S246669

IN THE SUPREME COURT OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

FIRST AMERICAN WHOLESALE LENDING CORPORATION et al.,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B283606

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE CALIFORNIA CHAMBER OF COMMERCE, THE AMERICAN INSURANCE ASSOCIATION, AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANT AND PETITIONER SOUTHERN CALIFORNIA GAS COMPANY

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND PETITIONER SOUTHERN CALIFORNIA GAS COMPANY

Under California Rules of Court, rule 8.520(f), the Chamber of Commerce of the United States of America (U.S. Chamber), the California Chamber of Commerce (CalChamber), the American Insurance Association (AIA), and the Property Casualty Insurers Association of America (PCI) request permission to file the attached amicus curiae brief in support of defendant and petitioner Southern California Gas Company.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part, and no person or entity other (continued...)

The U.S. Chamber is the world's largest business federation. It represents 300,000 members and indirectly represents the interests of over 3 million businesses and professional organizations of every size, from every sector, and in every geographic region of the country. In particular, the U.S. Chamber has many members located in California and others who conduct substantial business in the state and have a significant interest in the sound and equitable development of California tort law. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of concern. In fulfilling that role, the U.S. Chamber has appeared many times before this Court, the California Courts of Appeal, the United States Supreme Court, and the supreme courts of various other states.

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing businesses on a broad range of legislative, regulatory, and legal issues.

(...continued)
than amici, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community.

AIA, founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing more than 340 major property and casualty insurance companies based in California and most other states. AIA members collectively underwrite more than $134 billion in direct property and casualty premiums nationwide, including nearly $20 billion in this State, and range in size from small companies to the largest insurers with global operations. These companies underwrite virtually all lines of property and casualty insurance, including both commercial and personal lines insurance. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums nationwide. AIA also files amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace.

PCI promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is composed of approximately 1,000 member companies and 340 insurance groups, representing the broadest cross-section of home, auto, and business insurers of any national trade association. PCI members represent all sizes, structures, and regions, which protect families, communities, and businesses in the United States and across the globe. PCI members write $245 billion in annual premium, which is 38 percent of the nation's property casualty

insurance marketplace. In California, PCI members write 31.6 percent of the property casualty insurance market, including 32.6 percent of the personal lines market and 30.7 percent of the commercial lines market.

Amici believe the Court of Appeal correctly interpreted the economic loss doctrine and applied it to bar plaintiffs' negligence action seeking purely economic losses. Amici offer this brief to help explain the radical nature of plaintiffs' suggested change in tort law, the devastating impact that abolishing the economic loss doctrine in these actions would have, and why this Court should therefore continue to apply the economic loss doctrine to these actions. Accordingly, amici respectfully request that this Court accept and file the attached amicus curiae brief.

September 5, 2018

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AMICUS CURIAE BRIEF

INTRODUCTION

Under the well-established economic loss doctrine, a defendant has no general duty to prevent a plaintiff's purely economic losses. This doctrine has been applied for over half a century in California, and for even longer in other jurisdictions. Indeed, the majority of all jurisdictions have adopted the doctrine.

Nevertheless, plaintiffs ask this Court to reverse this longstanding and well-reasoned doctrine, and impose upon everyone in this state a general duty to prevent purely economic losses. They essentially ask this Court to create a new cause of action that will radically change California's tort law.

The devastating effect of abolishing the economic loss doctrine should not be understated. Plaintiffs' proposed rule would create the potential for limitless liability against every defendant in every negligence action; increase litigation costs; flood the already over-burdened courts with an all new category of fact intensive cases; prevent those who have suffered physical injuries or property damage from obtaining timely and effective relief; raise costs to business and consumers; upend well-settled law upon which businesses have relied for decades; and, ultimately, damage the state's economy.

This Court should not impose such a dramatic and unwarranted change in the legal foundations underlying economic activity in California. A decision to create a new and far-reaching category of tort claims should be left to the Legislature, which can

better balance the prospective burdens of such a change in the law with any perceived benefits. This Court should affirm the Court of Appeal's decision to apply the economic loss doctrine here.

LEGAL ARGUMENT

I. For over half a century, California has applied the economic loss doctrine, guided in part by the well-reasoned policy of guarding against limitless liability for negligence.

For 60 years, California has applied in negligence actions the economic loss doctrine, under which defendants have no general duty in such actions to prevent purely economic losses.[2] (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58 [noting that recognition of a duty to prevent purely economic loss to third parties "is the exception, not the rule, in negligence law"]; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 396-399 (*Bily*) [finding auditor has no duty to prevent economic losses to third parties]; *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18 (*Seely*) [finding manufacturer has no duty to prevent purely economic losses arising from defective product]; *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636-637 [rejecting claim for purely economic

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[2] Versions of this doctrine had already been applied by other jurisdictions long before California joined the majority of jurisdictions in adopting it. (See, e.g., *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303 [48 S.Ct. 134, 72 L.Ed. 290] (*Robins*); *Ultramares Corp. v. Touche* (1931) 255 N.Y. 170, 179-180; *Byrd v. English* (1903) 117 Ga. 191; *Stevenson v. East Ohio Gas Co.* (Ohio Ct.App. 1946) 73 N.E.2d 200, 201-204 (*Stevenson*).)

losses and stating it would "constitute an unwarranted extension of liability for negligence"].)

Courts have applied a narrow exception to the general rule against a duty for purely economic losses when a plaintiff shows a special relationship with the defendant under the factors stated by this Court in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*).[3] (See, e.g., *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1013-1019 (*Centinela*) [applying general no-duty rule but finding an exceptional duty based on special relationship]; *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 (*J'Aire*) [restating factors to determine whether duty should be imposed]; *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1215 ["[E]ntities generally have no *duty* to prevent purely economic loss to a potential plaintiff. [Citation.] Under the common law, it is only where a 'special relationship' exists [citation], giving rise to such a duty, that a plaintiff may recover purely economic loss."].)

On the other hand, it is equally well established that defendants are presumed to have a duty to prevent personal injuries and property damage in negligence actions, subject to the multi-factor test developed by this Court in *Rowland v. Christian*

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[3] The *Biakanja/J'Aire* factors are: "[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja, supra*, 49 Cal.2d at p. 650.)

(1968) 69 Cal.2d 108, 112-113 (*Rowland*).[4] (See, e.g., *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 (*Vasilenko*) [applying general duty rule in personal injury action]; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142-1144 [applying general duty rule in wrongful death and premises liability action based on exposure to asbestos]; see also *Seely*, *supra*, 63 Cal.2d at p. 19 ["Physical injury to property is so akin to personal injury that there is no reason to distinguish them"].)

Thus, one long-standing distinction between analyzing existence of duty in negligence actions is the type of harm suffered by the plaintiff. When a plaintiff suffers only economic loss, courts begin with the presumption of no duty and then determine whether an exception exists by applying the *Biakanja/J'Aire* factors. But when a plaintiff suffers personal injuries or property damage, courts presume a duty and then determine whether an exception to the duty exists by applying the *Rowland* factors. (Compare *Centinela*, *supra*, 1 Cal.5th at pp. 1013-1019 [finding economic loss defendant owed exceptional duty under *Biakanja/J'Aire* factors] with *Vasilenko*, *supra*, 3 Cal.5th at p. 1083 [finding personal injury defendant owed no duty under *Rowland* factors].)

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[4] The *Rowland* factors are: "[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland*, *supra*, 69 Cal.2d at p. 113.)

The main purpose of having one standard for analyzing claims involving purely economic losses, and another for those involving injuries to persons or property, is to avoid the imposition of a potentially limitless scope of liability for purely economic losses. As recently explained by the Court of Appeal:

> The main difference between the two sets of factors is the absence of the first [*Biakanja/J'Aire*] factor ("the extent to which the transaction was intended to affect the plaintiff") in the physical injury context. [Citation.] This makes sense. . . . [A] hypothetical negligent driver['s] . . . lack of intent to affect the particular victim of the car crash should have no bearing on the question of whether he had a duty to drive with due care and avoid injuring other drivers. But what if the accident caused a traffic jam on the freeway? Should our driver (who we are positing had a duty of care as to the victim who suffered physical injury and property damage in the crash) have a duty to the occupants of vehicles behind the traffic jam, such that any economic damages they suffer as a result of the traffic jam are recoverable? The introduction of this additional factor into the economic loss criteria is useful in avoiding such a result.

(*Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1341, fn. 20; accord, *Bily*, *supra*, 3 Cal.4th at p. 400, fn. 11 [discussing the "frequently used illustration" of a defendant who "negligently causes an automobile accident that blocks a major traffic artery such as a bridge or tunnel"].)

It makes sense to preserve the economic loss doctrine to guard against the possibility of limitless liability for strangers' purely

economic losses.[5] Indeed, the "economic loss rule has its firmest grounding" in these types of claims. (Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort* (2006) 48 Ariz. L.Rev. 857, 861-862 (hereafter Rabin).) There is necessarily a limited, finite, and identifiable number of plaintiffs who would suffer personal injuries or property damage from a negligent act—even a mass tort. Not so for those who may have suffered purely economic damages. (See *Dundee Cement Co. v. Chemical Laboratories, Inc.* (7th Cir. 1983) 712 F.2d 1166, 1171 (*Dundee Cement*) [" '[O]nly a limited amount of physical damage can ever ensue from a single act, while the number of economic interests a tortfeasor may destroy in a brief moment of carelessness is practically endless' "]; accord, *Aikens v. Debow* (2000) 208 W.Va. 486, 501-502 (*Aikens*) [discussing examples of numerous

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[5] The economic loss doctrine applies in many different contexts with varying justifications depending on the context. (See, e.g., *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988 [noting that in products liability actions, the economic loss rule prevents the " 'law of contract and the law of tort from dissolving one into the other' "]; see generally *Southern California Gas Leak Cases* (2017) 18 Cal.App.5th 581, 591 (*Southern California Gas Leak Cases*) ["the phrase, 'economic loss rule' appears in numerous appellate opinions involving contracts, warranties, and products liability; in those decisions, the 'economic loss rule' operates as a bar to recovery in the absence of personal injury or property damage"]; Dobbs et al., The Law of Torts (2d ed. 2018) Economic Torts and Economic Loss Rules, § 608 [discussing the "core economic loss rules" (original formatting omitted)]; Johnson, *The Boundary-Line Function of the Economic Loss Rule* (2009) 66 Wash. & Lee L.Rev. 523, 534-535 ["The truth may be that there is not one economic loss rule broadly applicable throughout the field of torts, but rather several more limited rules that govern recovery of economic losses in selected areas of the law"].)

third parties who might suffer economic losses from a defendant's negligence]; ABOM 40-41, 59-60 [describing numerous third parties who might have suffered economic losses from the gas leak].)

Further, plaintiffs' lengthy arguments against "a bright-line no-recovery rule in *all* cases involving purely economic losses" are wholly misplaced. (See, e.g., RBOM 1 ["SoCalGas wants a bright-line no-recovery rule in *all* cases involving purely economic losses"], 9-10 ["nothing categorically precludes claims . . . for negligently inflicted economic losses"], 13 ["that allowing recovery for economic losses might create problems of 'indeterminate liability' in *some* cases does not justify a no-recovery rule in *all* cases"].) The economic loss doctrine in California is not, and has never been, a categorical bar to all negligence actions for purely economic losses. And Southern California Gas Company does not appear to ask for such a categorical bar. (See ABOM 24 ["plaintiffs may not bring negligence claims for purely economic damages *absent* a 'special relationship' rendering any such losses limited and finite" (emphasis added)].)

The current well-established rule in California simply presumes that a defendant has no general duty to prevent purely economic losses to a plaintiff. That presumption only *begins* the analysis; courts must then determine under *Biakanja* and *J'Aire* whether a special relationship exists between the parties. Thus, while the economic loss doctrine appropriately guards against limitless liability, the *Biakanja/J'Aire* factors permit California courts to find an exceptional duty when justified by the facts.

II. Recognizing a new category of claims for purely economic losses caused by negligence would cause California to depart from the majority rule across the country.

The vast majority of jurisdictions apply the economic loss doctrine to bar negligence actions for purely economic losses, either outright or with narrow exceptions such as when a "special relationship" exists between the parties.[6] The Restatement of Torts

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[6] See, e.g., *Rogers v. Wright* (Wyo. 2016) 366 P.3d 1264, 1275; *Lawrence v. O and G Industries, Inc.* (2015) 319 Conn. 641, 666-667 (*Lawrence*); *LAN/STV v. Martin K. Eby Const. Co., Inc.* (Tex. 2014) 435 S.W.3d 234, 238-241, 250 (*LAN/STV*); *Long Trail House Condo. Ass'n v. Engelberth Const., Inc.* (2012) 192 Vt. 322, 327-329; *Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania* (2009) 604 Pa. 50, 52-57 & fn. 3; *Lowe v. Philip Morris USA, Inc.* (2008) 344 Or. 403, 413-414; *Plourde Sand & Gravel v. JGI Eastern, Inc.* (2007) 154 N.H. 791, 794-796; *Blahd v. Richard B. Smith, Inc.* (2005) 141 Idaho 296, 300; *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.* (2001) 96 N.Y.2d 280 (*532 Madison Avenue*); *Aikens, supra*, 208 W.Va. at p. 500; *In re Chicago Flood Litigation* (1997) 176 Ill.2d 179, 198; *FMR Corp. v. Boston Edison Co.* (1993) 415 Mass. 393, 394-395; *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984) 345 N.W.2d 124, 126-129; *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local No. 226 v. Stern* (1982) 98 Nev. 409, 411 (*Stern*); *National Roofing, Inc. v. Alstate Steel, Inc.* (N.M.Ct.App. 2015) 366 P.3d 276, 277-282; *Aguilar v. RP MRP Washington Harbour, LLC* (D.C.Ct.App. 2014) 98 A.3d 979, 983 (*Aguilar*); *L & P Converters, Inc. v. Alling & Cory Co.* (1994) 100 Md.App. 563, 570; *United Textile Workers of America, AFL-CIO v. Lear Siegler Seating Corp.* (Tenn.Ct.App. 1990) 825 S.W.2d 83, 84-87 (*Lear Siegler*); *D & A Development Co. v. Butler* (Minn.Ct.App. 1984) 357 N.W.2d 156, 158-159; *Stevenson, supra*, 73 N.E.2d at pp. 201-204; see also *East River S.S. Corp. v. TransAmerica Delaval, Inc.* (1986) 476 U.S. 858, 866-876 [106 S.Ct. (continued...)

and a leading treatise on tort law recognize the widespread adoption of the economic loss doctrine in this context. (See Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 2, Apr. 7, 2014) § 7 ["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" (boldface omitted)] & com. b; accord, Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 1, Apr. 4, 2012) § 1(a) ["An actor has no general duty to avoid the unintentional infliction of economic loss on another" (boldface omitted)] & com. c(1);[7] see also Dobbs et al., The Law of Torts, *supra*, Economic Torts and Economic Loss Rules, §§ 605-615, Negligent Interference with Contracts and Economic Interests, § 647 [discussing the economic loss doctrine].)[8]

(...continued)
2295, 90 L.Ed.2d 865]; *Robins, supra*, 275 U.S. at p. 309; *State of La. ex rel. Guste v. M/V TESTBANK* (5th Cir. 1985) 752 F.2d 1019, 1032 (*Testbank*); *Leadfree Enterprises, Inc. v. United States Steel Corp.* (7th Cir. 1983) 711 F.2d 805, 809 [applying Wisconsin law]; *Dundee Cement, supra*, 712 F.2d at pp. 1169-1170 [applying Illinois law]; *Marine Nav. Sulphur Carriers, Inc. v. Lone Star Indus., Inc.* (4th Cir. 1981) 638 F.2d 700, 701-702.

[7] The Restatement suggests that this general rule may not apply to every negligence action for purely economic losses. (See Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 2, *supra*) § 7, com. b; Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 1, *supra*) § 1, com. e.) But whether an exception should apply in any given action does not change the general rule.

[8] The American Law Institute (ALI) has approved section 1 of Tentative Draft No. 1 and section 7 of Tentative Draft No. 2, and its website states these materials "may be cited as representing the (continued...)

Like California, many of these jurisdictions apply the economic loss doctrine not merely to distinguish tort law from contract law, but to protect defendants from limitless liability for negligence. (See *Lawrence, supra,* 319 Conn. at p. 667 ["recognizing a duty of care . . . appears likely to result in a significant increase in litigation, without a corresponding increase in the safe operation of industrial sites such as the power plant"]; *532 Madison Avenue, supra,* 96 N.Y.2d at pp. 291-292 ["limiting the scope of defendants' duty to those who have . . . suffered personal injury or property damage--as historically courts have done--affords a principled basis for reasonably apportioning liability"]; *Aikens, supra,* 208 W.Va. at p. 500 ["We base our holding upon . . . our belief that a hybrid approach must be fabricated to authorize recovery of meritorious claims while simultaneously providing a barrier against limitless liability"]; *Aguilar, supra,* 98 A.3d at p. 983 ["We find compelling the reasoning and policy considerations espoused by the majority of jurisdictions that have adopted the economic loss doctrine and, therefore, adopt the economic loss doctrine in the District of Columbia"]; see also Rest.3d Torts, Liability for Economic Harm (Tent. Draft. No. 2, *supra*) § 7, com. b [discussing rationale of preventing indeterminate liability for purely economic losses arising

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Institute's position until the official text is published." (The American Law Institute, Restatement of the Law Third, Torts: Liability for Economic Harm <https://bit.ly/2MjO9hi> [as of August 22, 2018]; see *LAN/STV, supra,* 435 S.W.3d at p. 235, fn. 3 [discussing the ALI's approval of the tentative drafts].)

from an accident]; Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 1, *supra*) § 1, com. b [same].)

In the mid-1980s, two jurisdictions adopted the rule that a defendant owes a duty to prevent purely economic losses to a "particularly foreseeable" class of plaintiffs.[9] (*People Exp. Airlines, Inc. v. Consolidated Rail Corp.* (1985) 100 N.J. 246, 263-264 (*People Express*); *Mattingly v. Sheldon Jackson College* (Alaska 1987) 743 P.2d 356 [quoting and adopting *People Express*].) This minority view has been soundly rejected and criticized.[10] (See, e.g., *Aguilar, supra*, 98 A.3d at p. 984 [rejecting "the *People Express* foreseeability analysis" as lacking "a coherent limiting principle"]; *532 Madison Avenue, supra*, 96 N.Y.2d at pp. 290-291 [declining to follow *People*

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[9] The dissent below suggests a similar approach: that a duty may be owed to a business with such a "special dependence" on the immediate area of an accident that harm would be particularly foreseeable to that business. (*Southern California Gas Leak Cases, supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).)

[10] And for good reason; the *People Express* court itself recognized the difficulties in applying its "particular foreseeability" test. (*People Express, supra*, 100 N.J. at p. 264 ["We recognize that some cases will present circumstances that defy the categorization here devised to circumscribe a defendant's orbit of duty, limit otherwise boundless liability and define an identifiable class of plaintiffs that may recover. In these cases, the courts will be required to draw upon notions of fairness, common sense and morality to fix the line limiting liability as a matter of public policy, rather than an uncritical application of the principle of particular foreseeability."]; see *Aikens, supra*, 208 W.Va. at p. 498 ["Analysts of the *People Express* rationale have also criticized the wisdom of that approach by emphasizing that the 'Court itself noted the contradictory and inconsistent nature of its reasoning' by acknowledging the inherent limitations to predicating recovery on a principle of particular foreseeability"].)

Express]; *Lear Siegler, supra*, 825 S.W.2d at p. 86 [rejecting *People Express*'s holding as "contradictory and inconsistent"]; Rabin, *supra*, 48 Ariz. L.Rev. at p. 858 ["With a striking degree of unanimity, the highest courts in other states have failed to follow *People Express*; it stands as a lonely outpost"].)

A small minority of other jurisdictions have expressly limited the application of the economic loss doctrine to certain categories of cases, such as product defect or breach of contract actions. (See *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.* (Fla. 2013) 110 So.3d 399, 407; *Sullivan v. Pulte Home Corp.* (Ariz. 2013) 306 P.3d 1, 2-3; *Lesiak v. Central Valley Ag Co-op., Inc.* (2012) 283 Neb. 103, 120-23; *KB Home Indiana Inc. v. Rockville TBD Corp.* (Ind.Ct.App. 2010) 928 N.E.2d 297, 304-305; *Quest Diagnostics, Inc. v. MCI WorldCom, Inc.* (Mich.Ct.App. 2002) 656 N.W.2d 858, 863-86.)[11] These jurisdictions incorrectly suggest the only rationale of the economic loss doctrine is to maintain the boundaries of tort law and contract law, and wholly fail to address the more important purpose of the economic loss doctrine to guard against limitless

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[11] Notwithstanding plaintiffs' citation to *Pascarella v. Swift Transp. Co., Inc.* (W.D.Tenn. 2010) 694 F.Supp.2d 933, Tennessee is not one of these jurisdictions. (See RBOM 7-8, fn. 8.) Tennessee "disallow[s] recovery for purely economic loss absent physical injury or property damage" in negligence actions. (*Lear Siegler, supra*, 825 S.W.2d at p. 87.) A different federal district court in Tennessee has expressly rejected *Pascarella* and followed *Lear Siegler*. (*Ladd Landing, LLC v. Tennessee Valley Authority* (E.D.Tenn. 2012) 874 F.Supp.2d 727, 733 ["because *Lear Siegler* is a published decision by the Tennessee Court of Appeals that has not been overruled or modified by a subsequent decision of the Tennessee Supreme Court, it is controlling authority on this Court"].)

liability.[12] Only one jurisdiction appears to have completely abolished the economic loss rule altogether. (See *Cedarholley Inv., LLC v. Pitre* (La.Ct.App. 2016) 209 So.3d 850, 852-853.)

This Court should decline plaintiffs' invitation to depart from the majority rule and limit the economic loss doctrine to cases involving contract or warranty. (See OBOM 21-28.) As previously discussed, the economic loss doctrine is grounded in the well-reasoned principle of preventing limitless liability—and the threat of limitless liability is perhaps highest in tort cases arising from negligence. (*Ante*, pp. 15-20.)

Plaintiffs' suggestion that revoking the economic loss rule "is crucial to ensure that these types of accidents do not happen again" (RBOM 5) is misplaced. Southern California Gas Company already faces substantial regulatory consequences, and the Legislature enacted Public Resources Code section 3217 specifically addressing the Aliso Canyon gas leak. (See ABOM 50-51, 69-70 [discussing investigations by the California Public Utilities Commission and other regulatory agencies, and the Legislature's enactment of Public Resources Code section 3217].) More broadly, defendants in

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[12] Other cases cited by plaintiffs (see, e.g., RBOM 7, fn. 7) which reject the economic loss doctrine in the context of construction defect actions are irrelevant to whether this Court should apply the economic loss doctrine to general negligence actions for purely economic losses. The California Legislature adopted the Right to Repair Act specifically to carve out a limited exception to the economic loss doctrine in construction defect actions in this state. (See Civ. Code, §§ 895-945.5; *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 247 (*McMillin*).)

negligence actions already are subject to lawsuits from plaintiffs who suffer physical injuries or property damage.

III. This Court should not create a new category of negligence actions for purely economic losses.

A. Tests that focus on foreseeability, such as *Rowland*, fail to guard against limitless liability for purely economic losses.

According to plaintiffs, concerns about limitless liability are "appropriately addressed through the *Rowland* factors." (OBOM 29, boldface omitted; see RBOM 15.) Not so. The *Rowland* factors focus on foreseeability. (See *Rowland*, *supra*, 69 Cal.2d at pp. 112-113; OBOM 33-39, ABOM 58-59, RBOM 24-32.) Yet, as this Court has stated, " '[f]oreseeability' . . . 'is endless because [it], like light, travels indefinitely in a vacuum.' " (*Bily*, *supra*, 3 Cal.4th at p. 398.)

In the context of actions for negligent infliction of emotional distress, in which plaintiffs sustain no physical injuries or property damage, this Court recognized that an unadorned *Rowland*-type analysis would not sufficiently guard against unbounded liability:

> "Although [foreseeability] may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm." [Citation.] It is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among

> whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.

(*Thing v. La Chusa* (1989) 48 Cal.3d 644, 663-664 (*Thing*).) This Court further observed that "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." (*Id.* at p. 668.)

These reasons led this Court to establish requirements beyond foreseeability in actions for negligent infliction of emotional distress. (See *Thing*, *supra*, 48 Cal.3d at pp. 663-664.) In doing so, this Court "balance[d] the impact of arbitrary lines which deny recovery to some victims whose injury is very real against that of imposing liability out of proportion to culpability for negligent acts." (*Id.* at p. 664.) It also "weigh[ed] in the balance the importance to the administration of justice of clear guidelines under which litigants and trial courts may resolve disputes." (*Ibid.*) This Court ultimately limited bystander liability only to those plaintiffs in a special relationship with the victim. (See *id.* at p. 667.)

This Court also has recognized that the same dangers of a foreseeability test exist in negligence actions for purely economic damages. (See *Bily*, *supra*, 3 Cal.4th at pp. 398-399 [discussing *Thing* and rejecting a mere foreseeability test].) The gas leak at the Aliso Canyon storage facility may have foreseeably caused economic losses to hundreds or thousands of third parties. (See ABOM 40-41, 59-60 [describing numerous potential third parties who may have foreseeably suffered economic losses from the gas leak].) The same

will be true for many acts of negligence, such as a car crash on a busy bridge. Simply put, a foreseeability-focused test provides virtually no limit on liability for purely economic losses here.[13]

Other jurisdictions that have directly confronted the choice between a foreseeability test and application of the economic loss doctrine have rejected the foreseeability test. As one court soundly determined, even where "an indeterminate group . . . may have provable financial losses directly traceable to [an accident], with no satisfactory way geographically to distinguish among those who have suffered purely economic losses . . . limiting the scope of defendants' duty to those who have, as a result of these events, suffered personal injury or property damage--as historically courts have done--affords a principled basis for reasonably apportioning liability." (*532 Madison Avenue, supra*, 96 N.Y.2d at pp. 291-292.)

Many other courts also have adopted the economic loss doctrine because a foreseeability-focused analysis does not provide an adequate limiting principle where plaintiffs claim purely economic losses. (E.g., *Aguilar, supra*, 98 A.3d at pp. 983-984 [finding "compelling the reasoning and policy considerations espoused by the majority of jurisdictions that have adopted the economic loss doctrine"]; *Testbank, supra*, 752 F.2d at p. 1032 ["Denying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability"]; *LAN/STV, supra*,

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[13] This is so even though plaintiffs in any particular class action might strategically limit their proposed class. Although plaintiffs have arbitrarily limited their proposed class to businesses within a five-mile distance from the gas leak, nothing would stop others outside of that arbitrary distance from filing their own actions.

435 S.W.3d at p. 235 ["The [economic loss] rule serves to provide a more definite limitation on liability than foreseeability can"]; *Stern, supra*, 98 Nev. at p. 411 ["The foreseeability of economic loss, even when modified by other factors, is a standard that sweeps too broadly in a professional or commercial context, portending liability that is socially harmful in its potential scope and uncertainty"].)

The same concerns here caution against abolishing the economic loss doctrine in favor of a foreseeability test. This Court should continue to apply the economic loss doctrine to negligence actions for purely economic losses.

B. Allowing plaintiffs to bring negligence actions for purely economic losses would increase costs to litigants, the judicial system, the state economy, and every resident in the state, with little benefit.

Abolishing the economic loss doctrine and recognizing a new category of negligence claims for purely economic losses would not merely create limitless liability for any negligent act. Any minimal benefit gained would come at great cost to litigants, the judicial system, the economy, and every California resident.

Increased litigation costs. In all but the rarest of cases, any negligent act will cause economic losses to countless others. (See, e.g., *Bily, supra*, 3 Cal.4th at p. 400, fn. 11.) Abolishing the doctrine would open the floodgates and promote litigation by the vast pool of potential "third party" plaintiffs in every negligence action. It would result not only in the *potential* for limitless liability against defendants, but also the *certainty* of additional litigation

costs. Even assuming a defendant can afford the costs and successfully defends against these claims, the defendant nevertheless will have incurred unrecoverable costs and attorneys' fees. Defendants already face great incentive to avoid causing personal injuries and property damage; crushing every negligent defendant with an avalanche of additional litigation over purely economic losses would be intolerable.

Further, inviting negligence claims for purely economic losses would exacerbate already-existing problems of litigation abuse, such as class action complaints brought to coerce settlements from defendants. (See *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350 [131 S.Ct. 1740, 179 L.Ed.2d 742] [noting the "risk of 'in terrorem' settlements that class actions entail"].)

The dissent below suggested this case should have proceeded to discovery because, in its view, "it is quite possible that some—but certainly not all—of the businesses in a five-mile radius from the Aliso Canyon storage facility are situated such that Southern California Gas Company owed them a duty of care. In other words, I believe some businesses in the immediate geographic area of the gas leak could have a special dependence on that area such that harm to them would be foreseeable to Southern California Gas Company in a way it would not with respect to many other businesses in the area." (*Southern California Gas Leak Cases*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).) But that merely illustrates the practical problems that will arise if these types of cases are allowed to proceed. Which of the businesses within the five-mile radius will get protection under the dissent's

vague and unprincipled approach? Why? Might a business outside the 5-mile radius also have a "special dependence" on customers within that radius? What if the government does not delineate a relocation zone with respect to an accident?

There is a great benefit to having a clearly drawn, policy-driven line *before* litigation so that all parties know what claims will or will not be viable, and can expeditiously resolve viable claims while avoiding or economically overcoming the nonviable ones. The dissent's approach removes the benefit of the long- and broadly-accepted line (the economic loss doctrine) while substituting a different line that is no more principled, yet comes with the massive cost of being indiscernible without substantial litigation expenses.

The increase in litigation costs, either from the dissent's approach or any other test that focuses on foreseeability, would hit small companies the hardest. (See U.S. Chamber Institute for Legal Reform, Tort Liability Costs for Small Business (2010) p. 9 <https://bit.ly/2Biyolv> [as of August 22, 2018] (hereafter Tort Liability Costs for Small Business) [discussing the costs of litigation to small businesses]; Klemm Analysis Group for Small Bus. Admin. Office of Advocacy, Impact of Litigation on Small Business (2005) pp. ii-iii <https://bit.ly/2h58h8x> [as of August 22, 2018] [discussing the "huge burden" of litigation to small business owners].)

Increased judicial burden. The creation of a new category of claims previously unrecognized by California law would impose an intolerable burden on an already overworked and underbudgeted judicial system. (See, e.g., Chief Justice Cantil-Sakauye, *2018 State of the Judiciary: Chief Justice Calls for Civil Justice Reform*

Initiative, Cal. Cts. Newsroom (Mar. 19, 2018) <https://bit.ly/2Mk1beF> [as of August 22, 2018] [discussing the "budget crunch years" and that the increased 2018 budget will "allow the trials courts the needed flexibility to restore services they regrettably reduced"]; Chief Justice Cantil-Sakauye, *2017 State of the Judiciary*, Cal. Cts. Newsroom (Mar. 28, 2017) <https://bit.ly/2L6TEdW> [as of August 22, 2018] ["Since 2011, when I became Chief Justice, 6,408 laws have become law in California while the judicial branch budget has been shrinking. As I have said before, we are on the wrong side of justice when it comes to funding our courts."].)

Negligence actions for purely economic losses are impossible to resolve on a class-wide basis; every plaintiff will have its own unique facts regarding foreseeability and the existence and amount of economic loss. (See *Southern California Gas Leak Cases*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.) [suggesting "some businesses" might "have a special dependence on that area such that harm to them would be foreseeable . . . in a way it would not with respect to many other businesses in the area"].) Allowing countless plaintiffs to bring claims for purely economic losses will needlessly increase litigation over these fact-intensive questions, at great expense to our courts. This flood of litigation will also clog up court calendars and prevent plaintiffs who suffered personal injuries or property damage from obtaining timely relief.

Plaintiffs' reply brief on the merits acknowledges the increased strain on judicial resources. Their only response, however, is that courts already hear personal injury actions, and

therefore should bear the additional burden of hearing negligence actions for purely economic losses. (RBOM 18-19.) But providing courts and litigants with a readily determinable limit on the scope of claims that can be pursued is precisely the point of the economic loss doctrine.

Increased costs to injured plaintiffs and incentive to concoct bad faith claims against insurers. Insurance policies are not unlimited. The proliferation of litigation by plaintiffs who have sustained only economic losses will increase defense costs and reduce the funds available to pay truly injured plaintiffs.

Further, plaintiffs who have suffered personal injuries or property damage may be forced to share recoveries within policy limits with plaintiffs who have suffered only economic losses. Unscrupulous attorneys would have even further incentive to create bad faith claims against insurers rather than settling for policy limits. (See *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 900, fn. 2 (dis. opn. of Kaus, J.) [noting that "attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith"].) This not only affects insurers and businesses; it would likely result in higher insurance premiums to everyone who resides in California. (See *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 18 [recognizing that "[e]very judgment against an insurer potentially increases the amounts that other citizens must pay for their insurance premiums"].)

Increased costs to the economy. "No one sophisticated about markets believes that multiplying liability is free of cost." (*S.E.C. v. Tambone* (1st Cir. 2010) 597 F.3d 436, 452 (conc. opn. of Boudin, J.) (*Tambone*).) Plaintiffs' proposed rule would create a new tort action for purely economic losses against *anyone* alleged to be negligent in *any* action—not just mass tort actions or lawsuits filed against big businesses like Southern California Gas Company. Allowing these lawsuits to proceed would drag down the state's economy and hit small companies, which occupy a significant portion of the economy, particularly hard. (See Tort Liability Costs for Small Business, *supra*, at p. 3 [small companies "employ just over half of all private sector employees" nationwide, "pay 44 percent of the total U.S. private payroll," and "generated 64 percent of the net new jobs over the past 15 years and have created more than half of the non-farm private gross domestic product"].)

Tort litigation, including medical malpractice, costs small companies nationwide $133.4 billion in 2008, much of which were paid out of pocket rather than through insurance. (See Tort Liability Costs for Small Business, *supra*, at p. 1.) These costs often force these companies to increase the cost of their products and services, make a product or service unavailable, cut employee benefits, or lay off employees—if not go completely out of business. (*Id.* at p. 6; *Tambone*, *supra*, 597 F.3d at p. 453 [noting the cost of multiplying liability "gets passed along to the public"].) Time-consuming and expensive litigation often forces these companies to change their practices in ways that are not beneficial to their customers. (Tort Liability Costs for Small Business, *supra*, at p. 6.)

In sum, everybody would ultimately lose, but small businesses and ordinary consumers stand to lose the most.

Further, expanding tort liability to purely economic losses in negligence actions will exacerbate California's reputation as a hostile legal environment for businesses. A national survey of over a thousand in-house attorneys or senior executives shows that a state's lawsuit environment is likely to have an impact on important business decisions at their company—including where to locate or expand their businesses. (Chew et al., 2017 Lawsuit Climate Survey: Ranking the States (2017) pp. 8, 14-15 <https://bit.ly/2MSt9uo> [as of August 22, 2018].) This Court should not create a drag on California's economy by creating a new massive potential liability that will discourage economic activity.

IV. Any decision to create a new category of tort claims should be left to the Legislature.

In *Aas v. Superior Court* (2000) 24 Cal.4th 627, 632 (*Aas*), this Court held that the economic loss doctrine barred homeowners and a homeowners association from recovering damages for construction defects that did not cause property damage, but only purely economic losses. In doing so, this Court recognized that the power to carve out exceptions to the economic loss doctrine belongs to the Legislature. (*Id.* at p. 650 ["The Legislature, whose lawmaking power is not encumbered by precedent, is free to adopt a rule like that proposed"], 653 ["While the Legislature may add whatever additional protections it deems appropriate [for home buyers in California], the facts of this case do not present a sufficiently

compelling reason to preempt the legislative process with a judicially created rule of tort liability."].)

The Legislature responded to *Aas* by passing Senate Bill No. 800, the Right to Repair Act, a comprehensive construction defect litigation reform. (See Civ. Code, §§ 895-945.5.) Among other things, the Right to Repair Act created a limited exception to the economic loss doctrine in the context of construction defect actions. (See *McMillin*, *supra*, 4 Cal.5th at p. 247 [the Right to Repair Act "grant[ed] homeowners the right to sue for [construction defects] even in the absence of property damage or personal injury"].)

This Court's decision in *Aas* allowed the full deliberative legislative process to take place, and resulted in comprehensive statutory reform that likely could not have been achieved had this Court intervened and carved out a judicial exception to the economic loss doctrine. For example, to limit the costs and risks of construction defect litigation, the Right to Repair Act provides a mandatory prelitigation, nonadversarial, and private procedure as a precondition to litigation. (See Civ. Code, §§ 910-938; *The McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330, 1350 ["The purpose of [the procedure] 'is to give a builder the opportunity to resolve a homeowner's construction defect claim in an expeditious and nonadversarial manner' "]; *Anders v. Superior Court* (2011) 192 Cal.App.4th 579, 590 ["one of the major purposes of the legislation is to promote prelitigation repairs of construction defects in order to avoid the costs of litigation and the resulting increased costs of construction"].)

Likewise, here, the decision whether California should recognize a new tort action in light of the likely impact on the state's economy is a policy question best answered by the Legislature. This Court should follow 60 years of well-reasoned precedent and apply the economic loss doctrine, and allow the Legislature to determine whether any potential benefit that might be gained by allowing plaintiffs to pursue negligence actions for purely economic losses outweighs the massive economic and societal costs of such a rule.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeal's decision applying the economic loss doctrine to this action.

September 5, 2018

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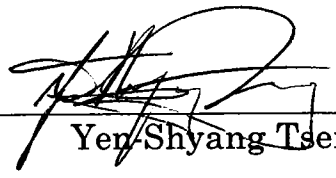
By: 
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CERTIFICATE OF WORD COUNT
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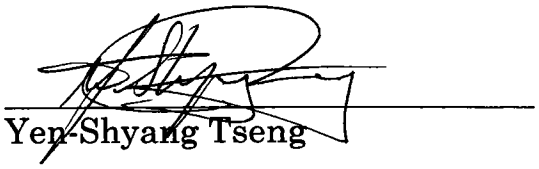

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PROOF OF SERVICE

SOUTHERN CALIFORNIA GAS LEAK CASES
Case No. S246669

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

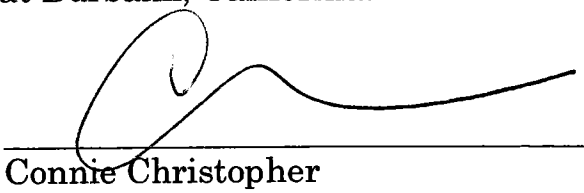
On September 5, 2018, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE CALIFORNIA CHAMBER OF COMMERCE, THE AMERICAN INSURANCE ASSOCIATION, AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANT AND PETITIONER SOUTHERN CALIFORNIA GAS COMPANY** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 5, 2018, at Burbank, California.



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