STATE OF RHODE ISLAND

SUPREME COURT

No. 07-121-A

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

AMICUS BRIEF OF THE HEARTLAND INSTITUTE IN SUPPORT OF APPELLANTS

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I. STATEMENT OF INTEREST

The Heartland Institute is a 23-year-old national nonprofit public policy research organization created to discover, develop, and promote free-market solutions to social and economic problems. Some 500 elected state officials serve on Heartland's legislative advisory board, acting as liaisons to their colleagues. Heartland also calls on its nearly 200 free-market policy experts—senior fellows, research fellows, managing editors, policy advisors, and contributing editors—to provide testimony, articulate issue positions through the media, and help educate in other ways policymakers at all levels of government in the fifty states and Washington, D.C. Heartland conveys its free-market ideas to the nation's 8,300 state and national elected officials and approximately 8,400 county and local officials.

Heartland has a long history of conducting research on and writing about the present lead-based paint public nuisance case in Rhode Island, cases now pending in Wisconsin and California, and the two cases summarily rejected by the state supreme courts in New Jersey and Missouri. Along with the Defendants herein and their supporting *Amicus Curiae*, Heartland is particularly concerned about the perilous precedent that would be set if the holdings by the trial court and the jury verdict are affirmed by this Court.

Financially crippling and perpetual liability would be imposed upon the surviving manufacturers in the paint industry, even though they have not manufactured lead-based paint for more than 50 years. This liability would arise even though the paint has been totally beyond any manufacturers' control ever since it was sold to third-parties beginning in the early 20th Century. And this liability would arise even though this product becomes dangerous only if and when the paint deteriorates through the negligent lack of maintenance by a third party—typically, the property owner.

The legally-insupportable bases for the trial court rulings and the jury's verdict are ably expressed in the briefs to this Court of the Defendants and their supporting *Amicus Curiae,* so Heartland will not repeat them here except to state that it shares them. As an independent nonprofit research and education organization, however, Heartland writes separately to urge this Court to consider several particular aspects of the case set out below.

Beyond their negative impact on the rule of law, the actual and potential ramifications of a ruling by this Court affirming the trial court holdings and the jury verdict below are serious and wide ranging. As described herein, a ruling by this Court affirming the trial court holdings and the jury verdict below would, Heartland believes, have devastating consequences both in Rhode Island and across the country. No product and no industry will be safe from a future "tort law shakedown"[1] if this Court affirms.

Heartland believes it would be desirable for this Court to take these ramifications into account.

II. SUMMARY OF ARGUMENT

First, the trial court banned from this case any evidence of actual injury to any particular property in Rhode Island, thus violating in this case this Court's bedrock principles of justiciability and standing and rendering this case unconstitutional *ab initio*. Second, affirmance of the jury verdict by this Court and subsequent approval of the legally unprecedented abatement measures called for by the State will ignite an inferno of post-judgment satellite litigation over the unprecedented and unreasonable invasions of Rhode Island citizenry's constitutional rights and their "peace, comfort or convenience" that abatement will cause. Third, if the State-advocated abatement plan is ultimately carried out,

[1] *See infra* at Section III(D).

the Rhode Island housing market and related financial sectors will potentially suffer, as will those who depend on that market for mortgage financing, insurance, and other housing market-related services.

Fourth, judicial intervention in lead-based paint abatement, in addition to being legally unwarranted in this case, is unnecessary because federal and state mechanisms are in place to enable the market to determine when and how to abate lead-based paint from structures in Rhode Island, thus imposing abatement costs on those who properly ought to pay. And fifth, this case is part of a concerted effort by trial lawyers to establish the theory of public nuisance as the preferred mode for serial attacks on industry, from tobacco to guns, now lead-paint, with fast food and alcohol next in the trial lawyers' crosshairs. This Court ought to stop this assault in its tracks, as other state supreme courts have done.

III. ARGUMENT

A. This Case Is Not Justiciable.

The trial court lacked the power to adjudicate this case in the first place.

This Court has long recognized that the judicial power in Rhode Island is limited to resolving "cases and controversies." This case presents neither. As this Court has held:

> Indeed, laws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of judicial power is, the power of the [courts] to apply the [laws] to the decision of those cases and controversies. *G & D Taylor & Co. v. Place, 4 R.I. 324, 337 (1856)*; *see also Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997)* (recognizing that "'our whole idea of judicial power' is entailed within the concept of courts applying laws to cases and controversies within their jurisdiction").

Consequently, we have concluded that this Court "will not issue advisory opinions or rule on abstract questions."

State of Rhode Island v. Lead Industries Association, 898 A.2d 1234, 1237-38 (2006).

For its proper exercise, judicial power requires that a case involve an "injury in fact." *Rhode Island Ophthalmological Society v. Cannon,* 113 R.I. 16, 28, 317 A.2d 124, 130-31 (1974). "Injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)(citations omitted). As this Court said in *Rhode Island Ophthalmological Society*:

> Litigation will be confined to those appropriate situations where the litigant's concern with the subject matter evidences a real adverseness, *i.e.*, his own injury in fact. However, the pleadings must be something more than an ingenious exercise in the conceivable. *Cf. United States v. Students Challenging Regulatory Agency Procedures, supra.* The allegations must be capable of proof at trial.

Ophthalmological Society, supra.

Here, no injury in fact was shown. The court below barred the Defendants from introducing evidence that any particular property in Rhode Island, whether public or private, contains lead-based paint. *Whitehouse v. Lead Industries Association, Inc.*, 2002 R.I. Super. LEXIS 90 (2002). Instead, pursuant to the trial court's ruling, the jury heard merely the State's statistical evidence that a certain percentage of Rhode Island residences presumably contains lead-based paint. That presumption arose, the trial court said, because the structures were built before 1978, the date after which lead-based paint was banned.

Is such paint present today on properties in Rhode Island? If so, on how many such properties? No one knows. Surely, no one ever submitted any proof to the jury.

Furthermore, the abatement phase of this trial now taking shape in the trial court, as proposed by the State, though not before this Court in this appeal, conclusively establishes

how “abstract” and “conjectural and hypothetical” this case is on its merits, an issue that *is* now before this Court on appeal.

The first step in the State’s proposed abatement plan, if approved, will be to inspect each and every single one of the 240,000 housing units in Rhode Island estimated to contain lead-based paint to determine whether lead-based paint is actually present and, if so, exactly how much. Maureen Martin, *Lead-paint plan will test R.I. patience, Providence Journal*, September 28, 2007 (“Providence Journal”).[2] This could and should have been done at the discovery stage of this case in the trial court, and would have been accomplished but for the trial court’s ruling.

As a result of that ruling, the injury shown in this case was not “concrete and particularized” nor was it “actual or imminent.” Rather, it was “abstract” and “conjectural and hypothetical.” As such, there was no case or controversy before the court and thus there was no justiciable issue for the jury to decide. Nor was there any “injury in fact” for the jury to redress by its verdict. The trial court holdings and the jury verdict ought to be reversed by this Court on this ground alone.

B. Abatement of Lead-Based Paint Under the State’s Plan Will Disrupt the Lives of Many Rhode Island Citizens and Cause Potential Disorder in the Housing and Insurance Markets and Hence in Rhode Island’s Economy.

Not one single owner or occupant of any single pre-1978 residence was provided notice of the pendency of this case, *Whitehouse, supra,* 2002 R.I. Super. LEXIS 90, even though the outcome of the case was to declare all such residences as *de facto* public

[2] Available at http://www.projo.com/opinion/contributors/content/CT_martin28_09-28-07_M077KR9.2954d20.html. The Heartland Institute will provide hard copies of this article and other authority cited in this brief as this Court directs.

nuisances.[3] The trial court ruled no notice was required because the proceedings would not affect "the property rights or possessory interests" of residents. *Id.* at *5-6. Rather, the trial court said the only effect would be a mere "indirect" impact on the value of their properties. *Id.* The trial court's ruling was incorrect.

1. Carried to the Conclusion the State Desires, this Case Will Irretrievably Disrupt the Lives of Rhode Island Owners and Occupants of Pre-1978 Housing.

The "property rights" and "possessory interests" of Rhode Island residents will unquestionably be disrupted and obstructed during abatement if the State's plan is approved.

If the State has its way, the "rehab police" will begin knocking on the doors of some 240,000 houses and apartments in Rhode Island constructed before 1978. (*See* Providence Journal.) The "rehab police" will demand entry to inspect these properties to detect the presence of lead-based paint. *Id.* No warrant will be required, and no Fourth Amendment right will apply to secure these residences from unreasonable searches.

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[3] This declaration was a "collective" one, not an individual one, according to the trial court.

> Here the jury is not to be asked if each such property is a separate public nuisance but rather, as to whether the cumulative effect of all such properties constitutes a single public nuisance. If the issue before the Court were as to the public nuisance status of each of the separate properties then clearly the owners of such properties would be parties and as such would be entitled to due process which would include the right to individual notice, and the right to be heard. This Court has endeavored throughout the several hearings hereinbefore held in this matter to make clear to the parties that it is the collective effect that will be the focus of Phase I.

Whitehouse, supra, 2002 R.I. Super. LEXIS 90 at *6-7. To property owners forced to evacuate their homes, relocate their children, find new ways to travel work and school, and confront lenders and insurers concerned about the impaired values of their properties, as contemplated by the State's proposed abatement plan (*see* Providence Journal), this surely is a distinction without a difference.

Those who refuse entry to the State's inspectors will then become subject to court orders requiring them to submit to inspections, under the State plan. *Id.* The State' plan is silent on what comes next for residents who remain recalcitrant, but civil contempt of court and even criminal contempt findings would be usual. *Nelson v. Progressive Realty Corp.,* 81 R.I. 445, 104 A.2d 241 (1954).

If the inspection discloses the presence of lead-based paint, Rhode Island residents will be forced to allow rehabilitation of their residences, even if the paint is not deteriorating. (*See* Providence Journal.) Court orders again can be sought against recalcitrants. *Id.* If the lead-based paint is extensive, residents will be forced to relocate to replacement housing for the duration of the remediation. *Id.* Their belongings will be placed in storage. *Id.* Again, such relocation can be forced by court order. *Id.*

This is much more than a mere "indirect" effect on property values. This scheme is a clear interference with the rights of Rhode Island residents to possess and enjoy property they have bought and paid for and a confiscation of their property rights. The trial court rulings and the jury's verdict ought to be reversed.

2. Rhode Island's Housing Market and Related Financial Sectors Will Potentially Be Disrupted If the Trial Court's Rulings and the Jury Verdict Are Upheld and Abatement Under the State Plan Takes Place.

The Defendants argued in the trial court, unsuccessfully as noted, that due process required notification of the owners and occupants of pre-1978 housing of the pendency of this case so they would have an opportunity to be heard. *Whitehouse, supra,* 2002 R.I. Super. LEXIS 90. In support of their motion, the Defendants provided what the trial court termed "a catalog" of affidavits documenting the impacts on these properties of this case:

> That catalog includes, but is not necessarily limited to, a drying up of available mortgage funds, declaration of mortgage defaults, cancellation of or the unavailability of liability insurance coverage, substantial diminutive in real estate values and so forth.

Id. at *2-3. Citing no authority—and stating, incorrectly, that there is none—the trial court summarily trivialized these concerns:

> Defendants' proffered affidavits speak not to legally cognizable property rights that will be taken but rather to indirect affects to such buildings that will impact not legal rights but property values. This Court believes that this distinction is substantial and is dispositive of the motion addressed herein. Issues affecting value in the broadest sense are beyond the power of the court. Issues affecting ownership interests are within traditional notions of property rights protected by due process. Accordingly, because neither property rights nor possessory interests are implicated in the case at bar even if the Court were to accept as binding upon it the mentioned affidavits, this Court finds that an indirect affect on property values does not warrant requiring notice from Plaintiff to the 330,000 property owners or to their insurance carriers or mortgagees.

Id. at *5-6.

This country has learned the hard way the sort of havoc that is wreaked by declines in property values. In the FDIC banking crisis of the late 1980s and early 1990s, some 1,500 commercial banks (10% of the banking industry) and 1,200 savings and loan associations

(25% of all S&Ls) failed when assets held by these institutions—primarily mortgages—declined in value. George G. Kaufman, *FDIC Reform: Don't Put Taxpayers Back at Risk,* Cato Institute Policy Analysis No. 432, April 16, 2002.[4]

More recently, declines in real estate values led to a foreclosure rate of 1.69% on all mortgage in the United States, the highest level ever. *Delinquencies and Foreclosures Increase in Latest MBA National Delinquency Survey*, Mortgage Bankers Association, December 6, 2007.[5] An additional 5.59% of all mortgages are in default, the highest rate since 1986. *Id.* The ripple effect has been widespread throughout the mortgage industry and the broader economy, exacerbated by the fact that some mortgagors in default cannot refinance because the values of their properties had declined. Nichole Gelinas, *A new subprime debacle, caused by government*, The Heartland Institute, Budget & Tax News, February 1, 2008 issue.[6]

What the trial court failed to take into account in its ruling that loss of property value is "indirect" is that, when it comes to mortgaged property, loss of value can lead directly to loss of that property, particularly when foreclosure cannot be avoided by refinancing. *Id.* And when such individual losses are aggregated, they assume constitutionally significant dimensions. *C.f. Wickard v. Filburn,* 317 U.S. 111, 128 (1942)("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial"). And totally ignored in this mix is the

[4] Available at http://www.heartland.org/Article.cfm?artId=11274

[5] Available at http://www.mortgagebankers.org/NewsandMedia/PressCenter/58758.htm

[6] Available at http://www.heartland.org/Article.cfm?artId=22659

negative impact of lower property values on property tax assessments and hence the property taxes revenues upon which Rhode Island governmental units depend.

Wickard further demonstrates the trial court's error in discounting the significance of "indirect" effects on property value in its holding that such effects can amount to cognizable constitutional violations:

> We believe that a review of the course of decision under the *Commerce Clause* will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

Id. at 120.

By ignoring market realities in the housing sector, the trial court grievously erred. Affirmance of this ruling would deprive Rhode Island homeowners of their property in violation of their due process right to notice and an opportunity to be heard. This ruling ought to be reversed.

C. Statutory Mechanisms Are in Place to Enable the Government and the Marketplace to Drive the Lead-Based Paint Abatement Process.

The State of Rhode Island has exercised the utmost responsibility in ensuring that its housing stock is safe from lead-based paint risks—and, that when it is not, the public knows about it. Coupled with lead-based paint risk disclosures required by federal law by sellers to buyers and by landlords to tenants, the market is well-equipped to allocate financial liability for lead-based paint abatement to those responsible for its deterioration.

To briefly summarize, Rhode Island law requires that lead hazards must be abated in pre-1978 rental property. R.I. Gen. Laws § 42-128.1-8. Buyers must be informed that lead hazards have been mitigated or abated or that lead hazards exist on the properties they wish to

purchase. R.I. Gen. Laws § 42-128.1-7(1). Tenants are to receive similar information. *Id.* at § 42-128.1-7-8. The state publishes current lists of the addresses of high risk property[7] and of properties with multiple lead-poisoned children.[8]

Federal law also provides for stringent notification requirements of lead-based paint risks in pre-1978 housing and further requires that prospective purchasers be allowed a 10-day period to inspect and test the property they wish to buy. 42 U.S.C. § 4852d. If lead hazards are found, they are free to negotiate accordingly.

These mechanisms, plus an abundance of other information available to purchasers and tenants and to parents who wish to keep their children safe,[9] ensures that these housing consumers are well-equipped to drive abatement. The Heartland Institute urges this Court to let these market forces work.

D. This Case Is Part of a "Shakedown."

There is a pattern here, and it began with tobacco. Robert A. Levy,[10] *Shakedown 3-4, 9-54* (Cato Institute 2004):

> Beginning a decade ago, dozens of states faced with ballooning Medicaid costs decided that litigation against cigarette makers would be a relatively painless

[7] Available at http://www.health.ri.gov/lead/lists/propertylist.php?list=HRP

[8] Available at http://www.health.ri.gov/lead/lists/propertylist.php?list=NLS

[9] Available at http://www.health.ri.gov/lead/index.php

[10] Levy is senior fellow in constitutional studies and a member of the board of directors at the Cato Institute. He is the founder of CDA Investment Technologies, a major provider of financial information and software, serving as its CEO until 1991. He holds a Ph.D. in business from American University and a J.D. from George Mason University School of Law. He clerked for Judge Royce C. Lamberth on the U.S. District Court in Washington, D.C. and for Judge Douglas H. Ginsburg on the U.S. Court of Appeals for the D.C. Circuit. He was an adjunct professor of law at Georgetown University from 1997 until 2004.

> path to fiscal fitness. Couching their legal claims in the lofty cant of public health, the states sought to recover tax-funded Medicaid expenditures for tobacco-related injuries. The legislatures could have raised taxes on cigarettes, of course.
>
> Both tax increases and tobacco companies were immensely unpopular, so the states took the politically safe course by avoiding higher taxes and attacking the industry. To effect that scheme, state attorneys general and their hired-gun trial lawyers came up with a quasi tax, camouflaged as damages, based on rules of tort law that were custom-designed for extortion.
>
> That was the beginning of the government's tort law shakedown….
>
> The state was not even required to show that a particular party was harmed by his use of tobacco. Instead, causation could be proven by epidemiological statistics alone. Plaintiff states—filling the dual and conflicting roles of lawmaker and litigant—needed only to show that some diseases were more prevalent among smokers than non-smokers. The outcome: lawsuits created out of whole cloth—retroactively eradicating settled legal doctrine, and denying due process to a single industry selected more for its deep pockets and public image than for its legal culpability.

Id. at 2-3. It is no accident that this scenario sounds just like the present case. Lead-based paint cases were next, Levy wrote:

> Rhode Island's Whitehouse admits that the multi-state tobacco settlement inspired him to file suit. In fact, Rhode Island is being represented by Ness, Motley, Loadbolt, Richardson & Poule [now known as Motley Rice], one of the law firms that was pivotal in rounding up states to sue cigarette makers.
>
> The complaints against lead paint makers are a near-perfect fit for the new litigation model: Costly lawsuits filed in multiple jurisdictions, spearheaded by private lawyers who stand to collect a heft piece of the action, based on perverted rules of tort law applied retroactively in an attempt to circumvent the legislative process.

Id. at 110-11.

The supreme courts of two other jurisdictions where lead-based paint public nuisance cases were filed drew a line in the sand and stopped the "shakedown." *In re Lead Paint*

Litigation, 191 N.J. 405, 924 A.2d 484 (2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007). The Heartland Institute urges this Court to join them.

IV. CONCLUSION

No product is safe from untrammeled attacks by contingent fee lawyers in hot pursuit of unconscionable profits, such as the one presented in the present case. No industries are safe, no manufacturing-related jobs are safe, no state economies are safe, and no governmental property tax assessment bases are safe from the devastating consequences that would be unleashed by this Court's affirmance of the trial court's rulings and the jury verdict below. The Heartland Institute urges this Court to reverse them.

Respectfully submitted,

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