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No. 14-___

IN THE

Supreme Court of the United States

AMERICAN CYANAMID CO., ET AL.,

Petitioners,

v.

ERNEST GIBSON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Wisconsin's "risk contribution" theory holds manufacturers of white lead carbonate pigments responsible for all injuries caused by ingestion of lead paint that was applied to a Wisconsin residence at any time throughout the 20th century (1) regardless of whether the manufacturers were even manufacturing white lead carbonate when the paint the plaintiff ingested was made or applied; (2) even if the manufacturers participated in the marketplace for only a few years; and (3) even though the manufacturers left the industry as many as 60 years before the risk contribution theory was formulated and as many as 80 years before it was extended to white lead carbonate pigments. The questions presented are:

1. Whether, under this Court's decision in *Eastern Enterprises*, the Due Process Clause or the Takings Clause prohibits states from imposing severe, retroactive economic liability that the defendant could not have anticipated at the time the defendant engaged in the conduct being challenged, and that is disproportionate to the defendant's experience and conduct in the marketplace?

2. Whether, under this Court's decisions in *Philip Morris* and *State Farm*, the risk contribution theory violates the Due Process Clause by eliminating any meaningful causation requirement?

PARTIES TO THE PROCEEDING

Petitioners American Cyanamid Company, Atlantic Richfield Company, The Sherwin-Williams Company, E.I. DuPont de Nemours & Company, and Armstrong Containers, Inc., were the defendants in the district court and appellees in the Seventh Circuit. NL Industries, Inc. was an additional defendant in the district court and appellee in the Seventh Circuit, but has settled with Gibson.

Respondent Ernest Gibson was the plaintiff in the district court and appellant in the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

Atlantic Richfield Company is a wholly owned subsidiary of BP America, Inc. BP America, Inc. is not publicly held, but it is an indirect wholly owned subsidiary of BP p.l.c., which is a publicly held company.

The Sherwin-Williams Company has no parent company. T. Rowe Price Associates, Inc. owns more than 10% of Sherwin-Williams' stock.

E.I. DuPont de Nemours & Company has no parent, and no publicly held company owns 10% or more of its stock.

American Cyanamid Company is now known as Wyeth Holdings LLC; Wyeth Holdings LLC is a wholly owned subsidiary of Pfizer Inc., and the shares of Pfizer Inc. are publicly traded.

Armstrong Containers, Inc.'s parent corporations are BWAY Corporation, BWAY Holding Company, BWAY Intermediate Company, Inc., BWAY Parent Company, Inc., BOE Intermediate Holding Corporation, and BOE Holding Corporation. No publicly held company owns 10% or more of Armstrong's stock.

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OPINIONS BELOW

The Seventh Circuit's opinion (App. 1a) is reported at 760 F.3d 600. The district court's opinion granting summary judgment to Atlantic Richfield (App. 49a) is reported at 719 F. Supp. 2d 1031. The district court's opinion granting summary judgment to the other Petitioners (App. 89a) is reported at 750 F. Supp. 2d 998.

JURISDICTION

The Seventh Circuit issued its decision on July 24, 2014, App. 1a, and denied rehearing en banc on August 21, 2014, App. 101a. On October 28, 2014, Justice Kagan extended the time for filing this petition to and including January 18, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The Fifth Amendment, extended to the states through the Fourteenth Amendment, provides, in relevant part, that no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

The Seventh Circuit approved an unprecedented theory of "risk contribution" fashioned by a sharply-

divided Wisconsin Supreme Court, imposing severe, retroactive, and disproportionate liability on Petitioners for actions as far back as 1919. Under the Wisconsin rule and the Seventh Circuit opinion, Petitioners may be sued on Respondent's claim that he ingested lead paint solely because Petitioners made a component of paint at some point somewhere in the United States over the *60-year period* when lead paint *might* have been applied to Respondent's home in Wisconsin. The rule makes manufacturers of white lead carbonate pigments responsible for all injuries caused by ingestion of lead paint in Wisconsin, regardless of whether the manufacturers were manufacturing white lead carbonate when the paint was actually made or applied; regardless of how long the manufacturers participated in the market; and even though all the manufacturers left the industry long before the risk contribution rule was formulated. This arbitrary, gross, and retroactive assignment of liability offends fundamental requirements of due process.

The Seventh Circuit's decision upholding Wisconsin's rule directly conflicts with multiple decisions of this Court, including *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The Seventh Circuit widened an intractable circuit split regarding the application of *Eastern Enterprises* to laws imposing severe retroactive liability and a related split on the interpretation of fragmented decisions from this Court.

This Court should grant certiorari to put a needed stop to the massive retroactive liability Wisconsin's rule imposes, and to establish uniformity among the circuits.

STATEMENT

A. The Use of Lead Pigments in the Twentieth Century

Pigments are components of paint "that impart color, toughness, and texture." App. 90a. White lead carbonate is a family of pigments favored by paint manufacturers and government regulators for the first half of the 20th century. "From the early 1900s through the 1960s, federal, state and local governments, including the City of Milwaukee, *required* the use of lead pigments in their project specifications." *Id.* (emphasis added). Wisconsin and other states even took steps "to prevent consumers from unknowingly buying inferior paint with non-lead pigments." *Id.*

Petitioners are former manufacturers of white lead carbonate pigments or their alleged corporate successors. They sold pigments for use in paint but also for a variety of non-paint purposes, including to make ceramics and plastics. App. 51a, 92a. Atlantic Richfield is the alleged successor to companies that manufactured white lead carbonate pigments in Indiana from 1920 to 1946. App. 51a. DuPont manufactured white lead carbonate between 1917 and 1924 in Philadelphia. App. 91a. Armstrong is the alleged successor to a company that manufactured white lead carbonate in Chicago from 1938 to 1971. App. 92a. Sherwin-Williams manufactured white lead carbonate in Chicago from 1910 until 1947. App. 93a. American Cyanamid manufactured white lead carbonate for potential use in paint for a period of just 18 months ending in 1972, also in Chicago. *Id.* Petitioners are neither the only former manufacturers of lead pigments nor the largest. *In re Nat'l Lead Co. et al.*, 49 F.T.C. 791, 817-18 (1953).

White lead carbonate pigments are not chemically fungible products: they "could be comprised of three different chemical compounds." *Thomas v. Mallett*, 701 N.W.2d 523, 569 (Wis. 2005) (Wilcox, J., dissenting) (reciting undisputed facts). Pigment manufacturers used different formulas containing substantially different amounts of lead. *Id.* at 569-70.

Pigment manufacturers sold their products to paint manufacturers who introduced even greater variety. There were over 200 paint manufacturers in Milwaukee alone between 1910 and 1971. Each produced paint following its own formula, using widely different concentrations of lead from pigments and other sources. *Id.* at 570; *Brenner v. Am. Cyanamid Co.*, 263 A.D.2d 165, 172 (N.Y. App. Div. 1999).

The dangers of lead pigments as a source of ingestible lead emerged as the 20th century progressed. In 1978, years after Petitioners had left the market, the Consumer Product Safety Commission banned paint manufacturers from adding lead pigments to residential paint. App. 3a; 16 C.F.R. §§ 1303.2(b)(2), 1303.4 (2010). Wisconsin followed suit in 1980. App. 90a.

B. The *Thomas* Decision and Wisconsin's Risk Contribution Theory

In case after case and jurisdiction after jurisdiction, courts have rejected claims against manufacturers of lead pigments absent proof that the manufacturer made the specific product the plaintiff actually ingested. *See, e.g.*, *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1248 (5th Cir. 1998) (Louisiana law); *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 551 (1st Cir. 1993) (Massachusetts law); *Brenner*, 263 A.D.2d at 172 (New York law); *Skipworth v. Lead Indus. Ass.*,

690 A.2d 169, 173 (Pa. 1997) (Pennsylvania law); *Jackson v. Glidden Co.*, No. 87779, 2007 WL 184662, at *2 (Ohio Ct. App. Jan. 25, 2007) (Ohio law).

Until Wisconsin. In 2005, the Wisconsin Supreme Court extended a novel tort theory called "risk contribution" to lawsuits involving white lead carbonate pigments. *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005). The court first formulated the "risk contribution" theory in *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984), involving a plaintiff who developed cancer from exposure *in utero* to DES, a drug once used to prevent miscarriages. The plaintiff sued 17 drug companies that produced or marketed DES during the nine months of her mother's pregnancy. *Id.* at 42. The Wisconsin Supreme Court held that each was liable because each "may have provided the product which caused the injury" and each therefore "contributed to the *risk* of injury." *Id.* at 49. Defendants could avoid liability only by showing they did not produce or market *any* DES during that nine-month period, or in the relevant geographical market. *Id.* at 52.

Collins distinguished "risk contribution" from the "market share" theory adopted for DES claims in a handful of other states. Those states require plaintiffs to sue a "substantial share" of DES producers, and each defendant is liable only for "the proportion of the judgment represented by its share of [the] market." *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980). Under Wisconsin "risk contribution," however, plaintiffs need not sue even a "reasonable number of possibly liable defendants." *Collins*, 342 N.W.2d at 50. A plaintiff can "recover all damages from [] one defendant"—no matter how small that defendant's market share. *Id.* Defendants can implead other

producers, but the right may be meaningless if other producers are bankrupt or dissolved. *Id.* at 51.

Twenty years after *Collins*, *Thomas* extended "risk contribution" to manufacturers of white lead carbonate pigments. The *Thomas* plaintiff claimed that he ingested white lead carbonate from paint on the walls of his homes. *Thomas* held that pigment manufacturers "contributed to the *risk* of injury," 701 N.W.2d at 558, and that the plaintiff could recover from any manufacturer that "produced or marketed white lead carbonate [of any type] for use during the relevant time period: the duration of the houses' existence." *Id.* at 564. Thomas's homes were built in 1900 and 1905, meaning he could sue any company that manufactured any white lead carbonate over a nearly 80-year window from 1900 to 1978, when lead-based residential paints were banned.

This was so even though Thomas could not identify: (1) which of the three types of white lead carbonate he ingested; (2) which company manufactured the white lead carbonate he ingested; or (3) when the paint containing white lead carbonate was made or applied to his home. *Id.* at 559, 564. Manufacturers could exculpate themselves if they present evidence establishing that they could not reasonably have made the actual white lead carbonate the plaintiff ingested. But absent a crystal ball to predict the risk contribution rule, manufacturers had no business reason to maintain records to prove this fact dating back to the early 20th century. *Thomas* anticipated the problem and said too bad; "if relevant records do not exist," manufacturers are out of luck. *Id.* at 564.

The court acknowledged that risk contribution could punish "defendants who are actually innocent," but thought it sufficient that each defendant was among

"a pool of defendants which can reasonably be assumed 'could have caused the plaintiff's injuries.'" *Id.* at 565. The court further acknowledged that 80 years of potential exposure was "drastically larger" than the 9 months in *Collins*, but viewed lead pigment manufacturers as "essentially arguing that their negligent conduct should be excused because they got away with it for too long." *Id.* at 562. The *Thomas* court left unstated how this justification applied to manufacturers that sold white lead carbonate for only a handful of years but would now be liable for all white lead carbonate any manufacturer sold over 80 years.

Thomas produced two vigorous dissents. Justice Wilcox charged the majority with departing from bedrock tort law by creating an "irrebuttable presumption of causation." *Id.* at 575. He distinguished lead pigments from DES because all DES is chemically fungible, while the risk created by lead pigments differs based on chemical composition and choices made by paint mixers. *Id.* at 583-84. "The end result of the majority opinion," he concluded, "is that the defendants, lead pigment manufacturers, can be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market." *Id.* at 567-68.

Justice Prosser dissented on the additional ground that *Thomas's* risk contribution rule violates the federal Due Process Clause. Risk contribution violates procedural due process by creating an "irrebuttable presumption of causation." 701 N.W.2d at 593. And the rule violates substantive due process under *Eastern Enterprises*, by imposing "retroactive and

severe liability based on 'transactions long closed.'" *Id.* at 596 (quoting *Eastern Enterprises*, 524 U.S. at 548 (Kennedy, J., concurring)).

C. Respondent's Complaint and the District Court's Decision

Thomas produced an avalanche of lawsuits against former manufacturers of white lead carbonate pigments. App. 61a. Petitioners are now defending against claims by 172 plaintiffs who allege that they ingested paint containing white lead carbonate pigments in Wisconsin but do not know whether any Petitioner caused their alleged injuries or when paint containing white lead carbonate was made or applied to their homes.[1]

One such plaintiff is Respondent Ernest Gibson. Respondent alleged that, in 1997, his family moved into a residence in Milwaukee and that, while living there, he ingested paint containing white lead carbonate. App. 3a. In 2006, Respondent sued eight manufacturers of white lead carbonate or their alleged corporate successors in Milwaukee Circuit Court.[2] Complaint, *Gibson v. Am. Cyanamid Co. et al.*, No. 06-cv-12605 (Milwaukee Cir. Ct. Dec. 22, 2006). Respondent conceded he could not "identify the specific manufacturer, supplier, and/or distributor of the white lead carbonate present in the residence in which he was exposed." *Id.* at ¶ 18. Nor did he say when paint containing lead pigments was made or

[1] *See, e.g.*, Complaint, *Allen v. Am. Cyanamid Co.*, No. 11-C-55 (E.D. Wis. 2011) (naming 163 plaintiffs).

[2] Five defendants (Petitioners here) remain. Of the three additional original defendants, one settled, one went bankrupt, and one was voluntarily dismissed.

applied to his home, beyond that it happened sometime between 1919, when his home was built, and 1978. Respondent sued Petitioners because they (or their alleged predecessors-in-interest) manufactured white lead carbonate pigments somewhere in the United States at some point over those nearly 60 years.

Petitioners removed the lawsuit to the Eastern District of Wisconsin on the basis of diversity jurisdiction. Petitioner Atlantic Richfield moved for summary judgment, which the district court granted. The court held that the "imposition of liability under the risk contribution rule violates the constitutional bar to retroactive liability expressed in *Eastern Enterprises*." App. 65a.

Eastern Enterprises invalidated a federal statute, the Coal Act, which required former coal mining companies to pay healthcare premiums for retired miners. A four-Justice plurality held that the statute violated the Takings Clause because it imposed substantial, unforeseen, retroactive liability on Eastern Enterprises based "solely on its roster of employees some 30 to 50 years before the statute's enactment." 524 U.S. at 531, 534.

Justice Kennedy concurred in the judgment, concluding that the Act violated the Due Process Clause: it "creat[es] liability for events which occurred 35 years ago" and "has a retroactive effect of unprecedented scope." *Id.* at 548-50.

Four Justices dissented. Those Justices agreed with Justice Kennedy that the Due Process Clause supplied the applicable constitutional rule and "protects against an unfair allocation of public burdens through...specially arbitrary retroactive means," but

concluded that the Act was constitutional under that standard. *Id.* at 558-60 (Breyer, J., dissenting).

The district court observed that appellate interpretations of *Eastern Enterprises* have produced "varying results." App. 76a (citing opinions from six circuits). The court then concluded that five Justices—concurrence plus dissent—"perceived the problem of retroactive liability as a substantive due process issue," and proceeded to analyze Wisconsin's risk contribution rule under the factors outlined in *Eastern Enterprises*. App. 77a.

The court held that risk contribution violated due process by "impos[ing] (1) severe (2) retroactive liability on a (3) limited class of parties that (4) could not have anticipated the liability, and the extent of that liability is (5) substantially disproportionate to the parties' experience." App. 78-79a (quoting *Eastern Enterprises*, 524 U.S. at 528-29); *see also* 524 U.S. at 548-50 (Kennedy, J., concurring). Petitioner Atlantic Richfield could not have anticipated when it completed transactions involving a predecessor company in 1981 that it would face liability in 2005 for "all of the injuries caused by white lead carbonate pigment in Wisconsin" by any manufacturer ever, simply because the predecessor's long-defunct subsidiaries manufactured some pigment before 1946. App. 80a.[3] "[T]he connection between [the plaintiff] and [Atlantic Richfield is] completely nonexistent." App. 84a.

Separately, the district court held that Wisconsin's risk contribution rule violated the Due Process Clause by imposing liability on Atlantic Richfield for damage

[3] Other defendants likewise face liability for products they never manufactured, including Armstrong, which is being sued solely in its capacity as alleged successor-in-interest.

Atlantic Richfield did not cause, in violation of *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). "Instead of liability for cases where its product caused a specific injury to a specific plaintiff, [Atlantic Richfield] is subject to liability in every case in Wisconsin." App. 87a.

The remaining defendants—Petitioners DuPont, Armstrong, American Cyanamid, and Sherwin-Williams—then moved for summary judgment, which the court granted for the same reasons. App. 89a-90a.

D. The Seventh Circuit's Decision

The Seventh Circuit reversed. After disposing of two jurisdictional issues,[4] the court addressed a Wisconsin statute, passed in 2013 after the district court rendered its decision, that overruled *Thomas* in substantial part and purported to apply to pending lawsuits.[5] Wis. Stat. § 895.046. The Seventh Circuit held that § 895.046 violated the Wisconsin Constitution as applied to persons whose claims had already accrued, and that Respondent and others could proceed under risk contribution. App. 11a-12a.

On the merits, the court held that *Eastern Enterprises* was inapplicable and irrelevant because Justice Kennedy's concurrence was not a "logical subset" of the plurality opinion and involved the Due Process Clause rather than the Takings Clause. App.

[4] These issues—one bearing on subject matter jurisdiction and another on the Seventh Circuit's appellate jurisdiction—were straightforward. The Seventh Circuit resolved them correctly, and they present no obstacle to certiorari. App. 5a-9a.

[5] The 2013 legislation amended a 2011 law that applied only prospectively and did not apply to this case, filed in 2006.

32a. The court held that it is never appropriate to consider a combination of a Supreme Court concurrence and a four-person dissent. App. 34a-35a.

The court then concluded that *Thomas* was neither irrational nor "'unexpected and indefensible by reference to the law which ha[d] been expressed prior to the conduct in issue.'" App. 40a (quoting *Rogers v. Tennessee*, 532 U.S. 451, 457, 462 (2001)). Rather than comparing *Thomas* to the law in effect at the time Petitioners made and sold white lead carbonate, however, the court explained that *Thomas* was expected in light of *Collins*, the 1984 case applying risk-contribution theory to DES. App. 44a.

The Seventh Circuit rejected the district court's alternative holding that risk contribution violated substantive due process by dispensing with a causation requirement, App. 42a, rejected Petitioners' takings claim (finding the *Eastern Enterprises* plurality opinion irrelevant, App. 45a-46a), and held that the procedural due process claim was "not really any different from the substantive-due-process argument" because both concerned causation. App. 46a-47a.

The Seventh Circuit denied rehearing en banc.

REASONS FOR GRANTING THE PETITION

All nine Justices agreed in *Eastern Enterprises* that severe, retroactive, disproportionate liability violates the Constitution. Astonishingly, the Seventh Circuit nonetheless held that *Eastern Enterprises* stood for literally nothing—beyond its "specific result." App. 34a. That decision directly conflicts with *Eastern Enterprises* itself, with this Court's subsequent statements about *Eastern Enterprises*, with this Court's

general approach to analyzing fragmented decisions, and with decisions of other circuits.

There is more. Ignoring *Philip Morris*, *State Farm* and centuries of tort law, the Seventh Circuit's holding invites states to impose potentially-limitless liability on a defendant for harms it did not cause, so long as the defendant is among a "pool" of suppliers that "could" be guilty. App. 44a. The court's dangerous theory is that the Due Process Clause permits a state to dispense with a causal link tying the defendant to the plaintiff's injury.

This case presents an ideal opportunity to resolve these important and recurring questions. Causation is a bedrock principle in American law and arises in contexts too numerous to list. The retroactive liability that Wisconsin's risk contribution rule contemplates is utterly unprecedented and bears no rational relationship to any Petitioner's conduct. This Court must step in to resolve entrenched confusion in the lower courts and to check Wisconsin's staggeringly unfair and unconstitutional rule.

I. The Seventh Circuit's Decision Conflicts With This Court's Precedents and Widens Two Circuit Splits

A. The Decision Below Conflicts With *Eastern Enterprises* and Other Precedents

1. For "centuries" the law has "harbored a singular distrust" of retroactive liability. *Eastern Enterprises*, 542 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part). Such liability defies "[e]lementary considerations of fairness" that "dictate that individuals should have an opportunity to

know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). On this point, all nine Justices in *Eastern Enterprises* agreed. The Court recognized that retroactive laws long have been viewed as "generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 524 U.S. at 533 (plurality op.) (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)); *see id.* at 538 (Thomas, J., concurring); *id.* at 547 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 558 (Breyer, J., dissenting). The Constitution therefore imposes special checks on retroactive liability—whether established by legislatures or judges. *Rogers*, 532 U.S. at 459-61; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

Eastern Enterprises set forth the governing standard for claims challenging the constitutionality of retroactive economic liability. The four-Justice plurality concluded that the Coal Act was "unconstitutional" under the Takings Clause because "it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." 524 U.S. at 528-29; *see id.* at 537.

Justice Kennedy concluded that the Coal Act was unconstitutional for reasons "in full accord with many of the plurality's conclusions"—but under the Due Process Clause, not the Takings Clause. *Id.* at 539, 548. The Act violated due process by imposing liability that (1) was "severe," *id.* at 549; (2) had "a retroactive effect of unprecedented scope," concerning "events

which occurred 35 years ago," *id.*; (3) was not proportional to Eastern's experience, *id.* at 550; and (4) interfered with Eastern's reasonable expectations about the "certainty and security" of its investments, *id.* at 548-49.

Dissenting on behalf of four Justices, Justice Breyer agreed with Justice Kennedy that the Due Process Clause, not the Takings Clause, barred severe retroactive liability, but concluded that applying the Coal Act to Eastern was not fundamentally unfair. 524 U.S. at 553, 558 (Breyer, J., dissenting).

2. The Seventh Circuit's holding that *Eastern Enterprises* has no precedential value beyond its specific result, App. 34a, is irreconcilable with this Court's precedents. Just two terms ago, all nine Justices agreed that Justice Kennedy's opinion was controlling. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (applying Justice Kennedy's opinion but distinguishing the sort of taking at issue in *Eastern Enterprises*); *id.* at 2605 (Kagan, J., dissenting) (discussing Justice Kennedy's "controlling opinion"). As the district court correctly held, a majority of the Court—Justice Kennedy and the four Justices in dissent—concluded that severe, retroactive and disproportionate liability violates the Due Process Clause. App. 78a.

The Seventh Circuit declined to apply *Eastern Enterprises* on the theory that combining a concurrence and a four-person dissent is categorically improper under *Marks v. United States*, 430 U.S. 188 (1977). "[T]he positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions," because, "by definition, the dissenters have disagreed with the plurality and the concurrence on *how* the

governing standard applies to the facts and issues at hand (even if there is agreement on what constitutional provision is being interpreted)." App. 34a-35a.

This Court's precedent is again directly contrary. This Court examines the *substance* of split opinions to determine whether five Justices agree—whether the agreement appears in plurality, concurring, and/or dissenting opinions. In *United States v. Jacobsen*, 466 U.S. 109, 115-18 & n.12 (1984), this Court derived a rule of decision—terming it the "majority" rule—from a two-Justice plurality and four-Justice dissent in a prior decision. As here, "disagreement between the majority and the dissenters...with respect to the [application of law to fact] is less significant than the agreement on the standard to be applied." *Id.* at 118 n.12.

This Court has repeatedly held that a dissent plus a concurrence constitutes the Court's holding, as long as there are five votes. *LULAC v. Perry*, 548 U.S. 399, 414 (2006) (concurrences and dissents constituted a "holding" on justiciability); *Alexander v. Choate*, 469 U.S. 287, 293 & n.8 (1985) ("two-pronged holding...emerged" from three-person concurrence, one-person, and three-person dissent); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) ("the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun [concurring in the judgment] formed a majority").

So too here. A majority in *Eastern Enterprises*—four Justices in dissent and Justice Kennedy concurring—held that due process principles supplied the rule of decision for a claim of severe, retroactive liability. They disagreed only over the application of the law to

the facts. The Seventh Circuit should have applied the *Eastern Enterprises* due process analysis.

B. The Seventh Circuit's Decision Widens Two Circuit Splits

Certiorari is all the more warranted because the Seventh Circuit's decision widened intractable circuit splits regarding how to analyze claims of severe, retroactive and disproportionate liability after *Eastern Enterprises*, and regarding the application of *Marks* to dissenting opinions.

1. The Courts of Appeals are divided on whether and how to apply *Eastern Enterprises*. This split is well-recognized. *McCarthy v. City of Cleveland*, 626 F.3d 280, 285 (6th Cir. 2010) (noting that "courts of appeal have differed in their analytical approaches" to *Eastern Enterprises* and identifying three competing approaches); *Swisher Int'l v. Schafer*, 550 F.3d 1046, 1054 n.5 (11th Cir. 2008) (describing three different approaches); App. 76a (district court noting "varying results" in appellate courts).

Three Circuits—the Third, Eleventh, and Federal—have held that a claim of severe retroactive liability is properly brought under the Due Process Clause rather than the Takings Clause and have applied Justice Kennedy's test, the plurality test, or some combination. The Eleventh Circuit in *Swisher* applied a due process analysis relying upon Justice Kennedy's concurrence to a tobacco manufacturer's claim about retroactive liability. 550 F.3d at 1049, 1057-58 (noting "primary factor which led to the holding that the Coal Act was unconstitutional was the fact that the Coal Act imposed upon Eastern Enterprises a retroactive obligation 'of unprecedented scope'"); *id.* at 1059 n.12 (noting that the plurality and concurrence analysis

were "virtually identical"). Likewise, the *en banc* Federal Circuit followed the "prevailing view that [lower courts] are obligated to follow the views of [the five Justices]" who concluded that retroactive monetary liability is not a taking, and then applied a due process analysis drawn from Justice Kennedy's concurrence. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339, 1343-44, 1347-50 (Fed. Cir. 2001).

The Third Circuit has held that *Eastern Enterprises* "obligate[s]" lower courts "to apply an additional level of substantive due process analysis" to retroactive laws. *Berwind Corp. v. Comm'r of Soc. Sec.*, 307 F.3d 222, 239 (3d Cir. 2002); *see id.* at 234 n.16. The court explained initially that *Eastern Enterprises* did not mandate any particular standard because it was fragmented, *id.* at 234, and accordingly went on to apply the plurality test *and* Justice Kennedy's standard, *id.* at 239 & n.20 (plurality test "is applicable to a substantive due process analysis as well" as a takings analysis); *id.* at 240 & n.22 ("rely[ing] on Justice Kennedy's explication of the relevant due process principles"). *See also Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 285 n.3 (3d Cir. 2008); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 670-74 (3d Cir. 1999).

Three Circuits—the First, Fifth, and Tenth—have held that the *Eastern Enterprises* dissent and concurrence together foreclose certain Takings Claims, while leaving open the possibility that *Eastern Enterprises* supplies a governing analysis under the Due Process Clause. *See Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (declining to address due process claim as waived); *Simi Inv. Co., Inc. v. Harris Cnty, Tex.*, 256 F.3d 323, 323 n.3 (5th

Cir. 2001) ("The Court [in *Eastern*] split 4-1-4, with five Justices concluding that a substantive due process analysis, and not a Takings Clause analysis, should be used to determine the constitutionality of the statute, which had retroactive effect."); *U.S. Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 420 (5th Cir. 2000) ("Justice Kennedy's due process analysis focuses on retroactivity and is essentially harmonious with the reasoning of the other four justices."); *Gordon v. Norton*, 322 F.3d 1213, 1217 & n.1 (10th Cir. 2003) (rejecting Takings Clause claim and noting that plaintiffs "did not raise a due process claim").

The Seventh Circuit in this case followed contrary authority from the Second, Fourth, Sixth, and D.C. Circuits. These Circuits hold that *Eastern Enterprises* has no precedential effect because Justice Kennedy and the plurality analyzed the claim under different rationales, and because Justice Kennedy's concurrence could not be combined with the dissent. *See, e.g.*, *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998) ("Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding."); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) ("no law of the land"); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 240-41 (4th Cir. 2002); *Franklin Cty. Conv. Facils. Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) ("no precedential effect").

This group of circuits, now including the Seventh Circuit, has taken an unduly narrow view of *Eastern Enterprises* that conflicts with this Court's precedent and all but precludes constitutional challenges to severe retroactive and disproportionate liability. Virtually all circuits have weighed in, and nearly two

decades of post-*Eastern Enterprises* uncertainty is enough. This Court should intervene.

2. The Seventh Circuit deepened a separate, broader circuit split: Do *Marks* and its progeny permit courts to combine opinions of dissenting and concurring Justices to establish a majority position?

The Seventh Circuit held that the views of five or more Justices can *never* produce a controlling principle of law if they appear in a dissent and a concurrence. App. 34a. The court announced a *per se* rule: "dissenting opinions cannot be counted under *Marks*." App. 35a. Other Courts of Appeals agree. *See King v. Palmer*, 950 F.2d 711, 781-83 (D.C. Cir. 1991) (en banc).

This Court follows no such categorical rule and has regularly distilled holdings from concurrences and dissents. *LULAC*, 548 U.S. at 414; *Alexander*, 469 U.S. at 293 & n.8; *Cone*, 460 U.S. at 17. Accordingly, other Circuits have expressly rejected the Seventh Circuit's *per se* rule. *B.H. ex rel Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 310 & n.16 (3d Cir. 2013) (en banc) (courts may "count even dissenting justices' votes that, by definition, could not 'explain the result'"); *United States v. Johnson*, 467 F.3d 56, 64-65 (1st Cir. 2006) (noting no "reservations" about "combining a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices"); *Simi*, 256 F.3d at 323 n.3; *Commonwealth Edison*, 271 F.3d at 1339, 1343-44, 1348-50.

C. The Risk Contribution Rule Is Plainly Unconstitutional

This is the ideal case to resolve the *Eastern Enterprises* split. Application of Wisconsin's 2005

"risk contribution" rule to former lead pigment manufacturers is severe, retroactive, and wholly disproportionate—even under the *Eastern Enterprises* dissent's analysis. For that reason, this case presents a unique opportunity to clarify the limits on retroactive lawmaking. Though judges, not legislators, imposed retroactive liability here, it is well-settled that due process restricts "arbitrary judicial lawmaking." *Rogers*, 532 U.S. at 462.

1. The plurality considered five factors, each indicating that Wisconsin's rule is unconstitutional under the plurality's Takings Clause theory or under the Due Process Clause. *See Eastern Enterprises*, 524 U.S. at 548 (Kennedy, J., concurring) (noting applicability of plurality factors to due process analysis). First, *Thomas* imposes "severe" liability. *Eastern Enterprises*, 524 U.S. at 528 (plurality op.). In *Eastern Enterprises*, total payments between $50 and $100 million qualified as severe, 542 U.S. at 529; Petitioners now face 172 plaintiffs, each of whom may seek in excess of $2 million. App. 79a. *See infra* at 33.

Second, the Coal Act "reach[ed] back 30 to 50 years to impose liability...based on the company's activities between 1946 and 1965." *Eastern Enterprises*, 542 U.S. at 532. For Petitioner DuPont, for example, *Thomas* reaches back 81 to 88 years to impose liability based on the company's activities between 1917 and 1924.

Third, *Thomas* imposes liability on a "limited class of parties," *id.* at 528, by "singl[ing] out" lead pigment manufacturers (or their alleged successors-in-interest) to bear a "substantial" burden, *id.* at 537. Hundreds of paint manufacturers and painters who made lead paint and applied it to residences are off the hook

under the risk contribution rule. *Thomas*, 701 N.W.2d at 570, 583-84 (Wilcox, J., dissenting).

Fourth, *Thomas* is "[un]anticipated." *Eastern Enterprises*, 542 U.S. at 529. No Petitioner could have predicted that by manufacturing white lead carbonate pigments for a few years—when the industry was *encouraged* by the federal government and Wisconsin—or by acquiring a company that had done so, it would incur liability for all injuries caused by any white lead carbonate that ever entered the state of Wisconsin.

Fifth, the liability is entirely "disproportionate to [Petitioners'] experience." *Id.* at 529. The liability that "risk contribution" imposes for products Petitioners did not in fact make by definition bears no "correlation" to any "responsibilities" that Petitioners (or their alleged predecessors) "accepted." *Id.* at 531.

2. The result is the same applying Justice Kennedy's concurrence: *Thomas* violates due process. The Coal Act had a "retroactive effect of unprecedented scope" and was "far outside the bounds of retroactivity permissible under our law" because it "creat[ed] liability for events which occurred 35 years ago." *Eastern Enterprises*, 524 U.S. at 549-50. *Thomas*' retroactive sweep is exponentially greater. Because Respondent's home was built in 1919, *Thomas* imposes liability on any and all Petitioners who manufactured lead pigments on or after that date—creating liability for events which occurred *95 years ago* and *86 years* before *Thomas* itself. This liability would extend over an unprecedented 60-year period, from 1919 through 1978, when lead paint was banned for residential use.

Nor does the liability produced under *Thomas* bear any relationship to the "actual, measurable cost of

[Petitioners'] business." *Id.* at 549. By relieving plaintiffs of the requirement of showing even when their home was painted, *Thomas* made each Petitioner responsible for *all* lead pigments manufactured by *any* manufacturer across 60 years (or 80 in *Thomas*), even if the Petitioner participated in the business for less than two years (American Cyanamid) or seven years (DuPont). Petitioners thus face hundreds of millions of dollars in unforeseen liability that is wholly untethered to their experience and conduct in the marketplace.

The Seventh Circuit dubiously reasoned that the risk-contribution theory "reflect[s] the *overall* liability that the manufacturers *should have expected to face* from selling lead pigment." App. 43a (second emphasis added). This strains credulity. First, white lead carbonate pigment is not the same thing as lead paint and has many perfectly safe uses; production has never been banned. Second, alternative "tort schemes" like *Thomas*' risk-contribution theory that "relax[] the traditional cause-in-fact requirement" are a modern legal development. *Id.* Petitioners had ceased selling lead pigments between *30 to 80 years before Thomas*: DuPont stopped selling lead pigments in 1924, American Cyanamid, in 1972. All Petitioners ceased selling lead pigments *more than 10 years before* risk contribution made its first—and only—prior appearance in Wisconsin. *Collins*, 342 N.W.2d 37. The Seventh Circuit did not explain just how Petitioners "should have expected to face" suit under legal theories that would not be conceived for decades.

But even assuming that Petitioners selling pigments in 1924 should have anticipated the risk contribution rule, the rule still would not reflect "*overall* liability." App. 43a. The Seventh Circuit

hypothesized that, "if for example Sherwin-Williams ends up paying for harm it did not cause in a particular case brought by a particular plaintiff, it will also end up paying less than it should in the next case—where it did cause the harm—when another manufacturer is also found liable for harm caused by Sherwin-Williams." *Id.*

That is plainly wrong. Risk contribution is not like ordinary market share liability. Rather, under *Thomas*, a defendant is potentially liable in *every single case* for the *entirety* of the damages, not just for the defendant's market share percentage. Plaintiffs can "recover all damages from one defendant"—no matter how small that defendant's share of the relevant market. *Collins*, 342 N.W.2d at 50 (explaining risk contribution rule that *Thomas* extended). Defendants can implead other producers, *id.* at 51, but not if they are dissolved or bankrupt—as two major former producers are.

Liability wholly untethered from fault is thus not merely a possibility in the lead pigment context, but a certainty. Petitioners will be sued again and again by plaintiff after plaintiff for precisely the same conduct—contribution to the overall "risk" created by the sale of lead pigments. App. 79a (noting "cumulative impact of multiple lawsuits").

Even assuming counterfactually that plaintiffs sued all potential defendants in every case, and that no defendant was bankrupt or out of business, liability *still* would not reflect a defendant's "overall" liability. Under the risk contribution rule juries allocate liability between available defendants based on a "nonexhaustive list of factors" including market share, but also "whether the company issued warnings about the dangers"; whether the company "took the lead or

merely followed the lead of others," and other factors. *Thomas*, 701 N.W.2d at 551. Asking a series of juries in a series of cases to apportion blame on the basis of these factors to pigment suppliers operating at different times across different decades is a recipe for inconsistent, arbitrary outcomes.

It is likewise absurd to attempt to determine each lead pigment manufacturer's "market share" over varying time periods spanning decades that will change in every case, depending on the wholly random question of when the plaintiff's home was built, and involving a constantly shifting set of market participants. *Thomas*, 701 N.W.2d at 570 (Wilcox, J., dissenting) (lead pigments market "was quite fluid"). There are no records reflecting each lead pigment manufacturer's market share each year in every state between 1900 and 1978.

"Apportioning risk contribution liability among manufacturers of lead pigment based on market share and relative culpability over an almost eight-decade period of time is nearly impossible as a purely factual matter." The Honorable Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 Marq. L. Rev. 723, 730 (2006). "[T]here are very few—if any—contexts in which market share liability will appropriately allocate the costs of injury among manufacturers responsible for the loss," and *Thomas* "ignored the conceptual conditions supporting the doctrine." Priest, *Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis*, 18 Sup. Ct. Econ. Rev. 109, 113, 132-33 (2010).

3. The risk contribution rule violates due process even under the standard articulated in Justice Breyer's dissent in *Eastern Enterprises*. Justice

Breyer concluded that the Coal Act was not "fundamentally unfair" because "the liability the statute imposes upon Eastern extends only to miners whom Eastern itself employed." 542 U.S. at 558-59. Risk contribution is fundamentally different: it imposes liability upon Petitioners based on lead pigments they did not manufacture, and consequently, injuries they did not cause. Risk contribution is the equivalent of requiring a few mining companies that were in the business for a few years to pay for the healthcare costs of every miner ever employed by any mining company at any point in the 20th century.

Nor did Petitioners continue to profit from the use of white lead carbonate in residential paint, as Eastern continued to profit from coal mining after exiting the industry, *id.* at 565 (Breyer, J., dissenting), or play any role in "creating the [plaintiffs'] expectations," as Eastern did by employing the miners, *id.* at 567.

In sum, because the retroactive effect of *Thomas* is so egregious, this case presents an ideal opportunity to clarify *Eastern Enterprises* and to fashion a clear governing standard striking down risk contribution under the Takings Clause or the Due Process Clause.

II. The Risk Contribution Rule Violates Due Process and This Court's Precedents By Eliminating Any Meaningful Causation Requirement

The Due Process Clause bars a state from seizing a defendant's property under the color of tort law without some connection between the defendant's conduct and the injury for which the defendant is taken to account. Wisconsin's risk contribution rule flouts that bedrock principle. The rule expressly and

intentionally punishes white lead carbonate pigment manufacturers for injuries they likely had nothing to do with and deprives manufacturers of any meaningful opportunity to defend themselves. Outside of Wisconsin and the Seventh Circuit, every other court, state or federal, to consider the issue has refused to apply risk contribution or any form of market share liability to lead pigment manufacturers. The Pennsylvania Supreme Court is representative: "Application of market share liability to lead paint cases such as this one would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair." *Skipworth*, 690 A.2d at 172.

The Seventh Circuit candidly acknowledged that it was endorsing arbitrary determinations of culpability: "[s]ome of the remaining defendants may be innocent," but this is "the price the defendants, and perhaps ultimately society, must pay to provide the plaintiff an adequate remedy under the law." App. 44a-45a. That is not so. Plaintiffs who ingest paint containing lead pigment can sue their landlords, App. 57a, a particularly appropriate remedy because lead paint is generally harmless unless it is chipping or peeling—meaning risk is in the landlord's control.[6] Indeed, Respondent sued his landlord and obtained a settlement.

Regardless, imposing such a "price" on Petitioners is wholly inconsistent with due process. This Court has long held that the Due Process Clause incorporates a causation requirement. *Philip Morris* held that a

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[6] U.S. Environmental Protection Agency, *Protect Your Family From Lead in Your Home*, at 5 (Sept. 2001), www.fsa.usda.gov/Internet/FSA_File/pfflinyhbrochure.pdf

state cannot impose punitive damages based on injuries to someone other than the plaintiff, because "the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation." 549 U.S. at 357. Likewise, *State Farm* held that due process prohibits tort liability "condemning [a defendant] for its nationwide policies rather than for the conduct directed toward the [plaintiffs]." 538 U.S. at 420. In *Western & A.R.R. v. Henderson*, this Court overturned on due process grounds a tort award based on a law making railroads presumptively liable for all rail collisions, concluding that "[t]he mere fact of collision...furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company." 279 U.S. 639, 642-43 (1929). *See also Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014) ("defendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others").

Although *Philip Morris* and *State Farm* concerned punitive damages, the principle applies *a fortiori* to compensatory damages. Relevant language in those cases focused on "punishment" generally. *Philip Morris*, 549 U.S. at 357; *State Farm*, 538 U.S. at 426. And the Due Process Clause cannot turn on labels. As the district court explained, compensatory damages awards that require no connection between the defendant's conduct and the plaintiff's injury and accumulate *seriatim* in case after case are the functional equivalent of punitive damages. App. 87a. "Apportionment of liability in a system that dispenses with the requirement of individualized causation asks the jury to assess and fix relative blame across an entire industry, not for the harm sustained by the

plaintiff who will recover but for generalized harm to the public at large." Sykes, *Reflections*, at 730.

Risk contribution additionally violates due process under this Court's cases on the validity of evidentiary presumptions. This Court has "'held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.'" *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (quoting *Heiner v. Donnan*, 285 U.S. 312, 329 (1932)). "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment." *Western*, 279 U.S. at 642.

The risk contribution rule's presumption is impermissible under both criteria: it is arbitrary, and there is no fair opportunity to repel it. There is no "rational connection between what is proved," *id.*—that a defendant manufactured pigments in the United States at one point between 1919 and 1978; "and what is to be inferred," *id.*—that the defendant manufactured the specific pigment that was applied to this particular plaintiff's home between 1919 and 1978. In *Usery*, for example, this Court explained that a presumption "requiring compensation for damages resulting from death unrelated to the [mine] operator's conduct" would pose constitutional problems. 428 U.S. at 24.

Thomas purports to permit defendants to exculpate themselves by affirmatively proving that they could not have supplied the product, for example, by proving that their lead pigments did not end up in the relevant geographic area. Do not be fooled. "Exculpation" requires ancient sales records that defendants had no business reason to maintain (or to request from

purported predecessors). *Thomas* claims are highly likely to involve older housing stock—86 percent of U.S. homes built before 1940 contained lead paint, compared to 52 percent in 1978.[7] Exculpation can be doubly illusory because pigment manufacturers do not sell direct-to-consumer or know where their product ends up; pigment is but one component of the ultimate product, lead paint. The Wisconsin Supreme Court forthrightly acknowledged that manufacturers often might lack records and may "have no reasonable ability to exculpate themselves" in precisely the situations where risk contribution imposes liability without causation. 701 N.W.2d at 562.

The Seventh Circuit reasoned that *Thomas* did not create "automatic" liability or "entirely eliminate causation." App. 42a. The court observed that plaintiffs must prove (1) that a defendant produced lead pigments at some point over the relevant period (here, 60 years), and (2) that lead pigment was the cause of the injury. *Id.* These are non-sequiturs. That's like saying that because a defendant produced bourbon at some point over the last 60 years and could have contributed to drunk driving, and because the plaintiff was injured by drunk driving, the defendant should have to reimburse the plaintiff—along with all other plaintiffs who were injured by drunk driving during those 60 years. *See also Thomas*, 701 N.W.2d at 585 (Wilcox, J., dissenting). But "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris*,

[7] Dep't of Housing & Urban Dev., American Healthy Homes Survey: Lead and Arsenic Findings, at ES-1 (April 2011).

549 U.S. at 353 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).[8]

The Seventh Circuit alternatively rejected the due process challenge on the theory that, while manufacturers "will be held liable in *particular* cases for injuries that they did not cause, what risk-contribution theory does is reflect the *overall* liability that the manufacturers should have expected to face from selling lead pigment." App. 43a. For the reasons discussed *supra*, at 23-25, that is untrue.

The Court's intervention is all the more urgent because Wisconsin's rule in effect imposes nationwide liability, arrogating to Wisconsin the right to punish former manufacturers of lead pigments for their out-of-state activities—exactly what this Court condemned in *State Farm*. 538 U.S. at 420-22; *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-72 (1996). Petitioners' plants were in Illinois, Indiana, and Pennsylvania, not Wisconsin. And it is Petitioners' activities in those states that Wisconsin juries will take into account in determining relative culpability, including "whether the company issued warnings" or "took the lead." *Thomas*, 701 N.W.2d at 551 (internal quotation marks omitted). Each Petitioner can avoid

[8] The Seventh Circuit's analysis is also in serious tension with decisions of the Fifth Circuit and the Florida Supreme Court. *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (barring class action where "[n]ot all of the Plaintiffs have been injured by the acts, omissions, conduct, or fault of all of the Defendants" and noting that the rule "find[s] expression in defendants' right to due process"); *Agency for Health Care Admin. v. Associated Indus. of Florida*, 678 So.2d 1239, 1254 (Fla. 1996) (portion of a law permitting recovery of Medicaid recipients' healthcare costs from tobacco companies violated Florida due process clause by conclusively presuming that companies' "product was...used by the recipient").

this fate only if it had the foresight a century ago to create and maintain for decades records detailing the location of its sales and the sales of the paint manufacturers to whom it sold white lead carbonate, all for the purpose of satisfying Wisconsin that it is not among the usual suspects to be rounded up in every case.

III. The Questions Presented Are of Critical and Recurring Importance to U.S. Businesses

This Court's review and reversal of the Seventh Circuit decision upholding *Thomas* is of critical importance to U.S. companies across a range of industries, including chemicals, paints, or any manufacturer of ingredients or components. The Seventh Circuit condoned staggering retroactive liability for any entity that at any point in its history manufactured any product that later turns out to be harmful, irrespective of whether it actually had any role in causing the harm. Without this Court's intervention, suppliers like Petitioners—and their consumers and shareholders—will face hundreds of millions of dollars in disproportionate liability.

1. The constitutionality of Wisconsin's risk contribution rule is vitally important to Petitioners and to other companies that once manufactured white lead carbonate or that have acquired former manufacturers. *Thomas* has dramatic nationwide effect: the decision attempts to solve Wisconsin's lead paint problem by imposing enormous retroactive liability on a handful of out-of-state pigment suppliers, without regard to whether they caused the harm alleged. The breadth of the decision is entirely intentional; the

Wisconsin Supreme Court expected and invited many plaintiffs to sue.

The 172 plaintiffs now suing Petitioners alone represent hundreds of millions of dollars in potential liability. Verdicts in lead paint cases regularly reach over $1 million per individual.[9] In 2010, a Baltimore jury awarded one plaintiff $21 million.[10] As the district court noted, the plaintiff in *Thomas* sought $2 million. App. 79a. That is to say nothing of the immense costs of taking hundreds of lead paint cases to trial and engaging expert witnesses to dispute whether a plaintiff was in fact injured by lead paint (one of the few defenses remaining to Petitioners under *Thomas*).

2. If the Seventh Circuit's decision stands, those 172 plaintiffs are just the beginning. There are tens of thousands of minors in Wisconsin with elevated blood-lead levels.[11] Petitioners could face hundreds of millions in *additional* potential liability if even a tiny fraction of these individuals try to bring suit.

And try they will for years to come, notwithstanding the fact that the Wisconsin legislature passed a statute prospectively repealing *Thomas* in 2011, and extended the repeal to pending cases in 2013. Wis. Stat. § 895.046. The reason is a combination of the

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[9] *Mealey's Litigation Report: Lead*, Vol. 12, Iss. 13 (April 2003) (compiling trial verdicts).

[10] Howard, *Jury Awards $21M In Lead Poisoning Case*, Law360 (Oct. 7, 2010), http://www.law360.com/articles/199795/jury-awards-21m-in-lead-poisoning-case

[11] Wisconsin Dep't of Health and Family Servs., *Report on Childhood Lead Poisoning in Wisconsin 2008*, at 7, http://www.chawisconsin.org/documents/LP3LegacyOfLead.pdf; www.nchh.org/Portals/0/Contents/WI-LPP&HHFactSheet.pdf.

Wisconsin Constitution and Wisconsin's provision for minority tolling. The Seventh Circuit held that the Wisconsin Constitution bars application of the *Thomas* repeal to claims that accrued before the repeal. App. 11a-14a. The only Wisconsin state court to consider the issue has agreed. *Clark v. Am. Cyanamid Co.*, No. 06-cv-12653, 2014 WL 1257118, at *3 (Wis. Cir. Ct. Mar. 25, 2014), *appeal pending*, No. 14-775.

Plaintiffs thus will and are continuing to sue under *Thomas* on the basis of injuries accruing before 2011. Thousands or tens of thousands of potential plaintiffs will claim they ingested lead paint sometime before 2011, that their claims accrued at that point, and that—under the Seventh Circuit's decision—they can circumvent the repeal by suing Petitioners under *Thomas*. The plaintiffs will argue that they can file suit until 2029, because Wisconsin law gives minors leave to bring suit until age 20 if their claims accrue during their minority. Wis. Stat. § 893.16. Thus, a person born in 2009 who ingests lead paint in 2010 will claim to be able to file a *Thomas* suit until 2029.

The Wisconsin legislature's decision to repeal *Thomas* is therefore not a vehicle problem, and it is no reason to deny certiorari. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the [relevant] Court of Appeals," *Elk Grove v. Newdow*, 542 U.S. 1, 16 (2004), and under the Seventh Circuit's interpretation, *Thomas* promises massive liability for many years to come. This Court is the only entity that can vindicate Petitioners' constitutional rights, the Seventh Circuit issued a lengthy, reasoned decision, and there is no better opportunity than this.

3. Finally, this Court's intervention is desperately needed to resolve nearly two decades of confusion regarding the proper interpretation of *Eastern Enterprises*. Since 1998 *Eastern Enterprises* has come up in 491 decisions in federal and state court across a kaleidoscope of industries. Beyond coal and lead pigments, industries seeking to invoke the protections of *Eastern Enterprises* have ranged from casinos to smelting operators to water utilities to tobacco companies to nuclear power plants to insurance to video games.[12] "[R]etroactive lawmaking is a particular concern for the courts because of the legislative 'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" *Eastern Enterprises*, 524 U.S. at 548 (Kennedy, J., concurring) (quoting *Landgraf*, 511 U.S. at 266). This Court should grant review to clarify the law and to correct the Seventh Circuit's departure from the requirements of due process.

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[12] In order: *Empress Casino Joliet Corp. v. Giannoulias*, 896 N.E.2d 277 292 (Ill. 2008); *Asarco Inc. v. Dep't of Ecology*, 43 P.3d 471, 474 (Wash. 2002); *Lake Durango Water Co. v. Pub. Utilities Comm'n of State of Colorado*, 67 P.3d 12, 15 (Colo. 2003); *Swisher*, 550 F.3d at 1057-59; *Commonwealth Edison*, 271 F.3d at 1341-57; *McKeithen*, 226 F.3d at 416-20; *Westside Quik Shop, Inc. v. Stewart*, 534 S.E.2d 270, 274-75 (S.C. 2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX