel for a party in the pending case authored the proposed *amici curiae* letter in whole or in part or made a monetary contribution intended to fund the preparation or submission of this proposed letter. No person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed letter.

Reasons this Court Should Grant the Petition

The Court should grant the petition to reinforce the crucial boundaries of tort liability, particularly the tort of public nuisance. At its essence, the Los Angeles County Counsel's office, is using this litigation to challenge the State's legal regime for managing certain commonly-used products—what it terms "single-use plastics." However, the laws surrounding the use of these plastics, including how they are defined, how they may be used, and how the State's recycling program works are all public-policy matters for the State Legislature or an appropriate regulatory body to address—not a question to be decided by tort-liability law governed by the courts. Nevertheless, the County Counsel's office filed this lawsuit and targeted these Defendants among the many companies that make, sell, or otherwise use these ordinary products. This policy-driven lawsuit does not state a viable cause of action—under public nuisance or any tort—and Defendants' demurrer should have been granted.

To the business community, the most alarming part of the ruling below is the holding that a defendant may be subject to public nuisance liability solely for making and selling a product with which a plaintiff takes issue. *See* Op. at *9. Specifically, the court held that it is the mere "introduction of single-use plastics into the ecosystem" that could subject the Defendants to liability. *Id.* Under this ruling, it is of no moment that these plastic products are fully lawful and have beneficial uses, that the State enacted a program to manage public costs associated with the use and disposal of plastic products, and whether consumers recycled the plastic products, or, contrary to the State's litter laws, discarded them improperly. This ruling cannot stand.

Merely selling a lawful product must not subject one to liability—under public nuisance or any other tort law. Businesses across economic sectors make and sell lawful products where risks of public costs are associated with their use, misuse, and abuse. Governments often establish regulations or programming to manage those risks. Tort liability, which penalizes defendants retroactively, must not be used to reverse the State's public-policy determinations and subject companies to penalties for engaging in lawful commerce. Such an outcome would not be in the interest of the public, who benefit from these products, and would raise serious due process concerns for the defendants.

The Trial Court's Ruling Imposes Public Nuisance Tort Liability Merely for Making a Lawful, Beneficial Product

In subjecting Defendants to public nuisance liability solely for making and selling plastic products, the trial court fundamentally erred in applying the State's public nuisance doctrine. It eliminated bedrock elements of the tort—namely that Defendants engaged in wrongful conduct that caused a public nuisance. Without these elements, the resulting liability would have no appreciable legal standards, which is why the California Supreme Court has cautioned against such rulings. It has explained that there must be "a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance.'" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1107.)

To be clear, the lower court's ruling conflicts with public nuisance law. In California and around the country, the tort of public nuisance has a long history and distinct purpose: to stop someone from engaging in disruptive activities that unreasonably interfere with rights common to the general public. (*See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 U. Cin. L. Rev. 741, 743-47.) It is settled law that public-nuisance liability extends only to those who engage in such unlawful conduct and, in doing so, cause a public nuisance. (*See In re Firearms Cases* (2005) 126 Cal.App.4th 959, 988 [stating the elements of a public-nuisance action, including causation].) It does not extend to the manufacturer of a product or instrumentality just because others used it to create the public nuisance.

Accordingly, when public nuisance cases have been brought against manufacturers or sellers of products, California courts have consistently held that public-nuisance liability requires the plaintiff to show that the defendant engaged in "far more egregious" misconduct than merely selling and promoting the product. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 309.) It requires conduct "quite similar to instructing the purchaser to use the product in a hazardous manner," knowing it would create a public nuisance (*Id.*; *see also City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 43 [requiring "affirmative steps" that promote, encourage, or instruct consumers to "use [a] product in a hazardous manner"].) This type of misconduct has no redeeming qualities and is objectively unlawful.

No such misconduct exists here. The County does not accuse Defendants of instructing people to litter, much less to litter in any way that creates a public nuisance. Thus, Defendants neither engaged in public-nuisance conduct nor caused any alleged public-nuisance. The tort is not fit for this situation.

Indeed, courts across the country have strongly cautioned against using the tort of public nuisance to impose liability for making and selling products.

(*See* Restatement (Third) of Torts: Liability for Economic Harm (2020) § 8, cmt. g [stating that public nuisance liability has been "rejected by most courts" in product cases "because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue."]; *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.* (S.D.N.Y. 2022) 578 F. Supp. 3d 511 [stating many courts apply "what appears to be an absolute rule" that if a product, after being sold, creates or contributes to a nuisance, an entity that is in the product's chain of commerce is not liable unless it "controls or directs" the public-nuisance-causing activity]; *In re Lead Paint Litig.* (N.J. 2007) 924 A.2d 484, 501 [stating that "the conduct of merely offering an everyday household product for sale" does not "suffice for the purpose of interfering with a common right as we understand it"].)

Jettisoning key elements of a public-nuisance claim—including wrongful conduct and causation—is as extreme as eliminating breach and causation from a negligence claim. (*See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?* (2022) 31 Mealey's Emerging Toxic Torts 15.) Doing so would lead to rudderless, potentially unlimited liability for a wide variety of businesses. The Court should grant the petition to correct the ruling below and reinforce the elements and limitations of the tort of public nuisance.

Product Liability Law, Not the Tort of Public Nuisance, Governs Product-Based Risks

The Court should also grant the petition to stop expansive public nuisance lawsuits from supplanting product liability law in the State. In California, and other states, product liability is the body of tort law that governs risks associated with manufacturing and selling products. Product-liability causes of action have their own carefully delineated purposes, elements, and remedies to manage risks that manufacturers and sellers can control before they place lawful products into the stream of commerce: ensuring the product is not defective in design, manufacture and warnings. Here, the lower court subverted California's product liability law by subjecting an entire category of lawful products to liability—irrespective of any defect.

This concept of "category liability" for products has been widely rejected under product liability law. (*See* Richard C. Ausness, *Product Category Liability: A Critical Analysis* (1997) 24 N. Ky. L. Rev. 423, 424.) It seeks to subject a manufacturer to liability for all the harm a product it sold causes—regardless of whether the product was lawful and non-defective, and that someone else controlled the product and caused the harms alleged. (*See* Henderson & Twerski, 66 N.Y.U. L. Rev. at 1329; *see also* Restatement of the Law, Third: Prods. Liab. (1998) § 2 cmt d [reporting "courts have not imposed liability for categories of products that are generally available and widely used"].) The result of allowing this theory would be to "prohibit

altogether the continued commercial distribution of such products." (*Id.*) The courts should not circumvent this long-standing product liability tenet by recasting the targeted product category as a public nuisance.

Further, for all types of products, courts and scholars have long explained that manufacturers and sellers are not responsible for policing customers to ensure products, after they are sold, are not used in ways that could create harm—including a public nuisance. (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 [stating that if such a theory were allowed, an auto manufacturer "would be liable for all damages produced by the car" and "anyone cut by a knife could sue the maker"].) For example, a person may cause a public nuisance by throwing nails or tacks on a public road to block people from using that road, but that does not create liability on the manufacturer of the nails or tacks. Similarly, here, Defendants are not insurers against litter or plastic bottles that end up in landfills.

Yet, that is what the ruling below would do. It would subject Defendants to liability for selling an entire category of products solely because consumers who purchase them may litter those products or throw those products into general trash, rather than recycle them.

To avoid this scenario, courts have held the risks associated with products are "better analyzed through the law of negligence or products liability." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292, 309-310 [cautioning against the use of public nuisance law in a way that would create "essentially a products liability action in the guise of a public nuisance action"]; *see also State ex rel. Hunter v. Johnson & Johnson* (Okla. 2021) 499 P.3d 719 ["Public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap."].)

These courts appreciated that creating category product liability through the tort of public nuisance would allow governments to "convert almost every products liability action into a nuisance claim." (*Johnson County, by and through Bd. of Educ. of. Tenn. v. U.S. Gypsum Co.* (E.D. Tenn. 1984) 580 F.Supp. 284, 294.) This liability theory could be invoked at the whim of any county, state, or municipal attorney. As a New York appellate court explained:

> 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.) Such unprincipled liability is not and never has been the law in California.

The Trial Court's Ruling Directly Contradicts the Legislature's Regime for Managing Public Risks Associated with the Sale of Plastic Products

Finally, the Court should grant the petition because this ruling inexplicably grants local officials a cause of action for suing companies over state or federal public policies with which they disagree. As the U.S. Supreme Court has recognized, "regulation can be effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." (*Kurns v. R.R. Friction Prods. Corp.*, (2012) 565 U.S. 625, 637 [cleaned up]).

There is significant danger in allowing local governments to use the blunt tool of civil liability to manage public risks when the State already has in place programs designed specifically to manage those risks. For decades, the State has developed and refined its recycling program, which implicitly authorizes and recognizes the lawful production and sale of plastic products—including those at issue in this case. This program identifies factors that make packaging recyclable and provides symbols or statements that may be displayed on the packaging to indicate recyclability. *See* Pub. Res. Code, § 42355.51, subd. (b),(c),(e). If a State finds that the public risks associated with a product outweighs its benefits—even when subject to regulation—it can ban them. It has not done so here, and for good reasons. Plastic packaging and bottles are highly beneficial to the public.

Using public nuisance litigation to second-guess these State public-policy decisions would not just undermine this regulatory regime—but all regulatory regimes. Manufacturers and other businesses must be able to rely on government regulations seeking to balance benefits and risks of products and services. Legislatures and regulatory bodies can weigh costs, benefits, and social values. They can conduct public hearings, commission research, engage in meaningful discourse with affected communities, and consider all stakeholder interests. Courts do not have these institutional tools.

Indeed, the California Supreme Court has recognized that when governments manage such risks, individuals, businesses, and others are not to be subject to liability when selling products or providing services subject to these programs. (*See City of Norwalk v. City of Cerritos* (2024) 99 Cal.App.5th 977, 986 ["Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."]) At the very least, here, selling plastic is *per se* reasonable, in public nuisance terms, because it is implicitly allowed and recognized as lawful under the State's recycling program.

Overall, banning products and developing government programs are the province of the Legislature and regulatory agencies. (*See Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 366 [noting that resolving the issues there "lies in the political sphere"].) The Court should grant the petition to protect the State's judiciary, its citizens, and companies operating here from litigation that seeks to use tort liability to impose policy preferences outside the checks and balances of the proper processes. Ensuring liability law aligns with the applicable regulatory regimes is a significant concern for the business community.

Conclusion

Amici respectfully urge the Court to grant Defendants' petition for review. This case is of great public significance. Court rulings that impose liability on businesses merely for making and selling lawful products and following the State's regulatory regime undermines the rule of law. If the Court does not grant the petition, many companies that manufacture and sell beneficial products—including where the government manages public benefits and risks—will undoubtedly face unprincipled and open-ended liability.

Further, the Court should not force these Defendants to litigate this case through trial before hearing this appeal. The trial court's ruling would impose unusually harsh and unfair burdens on Defendants based on a novel and unsupported legal theory that is significantly out-of-step with California law. The Court should grant the petition and reverse the ruling below.

Respectfully submitted,

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PROOF OF SERVICE

The People of the State of California v. Pepsico, Inc., et al., Case No. **B350585**.

I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am employed by the law firm of Shook Hardy & Bacon, LLP at 555 Mission Street, Suite 2300, San Francisco, CA 94105.

On November 26, 2025, I served the within AMICI CURIAE LETTER BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR WRIT OF MANDATE on the parties interested in this proceeding, as addressed below, by causing true copies thereof to be distributed as follows:

SEE ATTACHED SERVICE LIST

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

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

I am familiar with my firm's practice for collecting and processing correspondence for mailing and/or electronic service. Under that practice, any copies placed in the mail would be deposited with the service carrier that day in the ordinary course of business.

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

Executed November 26, 2025, at 555 Mission Street, Suite 2300, San Francisco, CA 94105.

/s/ Patrick J. Gregory
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