Case No. **H040880**

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff, Cross-Defendant and Respondent,

vs.

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants, Cross-Complainants and Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF SANTA CLARA COUNTY,
HON. JAMES P. KLEINBERG, CASE NO. 1-00-CV-788657.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS, CROSS-COMPLAINANTS AND APPELLANTS

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INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICUS

The Civil Justice Association of California ("CJAC" or "amicus")[1] welcomes the opportunity to address two issues this case presents:

(1) Is "public nuisance" an apt legal theory for holding three manufacturers of lead paint, who stopped making and selling it long before it was outlawed in 1978, responsible for paying $1.15 billion into a state fund to cover the costs of having that paint removed from the interiors of houses where it was applied decades ago; and

(2) Can these defendants be found, in logic or law, to have "caused" the "public nuisance" about which prosecutors (acting through privately retained contingency fee counsel) complain?

CJAC contends the rational and fair answer to both questions is "No." That the trial court held otherwise is deeply troubling, not just to defendants but to the public

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[1] By separate application accompanying the lodging of this brief, CJAC requests the Court to accept and file it.

interest and for the administration of justice. Unless reversed, defendants will be saddled with a huge financial burden for having done no more than made, advertised and sold paint containing lead pigment that was entirely legal for them to do at the time (and which they voluntarily discontinued making and distributing long before its sale was prohibited by federal law in 1978). The court's decision, paying lip service to phrases from *Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292 (*ARCO*), equated defendant's conduct in manufacturing, selling and advertising their legal products (for which they are deemed to have constructive knowledge about the paint's danger to health) as "promoting" and thereby "creating or assisting in the creation" of a "public nuisance."

Defendants' liability is based largely on cherry-picked statistical evidence – *viz.*, that they long ago manufactured a certain amount of paint containing lead-based pigments, an amount so disproportionately small when measured against the total amount of such paint manufactured, advertised and sold in the relevant jurisdictions that it cannot be realistically proportioned amongst defendants who also did the same but were neither named nor joined in the lawsuit. This "difficulty" of apportionment, led the judge to simply make each defendant "jointly and severally" liable for the total cost of abatement, an amount arrived at by another statistical guesstimate: multiplying the total number of homes in all plaintiff jurisdictions built before 1980 containing interior lead paint by the average cost of removing that paint from each home.

Most importantly, if this precariously premised judgment is upheld, it will serve as a dangerous precedent and future "model" for spin off claims against a wide array of businesses whose products or activities can, in retrospect, be said to somehow have

contributed in some way to a new, ill-defined and capacious "public nuisance." This is not a "Chicken Little – 'The sky is falling'" prophecy; it has already happened. "From guns to lead paint to sub-prime mortgages to global climate change, use of the common law doctrine of public nuisance to recover damages allegedly caused by the actions of multiple parties over many years is rising." Henry N. Butler & Todd J. Zywicki, *Expansion of Liability under Public Nuisance* (2010) 18 *SUP. CT. ECON. REV.* 1.

These concerns are central to CJAC, a nonprofit organization of businesses, professional associations and financial institutions. Indeed, these issues implicate our principal purpose – to educate the public about ways to make our civil liability laws more fair, efficient, economical and certain. Toward these ends, we regularly petition the courts, the legislature and the people themselves through voter initiatives, for redress when it comes to determining who should pay, how much, and to whom when the conduct of some occasions injury to others. In regards to one aspect of this case, for example, we unsuccessfully urged that private contingency fee counsel not be permitted to prosecute "public nuisance" actions because it would "distort the necessary neutrality required of public prosecutors when enforcing vague laws in which complex interests are to be delicately balanced."[2] The result of allowing this marriage of financial convenience between profit seeking private lawyers and public prosecutors was predictable:

> Even aside from the chance to rack up stupendous fees, [plaintiff] lawyers love these deals because they confer a mantle of legitimacy and state endorsement on lawsuit crusades, the

[2] *County of Santa Clara v. Superior Court (Atlantic Richfield Co.)* (2010) 50 Cal.4th 35, CJAC Amicus Curiae brief in support of defendants, filed April 27, 2009, p. 2.

> merits of which might otherwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee. There is no fee because the state generally will pay nothing for the private counsel's services unless the state wins at trial or obtains a lucrative settlement. . . . There are no expenses to pay because private contingent fee counsel generally advance the expenses associated with maintaining and prosecuting the lawsuit, subject to later reimbursement by the client.

Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 *MICH. ST. L. REV.* 941, 968-969. Not surprisingly, then, "public nuisance" lawsuits have proliferated to supplant conventional tort law and target a variety of products and services besides lead paint, including cigarettes, automobiles, gasoline, guns, pharmaceuticals, mortgage loans and fast food franchises.[3]

Most courts have seen through the folly of expanding public nuisance law to remedy every conceivable wrong, real or imagined; and the vast majority of scholarly comment about these tort extrapolation attempts have been highly critical. Nonetheless, the trial court's decision, bolstered by this court's opinion remanding the case after three previous trial judges dismissed it in all its iterations, stands unaware or unaffected by this plethora of authority and the reasons undergirding it. This time around, with at least a record based on more than artful pleadings, this court has an opportunity to "get it right" and correct the legal anomalies comprising and infecting this unprecedented, disturbing decision.

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[3] "[A] lesson can be learned from asbestos and tobacco litigation — that despite causation issues, a single case can have a far-reaching effect, opening a floodgate of similar litigation and toppling an entire industry." Lisa A. Perillo, *Scraping Beneath the Surface: Finally Holding Lead-Based Paint Manufacturers Liable by Applying Public Nuisance and Market-Share Liability* (2004) 32 *HOFSTRA L. REV.* 1039, 1041.

PROCEEDINGS BELOW

- **Before Trial**

In March 2000, the County of Santa Clara filed a class action complaint against a number of companies, or their successors-in-interest, that long ago manufactured, marketed, distributed, and/or sold paint containing lead pigment. The complaint alleged that this lead pigment contributed to health hazards when the paint deteriorated and peeled and people breathed in its dust or, in the case of children, ate paint chips. Other cities and counties soon joined the suit.

Following two successful demurrers, plaintiffs' third amended complaint alleged fraud and concealment, strict product liability, negligence, negligent breach of special duty, unfair business practices and public nuisance. As to the "public nuisance" action, plaintiffs alleged that the "presence of [l]ead in paint in homes and buildings in California unreasonably interfere[d] with the public health and safety of all residents of California who come in contact with it." Specifically, plaintiffs contended that defendants created or contributed to the creation of the public nuisance by marketing and promoting paint they knew, or should have known, posed health risks to the general population. Plaintiffs sought abatement of lead paint in the interiors of homes and buildings throughout their respective localities.

Defendants demurred to all causes of action, which the lower court granted without leave to amend. Plaintiffs appealed. In a lengthy and thoughtful opinion, this court overturned the trial judge's grant of demurrer to the plaintiffs' representative public nuisance cause of action, stating the complaint sufficiently alleged facts that, if proven, could lead to a finding the defendants caused or substantially contributed to

the nuisance.[4] The California Supreme Court denied defendants' petition for review of this decision. On remand, plaintiffs amended their complaint a fourth time to assert solely their representative public nuisance claim.

- **The Trial and Decision**

After a 23-day trial in which each side was allotted 40 hours to present evidence and argument, the court issued a 111-page "statement of decision." This decision ordered three of five paint manufacturers (defendants) to jointly and severally pay $1.15 billion into a new fund to be administered by, if it accepts, an existing state agency established by the Legislature years ago as part of a comprehensive regulatory scheme for dealing with the health hazards posed by lead in the environment. These monies were to be paid as "grants" to the plaintiff governments for "abating" the "public nuisance" of lead paint in the interior of residences constructed before 1980 within the combined jurisdictions represented by plaintiffs.

The decision made a number of findings and conclusions. Specifically, the court found, *inter alia*, that defendants, "to varying degrees, promoted and sold lead paint in the jurisdictions for years"; but did not find that they all ceased to do so decades before the use of lead pigments in paint was prohibited by federal law in 1978. It also found defendants "sold lead paint with actual and constructive knowledge that it was harmful"; though earlier in the decision it concedes that even if plaintiffs "have not proven that each defendant had actual knowledge of the hazard created by the use of lead paint on homes in the jurisdictions," they have "proven that defendants had

[4] This court also directed the lower court to vacate its order granting summary judgment and enter a new order granting summary adjudication on the UCL cause of action and denying summary adjudication on the negligence, strict liability and fraud causes of action.

constructive knowledge," and that is all that is required for public nuisance. Further, the court found that while "intact lead paint does not pose a hazard, since all paint deteriorates over time the hazard literally remains just below the surface"; and existing "programs at all government levels lack the resources to effectively deal with the problem." Decision, Pp. 93-94.

In its "conclusions of law," the decision states, *inter alia*, that lead ingested by anyone, but particularly children, is hazardous; that though "great strides in reducing lead exposure have been made," "thousands of children in the jurisdictions are still . . . victimized by this chemical"; that "constructive knowledge" by defendants' of the hazards of lead will suffice to impose "public nuisance liability upon them" for "promoting" their products through advertising, marketing and joining trade associations; that while "products of all kinds were at one time viewed as harmless," and "governmental agencies charged with public safety may have been late to their conclusions that lead was poisonous," this is not a "valid reason to turn a blind eye to the existing problem" instead of "tak[ing] advantage of . . more contemporary knowledge to protect thousands of lives"; and that defendants' reliance "on statistics and percentages" is "not a persuasive position" when "translated into the lives of children." Decision, Pp. 94-98.

SUMMARY OF ARGUMENT

The judgment should be reversed because it is legally unsound. Two essential elements of "public nuisance" are absent here: a right "common to the public" and causation. A "common public right" as that term is understood in the law of public nuisance, does not encompass the interest of a child to be free from exposure to

deteriorated lead-based paint in his or her private residence. Despite the tragic nature of the child's illness from ingesting lead paint chips or inhaling dust from deteriorating lead paint, that exposure usually occurs within the most private and intimate of surroundings: one's home, not a site "common to all members of the general public."

Causation requires a showing of actual causation – cause in fact – and legal causation, what formerly was called proximate causation. Neither are present here. There was no linkage to any of defendants' paint, whether containing lead pigments or not, to the interiors of any of the homes in any of plaintiffs' respective jurisdictions. Nor can there be legal causation, as the passage of time since any defendant made or sold paint containing lead pigments in any of plaintiffs' jurisdictions, and the intervening actions of others, make that connection so tenuous and remote as to negate legal causation. Further, legal causation cannot be based on defendants' conduct that was perfectly legal (before the government decided to prohibit the sale of paint containing lead pigments): making, advertising and selling their products and joining a trade association of other paint manufacturers and sellers to further their mutual interests.

This decision radically transforms public nuisance law, turning it into an unbridled tort that, unless corrected on appeal, will stand as a grave injustice to defendants and the administration of justice. The public nuisance claim and the impenetrable concept of causation on which it rests, presents a nonjusticiable issue that warrants reversal.

ARGUMENT

I. PUBLIC NUISANCE LAW IS ILL-SUITED FOR HOLDING A FEW MANUFACTURERS OF LEAD-BASED PAINT, WHO VOLUNTARILY STOPPED MAKING AND SELLING IT DECADES BEFORE IT WAS LEGALLY PROHIBITED, RESPONSIBLE FOR PAYING $1.15 BILLION INTO A STATE FUND TO COVER THE COST OF IDENTIFYING RESIDENCES WITH LEAD PAINT IN THEIR INTERIORS AND REMOVING IT.

A. The Decision Contorts the Doctrine of "Public Nuisance" into an Uncabined Concept By Confounding and Essentially Eliminating the Element of "Rights Common to the Public" with the Broader, Open-ended Criterion of "Public Health."

The decision cites to and quotes approvingly from *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 that "public nuisances are offenses against, or interferences with, the exercise of *rights common to the public*." *Id.* at 1103 (*Acuna*); Decision, p. 7, emphasis added . Yet a few pages later it leaps to the assertion that "[a]mong the rights common to the public is the right to public health," which it equates with "the right to be free from the harmful effects of lead in paint" that "is likely to cause significant harm to children, families, and the community at large." Decision, p. 12. No authority is cited for this proposition because none exists. By this statement, however, the trial court confuses a "right common to the public" with an abstract, ideal objective: the "right to public health" that would be nice for everyone to have, but cognizable only, at most, as a broad policy goal for courts to consider and weigh when rendering their decisions. This mistake mangles the tort of "public nuisance," taking it beyond its more

restricted common law parameters into the nether realm of a "super tort"[5] and warranting reversal.

Acuna and other appellate opinions are consistent in their reliance "extensively on the *RESTATEMENT (SECOND) OF TORTS*' formulation of elements to the public nuisance doctrine found in sections 821A through 821F," of which "unreasonable interference" with a "right common to the general public" is the first and foremost one. See, e.g., *Acuna, supra,* 14 Cal.4th at 1104-1105; *Fisher v. Zumwalt* (1900) 128 Cal. 493, 495-96 (noting that public nuisance is usually limited to "an invasion of a right which is *common to every person in the community*" or a "public right." (Emphasis added.)

Comment g to the *RESTATEMENT (SECOND) OF TORTS* section 821B provides, in pertinent part:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land *by a large number of persons*. There must be some interference with a public right. *A public right is one 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. (Emphasis added.)

This is a crucial point. As one astute scholar has commented about its importance in defining the scope of public nuisance doctrine:

> The essential nature of a "public right," may be illuminated by contrasting it with the "public interest." That which might benefit (or harm) "the public interest" is a far broader category than that which actually violates "a public right." For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a

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[5] Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law* (2010) 62 *OKLA. L. REV.* 629, 631.

> private right to hold a job). *Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.* It follows, then, that "a public right" is to "the public interest" much as "an entitlement" is to "a benefit." [Thus] . . . a government recoupment action that may well be initiated to promote or protect the public interest, is not necessarily a legitimate vindication of the violation of a public right.

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 *U. CIN. L. REV.* 741, 815-816; emphasis added. (Gifford).

In other words, contrary to the decision in this case, a "common public right" as that term is understood in the law of public nuisance does not encompass the interest of a child to be free from exposure to deteriorated lead-based paint in his or her private residence. Despite the tragic nature of the child's illness, the exposure to deteriorated and chipping lead-based paint usually occurs within the most private and intimate of surroundings: one's home, not a site "common to all members of the general public." We do not have here, then, an unreasonable interference by defendants with rights that are *common to the public*, but instead a threat to interests affecting a large number of persons – those who reside in residences built after 1980 whose interiors are covered with deteriorated lead paint. "Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes – obstruction of highways and waterways, or pollution of air or navigable streams." Gifford, *supra* at 818; see also *City of Chicago v. Beretta U.S.A. Corp.* (Ill. 2005) 821 N.E.2d 1099, 1114 (holding there is no public right to be "free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons" in Chicago).

To be sure, at first glance the language of California's public nuisance statutes appears in conflict with the *RESTATEMENT SECOND OF TORTS* and California case law on the importance of the "unreasonable interference" with a "right common to the public" element for a viable public nuisance action. That statute states:

> A public nuisance is one which *affects* at the same time an entire community or neighborhood, or *any considerable number of persons*, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Civil Code § 3480; emphasis added.[6] This language with its disjunctive phrases is broader than the *RESTATEMENT (2ND)* and pertinent appellate opinions that have placed judicial gloss on it, permitting an inference that lead pigment in paint applied to the interiors of residences constitutes a "public nuisance" if it "affects . . . [a] considerable number of persons," (Civ. Code § 3480) even though it does not satisfy the more stringent "common public right" requirement. While this may be the result inferred from a *literal* reading of the statutory language, it would not be the *literate* and correct one.[7]

Civil Code section 3480 was enacted in 1872 as a codification of the common law doctrine of "public nuisance" and has not changed in wording since last amended in 1874. In the ensuing 130 years, that language has, as mentioned, been informed and limned by a series of judicial opinions relying heavily on the *RESTATEMENT SECOND*

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[6] See also Civ. Code § 3479 defining a "nuisance," but not distinguishing between private and public nuisances, as "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin".

[7] Roger J. Traynor, *Reasoning in a Circle of Law* (1970) 56 Va. L. Rev. 739, 749.

OF TORTS. As *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 explained when interpreting another statute, section 1714 of the Civil Code,[8] as providing for comparative fault, though it had consistently been held for more than a century to instead provide for the quite different all-or-nothing defense of contributory negligence:

> [I]t was not the intention of the Legislature in enacting sections of th[e civil] code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Li, *supra*, 13 Cal.3d at 814. "Continuing judicial evolution" has made it abundantly clear that an essential element of public nuisance requires "unreasonable interference" with a "right common to the general public," (*RESTATEMENT (SECOND) OF TORTS* section 821B) not impairment of an interest that merely "affects . . . [a] considerable number of persons," (Civ. Code § 3480) the standard used by the trial court in reaching its decision. "[I]n the legal arena, *public* has a specialized meaning that is quite different from ordinary parlance. In the legal arena, *public* does not simply mean 'widespread.'" Mark A. Hall, *The Scope and Limits of Public Health Law* (2003) 46 *PERSP. BIOLOGY & MED*. 199.

Further support for the "interference with rights common to the public" element of "public nuisance" is found from enactment of statutes *in pari materia* with Civil Code

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[8] "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief."

section 3480. It is a basic canon of statutory construction that statutes *in pari materia* should be construed together so that all parts of the statutory scheme are given effect. *People v. Lamas* (2007) 42 Cal.4th 516, 525. "Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object." *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4; see also *Altaville Drug Store v. Employment Development Department* (1988) 44 Cal.3d 231, 236, fn. 4, [*in pari materia* means " '[o]f the same matter' " or " 'on the same subject,' " quoting *BLACK'S LAW DICT.* (5th ed.1981) 1004]).

In 2010, the Legislature passed, and the Governor signed, a bill to add language to the abatement remedy under Code of Civil Procedure § 731, permitting a "county counsel" to also enforce the referenced "public nuisance" statute, Civil Code § 3480.[9] These two statutes, the referenced and unchanged definition of "public nuisance" in section 3480 and the addition in section 731 of "county counsels" as parties entitled to assert the equitable remedy of abatement in enforcing that public nuisance provision, plainly relate to the same subject of "public nuisance" law and its enforcement. When, as here, the legislature amends a statute *in pari materia* with another "without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted [or referenced] portions of the statute are given the same construction they received before the amendment." *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734. "Where[, as here,] a statute is framed in language of an earlier enactment on the same or an analogous subject, and

[9] A.B. 1502, 2010 Cal. Legis. Serv. Ch. 570.

that enactment has been judicially construed, the Legislature is presumed to have adopted that construction." *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007. Thus, the language of Civil Code § 3480 must be read in the same way courts have consistently interpreted and applied it in conjunction with the *RESTATEMENT (SECOND) OF TORTS*: to require as an essential element of public nuisance that there be "unreasonable interference" with "rights common to the public." The decision in this case ignores any discussion of, or makes any finding on this element, instead improperly equating it with the amorphous "right to public health." Decision, p. 12.

B. The Decision's Expansion of the Tort of Public Nuisance is at Odds with the Legislature's Approach to Regulating the Problem of Lead Paint Hazards, Distorts California's Constitutional Structure and Inappropriately Determines a Nonjusticiable Political Question.

California has a comprehensive statutory and administrative scheme for dealing with health hazards posed by the presence of lead paint in commercial and residential buildings. The California Department of Health Services (Department) is required to establish and maintain an authorized state program for lead activities which meets U.S. Environmental Protection Agency (EPA) standards. Health and Safety Code § 105250(b).[10] California also enacted the Childhood Lead Poisoning Prevention Acts of 1986 and 1991, which mandate state screening of children's blood lead levels and case management for those with levels deemed worrisome. H & S Code §§ 124125-124165.

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[10] The required elements of such programs are established in federal regulations (61 Federal Register 45777, August 29, 1996) and include (1) accreditation of training programs, (2) certification of individuals, (3) implementation of work practice standards for lead activities, including abatement and lead hazard evaluation, and (4) enforcement and administration.

To comply with these legislative mandates, the Department adopted regulations governing lead activities in 1994 (Title 17, California Code of Regulations section 35001 *et seq.*) and established a Training and Certification Program for Lead Activities in 1998. The Department was recognized by the EPA as an authorized state program in September 1999. Since then, both the EPA and the U.S. Department of Housing and Urban Development (HUD) have adopted new regulations governing lead activities (64 Federal Register 50140, September 15, 1999; and 66 Federal Register 1205, January 5, 2001).

In addition, other state codes now make existing lead hazards, or creating a lead hazard, a violation subject to fines and/or imprisonment. This means that pre-1978 homes must be maintained so that they are lead-safe, with the paint intact. It also means that if a building owner and others with access to the buildings conduct activities that disturb painted surfaces on a pre-1978 building, they must take steps to contain paint chips and dust.

When governmental entities have actively regulated a particular kind of conduct or human activity by statute, ordinance, or administrative regulation, conduct that could be characterized as unreasonable under common law no longer subjects the actor to public nuisance liability if it complies with that regulatory scheme. *RESTATEMENT (SECOND) OF TORTS* § 821B cmt. f. Significantly, the California Legislature has expressly determined that only "deteriorated lead-based paint" is a "hazard" and that intact, well-maintained lead based paint is not a hazard. H & S Code § 17820.10. Yet the decision orders defendants to pay into a fund to be administered by a state agency, the Childhood Lead Poisoning Prevention Bureau, to abate all interior household paint

containing lead pigment in residences built before 1981, whether that paint is intact or not. Thus, the decision effectively amends existing statutes to make "abatable" under "public nuisance" what the Legislature has explicitly found not to be a health hazard; and it has ordered defendants to pay into a fund to be managed by an agency the Legislature directed to deal with lead in the environment by abating what the Legislature found not to be hazardous. Something looks wrong.

What's wrong is this court's decision ignores and usurps the Legislature's policy role in dealing with the problem of lead as a health hazard. The decision is a complex judicial decree that attempts to implement solutions to public health problems through the lens of justiciability – that is, determining whether the matter is suitable for judicial resolution or should be left to the legislative branch – and risks obscuring the dominant role of public prosecutors against paint manufacturers. In this case, public prosecutors have taken on for themselves the power to initiate and pursue regulatory litigation against product manufacturers. In doing so, they have expropriated functions traditionally handled in the constitutional framework by the legislative branch and by administrative agencies specifically tasked by the legislature to regulate particular products.

As imperfect as the functioning of state legislatures may be in practice, the attorney general's and local public prosecutors' appropriate roles within our constitutional framework are not to replace the provisions regulating products, whether resulting from settlement or judicial decree, so as to implement their own peculiar vision of social engineering. Nor will public policymaking be improved by a process that prioritizes regulatory goals depending on whether corporations with perceived

deep pockets can be blamed for causing a particular public health problem.

Courts have held that the enactment of comprehensive regulatory schemes such as that in place in California for lead hazards displace common law nuisance claims. See, *e.g.*, *Int'l. Paper v. Ouellette* (1987) 479 U.S. 481, 497 (holding that the Clean Water Act [CWA] precludes application of Vermont nuisance law against pollution source located in New York); *Milwaukee v. Illinois* (1981) 451 U.S. 304, 317-26 (holding that the CWA preempts federal common law nuisance claims for failure to adequately treat sewage). Most recently, the Supreme Court determined that incipient efforts by the EPA to regulate greenhouse gas emissions under the Clean Air Act are sufficient to displace federal common law nuisance actions seeking to compel reductions in those emissions. *Am. Elec. & Power v. Connecticut* (2011) 131 S. Ct. 2527, 2537.

When public nuisance was used as a precursor to CERCLA[11] to address environmental contamination in the Love Canal controversy, a decade of nuisance litigation failed to produce a solution.[12] Thereafter, arguments urging judicial expansion of public nuisance doctrine were increasingly rejected, including in California, where our state's supreme court deferred to the legislature's "statutory supremacy" to define and set standards for determining "public nuisance" liability for "criminal street gangs," cautioning that judicial creativity in concocting a right and remedy absent sufficient

[11] Comprehensive Environmental Response, Compensation, & Liability Act, 42 U.S.C. §§ 9601-9675.

[12] See generally, Charles H. Moellenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 *EXPERT EVIDENCE REPORT*, BNA (Sept. 24, 2007) 474, 475-76.

statutory moorings would risk "standardless" liability.[13] *Acuna*, *supra*, 14 Cal.4th 1107; see also *People v. Lim* (1941) 18 Cal.2d 872, 878–879 ("The courts of this state have refused to sanction the granting of injunctions on behalf of the state merely by a judicial extension of the definition of 'public nuisance.' ").

What the foregoing opinions reflect is a keen judicial awareness of the proper role courts must undertake in adjudicating disputes brought under the rubric of public nuisance. Defendants have characterized this sensitivity as appropriately embraced by the doctrine of "separation of powers,"[14] and urged reversal on that basis. Some courts and commentators place it in the category of nonjusticiable "political questions," for which courts have the authority to invoke *sua sponte* under both federal and California law. See, e.g., *Oryszak v. Sullivan* (D.C. Cir. 2009) 576 F.3d 522, 527("court must decline to adjudicate a nonjusticiable claim even if the defendant does not move to dismiss it." Ginsburg, J., concurring.); *Marks v. Whitney* (1971) 6 Cal.3d 251, 260-261 ("It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished.").

California, for instance, sued General Motors and five other automakers in federal court for creating and contributing to an alleged public nuisance under state and federal law – global warming. *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). The court dismissed the lawsuit on the ground it

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[13] *Acuna*, which upheld the anti-criminal gang injunction despite its warnings about the abuses inherent from expansive uses of public nuisance law, did not present the detailed statutory scheme to deal with contamination from lead in the environment that exists here.

[14] E.g., Opening Brief of Sherwin-Williams, Joined by other Defendants Pp. 49-51.

presented non-justiciable "political questions," explaining relevant to this case, that the claims asserted would require the court to balance the competing interests of reducing global warming emissions and the interests of economic and industrial development. "The balancing of those competing interests is the type of initial policy determination to be made by the political branches." *Id.* at *8. Similarly, to adjudicate the public nuisance claim in this case, the court must balance whether it's best to reduce risks to lead exposure according to the legislature's statutory scheme with the public prosecutors' notion of what should instead (or in addition) be done under the chameleonic "public nuisance" doctrine. Justice Scalia's plurality opinion in *Vieth v. Jubelirer* (2004) 541 U.S. 267, a gerrymandering challenge, teaches why the court should defer to the legislature and abjure the "public nuisance" remedy: public nuisance entails "a lack of judicially discoverable and manageable standards for resolving" the dispute. *Id.* at 305-306.

Here, political bodies including a federal task force,[15] the California Legislature, the California Department of Health, the federal Department of Housing and Urban Development (HUD),[16] all concluded that only interim controls,[17] more modest and more cost-effective hazard-reduction measures than lead abatement, were warranted.

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[15] *PRESIDENT'S TASK FORCE ON ENVTL. HEALTH RISKS AND SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS* (2000) p. 5.

[16] *HUD GENERAL LEAD-BASED PAINT REQUIREMENT AND DEFINITIONS FOR ALL PROGRAMS*, 24 C.F.R. §§ 35.100-35.175 (2010).

[17] Interim controls are "measures designed to reduce temporarily human exposure . . . to lead-based paint hazards." *Id.* at § 35.110. Examples of interim controls include painting over paint that is chipping and reducing dust created by surface friction. § 35.1330.

But the decision here takes the opposite approach. These other legislative and administrative agencies weighed the costs and benefits of literally hundreds of different combinations of lead-hazard reduction measures and came to the conclusion that only measures far more modest than those the trial court implemented were warranted. Obviously, the process through which these standards were determined was not one driven by "judicially discoverable and manageable standards." Further, the choice of the proper approach to correcting the conditions that led to childhood lead poisoning was "an initial policy determination of a kind clearly for non-judicial discretion," the type usually and best required from the politically accountable branches of government. In short, this case can and should be dismissed because it presents a non-justiciable political question.

C. The Majority of Courts that Have Considered "Public Nuisance" Law as a Vehicle to Hold Manufacturers of Lead Paint Responsible for its Abatement or Damages Have Rejected the Claims as Untenable.

Public nuisance suits filed against manufacturers for health hazards created by the sale and advertisement ("promotion") of their products have received a chilly reception in most jurisdictions. California courts would be wise to consider this, particularly the reasons animating the rejections. "Although holdings from other states are not controlling, and we remain free to steer a contrary course, nonetheless the near unanimity of agreement by courts considering very similar [applications of public nuisance doctrine] . . . indicates we should question the advisability" of holding the opposite. *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 298 (reversing third-party bad faith actions against insurance companies previously permitted by *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880).

Three state high courts – Missouri, New Jersey, and Rhode Island – and an Illinois appellate court have flatly rejected the application of public nuisance law to actions against manufacturers of paint containing lead pigments. One of the first courts to do so was the New Jersey Supreme Court, noted for its general receptivity to plaintiffs' claims. Twenty-six municipalities and towns brought civil public nuisance claims against lead paint manufacturers to recoup medical costs they incurred in providing care to their citizens suffering from illnesses related to lead paint exposure. The state's high court denied their claims, explaining that for it to do otherwise would require "stretch[ing] the concept of public nuisance far beyond recognition and . . . create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *In re Lead Paint Litig.* (N.J. 2007) 924 A.2d 484, 494. The opinion also stated that recognizing a public nuisance action "would be directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims." *Id.* at 487.

On the heels of New Jersey's ruling, the Supreme Court of Missouri heard an appeal filed by the City of St. Louis challenging the trial court's summary judgment order dismissing its public nuisance lawsuit against paint manufacturers. *City of St. Louis v. Benjamin Moore & Co.* (Mo. 2007) 226 S.W.3d 110. The city claimed, as do plaintiffs in this case, that before 1978 the defendants "produced, manufactured, processed, distributed, and marketed" lead paint and pigment. That paint was widely used in housing in the city, and defendants knew it was highly toxic and posed a real and serious health threat, particularly for children. The city contended the "presence of lead paint in housing built before . . . 1978 . . . unreasonably interfered with the public's

health, safety, welfare, and comfort," constituting a public nuisance for which it was owed damages for assessing, abating, and remediating the nuisance. But the Court upheld the trial court's ruling for defendants on *causation* grounds, explaining:

> The city . . . must meet the same causation standard as must other nuisance claimants and must show *specific and particularized harm* from the public nuisance of lead paint . . ..

226 S.W.3d at 116. The Court concluded that the requirement of "product identification . . .[, linking a particular product to harm caused,] applies with equal force to public nuisance cases brought by governmental entities for monetary damages accrued as an alleged result of the public nuisance." *Id.*

Next came Rhode Island's Supreme Court, which approved the public prosecutor's agreement with private contingency fee lawyers to litigate the public nuisance claim before it, but overturned the verdict against three lead paint companies for having created a public nuisance. (The abatement plan pursuant to the verdict was estimated to cost the three defendant paint companies $2.4 billion.)[18] In its unanimous rebuff to the public nuisance action, the Court stated the government plaintiffs could not show "that defendants' conduct interfered with a *public right* or that defendants were *in control of lead pigment* at the time it caused harm to children [in the state]." *State v. Lead Industries Association, Inc.* (R.I. 2008) 951 A.2d 428, 443.

[18] Joseph D. Pargola, *Childhood Lead Poisoning–Combating a Timeless Silent Killer* (2010) 37 *RUTGERS L. REC.* 300, 302.

An Illinois intermediate appellate court also rejected a governmental plaintiff's pubic nuisance claim against paint manufacturers and sellers of paint containing lead pigment. *City of Chicago v. American Cyanamid Co.* (2005) 355 Ill.App.3d 209, 823 N.E.2d 126. The City charged that the presence of lead-based paint in its jurisdiction constituted a public nuisance that defendants created by continuing to manufacture, market, and promote lead-based paint for use in areas accessible to children long after they knew or should have known that it was hazardous to children. The lower court dismissed the complaint for failing to state a claim. On appeal that judgment was affirmed on the basis there could be no *legal causation*, the court stating:

> We believe the same public policy concerns, applied to wrongdoers in tort cases, apply to cases involving a public nuisance. These public 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. Moreover, the legislature has enacted the Lead Poisoning Prevention Act, which places the responsibility upon landowners to remediate the effects of deteriorated lead-based paint. We therefore hold that the conduct of defendants in promoting and lawfully selling lead-containing pigments decades ago, which was subsequently lawfully used by others, cannot be a legal cause of plaintiff's complained-of injury, where the hazard only exists because Chicago landowners continue to violate laws that require them to remove *deteriorated* paint.

355 Ill.App.3d at 224. The Supreme Court of Illinois denied the City's appeal of the Appellate Court's decision. *City of Chicago v. Am. Cyanamid Co.* (Ill. 2005) 833 N.E.2d.[19]

[19] Significantly, in a fifth case – *City of Milwaukee v. NL Industries* (Wis. Ct. App. 2008) 762 N.W.2d 757, 770 – where the appellate court in a public nuisance action much like this reversed the trial court's summary judgment for defendant paint manufacturers on causation grounds and remanded the case back for trial, the jury (which defendants were denied here) (continued...)

Collectively, the opinions and decisions of these courts, which this decision does not discuss,[20] did and should have "put a significant dent in the momentum for governments" to deliberately lower liability standards by framing a case as a public nuisance action rather than a product liability suit. Victor Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-stakes Government Recoupment Suits* (2009) 44 *WAKE FOREST L. REV.* 923, 945. As the Supreme Court of New Jersey explained,

> [W]ere we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance. . . The result would be that merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action.

In re Lead Paint Litig., *supra*, 924 A.2d at 494, 501.

D. Scholarly Legal Commentary has been Critical of Attempts to Use Public Nuisance Law to Address Major Health and Environmental Problems like Lead Poisoning.

Commentary on efforts to expand public nuisance law to impose liability on manufacturers of products that contribute to various social and environmental ills has been generally critical. See, e.g., Richard Faulk & John Gray, *supra,* 2007 *MICH. ST. L. REV.* at 981-82 (public nuisance law threatens to become "a tort where liability is

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[19](...continued)
found defendant's conduct did not *cause* the nuisance.

[20] The decision states only that "while this court may take judicial notice from other jurisdictions that pertain to lead paint litigation (e.g., Rhode Island, Wisconsin), those cases are not controlling and are of marginal value because of the varied legal standards involved." Decision, p. 9. What these "varied legal standards" may be, the decision does not disclose.

based upon *unidentified* ills allegedly suffered by *unidentified* people caused by *unidentified* products in *unidentified* locations."); Roger Magnusson, *Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies* (2007) 35 *J.L. MED. & ETHICS* 571, 572 ("[its] . . . use . . . as a policy tool to respond comprehensively to environmental exposures, unhealthy lifestyles, and accidental injuries threatens to impinge on the interests of a wide variety of industries, and to significantly expand . . . state intervention."); James L. Huffman, *Beware of Greens in Praise of the Common Law* (2008) 58 *CASE W. RES. L. REV.* 813, 828-29 (expansive interpretations of public nuisance law undermines democratic choices made by elected officials.); Richard A. Epstein, *In Defense of the "Old" Public Health* (2004) 69 *BROOK. L. REV.* 1421, 1424 (by labeling health behaviors like diet, exercise, smoking, and tanning as "public health" problems, we trigger legal doctrines that privilege heavy-handed state intervention over protection of individual rights.); and Thaddeus Mason Pope, *The Slow Transition of U.S. Law Toward a Greater Emphasis on Prevention*, (2011) *PREVENTION VS. TREATMENT: PHILOSOPHICAL, EMPIRICAL AND CULTURAL REFLECTIONS* (Halley S. Faust & Paul T. Menzel eds.) ("while there may be cases in which aggregate de minimus self-regarding harm becomes collective harm, more is needed before the mere invocation of 'the community' justifies limiting liberty.").[21]

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[21] See also Mark A. Rothstein, *Rethinking the Meaning of Public Health* (2002) *J.L. MED. & ETHICS* 144, 148-149 (warning that because the use of public nuisance to protect public health includes the authority to supersede individual liberty and property interests in the name of the greater public good, it "cannot and must not be used indiscriminately."); Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule* (2001) 28 *ECOLOGY L.Q.* 755, 771, n. 54 (allowing personal injury claims to masquerade as public nuisance claims "inappropriate" because a "personal injury does not reflect injury to the community."); Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*
(continued...)

These articles emphasize both the distortion of conventional public nuisance law necessary to find liability, the likely metastasis of that doctrine for future litigation claims, the danger posed by expansion of public nuisance doctrine to representative democracy and individual rights, and the undesirable social and economic effects of applying this already difficult to define tort to a myriad of products manufacturers (e.g., multiple litigation, unwarranted claims, coercive settlements, excessive monetary awards, and escalating insurance, legal and related "transaction" costs). The breadth of criticism leveled at this omnivorous augmentation of public nuisance law, of trying to squeeze innumerable square boxes of factual patterns into the smaller, round doctrine of public nuisance law – along with numerous well-reasoned decisions of other state courts declining to just that – are pertinent to this court's reconsideration of its previous opinion in this case and whether to reverse the decision below. See, e.g., *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 921 (scholarly criticism justified reexamination of prior opinion "to determine its continuing viability.").

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[21](...continued)
(2008) 58 *CASE W. RES. L. REV.* 705, 748 ("[T]he expanded use of public nuisance doctrine in products liability and toxic torts cases . . . unjustifiably taints the primary legal doctrine of common law environmentalism."); Victor E. Schwartz, Cary Silverman & Phil Goldberg, *Toward Neutral Principles of Stare Decisis in Tort Law* (2006) 58 *S.C. L. REV.* 317, 366 (attempts by some states' attorneys general as well as personal injury lawyers to apply public nuisance law far outside the tort's traditional boundaries to product manufacturing an "unprincipled departure from stare decisis."); and Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 *U. CIN. L. REV.* 741, 815 (2003) (public nuisance should not be a means of recovering damages from product manufacturers.).

II. THERE IS NO "CAUSATION" SHOWN BECAUSE THE DECISION IS BASED ON MUDDLED, SHIFTING AND IMPROPER TESTS OF CAUSATION.

To succeed on a public nuisance cause of action, a plaintiff must prove causation. *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548. "[T]he critical question is whether the defendant created or assisted in the creation of the nuisance." *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38; accord, *ARCO*, *supra*, 137 Cal.App.4th at 306.

Whether the "created or assisted in the creation" of the public nuisance formulation is a separate, independent causation standard that supplants the well-recognized, long-standing principles of *actual* and *legal* causation, or is defined by them is unclear from the decision. Certainly there is authority that actual and legal causation must both be proven in public nuisance claims. "As with any tort, a plaintiff must establish causation to prevail in a public nuisance action. The causation analysis is the same as that for other torts and requires a showing of *both factual cause and proximate (legal) cause*." Schwartz, et. al., *ante* fn 5, 62 *OKLA. L. REV.* at 636; emphasis added.

The decision does not discuss *actual* or *legal causation* other than to state the judge's understanding that, according to *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969 (*Rutherford*), the "substantial factor" test for causation "subsumes the traditional 'but for' test of causation;" and that the "substantial factor" test is met so long as defendant's conduct plays more than an " 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss." Decision, p. 31. In other words, the judge believes no causation-in-fact need be shown whatsoever, only legal causation, which is easily demonstrated by simply showing that whatever defendants did, it was more

than a "theoretical" or "infinitesimal" cause of the "public nuisance." This parsing of *Rutherford* is nothing more than the imposition of "absolute liability" upon defendants under the guise of "public nuisance." Indeed, under the decision's verbal formulation for "causation," it would be difficult to imagine any defendant who could not be deemed liable for "creating or assisting in the creation" of a public nuisance by virtue of simply having made or distributed a product that eventually could be "connected" in some way to a health hazard, whether the product be lead paint, gasoline, pharmaceuticals, junk food or whatever.

Moreover, *Rutherford*, the principal authority upon which the judge rests his causation determination, is a *sui generis* causation test created especially for asbestos related injuries, one courts have found inapposite for private nuisance and related suits for damages brought on behalf of children suffering from "lead poisoning." "Because there is no "signature" injury linked to lead exposure in the way that mesothelioma is linked to asbestos, establishing causation [is] particularly difficult. Lindsay F. Wiley, *Rethinking the New Public Health* (2012) 69 *WASH. & LEE L. REV.* 207, 243. See also Kenneth Lepage, *Lead-Based Paint Litigation and the Problem of Causation: Toward a Unified Theory of Market Share Liability* (1995) 37 *B.C. L. REV.* 155, 158 ("Due to the generic nature of the effects of lead poisoning, it can be difficult to show both that lead poisoning is the cause of specific health defects and that a specific case of lead poisoning is due to lead paint." (footnote omitted)); *Brenner v. Am. Cyanamid Co.* (N.Y. App. Div. 1999) 699 N.Y.S.2d 848, 853 ("there is no signature injury associated with lead poisoning").

Likewise, attempts by public prosecutors to hold defendants who manufacture and distribute asbestos products liable under public nuisance doctrine have been soundly rejected by courts. *City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 586 ("City cites no California decision . . . that allows recovery for a defective product [asbestos] under a nuisance cause of action. Indeed, under City's theory, nuisance would become a monster that would devour in one gulp the entire law of tort.")'; *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.* (8th Cir. 1993) 984 F.2d 915, 920-21; *Cnty. of Johnson v. U.S. Gypsum Co.* (E.D. Tenn. 1984) 580 F. Supp. 284, 294 ("[A]llowing . . . this action under a nuisance theory would convert almost every products liability action into a nuisance claim."); *Detroit Bd. of Educ. v. Celotex Corp.* (Mich. Ct. App. 1992), 493 N.W.2d 513, 521 (stating that "manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by [a product] defect").

The decision, as mentioned, eschews any discussion of actual and legal causation other than a cryptic reference to the inapposite *Rutherford.* causation standard. This will not wash. As *In re Firearm Cases* (2005) 126 Cal.App.4th 959 instructs in response to the public nuisance claim against defendants for marketing and distributing firearms that became available to criminals, it must fail when "there is *no causal* connection between any conduct of the defendants and any incident of illegal acquisition of firearms or criminal acts or accidental injury by a firearm. *Defendants manufacture guns according to federal law and guidelines.*" *Id.* at 989; emphasis added.

Defendants here, like the defendant gun manufacturers, made, advertised and sold a product that was perfectly legal for them to do. In fact, *all* defendants found

liable here ceased to make and sell paint with lead pigment in it *decades before* it was banned by the federal government in 1978. Nonetheless, the decision imposes liability on them for having "created or assisted in the creation" – presumably *causing* – a public nuisance by "promoting" lead paint for interior use. The decision tellingly defines "promotion" as "the act of furthering the growth or development of something; especially: the furtherance of the acceptance and sale of merchandise through advertising, publicity, or discounting." Decision, p. 9, fn. 9.

But this court instructed that for public nuisance liability to attach, plaintiffs must show that defendants did something "distinct from and far more egregious than simply producing . . . .or failing to warn of a defective product." *ARCO*, *supra*, 137 Cal.App.4th at 309. Throughout the decision, however, defendants are deemed to have *caused* the public nuisance by having done no more than make, advertise and sell their legal products, products the decision states defendants *constructively knew* were dangerous. "Even if the People have not proven that each Defendant had *actual* knowledge of the hazard that was created by the use of lead paint on homes in the Jurisdictions, the People contend they have proven that the Defendants had *constructive* knowledge of that hazard. The Court agrees with the People on this point." Decision, p. 13. This is contrary to the court's guidance in *ARCO* that plaintiffs must demonstrate conduct "far more egregious than simply producing a defective product or failing to warn of a defective product." 137 Cal.App.4th at 309.

Advertising a product that is legal to make and sell is, of course, constitutionally protected activity; so no causative conduct imposing liability can be legally attributed to defendants for having done that. *44 Liquormart, Inc. v. Rhode Island* (1966) 517 U.S.

484, 504-508. Nor can defendants be found to have *caused* a public nuisance by belonging to a trade association to further their individual and collective interests. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment [freedom of association] protection." *Chavers v. Gatke Corp.* (2003) 107 Cal.App.4th 606, 618-619. The decision seeks to avoid this revetment to finding defendants liable for having engaged in constitutionally protected conduct by classifying it as mere evidence of their "creation" of the public nuisance rather than punishment for having done so; but this is distinction without a difference. Either way, defendants are being held liable for having done no more than engage in perfectly legal, protected conduct.

In sum, causation – actual and legal – for public nuisance liability was, and because of the confusing and improper factors seized upon by the judge, could *not* be shown. The absence of this other essential element from the lawsuit requires reversal.

CONCLUSION

For all the aforementioned reasons, the judgment should be reversed.

Dated: February 23, 2015

Respectfully submitted,

/s/

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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 9,400 words.

Date: February 23, 2015

Respectfully submitted,

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I, David Cooper, am employed in the city of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On February 23, 2015, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendants, Cross-Complainants and Appellants in *The People of the State of California v. Atlantic Richfield Co., et al.*, H040880 on all interested parties in this action by transmitting **via e-mail (except where indicated)** to the following:

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

Executed this 23rd day of February 2015 at Sacramento, California.

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