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March 12, 2018

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Honorable Chief Justice
Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: Letter of Amici Curiae Supporting Petition for Review in City of Modesto et al. v. The Dow Chemical Company et al., California Supreme Court No. S247128

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the American Chemistry Council submit this letter in support of the Petition for Review filed by The Dow Chemical Company and Axiall Corporation in the above-referenced matter.

The National Association of Manufacturers is the largest manufacturing association in the United States and represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million people, including more than 1,284,100 men and women in California. It also contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all pri-vate-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

The Chamber of Commerce of the United States of America is the world's largest busi-ness federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including California. An important function of the U.S. Chamber is to represent the interests of its members in matters before the judiciary, as well as the legislative and the executive branches of government. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of significant concern to the nation's business community.

The American Chemistry Council is one of America's oldest trade associations, represent-ing a diverse group of nearly 170 companies in the $768 billion business of United States chemis-try. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. This industry creates the building blocks for 96% of all manufactured goods, 25% of the U.S. gross domestic product, and over 800,000 American jobs. ACC advocates on behalf of ACC's members through legal and regulatory advocacy, legis-lative, communications and scientific research. Environmental safety is a primary concern of ACC members.

The Court of Appeal's decision in this case raises deep concerns among amici's members and other similarly situated companies that lawfully manufacture, market, and distribute benefi-cial, though potentially hazardous, products to the public. We write to emphasize three aspects of the opinion that are particularly unsound and warrant review.

Allowing a generalized notion of causation to supplant proving a direct link between a tortious act and the harm alleged

The Court of Appeal abandoned the bedrock tort law principle that causation requires a direct link between a specific tortious act and the harm alleged. The court held the "direct proof of every link in the chain of causation . . . is not required," and allowed Plaintiffs to conflate the "totality of defendants' conduct over decades" to create a mere impression of wrongful conduct. In addition, the court held that the chain of causation does not even have to reach the public nui-sance at all. It stated that only "affirmative steps toward" the public nuisance would suffice. This version of causation represents a major departure from California tort law and threatens to impose arbitrary and unpredictable liability on manufacturers and other members of the business community.

The impact of expanding the element of causation to this degree was starkly demonstrat-ed in this litigation by the divergent results in the two bench trials held to date. In the first trial, the court adopted this "taken as a whole"

approach to causation. There were clear breaks in the chain of causation between the manufacturers of PCE and the alleged public nuisance. But, Plaintiffs were allowed to pull back the lens far enough to blur the causation chain so the breaks could not be seen, leading to a finding for liability. In the second trial, the judge employed Cali-fornia's traditional causation standard and found against manufacturer liability. The court ex-plained that any nexus between cause and effect for the manufacturers was too remote or attenu-ated to justify liability.

Government lawyers and other plaintiffs have sought such generalized notions of causa-tion for years, including in public nuisance cases. These attempts have been widely rejected in other states. (See, e.g., *State v. Lead Indus. Ass'n* (R.I. 2008) 951 A.2d 428, 451 ["[B]asic fair-ness dictates that a defendant must have caused the interference to be held liable for its abate-ment."].) Selling hazardous materials is lawful, and companies engaged in these industries must be able to determine which types of conduct can give rise to liability and, just as important, what they can do to ensure that they are free of liability concerns. The "taken as a whole" approach does not provide necessary clarity.

The Court should grant review in this case to make sure this expansive and unpredictable view of causation is not allowed in California.

Reducing the standards for government public nuisance claims that are inconsistent with product liability and other tort claims that apply to manufacturers

The Court should also grant review to make clear that causation in a government public nuisance action is the same as in product liability or any other tort claim. A driver is not the cause of a collision because "taken as a whole" his driving was unlawful; there must be a specific act that caused the collision. (See *Dobbs, The Law of Torts* (2001) § 180, p. 443, fn.2 ["proxi-mate cause limitations are fundamental and can apply in any kind of case"].) In a public nuisance case, the entity that dumps the chemicals in a way that unreasonably interferes with a public right is the one responsible for creating the nuisance. The manufacturer of materials used to create the nuisance should not be liable without a demonstration that its conduct caused the nuisance.

Courts, in California and nationally, have long understood that for a manufacturer to be subject to liability for a public nuisance, its wrongful conduct must be tied directly to the creation of the nuisance such that it effectively controlled the improper disposal. An example California courts have provided is giving end users affirmative instructions relied upon to improperly dis-charge the chemicals. Otherwise, manufacturers would be thrust into the impossible role of polic-ing customers to ensure products are not misused, neglected, or disposed of in ways that could create a public nuisance. As courts have appreciated, such a cause of action would essentially be a products liability action in disguise, but without the elements and defenses that have developed in products liability law. (See *Johnson County, by and through Bd. of Educ. of. Tenn. v. U.S. Gypsum Co.* (E.D. Tenn. 1984) 580 F.Supp. 284, 294 [explaining such a change would allow governments to "convert almost every products liability action into a nuisance claim"].)

Like many chemicals, PCE is lawful and beneficial, even though it has hazardous proper-ties. By loosening causation standards for this government public nuisance claim, the court al-lowed liability against a chemical's manufacturers even when there was no evidence that they disposed of the products themselves, that someone followed their instructions to dispose of the products improperly, or that they caused the improper disposal through some other specific wrongful act. Thus, the Court of Appeal not only abandoned fundamental principles of causa-tion, it abandoned the fundamental principles of public nuisance and products liability law.

Changing tort law to facilitate liability against a perceived deep pocket

Also troubling here is the impression the Court of Appeal has given that it loosened the application of the State's causation standards for the very purpose of allowing for liability against PCE manufacturers in this case. The court explained that it favored the generalized notion of causation described above because "the social costs of limiting the responsibility of chemical manufacturers . . . would fall too heavily on the victims of the pollution by setting an almost in-surmountable standard for proving liability." Such end-game oriented rulings raise questions

about the fundamental pillar principle that California courts are trusted institutions for administering impartial justice.

Allowing courts to make liability rulings to reach a desired outcome creates a sense of lawlessness; it would subject manufacturers and other corporate defendants to unprincipled and open-ended liability. The Court of Appeal's stated desire to clean up this environmental harm is clearly strong, but so too must California's commitment be to long-standing liability law. The common law obligation to pay for injuries caused by tortious conduct should remain with the wrongdoer. Courts must not shift these costs to others, even if the other entities are perceived deep pockets.

The danger is that this novel "super tort" would be invoked at the whim of any county, state, or municipal attorney any time a product became associated with a hazard. Manufacturers would be responsible for abating public nuisances with few defenses. As a New York appellate court poignantly explained,

> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non- defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.

(*Spitzer v. Sturm Ruger & Co.* (N.Y. App. Div. 2003) 309 A.D. 91, 96.) The traditional tenets of public nuisance theory, product liability law, and tort law generally—including the lack of a manufacturer's wrongdoing, a product's utility, the overall public interest, and the lapse of time since the product was lawfully made and sold—would take a back seat to this desire for a new, deep-pocketed revenue source.

Conclusion

Amici respectfully request that the Court grant review to ensure the California judiciary remains a place for safeguarding principles of justice. Liability should flow only to those who wrongfully caused the alleged harm. The

pursuit of what is essentially "chain of commerce" liability is a new phenomenon in California courts. There are several cases working their way through the courts today where local governments are trying to raise funds from market participants to clean up environmental harms, even when the companies sued did not wrongfully cause the alleged harm. The Court should grant review to stop the overturning of fundamental tort law doctrines that are creating liability that has never before existed against lawful American companies.

Respectfully Submitted,

/s/ Amir Nassihi

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City of Modesto, et al. v. The Dow Chemical Company, et al.
Supreme Court No. S247128
Court of Appeal No. A134419 (Div. 4)
San Francisco County Superior Court Nos. CGC-98-999345 & 999643

I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am one of the attorneys of record in this proceeding. My primary office address is Shook, Hardy & Bacon L.L.P, One Montgomery, Suite 2700, San Francisco, CA 94104.

On March 12, 2018, I caused true copies of the within LETTER OF AMICI CURIAE SUPPORTING PETITION FOR REVIEW to be served on the courts and parties interested in this proceeding as follows:

Clerk, Court of Appeal
First Appellate District, Division Four
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AND BY U.S. MAIL, FIRST-CLASS POSTAGE PREPAID: I am readily familiar with the firm's practice in this office of processing correspondence for mailing. Under that practice, such correspondence is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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

Executed on March 12, 2018, at San Francisco, California.

/s/ Amir Nassihi