STATE OF RHODE ISLAND

SUPREME COURT

No. 07-0121

STATE OF RHODE ISLAND, by and through PATRICK LYNCH, ATTORNEY GENERAL

vs.

LEAD INDUSTRIES ASSOCIATION, INC., et al.

On Appeal From Judgment Entered in the Providence Superior Court

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AMICUS BRIEF OF NATIONAL PAINT & COATINGS ASSOCIATION, INC. IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

National Paint & Coatings Association, Inc. ("NPCA") 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. As the preeminent organization representing the coatings industry in the United States, NPCA's primary role is to serve as an advocate and ally for its membership on legislative, regulatory and judicial issues at the federal, state, and local levels. In addition, NPCA provides members with such services as research and technical information, statistical management information, legal guidance, and community service project support. Collectively, NPCA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

NCPA and its member companies have undertaken significant voluntary efforts to address the problems of lead poisoning arising from the failure of property owners to maintain their property in lead safe condition. While intact lead paint is not a health hazard, a risk of lead exposure does arise where property owners allow historically applied lead paint to chip or deteriorate. As recognized by the U.S. Environmental Protection Agency, NPCA has spearheaded a number of initiatives to address this problem, such as a 2003 landmark cooperative agreement with Attorneys General from 46 states, plus the District of Columbia and three territories, "which establishes a national program of consumer paint warnings, point-of-sale information, and education and

training to avoid the potential exposure to [EPA-HUD] lead-dust hazards." EPA Sector Strategies Performance Report (March 2006), at 64.[1]

Since its launch, NPCA's training program under the State AG agreement has provided free state-of-the-art certified training (offered in English and Spanish) to a documented 15,480 participants via 641 classes delivered throughout the nation. While the Rhode Island Attorney General was one of only four state AGs not to sign the agreement, NPCA's nationwide efforts nonetheless have included significant activities in Rhode Island. In the past year, for example, NPCA has (in partnership with a lead community based organization in Providence) conducted seven training classes, with 140 attendees. *See also* October 10, 2005 memorandum from Roberta Hazen Aaronson, Executive Director, Childhood Lead Action Program (heralding "very productive relationship" with NPCA training program that has "filled an important need in Rhode Island") (attached hereto as Ex. 2).

NPCA also founded the Community Lead Education and Reduction Corps ("CLEARCorps"), a joint public service partnership of the paint industry and the non-profit Shriver Center at the University of Maryland. Since 1995, CLEARCorps has protected thousands of young children from the risk of lead exposure through directed education programs and on-the-ground assistance for property owners, families and children across the country.[2] In Rhode Island, CLEARCorps has partnered with the West Elmwood Housing Development Corporation, pursuant to a grant from the U.S.

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[1] Relevant excerpts of the EPA report are attached hereto as Ex. 1. A complete copy of the report can be found at http://www.epa.gov/sectors/performance.html.

[2] This and further information about CLEARCorps is available at http://www.clearcorps.org.

Department of Housing and Urban Development, in assisting landlords of hundreds of housing units in low income neighborhoods to comply with lead safe standards established by Rhode Island state law.

NPCA's efforts on behalf of those at risk to lead exposure from improperly maintained and deteriorating lead paint is indicative of the important role that trade associations serve in providing a venue whereby business enterprises can cooperatively work for the public good. The Supreme Court and other courts have specifically recognized the array of important services that are provided by trade associations. Trade associations "often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services." *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999) (citing *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567 (1925)).

> Such organizations serve many laudable purposes in our society. They contribute to the specific industry by way of sponsoring educational activities, and assisting in marketing, maintaining governmental relations, researching, establishing public relations, standardization and specification within the industry, gathering statistical data and responding to consumer needs and interests. Furthermore, trade associations often serve to assist the government in areas that it does not regulate.

Meyers v. Donnatacci, 531 A.2d 398, 404 (N.J. Super. Ct. Law Div.1987); *see also D.C. Citizen Publ'g. Co. v. Merchants & Mfrs. Ass'n*, 83 F. Supp. 994, 998 (D.D.C. 1949) (trade associations "serve a useful purpose in the economic life of any community").

The Environmental Protection Agency likewise has explained that trade associations provide crucial services as liaison between industry and government regulators in protecting the environment.

> [T]rade associations can play an important role in promoting environmental stewardship. For example, they can provide critical technical expertise in identifying and vetting innovative ideas to advance their sectors' performance, and they can take on leadership positions to encourage the adoption of these ideas. Many trade associations promote changes that better prepare members to meet evolving market conditions, such as increasing preferences for greener products and production activities or certification to International Organization for Standardization (ISO).

(EPA Sector Strategies Performance Report (March 2006) at 1.) EPA accordingly has designed the Sectors Strategies Program to take advantage of trade associations' leadership positions within their respective industry sectors. *Id.* EPA has qualified 24 trade associations to take part in the Sectors Strategy Program, including NPCA. *Id.* at preface.

NPCA submits this amicus brief because the trial court rulings below on causation issues and on the State's use of historical documents of the Lead Industries Association (a defunct organization never affiliated with NPCA) threaten (1) to deprive its member companies (and product manufacturers generally) of the fundamental protection accorded them under tort law that manufacturers must be shown to have caused injuries related to their product before they can be found liable for damages or injunctive relief and (2) to chill the First Amendment rights of trade associations and member companies by raising the specter that associational activities will be used to fill evidentiary gaps and impose billions of dollars in damages where plaintiffs cannot identify defendant-specific evidence necessary to establish liability.

STATEMENT OF FACTS REGARDING THE RISK OF LEAD POISONING IN RHODE ISLAND

While lead exposure poses a serious health issue for some children, the State's suggestion that extraordinary judicial intervention is necessary to address the problem is without factual basis. As a result of legislative and regulatory efforts – in addition to voluntary initiatives like those discussed above – there have been dramatic improvements in blood lead levels both in the United States and Rhode Island over the past thirty years. The Centers for Disease Control ("CDC") reports that the percentage of children nationwide aged 1-5 with blood lead levels ("BLLs") greater than 10 μg/dL (thus meeting the CDC standard of elevated) has dropped sharply over the past 30 years, from 77.8% in the period 1976-1980 to 4.4% in 1991-1994 to 1.6% in 1999-2002.[3] In 2006, the percentage of children below 5 years of age nationwide with elevated BLLs stood at an all time low of 1.21%.[4] The progress in Rhode Island has been equally dramatic, with the incidence of elevated blood levels dropping from 33.6% in 1993 to 8.4% in 1997 to 1.6% in 2006.[5] While continued progress in Rhode Island can be anticipated, particularly with this Court's recent holding affirming the constitutionality of the Lead Hazard Mitigation

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[3] *See Blood Lead Levels -- United States, 1999-2002*, MMWR Weekly 54(20); 513-516 (May 27, 2005), available at CDC website at http:/www.cdc.gov/MMWR/preview/mmwrhtml/mm5420a5.htm.

[4] *See Number of Children Tested and Confirmed EBLLs by State, Year and BLL Group, Children < 72 Months Old*, available at CDC website at http://www.cdc.gov/nceh/lead/surv/database/State_Confirmed_byYear_1997_to_2006.xls

[5] RIDOH, Childhood Lead Poisoning in Rhode Island: The Numbers (2007 Edition) at 21, available at http://www.health.ri.gov/lead/databook/2007_Databook.pdf. In 2005, RIDOH changed its reporting criteria and began reporting data based on venous tests and confirmed capillary tests only. Previous years' data includes data from unconfirmed capillary tests.

Act,[6] the current incidence of elevated blood levels in childhood in the State is already well below the 5% incidence previously established by Rhode Island Department of Health ("RIDOH") as the target at which the "elimination of childhood lead poisoning would be achieved." PX 36, at 2.

The success in Rhode Island reflects significant efforts taken by the State's legislative and executive branches of government. In 1991, Rhode Island enacted the Lead Poisoning Prevention Act ("LPPA"), which initiated the requirement that every child under six years of age be tested for lead at least once annually. As noted by RIDOH, through its efforts under this Act, "Rhode Island has achieved recognition as the state with the highest screening rate in the nation."[7] More recently, Rhode Island has "focused its tactics on the *primary* prevention of lead poisoning: protection of children from sources of lead *before* they are poisoned, by concentrating on innovative methods for improved housing, lead education, and access to resources for Rhode Island families,"[8] an approach that mirrors those promoted by NPCA through its voluntary activities. This refocusing was motivated in part by published research that demonstrated that the inclusion within the LPPA of an "innocent owner" provision, whereby property owners previously could be held liable for fixing lead hazards only after a child was poisoned on their property, had impeded the state's efforts to protect children from

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[6] *Mackie v. Rhode Island*, 936 A.2d 588, (R.I. 2007).

[7] Rhode Island Department of Health, *Rhode Island's Plan to Eliminate Childhood Lead Poisoning by 2010*, at 6, available online at http://www.health.ri.gov/lead/family/eliminationplan.pdf

[8] *Rhode Island's Plan, supra* note 7at 3.

elevated blood levels.[9] Moreover, graduate research at Brown University conducted at the behest of the Providence mayor's office, revealed that a substantial proportion of the cases of elevated blood levels in the state had arisen in a small percentage of poorly maintained rental properties.[10]

Thus, in 2002, Rhode Island enacted the Lead Hazard Mitigation Act, "creating the regulatory environment that would enable the primary prevention of childhood lead poisoning."[11] The Mitigation Act removed the "innocent owner" clause. Under the Mitigation Act, "property owners who disregard obligations to correct lead hazards and repeatedly allow children to be poisoned are committing a felony."[12] The Act also increased the availability of lead liability insurance by providing that there could be no

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[9] In an article published in the American Journal of Public Health, investigators compared lead poisoning rates in Providence with those in Worcester County, Massachusetts, and after controlling for other potential confounding factors, concluded that Massachusetts policy of strict liability in which landlords may be held accountable for lead poisoning in their rental properties and stronger statutory enforcement resulted in a 50% lower risk of lead poisoning in Worcester as compared to Providence. *See* James D. Sargent, *The Association Between State Housing Policy and Lead Poisoning in Children*, American Journal of Public Health 89(11): 1690-1695 (Nov. 1999); *see also Rhode Island Plan, supra* note 7 at 14 (noting "recognized need to change the state's approach to lead in housing" to hold property owners accountable for failing to maintain properties in lead safe condition).

[10] *See* Christy Plumer, *Setting Priorities for Prevention of Childhood Lead Poisoning in Providence*, available at http://envstudies.brown.edu/oldsite/dept/thesis/master9900/christy_plumer.htm ("Two-percent (2%) of the residential addresses in the city housed 51% of the children with elevated blood-lead levels (EBLs - 15 mg/dl and above) and 32% of the addresses where a child resided in 1998 were addresses with a history of multiple poisonings in 1993-1997. This means that if the City had remediated all the houses where multiple poisonings had occurred, 930 addresses in total, a third of the 1998 poisonings would have been prevented.").

[11] *Rhode Island Plan, supra* note 7 at 3.

[12] *Id.* at 15

exclusion from coverage for property owners who comply with the law.[13] "To comply with the Law, owners of pre-1978 rental property must obtain Certificates of Compliance," for which "they must attend a three-hour lead hazard awareness course, identify lead hazards on their property, fix the hazards using the safe work practices learned in the course, and get an Independent Clearance Inspection from a certified inspector."[14] And the Mitigation Act also requires the Department of Health's Environmental Lead Program to maintain public lists of properties that, because of property owner misconduct, pose a high risk for lead poisoning.[15] The Rhode Island Department of Health has announced that, with the passage of this Act, "the elimination of lead poisoning in [Rhode Island] children was becoming a viable proposition."[16]

The dramatic progress in reducing the incidence of childhood elevated blood levels in the State demonstrate that this issue can be, and is being, successfully addressed by the legislative and executive branches of government. Moreover, the legislative framework in place in Rhode Island (as in other states) is appropriately directed at property owners, who are the parties in control of the conditions that can give rise to exposure from deteriorated lead paint and whose misconduct is required for any exposures to occur. As EPA explains, "[l]ead-based paint that is in good condition is usually not a hazard."[17] RIDOH has recognized that property owners can "prevent lead

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 16.

[16] *Id.* at 3.

[17] *See* EPA, *Protect Your Child From Lead Poisoning: Where Lead is Likely to be a Hazard*, available at EPA website at http://www.epa.gov/lead

poisoning by maintaining [their] property."[18] It is only where property owners unlawfully allow lead paint to chip or deteriorate that it can give rise to lead exposures and associated health problems. The risk of lead exposure thus arises due to specific unlawful acts of private parties – not party to this litigation – at particular properties under their control.

ARGUMENT

In allowing the case to go to trial and then upholding the trial verdict, the trial court repeatedly asserted that the State's claim, premised on the allegation that Appellants should be liable for their historical sales and promotion of lead pigments and paint, is "not a products liability claim." *State ex rel. Lynch v. Lead Indus. Ass'n.*, No. PC 99-5226, 2007 WL 711824, slip op. at 56 (R.I. Super. Feb. 26, 2007); *see also State ex rel. Lynch v. Lead Indus. Ass'n.*, No. PC 99-5226, 2005 WL 1331196, at *2 (R.I. Super. June 3, 2005) (same). The trial court thus improperly allowed the State to proceed under a theory of public nuisance and absolved the State of any obligation to satisfy the well-established elements under common law for establishing tort liability against product manufacturers.[19] The numerous missteps taken by the trial court's rulings to

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[18] *Rhode Island Plan*, *supra* note 7at 14.

[19] In very recently rejecting a virtually identical claim against lead pigment manufacturers, the New Jersey Supreme Court explained why products liability claims cannot be shoe horned into the public nuisance doctrine:

> Fundamental to this aspect of our analysis is the fact that we here address an ordinary, unregulated consumer product that defendants sold in the ordinary course of commerce. In public nuisance terms, then, were we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such

reach this result are comprehensively set forth in the Appellants' briefs, with which NPCA fully concurs, and will not be recounted here.

In this brief, NPCA focuses on two fundamental errors in the trial court's rulings that require dismissal even under the trial court's improper public nuisance theory: First, the trial court endorsed an unprecedented "no-cause" theory of liability, relieving the State of any meaningful requirement to prove that any of the Appellants was either a but-for cause or a proximate cause of the alleged public nuisance. Based on a misreading of *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982), the trial court also relieved the State of its burden of showing that the claimed injuries were caused by any Appellant's intentional and unreasonable or negligent conduct. Second, the trial court disregarded Appellants' First Amendment rights to association and petition by allowing the State to build its case before the jury with records of trade association activities. *See In re Asbestos Sch. Litig.*, 46 F.3d 1284 (3d Cir. 1994). Unless reversed by this Court, these rulings will create

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> an interpretation would far exceed any cognizable cause of action. ... Indeed, the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold, and although sold no more recently than a quarter of a century ago, have become dangerous through deterioration and poor maintenance by the purchasers.

In re Lead Paint Litig., 924 A.2d 484, 501-02 (N.J. 2007); *see also Detroit Bd. Of Educ. v. Celotex*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) ("manufacturers, sellers, or installers of defective products may not be held liable on a [public] nuisance theory for injuries"); *City of Philadelphia v. Baretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (same); *Camden County Bd. of Chosen Freeholders v. Baretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) (same); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993) (same); *see generally* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2002).

dangerous disincentives for product manufacturers and other industrial defendants who might otherwise do business in Rhode Island and would open wide the Rhode Island courthouse doors to plaintiffs' mass and class action attorneys from states like New Jersey and Missouri, whose state supreme courts very recently have rejected identical legal claims.

Each of these trial court errors is addressed in turn below.

I. Rhode Island Law Requires That A Plaintiff Establish That The Defendant Caused Its Alleged Injury.

This Court has explained that for a defendant to be held liable in tort under Rhode Island law, the plaintiff must establish that the defendant was both (1) the "but-for" or actual cause of the plaintiff's alleged injuries and (2) the proximate cause of those injuries. *See DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677, 692-93 (R.I. 1999) (holding that trial court must instruct jury as to both "but for" and proximate causation); *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191-92 (R.I. 1994) (reversing jury verdict in contract action due to trial court's failure to properly instruct as to both types of causation). Moreover, because the law does not cast product manufacturers as insurers who should be required to pay for unknown dangers that might be traced back to their products, a plaintiff must show some causal link between a defendant's tortious conduct and the alleged injury. *See Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775 (R.I. 1988) ("imposing liability on manufacturers for unknowable dangers would make them virtual insurers of their products"). In this case, the trial court allowed the State to proceed at trial without making any of these fundamental showings of causation.

A. Replacing But-For Causation With Market Share Liability Is Contrary to Rhode Island Law and Bad Public Policy

This Court has explained that a showing of but-for cause, also known as cause in fact is "a fundamental requirement ... imposed in tort cases." *Wells*, 635 A.2d at 1191. In order for a defendant to be liable in tort in Rhode Island, a plaintiff must show that "the harm to the plaintiff would not have occurred *but for* the negligent conduct of the defendant or the existence of a defect." *Salk v. Alpine Ski Shop, Inc.*, 342 A.2d 622, 626 (R.I.1975) (emphasis added). As the Missouri Supreme Court recently explained in rejecting a claim virtually identical to that pursued by the State here, "[i]n all tort cases, the plaintiff must prove that each defendant's conduct was the actual cause, also known as the cause-in-fact, of the plaintiff's injury." *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007).

This "fundamental" causation requirement exists regardless whether the State's claims are treated as products liability claims – as they should be – or as public nuisance claims. In *City of St. Louis*, the court explained that the public nuisance doctrine, as defined in the Restatement (Second) of Torts, requires a showing of actual causation: "To the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a public nuisance case, it is incorrect." 226 S.W.2d at 114. Indeed, Rhode Island public nuisance cases have long required a plaintiff to show that the defendant caused the alleged public nuisance. *See, e.g.*, *Moretti v. C.S. Realty Co.*, 82 A.2d 608, 611 (R.I. 1951) (public nuisance cause of action exists "against one who was responsible for maintaining his premises in a condition so hazardous to persons lawfully traveling on the highway"); *Sweet v. Conley*, 39 A. 326, 328 (R.I. 1898) (public nuisance claim may be brought against one who

"wrongfully and illegally cause[s] the surface water of a street to collect and remain in front of one's premises"); *Sanford v. Pawtucket St. Ry.*, 35 A. 67 (R.I. 1896) (public nuisance claim may be brought against party responsible for "cause of the accident"); *Hughes v. Providence & Worcester R.R.*, 2 R.I. 1493 (1853) ("For obstructions to a highway the public may proceed against the person causing the same by indictment, as for a public nuisance").

In order to establish but-for causation in this case, the State should have been required to show that each appellant sold lead pigments that are in fact present in particular Rhode Island properties and give rise to the alleged public nuisance the State seeks to have abated. But the trial court instructed the jury exactly to the contrary, telling them "You need not find that lead pigment manufactured by the defendants, or any of them is present in particular properties in Rhode Island ..." and "nor do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island." 2/13/06 Tr. 128-30, Jury Instructions at 14. Instead, notwithstanding this Court's express rejection of the market-share liability theory in *Gorman v. Abbott Laboratories*, 599 A.2d 1364 (R.I. 1991), the trial court allowed the State to proceed based solely on testimony that the defendants sold and promoted lead products and that they collectively accounted for between 50% and 80% of the national market for white lead pigment.

This attempted resuscitation of the market-share liability doctrine in Rhode Island should not be countenanced. As this Court correctly held in *Gorman*, "the establishment of liability [in Rhode Island] requires the identification of the specific defendant responsible for the injury." 599 A.2d at 1364. In so ruling, the Court relied on the seminal article by Professor David Fischer, *Products Liability – An Analysis of Market*

Share Liability, 34 Vand. L. Rev. 1623, 1627 (1981), which explained that "the market share liability theory contains several serious flaws that render it unsuitable as a means for allowing plaintiffs to recover."[20] Professor Fischer's thorough analysis demonstrates that the market share liability doctrine is both bad policy (because "the risk of over-deterrence" of socially useful manufacturing activity "is extremely high") and bad law (because of the doctrine's "greater potential for frustrating the underlying purposes of the cause in fact requirement" so that "damages are unlikely to be limited to the amount of harm that the defendant caused."). *Id.* at 1657, 1637-38. Each of these problems are as pronounced today as it was when this Court rejected the market-share liability doctrine in *Gorman*, and each is fully born out by the trial court rulings below.

1. The Market Share Liability Doctrine Improperly Discourages Socially Useful Business Activity.

The until now firmly-entrenched doctrine of causation in Rhode Island is founded upon the notion that tort law is not intended to provide social insurance to injured plaintiffs, but instead to provide a balanced legal system in which the rights of both plaintiffs and defendants are respected. Indeed, one of the goals of products liability tort law "is to protect manufacturers from liability that is unduly burdensome." *Market Share Liability*, at 1651. As Professor Fischer explains:

> The standard of living and quality of life in this country has improved significantly over the past one hundred years, in large part because of the use of dangerous machinery and drugs. A system that imposes excessive liability on the manufacturers of these products will inhibit their production and diminish their availability to an undesirable extent. For example, to impose liability on all automobile manufacturers for all the harm that their automobiles cause

[20] A copy of Professor Fischer's article is attached hereto as Ex. __ for the Court's convenience.

> – even in the absence of defect – would be consistent with the policies of risk spreading and deterrence. Courts, however, refrain from imposing such excessive liability because the effect on industry would be devastating.

Id.

With the trial court's ruling below, Dr. Fischer's hypothetical example, presumably presented as an imaginary, worst-case scenario, has become scarily prescient. While the target of the State's legal theory in this case is manufacturers of lead pigments, the same theory can be easily applied to target any industry that can be indirectly linked to any number of societal problems. For example, manufacturers and suppliers of automobiles, fast food, hand guns, and banking services have recently been threatened with legal liability for their alleged contributions to the societal problems of global warming,[21] obesity,[22] crime,[23] and the subprime mortgage crisis.[24] Thus far, these

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[21] *See* California Office of Attorney General Press Release, *Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California* (issued Sept. 20, 2006), available at http://ag.ca.gov/newsalerts/release.php?id=1338; *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *10 (N.D. Cal. Sept. 17, 2007) (dismissing state attorney general's public nuisance claim on justiciability grounds; "the Court finds that injecting itself into the global warming thicket at this juncture would require an initial policy determination of the type reserved for the political branches of government").

[22] William B. Werner, *et al.*, *The Risk to the American Fast-Food Industry of Obesity Litigation*, Cornell Hotel and Restaurant Administration Quarterly 48(2): 201-214 (2007) ("Our literature and case review analyzes the potential validity of obesity-related claims under existing and novel legal theories of liability"), abstract available at http://cqx.sagepub.com/cgi/content/abstract/48/2/201

[23] *See City of St. Louis v. Cernicek*, No. 02CC-1299, 2003 WL 22533578 (Mo. Cir. Oct. 15, 2003).

[24] *See Cleveland sues 21 investment banks over subprime mess: Big-name Firms blamed in costly subprime crisis*, The Plain Dealer (Jan. 11, 2008), available at http://www.cleveland.com/news/plaindealer/index.ssf?/base/cuyahoga/1200044068184570.xml&coll=2

arguments have been unavailing, as courts in other states properly have rejected such litigation efforts to vilify broad industries. A contrary ruling here would cast Rhode Island alone as a magnet for such plaintiff counsel-designed, litigation campaigns over issues best suited for the legislative branch.

Professor Fischer explains that "the risk of over-deterrence in market share liability cases" – *i.e.*, that tort litigation will unduly inhibit the development and marketing of nondefective products that are useful but potentially dangerous – "is extremely high." *Market Share Liability*, at 1657. First, "over-deterrence could result if the manufacturer perceives this additional cost to be greater than it feasibly can transfer to the consumers of its products. Under these circumstances, the manufacturer might decide against marketing the product at all, which – if the product is worthwhile – will thwart the goal of not discouraging socially desirable activity." *Id.* at 1654. This risk is increased by the fact that manufacturers often must base their decisions upon incomplete information. "If a product presents a risk of causing an unknown harm in the distant future, the market share liability theory may induce the manufacturer to withhold the product from the market, notwithstanding that the product ultimately might prove to be entirely harmless." *Id.*[25]

[25] While the health risks of *deteriorated* lead paint are now apparent, historically lead paint was favored not only for its durability but for its perceived health advantages. *See* 1/17/06 Tr. 5650-58, 01/18/06 AM Trial Tr. 4 (U.S. National Bureau of Standards recommendation of white lead paint for use, e.g., in school buildings and for indoor and outdoor home use, and representation in 1940 that white lead pigment "would be safest to use"); 1/18/06 Tr. 5750-51 (U.S. Forest Service 1939 *Consumers' Guide* recommended white lead pigment because, "if used exclusively, [it] remains the best choice for house owners who wished for durability of their paint"); 1/18/06 Tr. 5732-34 (1939 letter from chief scientist of the U.S. Forest Products Laboratory setting forth the advantages of white lead pigment, including its superior reliability, and urging that higher proportions of white lead pigment be used in pre-mixed paints); 1/18/06 Tr. 5738-40 (Department of Interior in 1936 advised government purchasers

Second, "[t]he market share liability theory also creates the possibility of over-deterrence in a more serious way because the theory creates the very real possibility that a defendant will be held liable for more harm than it actually caused." *Id.* at 1656. Professor Fischer identified "numerous practical and theoretical difficulties that make the theory unlikely to be able to apportion damages in proportion to the amount of harm caused," *id.* , likely divergent views on the definition of the relevant market, problems of proof, the likelihood that named defendants will be required to pay the shares of unavailable or unnamed market participants, and the further distortions that arise from the limited acceptance of the doctrine in different states. *Id.* at 1642-47. This risk is particularly present where, as here, a plaintiff brings suit against only a subset of companies that comprised the market but seeks to hold each named defendant jointly and severally liable. *Id.* at 1645-47. While these excessive costs will initially impact industry, the consequences will ultimately be borne by consumers, investors and employees of the improperly targeted companies. A recent report of the United States Council for Economic Advisors on the tort system highlighted these societal costs:

> Whereas an efficient tort system has a potentially important role to play in ensuring that firms have proper incentives to produce safe products, poorly designed policies can mistakenly impose excessive costs on society through foregone production of public and private goods and services. To the extent that tort claims are economically excessive, they act like a tax on individuals and firms. ... [We calculate] that the cost of excessive tort may be quite substantial, with intermediate estimates equivalent to a 2 percent tax on consumption, a 3 percent tax on wages, or a 5 percent tax on capital income.

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that white lead pigment in the hands of a skilled painter was "foolproof" and "safer to use" than alternatives).

Council of Economic Advisors, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* (April 2002) at 1, available at http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf.

Third, market share liability gives rise to over-deterrence because of the "enormous litigation costs that are associated with the theory." Because claims of industrywide liability necessarily expand the number of defendants dramatically and lead to complicated and often competing analyses of the alleged market, "[t]he legal fees and administrative costs arising from litigation of this magnitude could easily rival the cost of the plaintiff's judgment." *Id.* at 1657. The market share liability doctrine thus exacerbates the problem of deadweight costs (*i.e.*, payments not going to the alleged victims) that has long plagued the tort system.[26]

Professor Fischer ended his critique of the market share liability theory with a warning that is as relevant today as it was when first heeded by this Court nearly 20 years ago:

> While the goal of compensating injured accident victims is worthwhile, it cannot be regarded as the sole objective of tort law. The adversary system was designed to resolve disputes among individuals in an impartial manner, and any attempt to convert it into a compensation system will fail because of the enormous cost to society. The market share liability theory is a dangerous step towards just such a conversion, and courts in the future should reject it as a method for imposing liability in civil cases.

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[26] *See* Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update at* 17 (estimating that only 46% of all expenditures in tort litigation is paid to plaintiffs), available at http://www.omm.com/omm_distribution/newsletters/client_alert_class_action/pdf/tort_costs_trends_2003_update.pdf. *See also* Committee for Economic Development, *Who Should Be Liable?* 53 (1989) (estimating that only 35-45 percent of expenditures go to alleged victims in products liability and medical malpractice cases).

Market Share Liability, at 1662. This Court correctly rejected market share liability in *Gorman*. It should reaffirm that holding here.

2. The Market Share Liability Doctrine Is Particularly Ill-Suited to This Case.

In *Gorman*, the Court rejected a market share liability claim brought by an individual plaintiff against the manufacturers of diethlstilbestrol ("DES") for alleged cancer arising from her mother's *in utero* use of the drug during pregnancy. While compelling in *Gorman*, the arguments against market share liability are even more compelling in this litigation. In DES litigation there was at least some hope of defining a market based on the limited time period at issue, the complete fungibility of the generic drug, the defined group of market participant drug manufacturers, and the signature disease associated with the drug. *See Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).[27] Here – by sharp contrast – the relevant time period for the application of lead paint in

[27] This is not to say that application of market share liability proved manageable even in DES litigation. To the contrary, following *Sindell*, California trial courts struggled mightily to apply the market share doctrine. As the Illinois Supreme Court recounted in *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 337 (Ill. 1990):

> In San Francisco, the trial court determined that the only logical or practical definition for "market" would have to be on a national scale because the parties were unable to present data on a more narrow market, which the State supreme court directed it should attempt to do. The trial judge in Los Angeles expressed exasperation with the task of attempting to formulate market shares after spending over four weeks examining the DES market. (*Stapp v. Abbott Laboratories* (Super.Ct. Los Angeles County), No. C 344407 ("The harsh blunt fact that the evidence has shown is that that information and data is just not available" and "when the Supreme Court, *** without having any evidence says that you can determine what the [sales are] as to a particular manufacturer, it's just, just not there. That data doesn't exist").)

Rhode Island properties extended over a century, the market was defined by many small and local players who are either unidentified or no longer in existence, and there were a wide variety of different lead products with different potential risk profiles.

• Lead Paint Was Manufactured by a Changing Group of Companies over an Extended Time Period. In DES litigation, plaintiffs used a drug sold by a defined set of manufacturers for at most a nine-month period of pregnancy. Here, the State is proceeding against Appellants for abatement of lead paint that may have been applied to buildings in Rhode Island over a more than one hundred year period during which such paints were on the market. Over that time period, numerous companies entered and left the market, many of which no longer exist and the vast majority of which are not defendants in this lawsuit. As the Pennsylvania Supreme Court explained, the long and changing nature of the lead paint market precludes any accurate calculation of any defendant's market share:

> The difficulty in applying market share liability where such an expansive relevant period as one hundred years is at issue is that entities who could not have been the producers of the lead paint which injured [plaintiff] would almost assuredly be held liable. Over the one hundred year period at issue, several of the pigment manufacturers entered and left the lead paint market. Thus, application of the market share theory to this situation would virtually ensure that certain pigment manufacturers would be held liable where they could not possibly have been a potential tortfeasor.

Skipworth ex rel. Williams v. Lead Indus. Ass'n, 690 A.2d 169, 173 (Pa. 1997); *see also Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 550-51 (1st Cir. 1993) ("defendants' contributions to the lead paint market varied significantly during this time period. Given these facts, it is difficult to discern the basis upon which any market share determination would be premised."); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848, 852-53 (App.

Div 1999) ("During that extended time period, some of the defendants entered and left the white lead carbonate market.").

The fluid nature of the market not only gives rise to the risk of a defendant being held liable where it could not have been a potential tortfeasor, but also creates a situation where defendants could be held liable for more than their actual share of the market. As the trial court itself recognized, "it is possible and perhaps probable that many entities also sold and promoted lead pigment in Rhode Island in addition to the Defendants." *Lead Indus. Ass'n*, 2007 WL 711824, slip op. at 13; *see also City of St. Louis*, 226 S.W.3d at 115-16 ("Without product identification, the city can do no more than show that the defendants' lead paint may have been present in the properties where the city claims to have incurred abatement costs. That risks exposing these defendants to liability greater than their responsibility and may allow the actual wrongdoer to escape liability entirely"). The risk of misidentification and misallocation of liability is significantly compounded in lead paint litigation by the decades that have passed since there was any lead paint market and the lack of historical records that would allow even an attempt to define the market reliably from the late 1800s through to the 1970s when the market was in existence. Indeed, the State made no effort to do so, and instead provided the jury solely with national market data for white lead pigments only during a limited time period in the 1930s and 1940s. 1/12/06 Tr. 24:22-26:16.

Moreover, the passage of time and changing nature of the market also gives rise to an incentive for plaintiffs in lead paint litigation to suppress probative evidence. Thus, for example, if there was evidence establishing that a specific insolvent or no longer existing company manufactured the lead paint that was applied to specific properties in

Rhode Island, the State would not be able to recover the costs of abating those properties from Appellants.[28] Absent such evidence, however, the State could seek such costs from the named appellants under the market share theory. "This anomaly provides [the State] with an incentive to suppress evidence which indicates that an insolvent company supplied the product." *Market Share Liability*, at 1650.

• Lead Paint Was Not A Fungible Product: In DES cases, defendants manufactured an identical product that, to the extent used by plaintiff, gave rise to an identical risk. This is not the case with lead pigments. Rather, "it is undisputed that lead pigments had different chemical formulations, contained different amounts of lead, and differed in potential toxicity." *Skipworth*, 690 A.2d at 173. Lead paint was manufactured using a number of different lead compounds, including white lead carbonate, leaded zinc oxide, lead chromate, lead silicate, and lead sulfate. *Brenner*, 699 N.Y.S.2d at 852. Further, paint manufacturers used differing amounts of lead compounds in their paints. "Some lead based paint contained 10% lead pigment, while other paint was more toxic, containing as much as 50% lead pigment." *Id.* at 853; *see also Jackson v. Glidden Co.*, No. 87779, 2007 WL 184662, at *4 (Ohio Ct. App. Jan. 25, 2007) (manufacturers used different formulas and a variety of lead pigments in lead paint). And "differing formulae of lead paint result in differing levels of bioavailability of the lead. ... Because of differences in bioavailability, a child who ingests dust or chips of lead paint containing

[28] This is not merely a theoretical possibility. Because of insolvency, for example, the State did not proceed to trial against Eagle-Picher, notwithstanding the fact that it was a major producer of lead compound used in lead paints. *See Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1253 (5th Cir. 1997) (adopting and incorporating district court opinion) (discussing Eagle-Picher).

equal amounts of lead derived from two lead paints will *not* generally develop equal elevation in internal lead level." *Skipworth*, 690 A.2d at 173 (internal quotes omitted).

Further, it would be impossible today to accurately determine the specific formulations of the many different brands of lead pigment and paint historically used in the State. Because of the weight of lead paints and the high costs of transportation, the lead pigment and paint market was dominated well into the middle of the 20th century by small manufacturers in discrete markets. As one scholar explained, this created a highly competitive and secretive market place: "At the turn of the century, the paint industry relied on secret processes and formulas, which were jealously guarded by highly paid foremen who took their knowledge with them from job to job. In some factories, components were identified by numbers so that workers would not know what materials they were mixing."[29]

This factual setting precludes any honest application of market share liability. "The [market share liability] theory cannot be applied in cases in which quality control standards differ within the industry, since under these circumstances, some manufacturers will produce safer products than others. The imposition of liability in this situation actually could reduce a manufacturer's incentive to produce safer products." *Market Share Liability*, at 1653. "If a manufacturer realizes that it will be held liable for a portion of the harm that preventable manufacturing defects cause regardless of the amount of care it takes in the production of its products, then the manufacturer will have little financial incentive to implement effective quality control techniques." *Id.*

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[29] Anne Cooper Fundurberg, *Paint Without Pain*, 17(4) Invention & Technology Magazine (Spring 2002), available at http://www.americanheritage.com/articles/magazine/it/2002/4/2002_4_48.shtml.

• Lead Paint Was Used for Different Purposes Which Pose Differing Risks: The State's claim arises primarily from the use of lead paint on interior residential surfaces, where chipping and deteriorating paint gives rise to a greater risk of exposure. However, lead paint was used for numerous other purposes, including exterior surfaces and a multitude of nonresidential purposes that are not alleged to be harmful. *Brenner*, 699 N.Y.S. 2d, at 852. Thus, any proper market share analysis would need to separate out the market for paint used for interior surfaces, an impossible task which the State did not even attempt to perform here.

• Lead Paint Exposure Does Not Give Rise to a Signature Disease: In the DES litigation, allocation of liability solely among DES manufacturers could also be justified by the fact that the plaintiff suffered from a "signature disease" that was only caused by the drug. There is no such signature disease associated with lead pigments and paints. Rather, as the court explained in *Brenner*, the mental problems associated with lead poisoning "could have been caused by some source other than lead, or even by a source of lead other than lead-based paint." 699 N.Y.S.2d at 853; *see Santiago*, 782 F. Supp. at 192-93 (same).[30]

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As this Court properly recognized in *Gorman*, the market-share liability theory is bad policy and bad law. The theory is particularly ill-suited for lead pigment litigation.

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[30] As reported by the EPA, other sources of lead exposure include, *inter alia*, drinking water delivered through lead pipes or pipes using lead solder, soil contaminated by past use of leaded gasoline in cars, and occupational exposures. *See* EPA, *Protect Your Child From Lead Poisoning: Where Lead is Found*, available at http://www.epa.gov/lead; *see also* EPA, Office of Resource and Development, *Air Quality Criteria for Lead*, Vol. 1., chapter 3 "Routes of Human Exposure to Lead and Observed Environmental

The trial court's endorsement of the market share liability theory as a substitute for the requirement of but-for causation was in error and should not be allowed to stand.

B. Proximate Cause Does Not Exist Against Manufacturers of Lead Pigment That Was Safe Absent the Negligence of Property Owners.

The trial court likewise erred in relieving the State of its obligation to show that Appellants were the proximate cause of the alleged public nuisance. This Court has explained that "liability cannot be predicated on a prior and remote cause which merely furnishes the condition or occasion for an injury resulting from an intervening unrelated and efficient cause, even though the injury would not have resulted but for such a condition or occasion." *Clements v. Tashjoin*, 168 A.2d 472, 475 (R.I. 1961). But that is exactly what the trial court allowed the State to do here.

This Court has long since recognized that the chain of proximate causation in circumstances such as those presented here begins with the property owner. In *Moretti*, 82 A.2d at 611, the Court thus held that a traveler injured on a public street by a fan blade that flew off a fan unit in the wall of an adjacent building "would have a good cause of action [for public nuisance] against *one who was responsible for maintaining the premises* in a condition so hazardous to persons lawfully traveling on the highway." (emphasis added) The Court explained: "The public has the right to the unobstructed use of the highway free of unnecessary hazards, and it *is the duty of owners and occupiers of property abutting thereon* to use it so as not to endanger members of the public exercising such right." *Id.* (emphasis added). There is no hint in this opinion – or in any other Rhode Island case law – that a cause of action for public nuisance could have been

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Concentrations," EPA/600/R-05/144aF (Oct. 2006) (discussing various sources of lead exposures), available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=158823

brought instead against the manufacturer of the fan. But that is the premise upon which the State's claim here wholly rests.[31]

Appellants here sold a lawful product that, if properly maintained, does not pose a health risk. The health risk arises from the misconduct of property owners who allowed the lead paint to deteriorate in violation of state statutes and municipal ordinances. As the New Jersey Supreme Court explained:

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[31] It is worth noting as well this Court's emphasis in *Moretti* on the requirement that the alleged public nuisance interfered with a public right to travel on the highways. *See also, e.g., Wood v. Picillo*, 433 A.2d 1244 (R.I. 1982) (public nuisance in environmental case where contaminants could spread through groundwater into public lands and waterways). The trial court below accepted the State's argument that it could satisfy the interference with public right requirement for public nuisance by pointing to the "cumulative presence" of lead pigment in many thousands of Rhode Island buildings. But as explained in the Restatement (Second) of Torts, Section 821B, comment g: "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." *See generally* Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. at 814-19 (explaining that the "term 'public right' has a well-defined meaning in the history of public nuisance law, one that courts should not ignore when considering actions against product manufacturers and distributors"). As the court explained in *City of Chicago*, the State's claims for costs of abating lead paint in private properties cannot satisfy this essential element of public nuisance law:

> The concept of public right as that term has been understood in the law of public nuisance does not appear to be broad enough to encompass the right of a child who is lead-poisoned as a result of exposure to deteriorated lead-based paint in private residences or child-care facilities operated by private owners. Despite the tragic nature of the child's illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisances purposes — obstruction of highways and waterways, or pollution of air or navigable streams.

823 N.E. 2d at 132-33.

> [T]he conduct that has given rise to the public health crisis is, in point of fact, poor maintenance of premises where lead paint may be found by the owners of those premises. That conduct creates the flaking, peeling, and dust that gives rise to the ingestion hazard and thus creates the public nuisance.

In re Lead Paint Litig., 924 A.2d at 501; *see also City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 139 (Ill. App. Ct. 2005) ("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").[32]

Indeed, the State's causation argument for purposes of this litigation is at odds with the causation determination made by the Rhode Island Legislature. In enacting the Lead Poisoning Prevention Act, the Legislature – like that in New Jersey – correctly recognized that "the appropriate target of the abatement and enforcement scheme must be the premises owner whose conduct has, effectively, created the nuisance." *In re Lead Paint Litig.*, 924 A.2d at 501. Thus, under the LPPA, property owners in Rhode Island who fail to maintain their properties in lead safe condition can be held criminally and civilly liable, and their properties are listed on a public State website. The LPPA's "focus on owners maintains the traditional public nuisance theory's link to the conduct of an actor, generally in a particular location. Unlike the Legislature's careful adherence to

[32] *See also Pine v. Kalian*, 723 A.2d 804 (R.I. 1998) (affirming entry of injunction in pre-LPPA case against property owners who had repeatedly violated court orders to remediate deteriorated lead paint on its premises and who trial court had described as "obstructive" and "noncompliant ... to the point of outright defiance").

these long-established notions, [the State here] ignore[s] the fact that the conduct that created the health crisis is the conduct of the premises owner." *Id.*

Appellants are not the proximate cause of the alleged public nuisance, and the trial court's ruling allowing the State to proceed against them absent such causation is further error requiring reversal.

C. Product Manufacturers Are Not Insurers of Their Products and Cannot Be Held To Have Caused Injury Absent Some Evidence of Intentional and Unreasonable, Ultrahazardous and/or Otherwise Tortious Conduct.

Under Rhode Island law, "the burden is on plaintiff to produce evidence that defendant was negligent and that its negligence was the proximate cause of the injury." *Salk*, 342 A.2d at 625; *see also State v. Barnes*, 40 A. 374, 377 (R.I. 1898) ("[i]f ... it shall be made to appear that the defendant was conducting his business in a negligent and improper manner, thereby creating a public nuisance, then he may lawfully be prosecuted and punished therefore"). The trial court rejected this conduct causation requirement as well, however, relying on what it interpreted to be a contrary holding in *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982). Once again, the trial court was mistaken.

In *Wood*, the Court stated that "liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct. Thus, plaintiffs may recover in nuisance despite the *otherwise* nontortious nature of the conduct which creates the injury." *Id.* at 1247 (emphasis added). *Wood* did not hold that a plaintiff could be liable for nontortious conduct; it held that the tortious nature of the conduct could be demonstrated by showing that the defendant actions had caused "unreasonable injury." This Court subsequently explained how this showing could be made: a public nuisance is an "unreasonable interference with a right common to the general public." *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 957 (R.I. 1994) (quoting

Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980)). A plaintiff alleging public nuisance must establish "behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community." *Davis*, 420 A.2d at 59.

To establish "unreasonable interference," a plaintiff must show that defendant's "interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities. ... If the interference with the public right is intentional, it must also be unreasonable." Restatement (Second) Torts § 821B, comment e. (1979) Accordingly, the State should have been required to show that Appellants caused the alleged public nuisance through actions that were either (1) negligent, reckless or abnormally dangerous or (2) intentional and unreasonable. The trial court's failure to require the State to show either was clear error.

The trial court also failed to address the fundamental distinction that *Wood* involved the storage of hazardous wastes resulting in environmental contamination that the law in modern times has viewed as an ultrahazardous activity as to which strict liability applies.[33] The public outcry over the lax standards at certain toxic waste sites in

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[33] *See, e.g.*, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, et seq., under which parties are held strictly liable for environmental contamination without evidence of fault. This reasoning clearly informed the analysis in *Wood*: "It could well be argued that one who utilizes his land for abnormally dangerous activities or for storage of abnormally dangerous substances may be strictly liable for resultant injuries, even in the absence of a finding of nuisance or negligence." 443 A.2d at 1249 n.7. While the Court ultimately did not reach the issue, numerous other courts faced with the issue have found that the storage of toxic wastes in the manner described in *Wood* constitutes an ultrahazardous activity. *See Pine v. Shell Oil Co.*, No. 92-0346B, 1993 WL 389396, at *8 (D.R.I. Aug. 23, 1993) (holding in environmental contamination case that "the clear intent of the Rhode Island Supreme Court expressed in *Wood* ... [is] that one who utilizes his land for abnormally dangerous activities may be strictly liable for resulting

the 1960s and 1970s, highlighted by the controversy at the Love Canal in Niagara Falls, New York, resulted in a significant liberalization of the standards for liability against the operators of such sites, including in many cases the expansion of the scope of strict liability and public nuisance. See, *e.g.*, *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960 (W.D.N.Y. 1989); *see also* Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. at 809, 806-813 (noting that Restatement (Second) of Torts, § 821B was revised "following the revolt by environmentalists and their supporters ... to make the tort [of public nuisance] available against various forms of environmental pollution").

This context-specific, strict liability approach cannot be extended to actions premised on injuries or "public nuisances" allegedly caused by defective products. As the Court has explained: "Strict liability attaches when a plaintiff's injuries are proximately caused by some ultrahazardous or abnormally dangerous activity of the defendant but not when they are caused by an ultrahazardous or abnormally dangerous material." *Selwyn v. Ward*, 879 A.2d 882, 889 (R.I. 2005). "[I]f the rule were otherwise, virtually any commercial activity involving substances which are dangerous in the abstract automatically would be deemed as abnormally dangerous. This result would be intolerable." *Splendorio v. Billray Demolition Co.*, 682 A.2d 461, 466 (R.I. 1996).

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injuries"); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (defendant's "maintenance of the site – for example, allowing corroding tanks to hold hundreds of thousands of gallons of hazardous waste – constitutes abnormally dangerous activity and thus constitutes a public nuisance"); *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1307 (5th Cir.1982) (defendant's disposal of hazardous waste deemed an abnormally dangerous and ultrahazardous activity); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 850-56 (D.N.J. 2003) (same) *aff'd*, 399 F.3d 248 (3d Cir. 2005); *Albahary v. City & Town of Bristol, Conn.*, 963 F. Supp. 150, 154-56 (D. Conn. 1997) (same).

Wood plainly fits within the "Love Canal" rubric. In *Wood*, plaintiffs brought a private and public nuisance action against the owners of a hazardous waste site that the trial court had described as "a chemical nightmare." 443 A.2d at 1246. The evidence at trial established that there was "a huge trench" on the property that was "200 feet long, 15 to 30 feet wide, and 15 to 20 feet deep .. [and] [a] viscous layer of pungent, varicolored liquid covered the trench bottom to a depth of six inches at its shallowest point." *Id.* Truck operators were witnessed on the site dumping damaged barrels of combustible chemical waste "and chemicals poured freely from the damaged barrels into the trench." *Id.* State officials "discovered a second dump site [on the property] when 'sink holes' emitting chemical odors opened in the earth." *Id.*

The defendants' activities in running the hazardous waste site had resulted in various significant and dramatic risks to public health. At one point:

> an enormous explosion erupted into fifty-foot flames in a trench on defendants' Coventry property. Firefighters responded to the blaze but could not extinguish the flames. As the fire raged within the trench, additional explosions resounded. From the conflagration billowed clouds of thick black smoke that extended "as far as the eye could see on the Eastern horizon."

Id. at 1245. Further, on several occasions "pungent odors [emanating from the site] forced [neighbors] to remain inside their homes. The odors were described variously as 'sickening,' 'heavy,' 'sweet,' 'musky,' 'terrible,' and like 'plastic burning.' *Id.* at 1246. "One neighbor testified that the odors induced in her severe nausea and headaches, while another stated that on one occasion fumes from the [defendant's] property caused her to cough severely and to suffer a sore throat that lasted several days." *Id.* Moreover, "[a]ccording to the experts, the chemicals present on defendants' property and in the

marsh, left unchecked, would eventually threaten wildlife and humans well downstream from the dump site." *Id.* at 1247.

The Court's ruling in *Wood* that plaintiff need not show the defendant to have been negligent was explicitly based on the unique concerns posed by environmental contamination and the emerging public awareness of the risk of groundwater contamination.

> [D]ecades of unrestricted emptying of industrial effluent into the earth's atmosphere and waterways has rendered oceans, lakes, and rivers unfit for swimming and fishing, rain acidic, and air unhealthy. Concern for the preservation of an often precarious ecological balance, impelled by the spectre of "a silent spring," has today reached a zenith of intense significance. Thus, the scientific and policy considerations that impelled the Rose result are no longer valid. We now hold that negligence is not a necessary element of a nuisance case involving contamination of public or private waters by pollutants percolating through the soil and traveling underground routes.

Id. at 1249. Rhode Island courts have subsequently interpreted *Wood* as adopting a nuisance *per se* rule for environmental contamination cases: "Rhode Island courts have demonstrated they will now consider the pollution of subterranean waters nuisance *per se*. Advances in the science of groundwater hydrology and increased interest in protecting the purity of the state's waters are factors in the court's direction." *Woodmansee v. State* PM. 85-4854, 1991 WL 789747, at *3 (R.I. Super. Feb. 13, 1991) (citing *Wood*) *aff'd*, 609 A. 20 952 (R.I. 1992).

The trial court's reliance here on *Wood* is further flawed because – in sharp contrast to this case – the facts before the Court in *Wood* fully satisfied all of the other traditional elements of a public nuisance. The defendants' waste disposal activities had resulted in the spread of toxic chemicals into public lands and waterways in interference

with a public right, the defendants had control over the waste site and accordingly had the ability to abate the nuisance, the defendants' conduct was the but-for and proximate cause of the alleged injuries, and the defendants' activities interfered with the plaintiffs' use and enjoyment of their land. *See* Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. at 813-34. Moreover, while the trial court below had not made a specific finding of negligence, the Court recognized that "it may be that a finding of negligence is implicit in the trial judge's nuisance determination." *Wood*, 443 A.2d at 1248 n.5. Indeed, the facts set forth above and in the *Wood* opinion leave little question that plaintiffs' injuries were caused by tortious misconduct. *See also id.* at 1247 (noting that "defendants had in the past displayed an unwillingness or inability to remedy the danger").

Rhode Island law recognizes that manufacturers should not be treated as "insurers of their products." *Castrignano*, 546 A.2d at 782. Rather, for liability to attach, the alleged injuries must be caused by the manufacturer's improper conduct. Based on its misapplication of *Wood*, the trial court failed to hold the State to this causation requirement and the verdict below should be reversed on this ground as well.

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Rhode Island law requires a plaintiff to prove that (1) a defendant engaged in intentional and unreasonable, ultrahazardous and/or otherwise tortious conduct that was both (2) the but-for cause and (3) the proximate cause of the plaintiff's alleged injuries. The trial court rulings below absolved the State of its proper obligation with respect to each of these three requirements and, in so doing, strip product manufacturers of fundamental legal protections afforded to them in every other state in the country. Unless

reversed, the consequences of this ruling will be profound not only to Appellants – who are improperly faced with alleged liabilities that might exceed $2 billion – but to all businesses operating within the state. There is no basis in law or policy for Rhode Island to embark down a road where industry dare not tread, and this Court should return the law to its proper course.

II. Businesses Should Not Face the Risk of Civil Liability for Exercise of Their First Amendment Rights to Association and Petition.

The trial court's failure to hold the State to its proper causation requirement as to each of the Appellants led to a second fundamental error when the trial court allowed the State to rely on trade association activities to link Appellants to the alleged public nuisance. These evidentiary rulings were directly contrary to Appellants' rights under the First Amendment to the United States Constitution.

The United States Supreme Court has repeatedly emphasized the central role of the First Amendment right to association in our constitutional democracy. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981)). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.* at 908 (quoting *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958)).

In this case, the trial court paid lip service to these First Amendment rights of the Appellants, but nonetheless allowed the State to rely heavily at trial on evidence relating to Appellants' constitutionally-protected associational and lobbying activities through a

trade association, the Lead Industries Association ("LIA"). Although the trial court concluded during the trial that the State had failed to prove that LIA acted as an agent for any of the defendants, the trial court denied Appellants' motion to strike the voluminous LIA evidence that had been presented to the jury and denied Appellants' motion for a mistrial, and the State continued to rely on evidence relating to the Appellants' associational activities throughout the trial, including in closing argument (*See* 12/13/05 Trial Tr at 1-12; 12/15/05 PM Trial Tr at 63; 01/06/06 PM Trial Tr at 93-97; 01/12/06 Trial Tr at 59; 02/10/06 Trial Tr at 48;). The trial court acknowledged in its post-trial ruling that "certain evidence was admitted that related to protected commercial speech and lobbying activities" *Lead Indus. Ass'n*, 2007 WL 711824, slip op. at 34, and that "some of [the State's] statements regarding membership in the LIA were improper, such as the statements that the Defendants should have stopped paying dues, attending meetings, and funding programs." *Id.*, slip op. at 72.

The trial court held that it had cured any prejudice created by the admission of the LIA evidence and counsel's closing argument through a lone instruction to the jury that Appellants could not be held liable based merely on their membership in a trade association.[34] But no jury instruction can cure the chilling effect created both on these Appellants and on corporations generally that arises from the State's heavy use of trade association materials as a weapon in its pursuit against member companies of the billion dollar damages award that the State ultimately is seeking in this case. *See Votolato v. Merandi*, 747 A.2d 455, 464-65 (R.I. 2000) (affirming grant of new trial due to improper

[34] The trial court also held that certain pieces of LIA evidence were admissible as evidence of Appellant's knowledge of the hazards of lead or as evidence of improper

admission of settlement agreement notwithstanding purported curative instruction to the jury). The admission of the LIA evidence is particularly prejudicial because it was an essential cog in the State's case. As explained above and in the Appellants' respective briefs, the State could not establish that any individual Appellant had caused the alleged public nuisance. Thus, the State attacked the lead pigments industry as a whole and used Appellants' associational activities as the essential glue to apply its market-wide liability theories against a few industry members.

The State's trial strategy violated two separate lines of United States Supreme Court authority that protects against the imposition of liability based on the exercise of First Amendment rights to association and petition. These constitutionally-protected rights are not to be taken lightly. As numerous courts have recognized, the consequences to our constitutional democracy of allowing plaintiffs (particularly a State Attorney General) to use trade association-based litigation strategies to impose massive financial liabilities on industry are dire. The Court should reaffirm Appellants' constitutional rights, put an end to the misuse of trade association materials in tort litigation, and make clear that the trial court's admission of these materials was prejudicial error that itself requires a new trial.

A. The Admission of LIA Evidence and Related Closing Argument Violated Appellants' First Amendment Right to Association.

The United States Supreme Court has explained that the First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another" because allowing such actions would present "a real danger that

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conduct to create a public nuisance. NPCA defers on these evidence-specific arguments to the briefing of the parties.

legitimate political expression or association would be impaired." *Claiborne Hardware*, 458 U.S. at 918-19 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)). As the Court has explained in other contexts, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief" and "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). Moreover, "[i]n the domain of ... indispensable liberties, whether of speech, press, or association, the decisions of [the Supreme] Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Alabama*, 357 U.S. at 461. Government action may be precluded where it "may induce members to withdraw from [an] Association and dissuade others from joining it." *Id.* at 463.

"Civil liability may not be imposed merely because an individual belonged to a group." *Claiborne Hardware Co.*, 458 U.S. at 920. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Id.* The Court explained that the individual group member's intent "must be judged according to the strictest law." *Id.* at 919. "In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id. a*t 920.

Numerous courts thus have rejected as unconstitutional arguments like those pursued by the State at trial. In *In re School Asbestos*, for example, the Third Circuit Court of Appeals granted the extraordinary remedy of mandamus to reverse a district

court opinion that would have allowed plaintiff school districts to proceed with concert of action claims premised on an asbestos manufacturer's membership in a trade association.[35] The Third Circuit held that mandamus relief was necessary because even allowing the claims to proceed would have imposed an intolerable restraint on the petitioner's First Amendment rights. "Mandamus has been found to be proper in these cases because the duration of a trial is an 'intolerably long' period during which to permit the continuing impairment of First Amendment rights." *In re Asbestos Sch. Litig.*, 46 F.3d at 1294. As the Third Circuit explained:

> [R]equiring [petitioner] to stand trial ... predicated solely on its exercise of its First Amendment freedoms could generally chill the exercise of the freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate.

Id. at 1295-96.

In ordering a halt to the school district's claims, the Third Circuit held that the district court's opinion allowing the claims to proceed lay "far outside the bounds of established First Amendment law," was "clearly wrong," and had "implications that broadly threaten First Amendment rights." *Id.* at 1289, 1294. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. ... But the district court's holding, if generally accepted, would make these activities unjustifiably

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[35] As with the State here, the school district plaintiffs in *In re School Asbestos* argued that the manufacturer could be held liable due to the trade association's alleged misleading conduct in disseminating information about the potential health impacts of the manufacturer's products. *See* 46 F.3d at 1287.

risky and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.* at 1294 (citations omitted).

A similar ruling was recently handed down in the welding rod products litigation, where plaintiffs sought to bring concert of action claims against members of two trade associations that had allegedly concealed or misrepresented purported hazards of welding fumes. *See Hunt v. Air Prods. & Chems.*, No. 053-9419, 2006 WL 1229082 (Mo. Cir. Apr. 20, 2006). The court ruled that "[p]laintiffs' reliance on the thread of membership in trade associations is patently insufficient to establish an actionable conspiracy. Obviously, defendants enjoy a constitutional right to form and maintain trade associations. Defendants likewise enjoy a constitutional right to disseminate information." *Id.* at *3. In dismissing plaintiffs' claims, the court held: "Paramount is the burdening of fundamental rights of speech and association. ... [D]efendants have an absolute right to associate and speak on matters of public importance. ... [P]laintiffs would impose substantial burdens on those rights if, by associating for the purpose of promoting their economic interests, the defendants thereby were exposed to liability." *Id.* at *5; *see also Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 206-07 (Ct. App. 2003) (agreeing with *In re Asbestos School*); *Morgan v. W.R. Grace & Co.*, 779 So. 2d 503, 505 (Fla. Dist. Ct. App. 2000) (rejecting claims against trade association based on its alleged marketing, promoting, and encouraging the sale of radioactive land "given the First Amendment concerns this would raise").

Much of the evidence admitted at trial in this case is of exactly the type held impermissible by these other courts. For instance, Dr. Markowitz was allowed to testify for several days regarding the LIA's conduct, even though the State failed to establish

that the LIA was the agent of any defendant. *See, e.g.*, 12/12/05 Trial Tr pm p. 21; 12/12/05 Trial Tr. pm pp. 11-41; 12/15/05 Trial Tr. pm pp. 7-8). Moreover, the State repeatedly used the LIA evidence to impermissibly argue that mere membership in a trade association was unlawful:

- What the State is saying is that if you don't agree with your industry organization, get out or speak out or do something different. Don't continue paying your dues. Don't keep funding the programs, don't keep going to the meetings, don't keep serving on the board of directors, don't keep serving on committees . . . . Not one, not a single one of these defendants said stop it. Not a single one of them -- not a single one of them quit the LIA to protest their conduct. (02/10/06 Trial Tr. at 49).

- Now, the defendants, you know, they tried to distance themselves from the LIA today. But they can't really wash their hands of the LIA so easily when each one of them was a member. And each one of them attended a meeting where they were told that lead in paint was poisoning kids. (02/10/06 Trial Tr. at 48).

This evidence should not have been admitted, and there is no way to disentangle the impact of this improper and highly prejudicial evidence from the jury's verdict.

B. The Admission of LIA Evidence and Related Closing Argument Violated Appellants' First Amendment Right to Petition.

The United States Supreme Court likewise has held that trade associations and their members have the constitutional right to communicate with state and federal governments and regulatory bodies. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961, the Court rejected anti-trust allegations brought against railroad companies and a trade association that were premised on the industry's efforts to influence governmental action adverse to the trucking industry. As the Court explained, allowing such a claim would impermissibly intrude upon the First Amendment right to petition the government. "In a representative democracy such as this, the[

legislative and executive] branches of government act on behalf of the people, and to a very large extent, the whole concept of representation depends upon the ability of people to make their wishes known to their representatives." *Id.* at 137.

The Court rejected the argument – like that made by the State and accepted by the trial court here – that the railroads could be held liable because they intended through their lobbying efforts to further their own economic interests and damage those of the trucking industry: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek actions on laws in the hope that they may bring advantage to themselves and a disadvantage to their competitors." *Id.* at 139.

To avoid any infringement of the right to petition the government, either individually or through an association, the constitutional protection is broad in scope. As the Sixth Circuit has explained, *Noerr* "immunizes parties from liability ... for actions taken when petitioning authorities to take official action...[except where such petitioning] activities are not genuinely aimed at procuring favorable government action." *Knology, Inc. v. Insight Commc'ns Co.*, 393 F.3d 656, 658-59 (6th Cir. 2004). All statements made in petitioning legislatures and executive agencies for actions are protected, even if the statements were false. *E.g., Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (misrepresentations are "condoned in the political arena"); *Noerr*, 365 U.S. at 140 (protecting petitioning even though it involved "deception of the public," the manufacture of bogus sources of reference" and "distortion of public sources of information").

"[A]lthough originally developed in the antitrust context, the doctrine has now universally been applied to business torts." *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003). Courts thus have held that this doctrine applies "to product liability claims brought under a concert of action or civil conspiracy theory and under negligence." *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996) (citing *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 505-06 (D. Minn. 1984) and *Anchorage Joint Venture v. Anchorage Condo. Ass'n*, 670 P.2d 1249 (Colo. Ct. App. 1983)). *See also Sizemore v. Georgia-Pacific Corp.*, Nos. 6:94-2894 3, 6:94-2895 3 and 6:94-2896 3, 1996 WL 498410, at *9 n.13 (D.S.C. Mar. 8, 1996) (allegations against trade association based on its activities in advocating the interests of its members before governmental bodies "raise serious First Amendment concerns") *aff'd*, 114 F.30 1177 (4th Cir. 1997) (unpublished table decision); *Smith v. Lead Indus. Ass'n*, No. 2368, slip op. at 19 (Md. Ct. Spec. App. May 24, 2004) (dismissing claim against NPCA in part because NPCA's lobbying activity was protected free speech immune from imposition of duty of care), v*acated on other grounds,* 871 A. 2d 545 (Md. 2005)

For example, in *Senart*, the court rejected concert of action product liability claims brought against manufacturers of toluene diisocyanate based on their trade association's lobbying efforts before OSHA. The court upheld the right of corporations to participate in scientific debate on regulatory standards without fear of liability: "In short, plaintiffs assail defendants for taking a particular view in a scientific debate and trying to retain a regulatory standard which defendants preferred. Not only do these actions not constitute torts, they are protected by the first amendment." *Senart*, 597 F.

Supp. at 506; *see also Hamilton*, 935 F. Supp. at 1321 (First Amendment prohibits liability to be imposed on gun manufacturers for lobbying against handgun restrictions).

The record below is replete with evidence and testimony seeking to hold Appellants liable for the lobbying activities of the LIA. For example, the State proffered testimony through its expert Dr. Markowitz, that the LIA had lobbied Federal and state governments to specify lead pigment for their own paint needs and had monitored and opposed Federal and state regulations. For example:

- Dr. Markowitz testified that based on his extensive document review, LIA referred in documents to its "unending battle" with "state and federal regulations or legislation." (12/12/05 Trial Tr. pm p. 21).

- Dr. Markowitz testified that the LIA combated legislation and regulation and that the LIA's actions regarding legislation were consistent with their goal to combat substitutions and adverse publicity. (12/12/05 Trial Tr. pm pp. 11-41).

- Dr. Markowitz testified that "The LIA says that it was part of an agreement to get a piece of legislation that had been passed in Maryland in 1949 to get that legislation which had severe penalties for the use of lead on toys and children's furniture that had lead on it without -- that did not have a label. There were severe penalties even, even prison for people who violated the law and [the LIA] was part of an agreement to get that law repealed." (12/15/05 Trial Tr. pm pp. 7-8).

- Dr. Markowitz testified that the LIA gave Johns-Hopkins University $10,000 for research in exchange for the 1949 Maryland lead statute being repealed. (12/15/05 Trial Tr. pm pp. 6-13).

- Dr. Markowitz testified regarding Plaintiff's Exhibit 115, admitted against NL, that the LIA activities concerning legislation were consistent with their combating adverse publicity. (12/12/05 Trial Tr. pm pp. 17-18).

These are constitutionally protected activities that cannot under the Constitution provide a basis for civil liability. But that is exactly what happened here.

* * * *

While the parties have significant disagreements, the one thing that everyone agrees is that this is a major case. In this action, the State seeks to impose over two billion dollars in liability upon three companies based in large part on evidence of conduct of a trade association in which each company belonged. The ruling in this case is being closely followed by industry as a whole, and the messages sent by this Court will be widely heard. Absent reversal, one of these messages will be that companies that participate in trade associations – even with regard to the sale of lawful products with no showing of intentional and unreasonable, ultrahazardous or otherwise tortious conduct – do so at their peril. This sharp infringement on First Amendment rights should not be allowed.

CONCLUSION

Our common law system is based upon well established legal principles that insure fair treatment to all. Defendants who through their wrongful conduct can be shown to have caused injury to others are and should be held liable for any resulting damages. But defendants who have not engaged in wrongful conduct and who cannot be shown to have caused injury may not be held liable. Nor can defendants be punished with common law tort liability for the exercise of constitutionally protected rights.

In allowing the State to proceed under its public nuisance theory against (1) defendants whose products could not be identified on any buildings in Rhode Island, (2) for injuries proximately caused by the misconduct of property owners, (3) based on an inapposite environmental contamination case (*Wood*) and without any showing that defendants themselves had engaged in intentional and unreasonable or tortious conduct, and (4) based upon negative inferences from constitutionally protected activities of a

trade association, the trial court lost sight of these well established legal principles. The trial court's rulings and the resulting jury verdict should be reversed.

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