IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

No. H040880

THE PEOPLE,
Plaintiff, Cross-Defendant and Respondent,

v.

E.I. DU PONT DE NEMOURS COMPANY,
ATLANTIC RICHFIELD COMPANY,
Defendants,

and

CONAGRA GROCERY PRODUCTS COMPANY,
NL INDUSTRIES, INC.,
Defendants and Appellants,

and

THE SHERWIN-WILLIAMS COMPANY,
Defendant, Cross-Complainant and Appellant.

On Appeal from the Superior Court of Santa Clara County
(Case No. CV788657, Honorable James Kleinberg, Judge)

APPLICATION OF PACIFIC LEGAL FOUNDATION TO APPEAR AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND APPELLANTS AND REVERSAL

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TO BE FILED IN THE COURT OF APPEAL

State of California, Court of Appeal, Sixth Appellate District

Court of Appeal Case Number: **H040880**

Superior Court Case Number: **CV788657**

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APPELLANT/PETITIONER: **The People**

RESPONDENT/REAL PARTY IN INTEREST: **ConAgra Grocery Products Co., et al.**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*):

Amicus Curiae Pacific Legal Foundation

2.a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of Interest *(Explain)*:
(1)	
(2)	
(3)	
(4)	

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

s/ Christopher M. Kieser Date: **February 19, 2015**

CHRISTOPHER M. KIESER

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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APPLICATION OF PACIFIC LEGAL FOUNDATION TO APPEAR AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

Pursuant to California Rule of Court 8.200(c), and for the reasons set forth in this application, Pacific Legal Foundation respectfully requests permission to file the accompanying brief in support of Appellants ConAgra Grocery Products Company, *et al.*, for the reversal of the lower court decision.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals nationwide support PLF, as do many organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Washington, DC; and Palm Beach Gardens, Florida.

[1] In accordance with California Rule of Court 8.200(c)(3), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

PLF actively engages in research and litigation nationwide over a broad spectrum of public interest issues. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. As a general matter, the Project seeks to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice systems, and barriers to freedom of contract. PLF has participated in many cases in state supreme courts involving the scope of public nuisance theory and its application to business enterprises, including manufacturers of lead paint. *See, e.g., State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *People of the State of Cal. v. General Motors Corp.*, No. CO6-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

PLF believes that this public policy perspective and its national litigation experience will provide a helpful additional viewpoint on the issues presented in this case. PLF attorneys are familiar with the legal issues raised in this case, and their brief presents public policy and legal arguments pertinent to this Court's analysis. As Amicus Curiae, PLF will analyze the traditional underpinnings of the public nuisance doctrine, and demonstrate how the lower court's expansion of this doctrine to impose liability on the Defendants is incorrect as a matter of law. PLF will also argue that affirming the decision below will have a negative impact on California's economy.

For the above reasons, Pacific Legal Foundation respectfully requests this Court to grant its application to file the accompanying brief amicus curiae.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

INTRODUCTION AND SUMMARY OF ARGUMENT

This case demonstrates how the concept of public nuisance, if not strictly cabined, runs the risk of violating the due process guarantees of the Federal and state Constitutions. The doctrine of public nuisance is so vague that no legal authority actually knows what it means. Commentators have described it as "at least contested, and perhaps confused beyond repair," Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Envtl. Aff. L. Rev. 89, 96 (1998), and noted that "no judicial consensus has emerged on some of the core issues that should establish the parameters of the tort of public nuisance." Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 748 (2003). The superior court's declaration that all buildings with lead paint on them are *per se* public nuisances demonstrates—both substantively and procedurally—the danger that this vague legal concept presents to the guarantee of due process of law.

The superior court declared a significant portion of California's housing stock to be a public nuisance, *see* Statement of Decision at 104-06, and subjected manufacturers to staggering liability for selling and promoting a

product that was legal at the time it was made and sold. Left undisturbed, the decision below will dramatically expand the scope of tort liability in the state, contrary to sound public policy and in conflict with decisions of other state courts. Tort liability is a significant factor in a business' consideration of whether to expand its operations, create new jobs, or provide goods and services in a given market. If this Court declares that sellers of a legal product may be held liable for causing a public nuisance decades after engaging in activity that was lawful at the time, businesses will face constant uncertainty and a disincentive to operate in California.

The decision below also profoundly affects the rights of property owners throughout the state whose homes or other holdings have now been declared *per se* public nuisances. The superior court afforded these property owners no notice or opportunity to participate in the proceedings, yet it effectively declared their properties to be nuisances. As a result, any property owner who declines to participate in the abatement plan will be exposing himself to significant liability for maintaining a known public nuisance on his property. The damage to their property values and exposure to potential liability are severe. Yet, as with the corporate Defendants, these property owners have engaged in no wrongful behavior, and had no notice that their properties would be abruptly transformed into a public nuisance by judicial decree.

Public nuisance was poorly defined at common law, and recent decisions have served only to blur what few perceptible lines existed. According to the *Restatement (Second) of Torts* § 821B (1998), a public nuisance is an "unreasonable interference with a right common to the general public." But some recent judicial decisions, including the decision below, have held that even reasonable activities—such as legally selling lead paint without fraud or concealment—can serve as the basis for liability. The Rhode Island Supreme Court even declared that "plaintiffs may recover in nuisance despite the *otherwise nontortious* nature of the conduct which creates the injury." *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.1. 1982) (emphasis added).

By eliminating important legal guidelines, the court below has rendered the theory of public nuisance so vague that reasonable persons cannot be assured whether their actions will subject them to liability decades later, due to regulatory changes they could not possibly have anticipated. This violates one of the fundamental principles of due process of law, guaranteed by the Fourteenth Amendment. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

The exploitation of the vague concept of public nuisance also implicates separation of powers concerns because it allowed the superior court to significantly alter the state's tort law without input from the people's elected representatives in the Legislature. It is primarily the responsibility of the

Legislature to set rules for the sale of potentially hazardous products like paint, while it is the responsibility of courts to determine the presence of nuisances on a case-by-case basis that considers such objective factors as location, use, surrounding uses, and knowledge of risk, among other things. When courts place less emphasis on these considerations than on resolving what they see as broad social harms, they transcend the limits on the judicial function built up through the common law process and begin to usurp the legislative function. Given their statewide economic consequences, affecting countless parties who cannot—and in this case were not allowed to—participate in a court proceeding, such broad policy determinations should be left where they traditionally have been left: to the Legislature. The decision below should be reversed.

ARGUMENT

I

APPLYING PUBLIC NUISANCE LAW IN THIS SITUATION VIOLATES THE DUE PROCESS CLAUSE

Due process requires that laws be sufficiently clear and definite to allow persons to understand whether particular conduct violates the law. *Harrott v. Cnty. of Kings*, 25 Cal. 4th 1138, 1151 (2001). But the decision below takes a doctrine which is already extraordinarily vague and convoluted, and removes all perceptible limits on its application. It also significantly alters the rights of

owners of the affected properties without giving them an opportunity to be heard. Therefore, the application of public nuisance below violates the Due Process Clause of the Fourteenth Amendment.

A. Due Process Requires Reasonable Clarity in the Law

The legal theory of public nuisance is probably the most vague and least understood of all legal concepts. It has been alternatively described as a "wilderness of law,"[2] a "mystery,"[3] a "legal garbage can"[4] a "mongrel" doctrine "intractable to definition,"[5] and a "quagmire."[6] Given this troubling vagueness, courts have traditionally applied various limits to constrain it within constitutional boundaries. This Court should respect those long-established limitations on the public nuisance tort, and resist the state's attempt to manipulate public nuisance theory in ways that will allow it to recover damages for any conduct it sees fit to prosecute.

A basic element of due process of law is that the law must be clear enough that a reasonable person can know beforehand, with some reasonable degree of certainty, what acts will violate the law and what punishment is

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[2] Horace Wood, *The Law of Nuisances* iii (3d ed. 1893).

[3] Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 Harv. L. Rev. 984, 984 (1952).

[4] William Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942).

[5] F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. Rev. 480, 480 (1949).

[6] John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972).

likely to follow from a violation. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[O]rdinary notions of fair play" prohibit states from enforcing any law written "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

Although most cases involving the "constitutional requirement of definiteness," *United States v. Harriss*, 347 U.S. 612, 617 (1954), have dealt with criminal statutes, the requirement also applies to nuisance law. For example, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a protestor was convicted of violating a noise-abatement ordinance that prohibited a person from making "any noise or diversion which disturbs or tends to disturb the peace or good order" of a nearby school campus. *Id.* at 108. The protestor claimed that the law was unconstitutionally vague. While rejecting this claim, Justice Marshall explained that "a basic principle of due process" requires that the law should "clearly define[]" its "prohibitions." *Id.* Vague laws create three basic dangers. First, they may trap the innocent by not providing fair warning of what conduct is prohibited. *Id.* Second, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. *See also People v. Redd*, 48 Cal. 4th 691, 717 (2011) (noting that a law's lack of definiteness encourages arbitrary and discriminatory enforcement). And finally, vague

laws have the effect of deterring lawful conduct, because people must be always wary of violating them. *Grayned*, 408 U.S. at 109.

These principles also apply to civil laws.[7] Courts have applied the void-for-vagueness doctrine in cases involving "public nuisance" and similar causes of action, which might be described as civil, criminal, or both. *See Veiga v. McGee*, 26 F.3d 1206, 1213 (1st Cir. 1994). For example, in *Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), the court held that Pennsylvania could not use a public nuisance theory to prohibit the showing of an allegedly obscene film. It acknowledged that the state could restrict obscenity, but the law it employs to do so may not be "so vague and indefinite 'that men of common intelligence must necessarily guess at its meaning.'" *Id.* at 87 (quoting *Connally*, 269 U.S. at 391). That court described public nuisance as a "sprawling doctrine," and analogized it to "a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." *Id.* at 88 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)). *See also City of Bakersfield v. Miller*, 64 Cal. 2d 93, 99 (1966) ("the term 'nuisance' is peculiarly amorphous").

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[7] Modern public nuisance law occupies a middle ground between civil and criminal law. At common law, public nuisance was always a punishable crime. William L. Prosser & W. Page Keeton, *Prosser and Keeton on Torts* § 90, 645 (5th ed. 1984). Regardless of how it is classified, public nuisance is subject to the definiteness requirement.

Courts in several jurisdictions have applied a similar rule. In *Rubin v. City of Santa Monica*, 823 F. Supp. 709 (C.D. Cal. 1993), the plaintiffs challenged the constitutionality of a city ordinance that required a permit whenever a group of thirty-five persons assembled in a city park. The ordinance declared a license would not be granted if the assembly constituted a "public nuisance." *Id.* at 710. The district court explained that this standard was so ambiguous that it would give officials arbitrary power to grant or deny permits. Because the ordinance did not define a "public nuisance," it was "impermissibly vague." *Id.* at 713. Similarly, in *Connick v. Lucky Pierre's*, 331 So. 2d 431 (La. 1976), the Louisiana Supreme Court held that the Due Process Clause prohibits state officials from using a vague nuisance cause of action to shut down an alleged prostitution business. The court held that the statute was "so vague and indefinite that it does not give adequate notice of what action must be taken in order to avoid the issuance of an injunction or an order of abatement, or, once issued, of how to avoid being held in contempt for violation of the injunction." *Id.* at 435. The law was therefore "void for vagueness." *Id.*[8]

[8] It is true that businesses receive less protection than do individual defendants under the definiteness requirement, but even in the context of business regulation, "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (internal quotation marks and citation omitted). Therefore, the Defendants here are protected by the definiteness requirement.

These cases demonstrate the importance of clarity in legal definitions. The principles of Due Process require that the state announce comprehensible legal standards by which people can understand ahead of time what sort of behavior is likely to expose them to legal liability. For this reason, this Court must follow clear guidelines and limitations in applying public nuisance law.

B. The Application of Public Nuisance Law Below Violates Due Process

1. There Is No Judicial Consensus as to the Definition of Public Nuisance

"Commentators have long characterized the law of nuisance as a muddled and confusing doctrine." Halper, *supra*, at 89. Definitions—whether in case law or statutes—have generally proven unhelpful, often amounting to little more than a legal prohibition on bad conduct. In fact, Justice Blackmun commented that "one searches in vain . . . for anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

According to the California Legislature, a nuisance is "[a]nything which is injurious to health," and "interfere[s] with the comfortable enjoyment of life or property." Cal. Civ. Code § 3479. A "public nuisance" is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons." *Id.* § 3480. These broad terms leave much

to judicial construction and do little to cure the vagueness problem that besets public nuisance doctrine.

Aware of the habitual vagueness in the common law of public nuisance, the authors of the *Restatement (Second) of Torts* sought to limit its reach and to formulate a more objective definition. In Section 821B, they defined public nuisance as "an unreasonable interference with a right common to the general public." This is still a very broad definition, but it does contain two relatively clear elements: unreasonableness and interference with a common right.[9] Thus, the law of public nuisance was at least limited by some legal standards.

This is profoundly important because the goal of common law case development is to discover and articulate understandable standards, both to ensure the success of the government's mission of remedying and deterring wrongs and to limit government's power and protect innocent behavior from interference. "The handful of principles governing the tort of public nuisance were never intended to govern any unreasonable harm that might result from human interaction, nor are they adequate for such a daunting task." Gifford, *supra*, at 833. Nevertheless, the superior court effectively erased these principles which define and limit the scope of the public nuisance tort.

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[9] California courts have often cited Section 821B when interpreting the state's public nuisance statute. *See, e.g., People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1104 (1997); *In re Firearm Cases*, 126 Cal. App. 4th 959, 987-88 (2005).

2. The Decision Below Blurs the Few Existing Standards That Govern Public Nuisance Actions

The superior court's decision is typical of the fundamental problems with recent public nuisance actions. It suffers from four deficiencies. First, by declaring a lawfully sold product to be a public nuisance, the decision reads the element of "unreasonableness" out of the doctrine. Second, the superior court inappropriately broadened the definition of "public right" to include the aggregation of many private injuries, rather than an injury to the public as a whole. Third, the court did not require the state to prove that the Defendants caused any particular nuisance. And finally, property owners whose homes have now been declared public nuisances were not put on notice or given an opportunity to be heard before the judgment was entered.

a. The Decision Below Eliminates the "Unreasonableness" Element

However amorphous the concept of public nuisance, California courts have at least always followed the *Restatement*'s view that it only applies to unreasonable activity. *See Acuna*, 14 Cal. 4th at 1105 ("To qualify [as a public nuisance], and thus be enjoinable, the interference must be both substantial and unreasonable." (emphasis omitted)). This is probably not definite enough to satisfy due process requirements, but terms such as "unreasonable" are at least subject to "principled and intellectually rigorous common law development."

Gifford, *supra*, at 746. This allows parties to have a better sense of whether their conduct is illegal.

The authors of the *Restatement* defined an unreasonable act as one which is either intentional or "unintentional and otherwise actionable under the principles controlling liability for negligent and reckless conduct or for abnormally dangerous activities." *Restatement (Second) of Torts* § 821B, cmt. e. Moreover, the *Restatement* suggests that "[i]f a defendant's conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard." *Id.* In such cases, "the potentially widespread damage liability for a public nuisance" suggests that courts should refer to standard tort definitions of unreasonableness. *See id.* (directing courts to the standards for unreasonableness set out in §§ 826-831 of the *Restatement*).

In other words, conduct is not unreasonable solely because of its negative consequences, even if those consequences are severe. To hold otherwise would be, essentially, to illegalize "bad action" or "improper conduct." *Cf. Goldsmith v. Bd. of Educ.*, 66 Cal. App. 157, 167 (1924) (stating that California courts would likely find "unprofessional conduct" an insufficiently definite criterion to revoke a professional license); *Junction 615, Inc. v. Ohio Liquor Control Comm'n*, 732 N.E.2d 1025, 1032-33 (Ohio Ct.

App. 1999) (finding legal prohibition of "improper conduct" unconstitutionally vague).

But in this case, conduct which was lawful and non-tortious at the time that the Defendants engaged in it has been declared "unreasonable." The superior court found only that the Defendants had "sold lead paint with actual and constructive knowledge that it was harmful." Statement of Decision at 94. The state does not argue that the paint was defective; on the contrary, it was marketable at the time it was sold. Nevertheless, the trial court imposed liability on the basis of the Defendants' constructive knowledge that lead paint was harmful. *See id.* at 93-94. In response to the Defendants' contention that it is improper to base liability on hindsight, the trial court asked "shouldn't we take advantage of . . . contemporary knowledge to protect thousands of lives?" *Id.* at 96. Under this reasoning, states could seek indemnification from companies whenever they later determine that a legal product which the seller believed to be safe has caused too many negative consequences. This makes it impossible for anyone to know what conduct violates the law. As the New Jersey Supreme Court concluded when rejecting a complaint almost identical to that presented here, the decision below "stretch[es] the theory" of public nuisance "to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although *legal* when sold, and although sold no more recently than a quarter of a century ago, have become dangerous through deterioration and poor maintenance by the

purchasers." *In re Lead Paint Litig.*, 924 A.2d 484, 502 (N.J. 2007) (emphasis added).

By gutting the "unreasonableness" element, the court worsened the already vague boundaries of the public nuisance tort so that people may be held liable for virtually any lawful behavior later found to have deleterious effects. Widening the reach of tort law to such a vague and unpredictable horizon violates the principles of Due Process. "Courts are not free to pick undefined words from statutes and define them in a way to reach conduct which they disapprove." *State ex rel. Clemens v. ToNeCa, Inc.*, 265 N.W.2d 909, 914 (Iowa 1978). This Court should make clear that is not unreasonable for a manufacturer of a legal product to make and sell that product in a lawful and non-tortious way.

b. The Court Below Broadened the "Public Right" Element Beyond Its Proper Definition

The superior court's decision impermissibly broadens the definition of "public right" which is so important in limiting the scope of the public nuisance tort. This Court held in *In re Firearm Cases* that a defendant can be found liable for causing a public nuisance, not if it merely "create[s] a risk of some harm," but only if the harm caused is "likely to lead to invasion of the *public right* at issue." 126 Cal. App. 4th at 988 (emphasis added).

As with every other aspect of this tort, the definition of a "public right" has never been very clear. The *Restatement* defines it as a right "common to

all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." *Restatement (Second) of Torts* § 821B, cmt. g. From the history of common law decisions, it appears that a "public right" is something on the order of interfering with a common thoroughfare or public property. *See, e.g.*, *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 139 (Ill. App. Ct. 2005) (defining public right as "an indivisible resource shared by the public at large, like air, water, or public rights of way").

In brief, as the Rhode Island Supreme Court has observed, "a public right is more than an aggregate of private rights by a large number of injured people." *Lead Indus.*, 951 A.2d at 448. The latter are properly vindicated through class-action litigation seeking recovery for the aggregate private injuries. But the "public right" at issue in public nuisance cases is categorically different: it means interference with the sort of public trust that only the government can vindicate. As such, "[t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance." *Id.* (quoting Gifford, *supra*, at 817). This is because products are bought and used by individuals and any injury they cause is individual in nature. *See id.* Even aggregated, these injuries remain individual and cannot qualify as an injury to a "public right."

The court below, however, failed to analyze whether there is a public right to be free from exposure to lead paint. Instead, it simply assumed that a public right was violated because "[u]ltimately society will pay for these problems over time." Statement of Decision at 94. But if any product that may cause societal problems creates a public right to be free from its effects, there would truly be no difference between a public and private right. Were the Court to expand the definition of a public right, it "would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals." *Lead Indus.*, 951 A.2d at 454.

The "public right" which the public nuisance tort was designed to protect is the type of non-excludable public resource such as the air, or fishing rights, which can be affirmatively and directly harmed by a defendant's conduct, but which cannot be defended in any way except for public prosecution and abatement. This Court should not allow the state to broaden that definition to create a public right in each individual not to be injured by a potentially dangerous product.

c. The Superior Court Did Not Require Sufficient Evidence of Causation

Proof of causation is an essential element of any plaintiff's cause of action. In all but rare cases, the plaintiff must establish some causal relationship between the injury and the alleged wrongful conduct. Here, the

superior court observed that the Defendants sold lead paint in California that is currently contributing to increased blood lead levels, particularly in children. *See* Statement of Decision at 93-95. But it required no proof that lead paint sold by any of the Defendants actually *caused* an injury. *Id.* at 96. The court instead merely jumped from the fact that lead paint has detrimental effects, to the conclusion that the Defendants should indemnify the state. *See id.* Such a weak and attenuated causation analysis raises serious due process concerns.

Other courts considering the recent spate of creative public nuisance lawsuits have expressed significant concerns about the weakness of the causation element in such cases. For example, in *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, 615 F.3d 496 (6th Cir. 2010), city officials sued banks on the theory that funding low-interest home mortgage loans caused a public nuisance when the homebuyers were unable to make their payments and abandoned their homes. The court held that the harms alleged by the city ("eyesores, fires, drug deals, and looting") were not caused by the lenders. *Id.* at 505. Rather, "[h]omeowners . . . were responsible for maintaining their properties. Fires were likely started by negligent or malicious individuals or occurred because a home was poorly built. Drug dealers and looters made independent decisions to engage in that criminal conduct." *Id.* And in *Ashley County v. Pfizer, Inc.*, 552 F.3d 659, 668 (8th Cir. 2009), the court found that city officials failed to demonstrate a causal connection between the legal sales of cough medicine and the later criminal

activity of manufacturing methamphetamine. It noted several intervening causes, such as "the conduct of the independent retailers in selling the products; the illegal conduct of methamphetamine cooks purchasing the cold medicine along with numerous other items with the intent to manufacture methamphetamine; the illegal conduct of cooking the items into methamphetamine," and so forth. *Id*. Yet here, the superior court provided no meaningful analysis of causation.

If allowed to stand, the decision here will read out of the law the essential element of causation, fundamentally reshaping California tort law. This Court should not countenance this radical effort "to "re-engineer the law in order to reach the conduct of big industry." Frederick C. Schaefer & Christine Nykiel, *Lead Paint: Mass Tort Litigation and Public Nuisance Trends in America*, 74 Def. Couns. J. 153, 155 (2007).

d. The Decision Below Significantly Affected the Rights of Property Owners Without Notice

It is a fundamental principle of due process that property owners are entitled to notice and the opportunity to be heard before a court may render a decision that will "substantially affect" their property rights. *See Horn v. Cnty. of Ventura*, 24 Cal. 3d 605, 612 (1979). The decision below dramatically transgresses this rule.

The superior court classified millions of homes and other structures in California as *per se* public nuisances because they contain lead-based paint.

The court then ordered the Defendants to fund an abatement plan, which will reimburse participating homeowners for the process of abating that public nuisance. Statement of Decision at 102-04. But property owners who choose *not* to participate in that plan will thereby acknowledge that their property is a public nuisance of which they are aware. The superior court's order provides that if a property owner chooses not to enroll in the abatement plan, "the property should be deferred for actionable lead hazard control until the property owner vacates or sells," *id.* at 104,[10] but any person who chooses not to participate will be put on a publicly accessible list. *Id.*

This list will therefore become a list of owners who will have been legally deemed to be maintaining *per se* public nuisances on their property—subjecting them to significant liability and decreasing the value of their properties. Yet there may be any number of legitimate reasons why a property owner would prefer not to participate in the abatement program. The superior court itself acknowledged that "[t]ruly intact lead paint does not pose a hazard," *id.* at 94, and if a homeowner has just completed a fresh paint job that covered the old lead paint in the entire house, he may reasonably decide to reject the abatement and keep his house the way it is.[11] By making the

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[10] The Order adds, "unless there is a child who is at risk." *Id.* It does not specify how the abatement program is to compel homeowners with children to participate in the program if they choose not to do so.

[11] The Federal Government acknowledges that "[i]f paint is kept intact and (continued...)

abatement program voluntary, it implicitly acknowledges that property owners may validly choose to accept the risks. But by requiring a list of all properties that do not comply, the court makes those owners liable as a matter of law for maintaining public nuisances on their properties.

The problem is even more severe for the state's apartment owners and landlords. Under California law, a property may not be rented if it has a nuisance condition. *See* Health & Safety Code § 17920.3 (imposing liability on landowners for maintaining property under certain conditions). State statutes do *not* define intact lead paint as a lead hazard. *See id.* § 17920.10(a). But, in effect, the superior court's decision does. *See* Statement of Decision at 94 ("Truly intact lead paint does not pose a hazard, but since all paint deteriorates over time the hazard literally remains just below the surface."). As a result, the decision essentially rendered countless rental properties in California untenantable nuisance properties.[12] In addition, the Order requires that funding be prioritized for repairing dilapidated properties. *See* Statement of Decision at 107. This means that the primary beneficiaries of the abatement

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[11] (...continued)
surfaces are kept clean, children can live safely in a home painted with lead-based paint." Department of Housing and Urban Development, *Lead Paint Safety: A Field Guide for Painting, Home Maintenance, and Renovation Work* 2 (2001), *available at* http://www.hud.gov/offices/lead/training/LBPguide.pdf.

[12] The superior court acknowledged that these arguments were raised, but never addressed them. *See* Statement of Decision at 78.

plan will be those landlords who failed to maintain their properties adequately, while more conscientious landlords are saddled with potential nuisance liability—and must wait in line for reimbursement under the abatement program. That is why one commentator concluded that the "big winners" in the decision below are "slumlords." Daniel Fisher, *Slumlords are The Big Winners in California Judge's $1 Billion Lead-Paint Ruling*, Forbes, Dec. 19, 2013.[13]

The superior court imposed these massive new liabilities on property owners without allowing them to participate in the proceedings and be heard. Due process requires that a property owner receive notice and an opportunity to be heard before his property is declared a nuisance subject to abatement. *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 286 (1996). While there are circumstances in which a nuisance is so severe, or presents such an emergency, that less process is acceptable, *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 190 (1962), no such circumstances were present here.

In *Thain*, a property owner who failed to remove weeds from his property was subject to summary action by the city, which hired a gardener to remove the weeds and then billed the property owner. *Id.* at 179. The owner objected that he had not been accorded adequate notice and a proper hearing. *Id.* at 180. The court found that "special or summary proceedings for

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[13] *Available at* http://www.forbes.com/sites/danielfisher/2013/12/19/slumlords-are-the-big-winners-in-california-judges-1-billion-lead-paint-ruling/.

abatement are valid where they afford the essential elements of due process of law, namely notice and an opportunity to be heard." *Id.* at 189. The owner of a property subject to a nuisance action should, whenever possible, "be given a hearing upon the question whether his property is in fact a menace to the community." *Id.* (internal quotation marks and citation omitted). Only in extraordinary cases, in which something is "palpably and indisputably" a public nuisance, may "the legislature . . . authorize the seizure and destruction of property which is a nuisance without previous notice to the owner and an opportunity for a hearing." *Id.* at 190 (internal quotation marks and citation omitted). Here, no urgency was presented, and there was no reason not to allow the property owners to participate in a trial which determined whether they would be put to the choice of participating in renovation of their properties or having their names publicly announced as knowingly maintaining public nuisances on their properties.

In fact, the Defendants in this case made that precise argument in their Motion to Join Indispensable Parties, or, in the Alternative, to Dismiss. (*See* Filing G-31211 in Case No. 1-00-CV-788657, at 6.) The superior court rejected the Defendants' attempt to join the property owners and protect their due process rights. (*See* Filing G-32661 in Case No. 1-00-CV-788657, at 6-7.) The court also denied the Defendants' Application for Permission to Serve Inspection Notices before the trial. As a result, the property owners had no

input before the court took the substantial step of declaring their property to be a nuisance. The superior court's judgment is therefore improper.

II

DECLARING THE SALE OF LAWFUL ITEMS TO BE A PUBLIC NUISANCE IS CONTRARY TO SOUND PUBLIC POLICY AND THE PREVAILING NATIONAL TREND

Many commentators have recognized that "unchecked, unbalanced tort law can remove good products from the marketplace, discourage innovation, limit the supply of necessary medical services, result in loss of jobs, and unduly raise costs for consumers." Victor E. Schwartz, et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 Loy. U. Chi. L.J. 745, 746 (1997). The tort system cost the United States economy $264.6 billion—or $857 per person—in 2010. Towers Watson, *U.S. Tort Law Trends* 3 (2011). A rule of law that allows lawful activity to be penalized with massive financial liability years later would have potentially catastrophic effects on the state's economy.

This case exemplifies the startling degree of liability that can attach to lawful actions under the superior court's expansive public nuisance theory. The court required the three remaining Defendants to pay $1.15 billion into the abatement fund. *See* Statement of Decision at 109. Nor is this the first public nuisance action brought against these Defendants for the sale of lead paint. If courts in other states were to adopt the trial court's theory and hold the

Defendants liable, abatement costs would reach ruinous levels. *But see Lead Indus.*, 951 A.2d at 454 (refusing to allow public nuisance liability); *In re Lead Paint Litig.*, 924 A.2d at 502 (same).

Because public nuisance is such a vague concept and its application can lead to staggering liability, courts should exercise caution before extending the doctrine. Indeed, many courts have found persuasive policy reasons not to extend nuisance liability in lead paint cases. For example, in rejecting a claim by the State of Rhode Island against many of these same Defendants, the Rhode Island Supreme Court characterized that state's public nuisance argument as an "enormous leap." *Lead Indus.*, 951 A.2d at 454-55. That court expressed concern that expanding public nuisance to cover lead paint cases would impermissibly blur the distinction between nuisance and product liability actions. *See id.* at 456 ("A product-based public nuisance cause of action bears a close resemblance to a products liability action, *yet it is not limited by the strict requirements that surround a products liability action*." (emphasis added)). The New Jersey Supreme Court observed in a similar case that "were we to find a cause of action here, 'nuisance law would become a monster that would devour in one gulp the entire law of tort.'" *In re Lead Paint Litig.*, 924 A.2d at 505 (quoting *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (per curiam) (internal quotation marks omitted)); *see also City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114-15 (Mo. 2007) (refusing to

depart from traditional causation standards and holding lead paint sellers not liable for contributing to public nuisance); *Am. Cyanamid Co.*, 823 N.E.2d at 139 ("[P]ublic policy concerns dictate that legal cause cannot be established with respect to defendants in the present case that produced a legal product decades ago that was used by third parties who applied the product to surfaces in Chicago.").

This Court came to a similar conclusion in *In re Firearm Cases*. There, California cities and counties argued that firearms dealers contributed to a public nuisance by increasing the risk of gun-related deaths. 126 Cal. App. 4th at 968. The court rejected that theory, observing that "[c]ases cited by plaintiffs as examples of public nuisance in other contexts are distinguishable because the acts of defendants in those cases *were illegal or violated regulatory provisions* and did more than create a risk of harm." *Id.* at 988 (emphasis added). On the contrary, like the Defendants here, the firearms dealers had done no more than sell a legal product in accordance with state and federal regulations. This Court held that this was insufficient to subject them to vast public nuisance liability.

Significantly, this Court agreed with Ninth Circuit Judges Callahan and Kozinski about the consequences of expanding public nuisance doctrine. *See id.* at 990-91. In *Ileto v. Glock Inc.*, 370 F.3d 860 (9th Cir. 2004), Judge Callahan had written that allowing such a nuisance claim would have a "staggering" effect, because "[a]ny manufacturer of an arguably dangerous

product that finds its way into California [could] be hauled into court in California to defend against a civil action brought by a victim of the criminal use of that product." *Id.* at 862 (Callahan, J., dissenting from denial of rehearing). Judge Kozinski agreed, noting that "[i]mposing novel tort theories on economic activity significantly affects the risks of engaging in that activity, and thus alters the cost and availability of the activity." *Id.* at 868 (Kozinski, J., dissenting from denial of rehearing). Because regulation administered through the courts is inherently unpredictable, courts should "be wary of adopting broad new theories of liability, lest they undermine the democratic process through which the people normally decide whether, and to what degree, activities should be fostered or discouraged within the state." *Id.*

Both of these concerns are implicated in this case—particularly Judge Callahan's, because the theory of liability is not based upon the act of a third party, but rather on the simple passage of time. The superior court held the Defendants liable because deteriorating lead paint in private residences causes a health hazard, even though it did not when it was sold and applied. Statement of Decision at 94. If that is the proper standard for public nuisance liability, it would greatly increase the risk of doing business in California.

As these cases demonstrate, if the lawful sale of a legal product can later serve as the basis of public nuisance liability of unlimited severity, businesses will be less willing to participate in the California market, or to provide citizens with products that might later prove hazardous or simply

unpopular. This is not only true of such items as paints and firearms, but also of dangerous or unhealthy yet lawful products such as fast food, alcohol, or even automobiles. *See generally* Richard C. Ausness, *Tell Me What You Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for "Big Food"?*, 39 Ga. L. Rev. 839 (2005); Samuel J. Romero, Comment, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 Chap. L. Rev. 239, 277 (2004) ("Whether the fast-food industry has created a public nuisance by promoting unhealthy products and whether courts should ever interfere in this area of personal choice are difficult questions.").

In this case, the trial court declared lead paint to be a public nuisance because "the evidence is overwhelming that lead ingested by anyone is hazardous." Statement of Decision at 94. But, since "[t]ruly intact lead paint does not pose a hazard," it is only the passage of time that has caused the purported nuisance. *Id.* Under such a theory, things such as wood houses and electrical wiring could be public nuisances because they can cause fires when they get old. Perfectly legal products would then transform into nuisances over time. This cannot be a proper rule of law.

It is not far-fetched to imagine that, if the state is ultimately successful in this case, lawsuits against the manufacturers of other important and pervasive products will be forthcoming as well. California has already filed such cases. In *People of the State of California v. General Motors Corp.*,

No. CO6-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), the state sought millions of dollars in damages against car manufacturers for contributing to the public nuisance of global warming by manufacturing and selling automobiles.[14] And in *In re Firearm Cases*, 126 Cal. App. 4th 959, government officials sought nuisance damages against firearms manufacturers on the theory that legally making and selling guns contributed to crimes and other social harm. Ohio officials have tried—so far unsuccessfully—to sue banks on a public nuisance theory for funding sub-prime home mortgage loans, which homebuyers were later unable to pay, leading them to abandon the houses. *See, e.g.*, *Ameriquest Mortgage Sec.*, 615 F.3d 496; *City of Cleveland v. JP Morgan Chase Bank, N.A.*, 2013-Ohio-1035, 2013 WL 1183332 (Ohio Ct. App. Mar. 21, 2013).

As noted above, the Eighth Circuit recently dismissed an attempt by Arkansas officials to sue makers of legal cough medicine for public nuisance on the theory that some buyers use the medicine to make methamphetamine, which leads to social harms. *Pfizer, Inc.*, 552 F.3d at 668. That court was "very reluctant to open Pandora's box to the avalanche of actions that would follow" if it permitted such lawsuits, because it

> could easily predict that the next lawsuit would be against farmers' cooperatives for not telling their farmer customers to

[14] The district court in that case dismissed California's federal common law nuisance claim as a non-justiciable political question and declined to exercise supplemental jurisdiction over the state-law public nuisance claim. *Id.* at *16.

> sufficiently safeguard their anhydrous ammonia (another ingredient in illicit methamphetamine manufacture) tanks from theft by methamphetamine cooks. And what of the liability of manufacturers in other industries that, if stretched far enough, can be linked to other societal problems?

Id. at 671. The court was reluctant to encourage "'a proliferation of lawsuits . . . against these defendants but against other types of commercial enterprises—manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games—in order to address a myriad of societal problems.'" *Id.* at 672 (quoting *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 651 (D.C. 2005)); *see also People ex rel. Spitzer v. Sturm, Roger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003) ("[G]iving a green light to a common-law public nuisance cause of action today will . . . likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.").

Finally, the decision below violates the principles of separation of powers. The California Supreme Court has recognized that in a field of law "so vague and uncertain," it is the function of the Legislature, not the judiciary, to make policy determinations. *People v. Lim*, 18 Cal. 2d 872, 880 (1941). As the *Lim* Court noted, the trouble with allowing the judiciary to expand public nuisance doctrine is that "[a]ctivity which in one period constitutes a public nuisance . . . might not be objectionable in another." *Id.* Allowing judges to set the state's public nuisance policy will only increase the uncertainty

inherent in the doctrine and make it nearly impossible for other potential defendants to avoid violating the law. Simply put, if the people of California wish to make the presence of lead paint an actionable public nuisance, it should be done by the Legislature and not the courts.

There is no dispute that California has the authority to protect the public from dangerous, pollution-causing products, or that the judiciary has a role to play in such regulation. But the Legislature and the courts have devised mechanisms for doing so—through environmental legislation and products liability law. Indeed, California already has such a law in place—Health & Safety Code § 17920.10—which acknowledges that well-maintained, intact lead paint is not hazardous. Such statutory standards have what the public nuisance theory dangerously lacks: clear, predictable standards that permit a business to know what sort of behavior is prohibited, and what sort of liability it will expose itself to if it engages in that behavior. Employing the amorphous concept of public nuisance instead, and disregarding such essential legal standards as causation, reasonableness, and notice-and-hearing, is an end-run around the legislative process which is legally improper and economically dangerous. *See* Gifford, *supra*, at 837 ("The recent attempts to use public nuisance law in novel ways are patently intended to circumvent 'the boundary between the well-developed body of product liability law and public nuisance law.'" (quoting *Camden Cnty.*, 273 F.3d at 540)). This Court should reject the

superior court's excessively broad public nuisance finding and reverse the decision below.

CONCLUSION

The decision below is contrary to sound public policy and to basic principles of Due Process, which "protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law . . . [through] judicial alteration of a common law doctrine." *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001). It violates not only the rights of the corporate Defendants, but also of countless California property owners whose properties have been deemed a *per se* public nuisance in a proceeding in which they were given no notice or opportunity to participate.

The judgment of the Santa Clara County Superior Court should be reversed.

DATED: February 19, 2015.

Respectfully submitted,

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By s/ Christopher M. Kieser
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND APPELLANTS is proportionately spaced, has a typeface of 13 points or more, and contains 8,019 words.

DATED: February 19, 2015.

s/ Christopher M. Kieser
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DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 19th day of February, 2015, at Sacramento, California.

s/ Barbara A. Siebert
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