No. 14-849

IN THE

Supreme Court of the United States

AMERICAN CYANAMID CO., ET AL.,
Petitioners,
v.
ERNEST GIBSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN COATINGS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CORN REFINERS ASSOCIATION, AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONER

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February 13, 2015

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INTRODUCTION AND INTEREST OF AMICI

Amici curiae the National Association of Manufacturers, the American Chemistry Council, the American Coatings Association, and the Chamber of Commerce of the United States of America respectfully submit this brief in support of the Petitioners, on behalf of themselves and their membership.[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is a $812 billion enterprise and a key element of the nation's economy.

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[1] Pursuant to Rule 37.2(a), amici certify that counsel of record for the parties received timely notice of the intent to file this brief and have granted consent, which is on file with the Clerk of the Court. Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or its counsel made such a monetary contribution.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

The Corn Refiners Association ("CRA") is the national trade association representing the corn refining industry of the United States. The association and its predecessors have served this important segment of American agribusiness since 1913.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies.

The decision below strikes at the heart of a well-settled principle of American jurisprudence: That an individual will not be held liable for injuries to another unless a causal relationship between that individual and the injuries is demonstrated. This principle is founded in the core concepts of individual liberty and natural law that shape our legal system and in the social contract embodied in the Constitution's protection against deprivation of life, liberty and property without due process of law. The Seventh Circuit's disregard of this principle and its extraordinary retroactive imposition of liability without proof of causation for lawful conduct dating back to the first half of the 1900s cannot survive constitutional scrutiny.

While particularly extreme in its application, the risk contribution rule endorsed by the Seventh Circuit is illustrative of a broader trend in which courts are

applying novel tort theories by which individuals are forced to pay damages for injuries without proof of causation. These theories of liability without causation ignore traditional practice dating back to pre-Revolutionary times and pose a direct threat to the fabric of our constitutional system. This case provides an ideal vehicle for the Court to set a constitutional boundary for such theories without intruding upon the States' proper prerogatives in shaping tort liability. *Amici* urge that the Petition be granted.

ARGUMENT

More than a hundred years ago, the Court was presented with the question whether members of a voluntary pilot association could be held collectively liable to the owners of piloted vehicles for the negligence of an individual pilot. *Guy v. Donald*, 203 U.S. 399 (1906). The Court held that such collective liability was impermissible. The Court noted that the law may impose liability on individuals who have not directly caused damage in certain circumstances, such as when a principal is held liable for the acts of his agent, but the Court explained "there is always a limitation." *Id*. at 406. The Court warned that the law of agency "presses to the verge of general principles of liability" and that the law "must not be pressed beyond the point for which we can find a rational support." *Id*. at 407.

Last term, the Court sounded much the same cautionary note in holding that an individual defendant found guilty of possession of child pornography could not be held liable for the aggregate sum of all damage caused to the victim of the pornography. *Paroline v. United States*, 134 S. Ct. 1710 (2014). The Court allowed that tort law provides

in some instances for "a kind of legal fiction" in which defendants who combined to cause injury could be held individually liable, but explained that these "alternative causal standards . . . can be taken too far." *Id*. at 1724. The Court warned that courts must be "reluctant to adopt aggregate causation logic in an incautious manner," *i.e*., "a manner contrary to the bedrock principle that restitution should reflect the consequences of the defendant's own conduct." *Id*. at 1724, 1725.

As in *Guy* and *Paroline*, the Seventh Circuit's endorsement of collective liability presses the law beyond the point for which we can find rational support and, in so doing, violates the bedrock principle that restitution should reflect the consequences of the defendant's own conduct. The Court should grant review to insure that there continues to be a limitation on novel tort theories that would deprive defendants of their due process right to a defense based on a lack of causation.

I. THE CAUSATION REQUIREMENT IS FUNDAMENTAL TO CONSTITUTIONAL PROTECTIONS AGAINST DEPRIVATION OF LIBERTY AND PROPERTY.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for the constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). In *Murray's Lessee v. Hoboken Land & Improvement Co*., 59 U.S. 272, 276-77 (1855), the Court explained that the determination of what due process requires turns on a two-part analysis. First, the Court "must examine the constitution itself, to see whether th[e] process be in conflict with any of its provisions." *Id*. at 277. Second,

"[i]f not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Id*.

The Court elaborated on this "settled usage" doctrine in *Twining v. New Jersey*, 211 U.S. 78 (1908). The Court allowed that it does not necessarily follow from the rule set forth in *Murray's Lessee* that a settled practice is an essential element of due process of law. *Id*. at 101. But the Court explained that "consistent[] with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right and guard him against the arbitrary action of the government." *Id*.

The questions then in this case are (1) whether the causation requirement was a settled part of common law at the time of the Constitution that continued to be acted upon by the courts in this country thereafter and (2) whether the causation requirement is supported by fundamental principles underlying our constitutional system. The answer to both of these questions is yes, and for that reason, the Court should grant the Petition.

A. The Causation Requirement Is Deeply Embedded in American Common Law.

The requirement of causation for tort liability has been embedded in our common law since the country's foundation. William Blackstone—whose

legal reasoning was hugely instrumental in the development of the country's jurisprudence and founding documents[2]—explained the centrality of causation in the famous "flying squib case," *Scott v. Shepherd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773).

In *Shepherd*, the plaintiff Scott sought damages for injuries caused when a lighted squib that Shepherd had thrown into a crowded market place was redirected by two other men, the latter of whom threw the squib into Scott's face. Judge Blackstone acknowledged the unlawfulness of Shepherd's original action, but explained that proof of wrongful conduct was not enough for imposition of liability. *Id*. ("The lawfulness or unlawfulness of the original act is not the criterion."). Judge Blackstone held that Shepherd could not be held liable because his action—throwing the squib at some distance away from Scott—had not caused Scott's injuries. Judge Blackstone "admit[ted] that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act." *Id*. But, Judge Blackstone proclaimed, the defendant "is not responsible for the acts of other men." *Id*. In words equally applicable today, Judge Blackstone warned: "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." *Id*.

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[2] As one scholar has explained, "all of our formative documents—the Declaration of Independence, the Constitution, the Federalist papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in Sir William Blackstone's *Commentaries on the Laws of England*. So much was this the case that the *Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions." William D. Bader, *Some thoughts on Blackstone, Precedent, and Originalism,* 19 Vt. L. Rev. 5, 8 (1994-95).

Blackstone's pronouncement on causation was readily adopted by the courts in this country. The causation requirement is set forth in this Court's rulings dating back nearly 200 years. *See, e.g., Milwaukee and Saint Paul Railway Co. v. Kellogg*, 94 U.S. 469, 475 (1876) ("We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury."); *Waters v. Merchant Louisville Ins. Co.*, 36 U.S. 213, 223 (1837) ("It is a well-established principle of [common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause . . ."). It is central as well to foundational tort law cases from the state courts. *See, e.g., Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do.") (internal quotation marks omitted). And "[t]he first major torts treatise, in 1860, recognized proximate cause as a limitation on all liability in tort." Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 Wash. U. L. Q. 49, 72 (1991) (citing C. Addison, Wrongs and Their Remedies, Being a Treatise on the Law of Torts 4-5 (1860)).[3]

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[3] In particular, Addison stated: "If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damages are not sufficiently conjoined or concatenated as cause and effect to support the action." (internal quotation marks omitted)

This historical foundation of the causation requirement highlights as well the Seventh Circuit's separate constitutional error in applying the risk contribution theory retroactively to impose liability on Petitioners for their manufacture of white lead carbonate pigments in the late 1800s to mid-1900s. As the Seventh Circuit acknowledged, "There are indeed Due Process limits on the retroactive application of a judicial decision . . . if the judicial decision 'is unexpected and indefensible *by reference to the law which had been expressed prior to the conduct at issue*.'" Pet. 39a (quoting *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (emphasis added). But that is exactly what happened in this case.

In more recent years, the Court has continued to invoke the traditional requirements in tort law of both causation in fact and proximate causation. *See Doe v. Chao*, 540 U.S. 614, 621 (2004) (noting "traditional understanding that tort recovery requires . . . wrongful act plus causation [along with] proof of some harm"). The Court has explained that "[c]ausation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim." *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524 (2013). "In the usual course, this standard requires the plaintiff to show that the harm would not have occurred in the absence of—that is but for—the defendant's conduct." *Id*. (internal quotation marks omitted); *see also Paroline*, 134 S. Ct. at 1722 ("but for" causation "is a familiar part of our legal tradition").

Likewise, the Court has explained that "proximate causation principles are generally thought to be a necessary limitation on liability." *Exxon Co., U.S.A. v. Sofec, Inc*., 517 U.S. 830, 838 (1996). The Court has

said "that proximate causation normally eliminates the bizarre . . . [and] depends to a great extent on considerations of the fairness of imposing liability for remote consequences." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 713 (1995) (internal quotation marks omitted). "At bottom, the notion of proximate cause reflects ideas of what justice demands . . ." *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (internal quotation marks omitted). "[A]mong the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id*. at 268.

B. The Causation Requirement Is Fundamental To The Protection Of Constitutional Rights To Liberty and Property.

The well-settled tort law requirement of causation is also deeply rooted in the philosophical tenets upon which our Constitution was founded. *See* Paul J. Zwier, "*Cause in Fact*" *in Tort Law—A Philosophical and Historical Examination*, 31 DePaul L. Rev. 769, 784-96 (1982). Our country's break from England in the 1770s was predicated on a rejection of the arbitrary exercise of power by the King of England in favor of elementary principles of natural law that emphasized the rights of the individual. *Id*. at 788-790. This conception of natural law—which was enshrined in the Bill of Rights—places strong emphasis on the requirement of causation as a necessary predicate to individual liability. *Id*. at 791. As Professor Roscoe Pound explained in his treatise, The Spirit of the Common Law (1921):

> Liberty . . . mean[t] in the nineteenth century . . . that the individual shall not be held legally unless

> for a fault, *unless for an act on his part that infringes another's right*, and that another shall not be permitted to exact of him except as and to the extent he was willed a relation to which the law in advance attached such power to exact.

Id. at 143 (emphasis added); *see also* Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. Rev. 1473, 1524 (1986) ("[G]roup responsibility rejects the most fundamental premise of liberalism—that each individual is a separate and sovereign being whose existence and fulfillment, to the extent consistent with the same for others, is the whole raison d' être of society."). "Causation in tort law is, thus, a way of describing the point where personal freedom runs out and responsibility to others begins. An account of causation in tort law is necessarily an account of a society's conception of liberty." Robert Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 Chi.-Kent L. Rev. 523, 524 (1987).

The requirement of causation is also embodied in John Locke's theory of social contract. *See* Zwier, at 792-93. "The theory of social contract states that individuals joined with each other to form a 'contract' to establish a government, and this government, through the collective will of the people, protects an individual's inherent rights." *Id*. This political philosophy would require the plaintiff to show a strong causal element to protect the individual defendant. "In social contract terminology, an individual would not enter into a contract whereby his individual rights and protections later could be altered without the accuser first demonstrating that he was the cause in fact of the injury." *Id*. at 793; *see also id*. at 793 n. 141

(noting that the "defendant's reaction that 'we didn't bargain for' liability without proof of causation is supported by due process concepts, which, in turn, are derived largely from social contract theory").

II. DEFENDANTS HAVE A DUE PROCESS RIGHT TO DEFEND AGAINST LIABILITY BASED UPON THE LACK OF CAUSATION.

The basic guarantee of due process in a civil trial is that a defendant will not be held liable for damages without a meaningful opportunity to present every available defense to liability, including a defense based upon lack of causation. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). In *Williams*, the Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Id*. The Court explained that "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary." *Id*. at 353-54.

The Court applied similar reasoning outside the punitive damages context in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Dukes*, the Court cited to the Due Process Clause in rejecting a putative class action whereby plaintiffs sought to establish a collective right to backpay from alleged sex discrimination, holding that the defendant was "entitled to individualized determinations of each employee's eligibility for backpay." *Id*. at 2560. The

Court explained that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Id*. at 2561.

Likewise, Justice Scalia, sitting as a single Justice, granted a stay of a Louisiana intermediate appellate court ruling in a tobacco class action whereby the Louisiana court had "eliminated any need for respondents to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions and continued to smoke as a result." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., sitting as a single Justice). Justice Scalia concluded that "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process" by preventing the defendant from defending individual claims based on lack of causation "is an important question" worthy of the Court's review." *Id*. at 4.

The Fifth Circuit reached a like conclusion in *In re Chevron*, 109 F.3d 1016 (5th Cir. 1997). In that case, a group of plaintiffs sought damages for personal injuries, wrongful death, and property contamination allegedly caused by the spread of crude oil from the defendant's waste pits to the plaintiffs' drinking water supply. Over the defendant's objection, the trial court adopted a trial plan whereby the defendant's liability to all the plaintiffs would be established through a single unitary trial involving 30 bellwether plaintiffs. *Id*. at 1017. The Fifth Circuit rejected the trial court's plan on both procedural and substantive due process grounds. The Fifth Circuit held that the plan violated

the defendant's procedural due process rights because it was "devoid of safeguards designed to ensure that the claims against Chevron of the non-represented plaintiffs as they relate to liability or causation are determined in a proceeding that is reasonably calculated to reflect the results that would be obtained if those claims were actually tried." *Id*. at 1020. And the Court held that the plan violated the defendant's substantive due process "based on the lack of fundamental fairness contained in a system that permits … the imposition of liability in nearly 3,000 cases based upon results of a trial of a non-representative sample of plaintiffs." *Id*.

The Seventh Circuit below attempted to sidestep such due process concerns by suggesting that "if [a defendant] ends up paying for harm it did not cause in a particular case brought by a particular plaintiff, it will also end up paying less than it should in the next case—where it did cause the harm—when another manufacturer is also found liable for harm caused by [the defendant]." App. 43a. This suggestion is wrong as a matter of fact. *See* Pet. 23-25. But, in any event, as the Fifth Circuit explained in another case, this aggregate causation theory does not pass constitutional muster. In *In re Fibreboard Corp*., 893 F.2d 706, 709 (1990), plaintiffs made much the same argument in defending a trial court procedure whereby defendants' liability to some 3,000 asbestos plaintiffs would be decided based upon a statistical extrapolation of jury findings as to 41 representative plaintiffs: "[P]laintiffs say that so long as their mode of proof enables the jury to decide the total liability of defendants with reasonable accuracy, the loss of one-to-one engagement infringes no right of defendants." The Fifth Circuit disagreed. The court explained that it is a "fundamental principle of traditional products

liability law . . . that the plaintiffs must prove that the defendant supplied the product which caused the injury. These elements focus upon individuals, not groups." *Id*. at 711 (internal citation and quotation marks omitted). The Court held that the proposed procedure was "beyond the scope of federal judicial authority," explaining that the concerns raised by such an aggregated approach "find[s] expression in defendants' right to due process." *Id*.

The due process concern noted in the cases above arose in the context of claims brought by a collective group of plaintiffs against a single defendant. The present case involves claims brought by a single plaintiff under a collective liability theory against a group of defendants. In each instance though, the due process concern is the same: an individual defendant is deprived of its right to defend against the claim of an individual plaintiff who is not required to establish that the defendant's conduct caused his or her particular injury. Petitioners have a due process right to hold the Respondent to this basis prerequisite of liability. The Court should grant the Petition to secure the Petitioners that right.

III. THE COLLECTIVE LIABILITY THEORY ENDORSED BY THE COURT IS ONLY ONE EXAMPLE OF A BROADER ATTACK AGAINST THE REQUIREMENT OF CAUSATION.

The nature of tort litigation in this country has shifted dramatically in the past forty years. While tort litigation traditionally had involved a single plaintiff alleging harm from the conduct of a single defendant, the emergence of asbestos litigation in the 1970s gave rise to a new tort model whereby plaintiffs proceeded

against a group of defendants who collectively were alleged to have caused or contributed to the plaintiffs' injuries. The huge recoveries in asbestos litigation, in turn, gave rise to an increasingly well-financed plaintiffs' bar that has moved aggressively to solicit ever larger groups of plaintiffs and to export the asbestos model into new arenas, including, *e.g.*, tobacco, handguns, lead pigments, pharmaceuticals, food products, and environmental claims.

This new tort model has placed increasing pressure on the legal standards and procedures that have traditionally governed the imposition of tort liability. Some of this pressure has been caused by numbers alone, which have led courts to devise creative case management approaches to address mass litigations that can routinely involve thousands of plaintiffs and scores of defendants. This Court has placed limits on such approaches, holding that the changing nature of tort litigation cannot justify departures from constitutional restraints. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (rejecting putative mandatory settlement class in asbestos litigation due to the "serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale"); *see also Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (noting the "gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous").

Additional pressures have been imposed by the plaintiff bar's creative efforts to extract additional monies from defendants without satisfying traditional burdens of proof. This Court has had less opportunity to place limits on these efforts, but they likewise raise

serious constitutional concerns that merit this Court's attention.[4]

The plaintiff bar's efforts to impose liability without causation is evident in virtually every area of mass tort litigation and has resulted in the creation out of whole cloth of novel theories of liability that have no precedent in the common law. *See generally* Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 Wash. & Lee L. Rev. 873, 880, 890-933 (2005) (surveying the many novel theories by which plaintiffs seek to impose liability without causation and warning that "[t]oday the fate of the individual causation requirement in mass products tort law hangs in the balance"). While defendants have been successful in defeating such theories in the majority of cases, there have been notable exceptions that have resulted in judgments and payments in the many billions of dollars. These successes have fueled ever more creative theories of liability without causation that have stretched the constitutional fabric of tort law beyond the breaking point.

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[4] In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the Court did address and reject a "medical monitoring" theory whereby asymptomatic plaintiffs would be entitled to recover damages for the costs of monitoring for potential future disease. After canvassing state common law cases, the Court found no support for the argument that the exposure to a toxic substance without evidence of physical injury constitutes a sufficient basis for a tort recovery. *Id.* at 440. The Court noted that the large number of plaintiffs who could proceed under such a theory along with the uncertainty as to the amount of liability "could threaten both a 'flood' of less important cases . . . and the systemic harms that can accompany 'unlimited and unpredictable liability.'" *Id.* at 442.

The current lawsuit is based upon one of a number of collective liability theories whereby plaintiffs seek to impose liability on a group of defendants without demonstrating that any one defendant caused a particular plaintiff's injury. These theories, *e.g.*, market share liability, alternative liability, enterprise liability, commingled product liability, and risk contribution, differ in the particulars but share the common characteristic of holding a defendant individually liable for injuries that may have been caused by other defendants who sold similar products or engaged in similar operations. *See* Gifford (2005), at 900-15. Collective liability theories properly have been rejected by many courts, but they have been endorsed to varying degrees by courts in cases involving pharmaceuticals[5], asbestos[6], Agent Orange[7], blasting caps[8], MTBE groundwater contamination[9], and, here, lead pigments[10].

Plaintiffs as well have sought to avoid their causation requirement through novel reinterpretations of the common law doctrine of public nuisance to co-opt traditional products liability claims. Under this

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[5] *See*, *e.g.*, *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 53 (Wis. 1984); *Hymowitz v. Eli Lilly*, 539 N.E.2d 1069, 1078 (N.Y. 1989).

[6] *See Menne v. Celotex Corp.*, 861 F.3d 1453, 1474 (10th Cir. 1988); *Wheeler v. Raybestos-Manhatten*, 11 Cal. Rptr. 2d 109, 113 (Cal. App. 1992).

[7] *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 822-28 (E.D.N.Y. 1984).

[8] *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 370-80 (E.D.N.Y. 1972).

[9] *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 591 F. Supp. 2d 259, 274-76 (S.D.N.Y. 2008).

[10] *See Thomas v. Mallett*, 701 N.W.2d 523, 532-33 (Wis. 2005).

new public nuisance theory, defendants can be held liable for claimed injury to the public as a whole from the sale of an alleged toxic product without evidence that the defendant's conduct caused injury to any particular individual.[11] This public nuisance theory first arose in the context of tobacco litigation where, although never addressed by any court, it provided a legal foundation for a massive $206 billion settlement with the federal government and over 40 states (a significant portion of which was then passed on to private plaintiff attorneys). Plaintiffs have subsequently pursued this public nuisance theory in litigation involving handguns[12], lead pigments[13], pharmaceuticals[14], poultry litter[15], subprime mortgages[16], automobiles[17], and energy utilities[18].

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[11] *See generally* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003).

[12] *See City of New York v. Baretta U.S.A. Corp.*, 524 F.3d 384, 391 (2d Cir. 2008); *District of Columbia v. Baretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005); *City of Chicago v. Baretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004).

[13] *See State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007).

[14] *Ashley County, Arkansas v. Pfizer Inc.*, 552 F.3d 659 (8th Cir. 2009).

[15] *Oklahoma v. Tyson Foods Inc.*, No. 05-CV-0329-GKF-RJC, 2010 WL 653032 (N.D. Okla. Feb. 17, 2010).

[16] *City of Cleveleand v. Ameriquest Mortg. Secs., Inc.*, 615 F.3d 496 (6th Cir.), *cert denied*, 131 S. Ct. 1685 (2011).

[17] *California v. General Motors Corp.*, No. C06-05755MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

[18] *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 316 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Native Vill. Of Kivalina v. Exxon Mobil*

Most of these efforts have failed, but in a very recent decision, a California trial court awarded $1.2 billion against three companies for an alleged public nuisance from sales of lead pigments prior to 1980.[19] Shortly thereafter, the same municipal plaintiffs filed a public nuisance claim against a group of pharmaceutical companies for alleged injuries to the public at large from the defendants' marketing of opioid painkillers.[20]

Plaintiffs have also sought to avoid the causation requirement in pharmaceutical products liability litigation by suing drug companies that they acknowledge did not manufacture the drug they alleged caused their injuries. Recently, the Alabama Supreme Court became the first state supreme court to adopt the innovator liability theory whereby a brand manufacturer can be held liable for an injury caused by a generic version of the drug sold and marketed by another company.[21] And a federal district court in Louisiana recently upheld what was originally a $3 billion punitive damages verdict against a non-manufacturer drug company on the theory that it had engaged in co-promotional activities with the drug

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Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

[19] *Dollar Judgment in California Public Nuisance Case*, Mondaq News Alert (Jan. 17, 2014), available at http://www.mondaq.com/unitedstates/x/286860/Chemicals/Lead+Paint+Companies+Hit+With+Billion+Dollar+Judgment+In+California+Public+Nuisance+Case.

[20] *See* Amanda Robert, *Opioid suit is latest brought by Calif. County with help from contingency fee attorneys*, Legal Newsline (July 14, 2014), available at http://legalnewsline.com/issues/lead-paint/250493-opioid-suit-is-latest-brought-by-calif-county-with-help-from-contingency-fee-attorneys.

[21] *Wyeth v. Weeks*, --- So.3d ----, No. 1101397, 2014 WL 4055813 (Ala. Aug. 15, 2014).

company that manufactured the alleged injury-causing drug.[22]

In addition, over the past decade, there has been a surge of class action lawsuits involving foods, cosmetics, pharmaceuticals, and other consumer products in which the plaintiff bar has repackaged traditional product liability failure-to-warn claims as fraud claims under state consumer fraud statutes.[23] Through this repackaging, plaintiffs seek to avoid any requirement to show that the alleged inadequate warnings caused them injury. Moreover, plaintiffs have succeeded in convincing at least some courts that plaintiffs need not prove that the alleged misstatement caused any particular plaintiff to purchase the product.[24]

Many of the issues raised by these novel state law theories are properly addressed in the lower courts as a matter of common or statutory law. However, under the Due Process Clause, this Court has the constitutional duty to insure that plaintiffs' attempts to extract damages from defendants without satisfying their traditional burden of causation do not "press[the law] beyond the point for which we can find a rational support." *Guy*, 203 U.S. at 407.

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[22] *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-MD-2299, 2014 WL 4364832 (W.D. La. Sept. 2, 2014).

[23] *See*, *e.g.*, U.S Chamber Institute for Legal Reform, *Food Class Action Litigation*, The New Lawsuit Ecosystem: Trends, Targets and Players 88-100 (Oct. 2013).

[24] *See Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1282-83 (11th Cir. 2011); *Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689 (S.D. Fla. 2010).

The Seventh Circuit's ruling below—holding a handful of still-existing former manufacturers of white lead carbonate liable in full for all injuries caused by ingestion of lead paint manufactured and sold many decades ago by a much larger universe of historic lead pigment and lead paint companies—represents a particularly stark departure from the settled causation requirement and plainly presses the law beyond its constitutional breaking point. As such, it provides the Court with the ideal vehicle to draw the line beyond which tort law may not cross consistent with Due Process. *See Paroline*, 134 S. Ct. at 1724 ("alternative causal standards . . . can be taken too far").

CONCLUSION

For the reasons set forth herein, *amici curiae* urge that the Petition be granted.

Respectfully Submitted,

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February 13, 2015