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No. S246669
Court of Appeal No. B283606

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Deputy

SOUTHERN CALIFORNIA GAS LEAK CASES

**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
SOUTHERN CALIFORNIA EDISON COMPANY, PACIFIC GAS &
ELECTRIC COMPANY, SOUTHWEST GAS CORPORATION, EDISON
ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN
SUPPORT OF RESPONDENT**

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**TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE
OF THE SUPREME COURT OF CALIFORNIA:**

Pursuant to California Rule of Court 8.520(f), privately-owned utilities Southern California Edison Company (“SCE”), Pacific Gas & Electric Company (“PG&E”), and Southwest Gas Corporation (“Southwest”) and utility associations Edison Electric Institute (“EEI”) and American Gas Association (“AGA”) (collectively, “*Amici*”) respectfully request leave to file the attached *amicus* brief in support of Respondent Southern California Gas Company (“SoCalGas”). This brief is timely, as it is filed within 30 days after the last reply brief was filed.

STATEMENT OF INTEREST

Amici SCE, PG&E and Southwest are among California’s oldest and largest utilities. SCE delivers power to 15 million customers across nearly 55,000 square miles in California. PG&E provides natural gas and electricity to more than 16 million people and businesses across 70,000 square miles in California. Southwest provides natural gas to nearly 200,000 customers in parts of El Dorado, Nevada, Placer, and San Bernardino Counties. *Amicus* EEI is the national association of U.S. shareholder-owned electric companies. Its members provide electricity in all fifty states and the District of Columbia and provide electric service to about seventy percent of all retail customers in the nation. *Amicus* AGA represents more than 200 state-regulated and municipal natural gas utility companies that deliver clean natural gas throughout the United States. Its members provide gas service to about 95% of all residential, commercial, and industrial customers in the nation.

Amici have a strong interest in this case because the continued application of the economic loss doctrine in its time-tested, current form is of particular importance to them or their members due to the public and geographically-broad nature of the critical services they provide.

Amici's proposed brief presents arguments that materially add to and complement the initial briefing following appeal from the Court of Appeal by Respondent SoCalGas, without repeating those arguments. *Amici* have significant experience with respect to the utility businesses in California.

Amici's brief will provide focused assistance to the Court in understanding: (1) the historical context for the long-standing economic loss doctrine, as it has developed in the United States and other common law jurisdictions, (2) certain public policy considerations that confirm the wisdom of this Court's prior rulings, which long ago firmly established the economic loss doctrine in the bedrock of California's tort law, and (3) the negative consequences that would befall California if Plaintiffs' proposed revision of the economic loss doctrine were adopted.

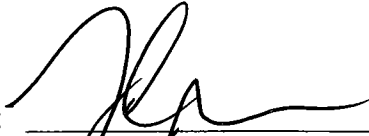
For the foregoing reasons, *Amici* respectfully request that the Court grant *Amici's* application and accept the enclosed brief for filing and consideration.

No party or counsel for any party, other than counsel for *Amici*, has authored the proposed brief in whole or in part or funded the preparation of the brief.

Dated: September 5, 2018

Respectfully submitted,

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**BRIEF OF *AMICI CURIAE* SOUTHERN CALIFORNIA EDISON
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INTRODUCTION

It has long been the rule in California that a plaintiff cannot recover pure economic losses resulting from negligent injury to other parties or their property. This legal principle, known as the “economic loss doctrine,”¹ guards against liability for speculative, excessive, or potentially unforeseeable losses, or losses outside the scope of risks that makes one’s conduct negligent. The doctrine expresses this Court’s judgment that pure economic losses are generally not recoverable.

Undeterred by over a century of precedent and sound reasoning, Plaintiffs seek to gut the economic loss doctrine. Plaintiffs’ proposed revision would unleash cascading consequences on *Amici*, their customers, and all Californians. Plaintiffs’ novel expansion of the economic loss doctrine would subject individuals and businesses to near limitless exposure, impacting commercial and other socially beneficial activity. Other states have dealt with precisely the sort of boundless exposure Plaintiffs seek to impose on California; like California, those states have properly drawn the line to impose reasonable and appropriate limits on liability. The effects of Plaintiffs’ ill-advised doctrinal redo would be far-reaching, but most

¹ “Courts and commentators have defined the economic loss doctrine in varying ways, which itself has created some confusion in the law. . . . [These formulations] conflate[] two distinct issues: (1) whether a contracting party should be limited to its contract remedies for purely economic loss; and (2) whether a plaintiff may assert tort claims for economic damages against a defendant absent any contract between the parties.” *Flagstaff Affordable Hous. Ltd. P’ship v. Design All., Inc.* (Ariz. 2010) 223 Ariz. 320, 323 (en banc). This case concerns the second issue: the judicially imposed limits on tort liability.

keenly felt by businesses that provide services to the public, such as utilities, who would face unprecedented and unpredictable liability.

In Part I, *Amici* provide historical context for the long-standing economic loss doctrine, as it has developed in the United States and other common law jurisdictions. Part II provides a plain statement of California's long-standing blackletter law as to the economic loss doctrine. Finally, Part III discusses certain public policy considerations that confirm the wisdom of this Court's prior rulings, which long ago firmly established the economic loss doctrine in the bedrock of California's tort law. It also illustrates the negative consequences that would befall California if Plaintiffs' proposed revision is adopted. For these reasons, *Amici* respectfully urge this Court to agree with the sound judgment exercised by the Court of Appeal and order the trial court to sustain Southern California Gas Company's ("SoCalGas's") demurrer without leave to amend.

RELEVANT BACKGROUND

Amici Southern California Edison Company ("SCE"), Pacific Gas & Electric Company ("PG&E"), and Southwest Gas Corporation ("Southwest") are among California's oldest and largest utilities. SCE delivers power to 15 million customers across nearly 55,000 square miles in California. PG&E provides natural gas and electricity to more than 16 million people and businesses across 70,000 square miles in California. Southwest provides natural gas to nearly 200,000 customers in parts of El Dorado, Nevada, Placer, and San Bernardino Counties. *Amicus* Edison Electric Institute ("EEI") is the national association of U.S.

shareholder-owned electric companies. Its members provide electricity in all fifty states and the District of Columbia and provide electric service to about seventy percent of all retail customers in the nation. *Amicus* American Gas Association (“AGA”) represents more than 200 state-regulated and municipal natural gas utility companies that deliver clean natural gas throughout the United States. Its members provide gas service to about 95% of all residential, commercial, and industrial customers in the nation. *Amici* have a strong interest in this case because the continued application of the economic loss doctrine in its time-tested, current form is of particular importance to them or their members due to the public and geographically-broad nature of the critical services they provide. And class actions like this case are not rare or uncommon: SCE and PG&E are currently facing similar class actions.

If adopted by the Court, Plaintiffs’ proposed revision of the economic loss doctrine would expose all businesses in California, and in particular the businesses engaged in by *Amici* or their members, to unforeseeable, speculative, excessive, and unjustified liability. In addition to being unworkable and inequitable, Plaintiffs’ revision of the doctrine would dampen economic and other socially beneficial activity in California, with widespread negative impacts on utility customers, residents, businesses, workers, and vulnerable communities served by these businesses. *Amici* respectfully request that this Court reject Plaintiffs’ proposed erosion of the economic loss doctrine.

ARGUMENT

I. A Brief History of the Long-Standing Economic Loss Doctrine

The economic loss doctrine has been black letter law in the United States for well over a century.² By 1927, the doctrine was so well established that the United States Supreme Court stated: “[N]o authority need be cited to show that . . . a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong.”³ This doctrine has been repeatedly reaffirmed by the California Supreme Court, by the United States Supreme Court,⁴ and the overwhelming majority of other State Supreme Courts.⁵ It is also the law in England.⁶ This doctrine has been restated without ambiguity in treatises⁷ and

² See, e.g., *Kahl v. Love* (1874) 37 N.J.L. 5, 8.

³ *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, 309.

⁴ See, e.g., *E. River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 874.

⁵ See, e.g., *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.* (N.Y. 2001) 96 N.Y.2d 280, 292; *Garweth Corp. v. Boston Edison Co.* (Mass. 1993) 415 Mass. 303, 305; *Aikens v. Debow* (W. Va. 2000) 208 W. Va. 486, 490. New Jersey rejected the economic loss doctrine in *People Exp. Airlines, Inc. v. Consol. Rail Corp.* (N.J. 1985) 100 N.J. 246, but “[w]ith a striking degree of unanimity, the highest courts in other states have failed to follow *People Express*; it stands as a lonely outpost.” Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort* (2006) 48 *Ariz. L. Rev.* 857, 858.

⁶ See *Murphy v. Brentwood DC* (H.L. 1990) 1 A.C. 398, 468. This doctrine dates back over a century in England as well. See *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453.

⁷ See, e.g., 5 WITKIN, SUMMARY 11TH TORTS (2018) § 867.

works of legal scholarship.⁸ As explained in the draft of the upcoming Third Restatement of Torts, “Except as provided elsewhere in this Restatement, a claimant cannot recover for economic loss caused by (a) unintentional injury to another person; or (b) unintentional injury to property in which the claimant has no proprietary interest.”⁹

The economic loss doctrine has endured with little change. Even as the law of negligence—and particularly products liability—expanded in the twentieth century, there was no change to the economic loss doctrine.¹⁰ Judge Cardozo, who was instrumental in expanding tort liability in *MacPherson v. Buick Motor Co.*,¹¹ explicitly reaffirmed the economic loss doctrine in *Ultramares Corp. v. Touche*, warning that absent this doctrine, there would be “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”¹²

⁸ See, e.g., Fleming James Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 VAND. L. REV. 43; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977) §§ 4.1, 4.7, at 65; Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss* (2006) 48 ARIZ. L. REV. 773.

⁹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (Am. Law. Inst. 2014) § 7 TD No 2.

¹⁰ Fleming, *supra* note 8, at 47.

¹¹ (N.Y. 1916) 217 N.Y. 382.

¹² (N.Y. 1931) 255 N.Y. 170, 179.

II. California's Well-Settled Economic Loss Doctrine

In California, as in virtually every other state, a plaintiff generally cannot recover pure economic losses resulting from negligent conduct by a defendant.¹³

This Court has consistently reaffirmed this doctrine to avoid the “potentially infinite liability” that would result from claims for pure economic losses.¹⁴

There is a narrow exception to this doctrine where there is (1) an underlying contract or transaction between the defendant and a third party, *and* (2) a “special relationship” between the plaintiff and the defendant.¹⁵ The law in California dates back to this Court’s 1960 decision in *Fifield Manor v. Finston*.¹⁶ As both of these elements are required, this Court has never found an exception to the economic loss doctrine where there is no underlying contract or transaction. Where there is such a contract, California courts then analyze the so-called *Biakanja* factors to determine whether a special relationship exists: (1) “the extent to which the transaction was intended to affect the plaintiff,” (2) “the foreseeability of harm to the plaintiff,”¹⁷ (3) “the degree of certainty that the plaintiff suffered injury,” (4)

¹³ See, e.g., *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 58 (“Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law.”).

¹⁴ *Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 399.

¹⁵ *J’Aire Corp. v. Gregory* (1979) 24 Cal. 3d 799, 804.

¹⁶ (1960) 54 Cal. 2d 632, 636.

¹⁷ While initial cases sometimes rationalized the economic loss doctrine on the

“the closeness of the connection between the defendant's conduct and the injury suffered,” (5) “the moral blame attached to the defendant's conduct,” and (6) “the policy of preventing future harm.”¹⁸

Applying these factors, this Court has found special relationships when there was an underlying contract between the defendant and a third party intended to benefit the plaintiff: (1) the lessee of a commercial space and a contractor employed by the lessor,¹⁹ (2) the heirs to a will and the will's drafter,²⁰ and (3) home purchasers and the manufacturer of the windows in their homes.²¹ Here, Plaintiffs have abandoned any allegations of any contract between SoCalGas and Plaintiffs' lost customers and therefore do not raise the contract/transaction exception in their appeal.²² Even if they did, any such contract would not have

“unforeseeability” of pure economic losses, *see Adams v. S. Pac. Transp. Co.* (1975) 50 Cal. App. 3d 37, 41 (“Conventional negligence analysis next turned to the question of foreseeability”), this Court has more recently made clear that the economic loss doctrine bars even *foreseeable* economic losses. *Bily*, 3 Cal. 4th at 399 (“In line with our recent decisions, we will not treat the mere presence of a foreseeable risk of injury to third persons as sufficient, standing alone, to impose liability for negligent conduct. We must consider other pertinent factors.”).

¹⁸ *Biakanja v. Irving* (1958) 49 Cal. 2d 647, 650.

¹⁹ *J'Aire Corp.*, 24 Cal. 3d at 805.

²⁰ *Biakanja*, 49 Cal. 2d 647.

²¹ *Jimenez v. Superior Court* (2002) 29 Cal. 4th 473, 484.

²² *S. Cal. Gas Leak Cases* (2017) 18 Cal. App. 5th 581, 590 (“business plaintiffs abandoned their earlier allegations that SoCalGas was a party to a contract intended to affect them and now assert their ‘loss did not arise out of any contract.’”).

been intended to benefit Plaintiffs, so there would be no special relationship between Plaintiffs and SoCalGas.

III. California’s Economic Loss Doctrine Is Based on Sound Legal Principles and Recognized Public Policy Considerations

Several considerations confirm the soundness of California’s settled economic loss doctrine and illustrate the reasons why this Court should reject Plaintiffs’ proposed revision to it.

A. California’s Economic Loss Doctrine Strikes the Right Balance Between Competing Principles of Tort Law: Compensation, Deterrence, and Certainty

California’s economic loss doctrine strikes a careful balance between compensating those affected by torts and creating predictability in the law and common-sense limits on liability. Although the physical consequences of an individual’s negligence are limited in time and space, the indirect economic consequences of one’s acts or omissions can be virtually unbounded.²³ And given the complexity and size of California’s economy, it is nearly impossible to estimate the potential indirect, downstream economic consequences of tortious acts.²⁴ As explained by Professor Farnsworth, contributor to the American Law

²³ James Fleming, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 VAND. L. REV. 43 (arguing that the economic loss doctrine is grounded in a pragmatic “floodgates” concern with the specter of limitless liability—whereas the physical consequences of negligence are typically limited, the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended).

²⁴ See Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability* (2005) 57 S.C. L. REV. 255, 302–03 (“[L]ost economic opportunities are

Institute's Restatement Third, Torts: Liability for Economic Harm, the economic loss doctrine controls "the potential for economic losses to proliferate in ways that physical damage does not."²⁵ Permitting recovery of potential economic losses in the absence of an injury to person or property would expose individuals to unlimited and unforeseeable liability that is disproportionate to fault.²⁶

California tort law encourages individuals to take account of all foreseeable costs or injuries that may be directly caused by their activities. When coupled with the regulatory framework that governs many industries in California, including the types of businesses engaged in by *Amici* or their members, businesses have strong incentives deterring them from inflicting harm on others and, relatedly, prompting them to invest in effective safety measures. If and when businesses run afoul of

often not readily susceptible to precise calculation . . . [and by] ruling out litigation in a huge range of cases (suits involving no personal injury or property damage), the economic-loss rule helps to ensure that compensation is not awarded for [speculative] amounts.”).

²⁵ Ward Farnsworth, *The Economic Loss Rule* (2016) 50 VAL. U. L. REV. 545, 544.

²⁶ *Ultramares Corp. v. Touche, Niven & Co.* (N.Y. 1931) 174 N.E. 441 (Cardozo, C.J.) (“If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.”); see *Hininger v. Case Corp.* (5th Cir. 1994) 23 F.3d 124 (holding that the economic loss doctrine cuts off “unlimited and unforeseeable liability”); cf. *East River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858 (doctrine needed to prevent warranty law from “drown[ing] in a sea of tort”); see also RESTATEMENT (SECOND) OF TORTS (Am. Law. Inst. 1979) § 766C cmt. a (noting that the economic loss doctrine is justified, in part, by “extremely variable nature of the relations, the fear of an undue burden upon the defendant’s freedom of action, [and] the probable disproportion between the large damages that might be recovered and the extent of the defendant’s fault”).

applicable tort laws or regulations, regulatory agencies can fine the businesses.

Parties whose properties are damaged or who suffer personal injuries have powerful remedies to make themselves whole. Further, if a tortfeasor's conduct is sufficiently egregious, injured parties may even recover punitive damages. These deterrents have properly incentivized and governed the conduct of business in this state and elsewhere for decades. But it is fundamentally unfair to ask businesses to operate in the face of unpredictable—and essentially unlimited—risk or exposure. For these reasons, revising the economic loss doctrine as Plaintiffs propose would be both unwise and unnecessary.

California's economic loss doctrine also promotes commercial activity and other socially beneficial conduct by providing a measure of legal certainty to tort law. Society benefits when the law is predictable and consistent. Predictability in the law allows individuals and businesses to provide services to the public, while ensuring that they take appropriate precautions. Predictability and certainty also provides direction to the courts and litigants so they know what is actionable and what is not. As explained below, Plaintiffs' proposed change to the economic loss doctrine would accomplish the exact opposite: it would expose economic participants in our society to unpredictable, indefinite, and potentially crippling liability, which could lead to overdeterrence or economic actors simply removing themselves from the market.

By allowing plaintiffs to recover for economic losses only when the tort causes damage to their person or property, the economic loss doctrine balances the

competing interests of individual plaintiffs who seek compensation and society at large that needs certainty, reasonable limits on liability, and the provision of essential services provided by utilities. In this way, the doctrine fully compensates a class of plaintiffs who are limited by time and place but prevents extending tort liability *ad infinitum*.

B. Plaintiffs' Proposed Revision Would Be Unworkable

Plaintiffs ask this Court to effectively abolish California's well-settled economic loss doctrine in favor of an indeterminate seven-factor test that would require parties and courts to assess foreseeability and public policy in a broad array of new cases. To fully compensate every single downstream economic consequence of allegedly tortious conduct, Plaintiffs ask the Court to sacrifice the societal benefits provided by the economic loss doctrine.

As this Court previously explained, "One frequently used illustration of the need to limit liability for economic loss assumes a defendant negligently causes an automobile accident that blocks a major traffic artery such as a bridge or tunnel. Although defendant would be liable for personal injuries and property damage suffered in such an accident, it is doubtful any court would allow recovery by the myriad of third parties who might claim economic losses because the bridge or tunnel was impassible."²⁷ More importantly, this illustration captures the futility of Plaintiffs' proposed test: it is likely that people would be delayed following a

²⁷ *Bily*, 3 Cal. 4th at 400 n.11.

crash that closes a bridge or tunnel, and that hourly workers caught in traffic would lose wages, their employers would lose profits, and so on. Yet Plaintiffs argue that not only the delayed drivers—but also anyone who engages in business or contracts with these delayed drivers—should be allowed to collect. Precisely because of the absurdity of this result, California, like most of its sister states, has established clear rules that govern when economic losses are recoverable and when they are not.

C. Plaintiffs' Proposed Revision Threatens to Make California Businesses, Including Privately-Owned Utilities, Unsustainable

The dramatic expansion of tort exposure advocated by Plaintiffs would negatively impact the well-being of businesses, especially California's privately-owned utilities. By exposing them to untethered liability, Plaintiffs' proposed rule would jeopardize the financial health of investor-owned utilities. If utilities and other businesses in this state are weakened, then customers, their workers, and all Californians will feel the impacts.²⁸

In response to Plaintiffs' proposed economic loss doctrine, California businesses would be forced to limit their activities and the scope of their services. This is because excessive, unpredictable, and disproportionate liability necessarily

²⁸ Though *Amici* primarily are and represent privately-owned utilities, municipal utilities would also face significant expansions of their liability under Plaintiffs' proposed revision of the economic loss doctrine, the cost of which would be passed onto ratepayers and the public.

results in overdeterrence of socially beneficial activity.²⁹ This would lead to an inefficient (and undesirable) reduction in commercial activity.³⁰ Excessive or indeterminate tort liability drives down and manipulates technological innovation.³¹ It also unjustifiably transfers wealth between private actors, and it encourages individuals to exit markets or industries altogether where the benefits of economic activity are outweighed by the costs and risks of tort liability.³² If Plaintiffs' revision to the economic loss doctrine were accepted, privately-owned utilities, among other critical economic actors in California, would likely be forced to reduce their level of investment in other socially beneficial activity in exchange for markedly increased expenditures on insurance and risk management.

²⁹ See, e.g., *Lawrence v. O & G Indus., Inc.* (Conn. 2015) 126 A.3d 569, 585 (concluding that defendants whose alleged negligence caused an explosion at power plant “did not owe a duty of care to the plaintiffs, who were employees that sustained only economic losses as a result of the explosion,” and referring to the “vast majority of other jurisdictions precluding recovery in similar situations”); Cf. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson* (1998) 146 U. PA. L. REV. 1733, 1833 (“Our duties to take reasonable care not to cause physical injury or property damage to others are quite burdensome To add to these duties other general duties to take care to avoid causing emotional and economic injuries would be enormously burdensome. Indeed, it would arguably be so burdensome that it would undercut the capacity of the sense of duty to prioritize and to focus.”).

³⁰ Kevin J. Breer & Justin D. Pulikkan, *The Economic Loss Rule in Kansas and Its Impact on Construction Cases* (2005) 74 J. KAN. B.A. 30, 31 (“The primary motivation behind the economic loss rule is the fear that allowing a party to proceed in tort would result in ‘crushing useful activity by a liability.’”) (quoting *Gunkel v. Renovations Inc.* (Ind. Ct. App. 2003) 797 N.E.2d 841, 844).

³¹ See Peter W. Huber & Robert E. Litan, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber & Robert E. Litan eds., 1991) 1, 2, 372–81.

³² *Id.* at 1, 2.

Though *Amici* are committed to providing the highest levels of service to customers in their territories, Plaintiffs' proposed expansion of liability risks would increase the cost to maintain the same level of goods and services offered in California and endanger the public's access to utility services at affordable rates.

D. Plaintiffs' Proposed Revision Endangers California's Economy and Environment

The vast expansion of tort liability advocated by Plaintiffs will harm the public. If utilities are forced to invest in economically inefficient measures (i.e., to deter every possible risk no matter how remote) in order to avoid unpredictable and open-ended liability, then utilities will not have the resources to make other socially beneficial investments in California. It cannot be disputed that the funds utilities will be forced to spend if Plaintiffs' rule were to be adopted are funds that would be unavailable to address California's other progressive priorities. In short, Plaintiffs' proposed rule would reduce the incentive to invest in California, weaken the economy, and set back California's environmental agenda.

Among other things, stakeholders, from investors to insurance providers, would question the investment environment in California, which would put California's privately-owned utilities and other businesses at a severe disadvantage. First, capital markets could shrink for California's privately-owned utilities because they are competing for capital against other businesses across the country that do not carry the risk of sustaining damages for pure economic

losses.³³ Second, customers already pay for the cost to safely and reliably provide the utility services that Californians require, including significant investments in infrastructure modernization. Difficulty accessing capital markets results in higher costs that, along with increased insurance costs, are passed onto customers. Rising costs adversely affect all customers, but in particular those who are financially vulnerable. The desire to avoid the rate shock that would result from Plaintiffs' expansion of the economic loss doctrine could lead to a reduction of the utilities' ability to promote environmental and other societal agendas. The revision of this longstanding doctrine could thus deprive the state's privately-owned utilities of the resources needed to maintain and improve the efficiency of their infrastructure. Third, if left unchecked, this negative perception of California's business environment would have ripple effects beyond the utility industry and discourage investments in the larger California economy.

³³ California's privately-owned utilities currently face increasingly hostile capital markets given the way that certain appellate courts have inappropriately applied inverse condemnation liability to them. *See, e.g.,* Moody's Investors Service, *Rating Action: Moody's Changes Edison International and Southern California Edison's Rating Outlooks to Negative* (Apr. 11, 2018), https://m.moodys.com/Research.html?docid=PR_380780 ("SCE's credit profile is weighed down by the potentially large contingent exposure created by the application of [a] strict liability standard in California in the case of wildfires where utility equipment was determined to be the source of the fire."); Moody's Investors Service, *Rating Action: Moody's Changes San Diego Gas & Electric's Rating Outlook to Negative from Stable* (Apr. 11, 2018), https://www.moodys.com/research/Moodys-Changes-San-Diego-Gas-Electrics-Rating-Outlook-to-Negative--PR_380749 ("The increasing inverse condemnation risk exposure has caused us to reassess our view of the credit supportiveness of the regulatory environment in California."). Making the economic loss doctrine effectively boundless, as Plaintiffs propose, only adds to the already significant challenges imposed on California's utilities.

Undermining the financial health of privately-owned utilities is bad for California workers. *Amici* SCE and PG&E alone employ approximately 33,000 Californians—and many thousands of independent contractors—providing them with good, well-paying jobs with benefits. Privately-owned utilities are also valuable sources of tax revenue, which is used to furnish a host of services and opportunities to Californians in need. Furthermore, electricity and natural gas are the lifeblood of numerous other economic activities and industries in California. Hobbling California’s privately-owned utilities would undermine their ability to supply energy at affordable prices, which could have far-reaching consequences for California’s economy.

If Plaintiffs’ proposed revision were adopted, California may be unable to achieve its environmental objectives. Indeed, privately-owned utilities are uniquely positioned to facilitate California’s clean energy transformation. They have the size, scope, and infrastructure assets needed to deliver clean energy to their existing and future customers. They also have the capacity to finance prudent investments to maintain and modernize their grids and pipeline infrastructure, with regulatory approval. If California hopes to achieve its greenhouse gas and clean energy goals, privately-owned utilities must modernize their infrastructure to integrate new technologies, enable customer choices around technology, and foster efficient, widespread transportation electrification. These projects and endeavors will not be attainable if the needed resources are sapped by the limitless tort liability that Plaintiffs propose.

It is also clear that the impact of Plaintiffs' unwise revision of the economic loss doctrine would not be limited to utilities. Rather, all types of businesses in this state would be exposed to indefinite and unconstrained liability, jeopardizing California's ability to retain businesses in-state and secure economic growth. Any business offering services to the public, or potentially subject to tort liability, would be forced to grapple with the unknown consequences of Plaintiffs' new rule. Businesses as varied as railroads, airlines, pharmaceutical companies, biomedical device manufacturers, construction companies, and makers of household products, and in turn those businesses' customers and employees, would be harmed.

IV. Plaintiffs' Policy Arguments Are Unpersuasive

Plaintiffs advance several policy arguments that they believe support their new economic loss doctrine. Plaintiffs' policy arguments are unfounded.

First, Plaintiffs argue that abandoning the economic loss doctrine is justified because SoCalGas's conduct is morally blameworthy. But they fail to identify any immoral acts or omissions that SoCalGas allegedly committed, asserting only that SoCalGas is morally blameworthy in that it negligently caused harm to the residents of Porter Ranch. Negligence is not the same as moral blameworthiness as a matter of law, and the law already provides a suite of remedies for negligent conduct.³⁴

³⁴ *Adams v. City of Fremont* (1998) 68 Cal. App. 4th 243, 270.

Second, Plaintiffs assert that recognizing a duty here would help prevent future harm. This is incorrect. As explained above, California’s tort law regime already provides SoCalGas (and all California businesses) with ample incentives to avoid committing mass torts. Plaintiffs’ proposed revision of the doctrine would merely result in a “great increase in litigation over many negligent incidents,” the costs of which “would not . . . be justified by a commensurate increase in safety or security.”³⁵ This may suit Plaintiffs (right now), but it is not in the best interest of all Californians.

Third, Plaintiffs say that the Porter Ranch Community will benefit and SoCalGas will be appropriately burdened if a duty of care is maintained. Once again, Plaintiffs are wrong. Abandoning the doctrine will inflict enormous damage on California’s economy—including the Porter Ranch Community—without a proportionally beneficial deterrent effect on SoCalGas. Further, SoCalGas has already expended millions of dollars to relocate Porter Ranch residents and remediate the effects of the gas leak, in addition to the nearly \$120,000,000 it is paying to settle with the state and localities. And residents have further remedies against SoCalGas to the extent it negligently caused damage to their property. There is no need to provide Plaintiffs with a windfall for harm that was not directly caused by SoCalGas’s alleged negligence, particularly given the extensive harm that would be suffered by all Californians from doing so.

³⁵ Farnsworth, *supra* note 25, at 554.

Finally, Plaintiffs argue that abandonment of the doctrine is appropriate because liability insurance is generally available. Plaintiffs plainly misunderstand the insurance market. In reality, Plaintiffs' ill-advised revision of the doctrine would lead to increased scarcity and cost of insurance coverage. For example, fire insurance for electric utilities is extremely expensive yet does not provide much additional coverage beyond a typical utility insurance policy. Faced with limitless tort exposure, insurance carriers would be reluctant or unwilling to underwrite the unbounded risks implicated by Plaintiffs' proposed doctrine. In this environment, the availability of insurance coverage would contract, and might even become unavailable for utilities and other large enterprises. And, to the extent it remained available, the increased costs of insurance would, once again, be borne by all customers of California's utilities.


CONCLUSION

California's economic loss doctrine is settled and sound. The consequences of adopting Plaintiffs' new economic loss doctrine are far-reaching and devastating, with no societal benefit. *Amici* respectfully request that this Court affirm the sound decision reached by the Court of Appeal and order the trial court to sustain SoCalGas's demurrer without leave to amend.

Dated: September 5, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c), I certify that this Brief of *Amici Curiae* Southern California Edison Company, Pacific Gas & Electric Company, Southwest Gas Corporation, Edison Electric Institute, and American Gas Association in Support of Respondent, contains 5,391 words, not including the Table of Contents, Table of Authorities, this Certificate, the caption page, signature blocks, or attachments.

Dated: September 5, 2018

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DECLARATION OF SERVICE

I declare that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above entitled action. My business address is 523 West 6th Street, Suite 400, Los Angeles, California 90014. I am a citizen of the United States and am employed in the City and County of Los Angeles. On September 5, 2018, I served the following document(s): **Application for Leave to File Brief of *Amici Curiae* Southern California Edison Company, Pacific Gas & Electric Company, Southwest Gas Corporation, Edison Electric Institute, and American Gas Association in Support of Respondent and Brief of *Amici Curiae* Southern California Edison Company, Pacific Gas & Electric Company, Southwest Gas Corporation, Edison Electric Institute, and American Gas Association in Support of Respondent**, upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

Via Overnight Delivery:

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California Court of Appeal Second District Ronald Reagan State Building 300 S. Spring St., 2nd Fl. Los Angeles, CA 90013	
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I further declare that this same day a copy has been e-submitted and the **original** and 8 copies have been hand-delivered for filing by a third party commercial carrier for next business day delivery to:

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350 McAllister Street
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I declare under penalty of perjury that the foregoing is true and correct.

Signature: *Sarah Jones*