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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,
Respondent to Petition for Review,

SUPREME COURT
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v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent to Petition for Writ of Mandate.

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

After a Decision by the Court of Appeal,
Second Appellate District, Division Five, Case No. B283606

The Superior Court of Los Angeles County,
Judicial Council Coordination Proceeding No. 4861,
The Hon. John Shepard Wiley, Jr., Judge

PLAINTIFFS' CONSOLIDATED ANSWER BRIEF IN RESPONSE TO AMICI BRIEFS FILED IN SUPPORT OF SOCALGAS

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Pursuant to Rule of Court 8.520, subdivision (f)(7), Plaintiffs file this consolidated answer to the five amicus-curiae briefs filed in support of SoCalGas.[1]

INTRODUCTION AND SUMMARY

Amici fail to provide any persuasive rebuttal to the arguments in Plaintiffs' Opening and Reply Briefs on the Merits ("OBOM" and "RBOM," respectively). Before addressing amici's arguments, however, it may be useful to summarize Plaintiffs' overall position.

First, the Court of Appeal should have begun its analysis with California Civil Code § 1714(a), which sets forth the "basic policy of this state" with regard to negligence claims. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 118-119.) The language of Section 1714(a), which "has been unchanged in our law since 1872" (*id.* at 112), is broad and unequivocal. It provides that "[e]very one is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Cal. Civ. Code § 1714(a).) Because Section 1714(a) "does not distinguish among injuries to one's person, one's property *or one's*

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[1] Because these amici have lengthy names, we refer to them as follows:
"Chamber": Chamber of Commerce of the United States, *et al.*
"Civil Justice": Civil Justice Association of California,
"Plains": Plains All American Pipeline, L.P., *et al.*
"Private Utilities": Southern California Edison Company, *et al.*
"Tort Scholars": California Tort Law Scholars.

financial interests," it should be the starting point for analyzing *all* negligence claims, including those seeking redress for purely economic losses. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 806 fn. 3 [emphasis added].)

Second, the Court of Appeal should have then analyzed the factors set forth in *Rowland* to determine whether an exception to Section 1714(a)'s presumptive duty of care for the general category of conduct at issue—i.e., a private utility's negligent failure to protect members of the surrounding community from foreseeable economic losses caused by a catastrophic gas-well blow-out—is "clearly supported by public policy." (*Rowland, supra,* 69 Cal.2d at 112.)

Rowland applies here because this Court has never recognized any broad, categorical exception to Section 1714(a)'s duty of care for *all* negligence cases involving purely economic loss. Instead, this Court has only found such exceptions in two categories of economic-loss cases: (1) product cases involving breach of warranty (e.g., *Seely v. White Motor Corp.* (1965) 63 Cal.2d 9); and (2) cases involving breach of contract (e.g, *Biakanja v. Irving* (1958) 49 Cal.2d 647). Neither transactional category applies here, and thus Plaintiffs' claims should be subject to the presumptive duty of care set forth in Section 1714(a).

Third, there is no reason why this Court *should* recognize another categorical exception to Section 1714(a), one for *all* negligence cases

involving purely economic losses that has the potential to dwarf in size the existing two categories. This Court has recognized an exception in the *transactional* setting to preserve the boundary line between contract and tort. (*See Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.) But this rationale has no application in economic-loss cases between *strangers*, where the parties' "economic expectations" are not already "protected by commercial and contract law." (*Id.*)

At the same time, recognizing another categorical exception from Section 1714(a) for all negligence cases involving economic loss would inflict serious social costs, including stripping tort victims of their ability to seek compensation from the wrongdoing party and undermining this State's "overall policy of preventing future harm." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1150.)

Fourth, and relatedly, limiting application of the economic loss rule ("ELR") to the transactional context is consistent with the overall rationale and approach of *Rowland* itself. There, the Court jettisoned the common-law approach to tort liability for occupiers and owners of land, which distinguished between the duties owed to "invitees, licensees, and trespassers," in favor of the presumptive duty rule of Section 1714(a). (*Rowland, supra,* 69 Cal.2d at 116.) In so doing, *Rowland* recognized that "a man's life or limb does not become less worthy of protection by the law" based on his relationship with the defendant, and accordingly "stripped

away" those "ancient concepts." (*Id.* at 118-119.) *Rowland* further observed that the traditional approach was not only unduly rigid and contrary to Section 1714(a), but had also generated "confusion, complexity, and fictions" in the case law. (*Id.* at 120.)

The same could be said of the ELR, which has been described as "the most confusing development in the law." (Dean Ward Farnsworth, *The Economic Loss Rule* (2016) 50 Valparaiso Univ. L. Rev. 545, 545 ["*Farnsworth*"].) The way to resolve this confusion, however, is *not* to adopt a bright-line no-duty approach to the ELR, as SoCalGas and some of its amici urge, or the presumptive no-duty approach of the new Restatement (Third) of Torts (which is subject to various categorical exceptions). The former is unduly draconian; the latter resurrects the type of scheme rejected in *Rowland*; and, critically, *both* approaches are directly contrary to Section 1714(a). Rather, the proper approach is to follow *Rowland* and make clear that *all* economic-loss claims outside the transactional context are subject to the presumptive duty rule of Section 1714(a).

Fifth, and finally, not only should the Court of Appeal have begun its analysis with Section 1714(a), but it should have concluded its analysis by applying *Rowland*'s various factors to determine whether there are reasons "clearly supported by public policy" to exempt Plaintiffs' claims from Section 1714(a). (*Rowland, supra,* 69 Cal.2d at 112.) Plaintiffs have shown that those factors, properly applied, do not warrant an exception

from the general rule that SoCalGas had a duty to act with reasonable care to prevent the economic injuries suffered by Plaintiffs. The Court should so conclude here.

* * *

This brings us to SoCalGas's amici, which largely overlook Section 1714. Instead, they urge this Court to presume the absence of a duty of care in *all* cases involving purely economic losses because (they say) such a rule is (1) mandated by this Court's existing case law; (2) consistent with the law in most other jurisdictions; and (3) essential to prevent opening the floodgates of unlimited liability. None of these arguments is correct.

First, amici ignore that the duty of care in this case *already* exists (by virtue of Section 1714(a)). SoCalGas and its amici seek a broad duty *exception* to that duty of care applicable to *all* economic-loss cases arising in negligence. Such an exception would represent a radical break from this Court's existing case law and render negligence law a nullity in a large swath of cases.

Second, amici's approach is inconsistent with the rule in the majority of other states. By an ample majority, most other states have never applied the ELR to negligence actions outside the transactional context—that is, to cases among or between strangers. And a growing number of states have expressly rejected exactly the type of broad, no-duty rule advocated by SoCalGas.

Third, amici's argument that a bright-line no-duty rule is needed to prevent "limitless liability" ignores the concrete facts of this case and the way the tort law works in practice. The argument should be seen for what it is: a scare tactic. Other states that allow tort claims for economic losses in the non-transactional context have not experienced the type of apocalyptic results predicted by SoCalGas's amici, and there is no reason to expect a different result in California.

At bottom, amici's arguments suffer from the same fatal flaw as SoCalGas's: they focus on only one side of the liability coin, failing to recognize the harsh impact of their proffered rule on victims of tortious misconduct. As Dean Farnsworth himself recently wrote: "a serious monetary loss may be a far graver thing than a less substantial personal injury." (*Farnsworth*, *supra,* 50 Valparaiso L. Rev. at 546.) That being so, "the difficulties of adjudication [should not] frustrate the principle that there be a remedy for every substantial wrong." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 739).

ARGUMENT

I. Amici Misrepresent Existing California Law on Recovery of Purely Economic Losses.

Amici pay little to no heed to Section 1714(a). Instead, they leapfrog over the statute—and yet also contend that Plaintiffs are asking this Court to "radically change" California law by "revok[ing] the economic loss rule." (Chamber Br. at 14, 26. *See also* Private Utilities Br. at 6 [criticizing Plaintiffs for advocating an "ill-advised doctrinal redo" that would "gut the economic loss doctrine."].)

These arguments mischaracterize the law. Although this Court has recognized limitations on recovery of economic losses in cases involving breach of contract and product warranty (in order to prevent the law of contract and the law of tort from "dissolving one into the other," *Robinson Helicopter, supra*, 34 Cal.4th at 988), this Court has *never* recognized any such exceptions outside these "transactional" contexts. (*See* OBOM 22-28; RBOM 11-12.) This is not surprising, for any such rule would be directly contrary to the presumptive duty of care set forth in Section 1714(a)—a duty that, in California, "serves as the foundation of our negligence law." (*Rowland, supra,* 69 Cal.2d at 112.)

Beyond that, *J'Aire* strongly suggests that no categorical exception exists for economic losses outside the transactional setting. *J'Aire* allowed a restaurant that suffered economic losses due to the defendant's

construction delays to recover its damages from the defendant despite the absence of any contract between the parties. Although *J'Aire* analyzed the plaintiff's claim by applying the "special-relationship" test of *Biakanja, supra*, 49 Cal.2d 647, the Court's language swept far more broadly in several crucial respects. (*J'Aire, supra*, 24 Cal.3d at 805.)

First, in finding that the plaintiff had the right to recover its purely economic losses from the defendant despite the lack of a contractual relationship between the two, the Court's principal focus was on the foreseeability of the plaintiff's injuries. (*See id.* at 804.) *J'Aire* repeatedly emphasized that "it was clearly foreseeable that any significant delay...would adversely affect [plaintiff's] business..." (*Id.* at 804-805. *See also id.* at 805 ["[w]here the risk of harm is foreseeable..., an injury to the plaintiff's economic interests should not go uncompensated merely because it was unaccompanied by any injury to his person or property."].)

J'Aire emphasized that its analysis was grounded in the presumptive duty rule of Section 1714(a): "This holding is consistent with the Legislature's declaration of the basic principle of tort liability, embodied in Civil Code section 1714, that every person is responsible for injuries caused by his or her lack of ordinary care." (*Id.* at 806 [citing *Rowland, supra*, 69 Cal.2d at 119].)

J'Aire then stated that Section 1714(a)'s presumptive duty rule is applicable to claims involving stand-alone economic losses, including lost

profits from business interruptions. The Court observed that Section 1714(a) "does not distinguish among injuries to one's person, one's property *or one's financial interests*." (*Ibid.* [emphasis added].) To the contrary, "[r]ecovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, *should not be foreclosed* simply because it is the only injury that occurs." (*Ibid.* [emphasis added].)

Then, perhaps most telling of all, *J'Aire* expressly "disapproved" the holding in *Adams v. Southern Pac. Transportation Co.* (1975) 50 Cal.App.3d 37, a decision that applied the ELR to bar recovery of purely economic losses in the stranger context. In *Adams*, a load of military bombs carried by a freight train detonated in a railroad's freight yard, destroying a nearby manufacturing plant. The plant's employees sued the railroad, the County, and the State for damages resulting from their lost employment, including lost wages. (*Id.* at 39.)

The *Adams* court opined that, under the longstanding tort rules of this State, the plaintiffs *should* be allowed to recover their economic losses. *Adams* cited, among other things, Section 1714(a), stating that "nothing in the [statute's] language, purpose, or history...confines it to suits against land possessors." (*Id.* at 42.) *Adams* noted that a long line of this Court's cases, including *Rowland* itself, "denigrate[d] the precedential value of crystallized rules of duty"—rules, like the ones in pre-*Rowland* premises

law, that short-circuited the normal duty analysis, instead relying on archaic formal distinctions. (*Id.* at 44 [discussing cases].)

Adams further observed that this Court had repeatedly "recognize[d] liability for economic loss inflicted upon third persons with whom the defendant had no direct dealing." (*Id.* at 46 [citing, *inter alia*, *Dillon, supra*, 68 Cal.2d 728; *Barrera v. State Farm Mutual Automobile Ins. Co.* (1969) 71 Cal.2d 659; and *Connor v. Great Western Savings & Loan Ass'n* (1968) 69 Cal.2d 850].) *Adams* then noted the incongruity between these decisions and *Fifield Manor* v. *Finston* (1960) 54 Cal.2d 632, which disallowed the recovery of purely economic losses between unrelated parties. (*See Adams*, supra, 50 Cal.App.3d at 46 [describing "the doctrinal discord between *Fifield Manor* and later decisional developments."])

Despite these observations, *Adams* reluctantly denied the plaintiffs' claims on *stare decisis* grounds, even though (in the court's view) their economic injuries were arguably just as foreseeable to the defendants as the economic losses deemed recoverable in prior cases like *Connor*. (*See id.* at 46.)

It was against this backdrop that this Court decided *J'Aire*. Because *Adams* was a Court of Appeal decision that did not involve any underlying transaction or contract, one would have expected the Supreme Court in *J'Aire* to simply ignore *Adams*. But the Court did not ignore *Adams*. Instead, *J'Aire* went out of its way to "disapprove" *Adams*' holding that the

claim for negligent interference with prospective economic advantage was not cognizable. (*J'Aire, supra*, 24 Cal.3d at 807.) *J'Aire* observed that, although cases like *Adams* pose a theoretical risk of excessive liability, "judicial attention on the foreseeability of the injury and the nexus between the defendant's conduct and the plaintiff's injury" place a natural "limit on recovery…" (*Id.* at 808.)[2]

Everything about *J'Aire*—its focus on foreseeability, its embrace of Section 1714(a), its rejection of categorical duty rules, and its "disapproval" of *Adams*—suggests that the Court would not have established a categorical rule barring recovery of economic losses outside the transactional settling. *J'Aire* did not reach that issue because it was not presented by the facts, so the Court left unanswered the question presented here: whether a defendant may be liable to a *stranger* for foreseeable economic losses inflicted by its negligence. But *J'Aire* strongly suggests that the right way to answer this

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[2] Contrary to amici's contention, *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (Chamber Br. at 15), did not signal a departure from *J'Aire*'s focus on foreseeability. *Bily* wrestled with a vexing question: whether investors could recover economic losses from an auditor whose negligence caused massive financial losses to a huge class of persons. In denying the investors' negligence claim against the auditor, *Bily* emphasized "the lack of any effective limits on access to audit reports once they reach the client," which meant that "an auditor can foresee its reports coming into the hands of practically anyone." (*Id.* at 390.) In this context, *Bily* held that auditors cannot be held liability to "all foreseeably injured third parties," particularly given the "prospect of private ordering" through contract. (*Id.* at 402.) Nothing in *Bily*, however, suggested an intent to dilute the importance of foreseeability in cases like *J'Aire*, where foreseeability is not boundless and, as a result, there *are* "effective limits" on the defendant's liability.

question is to apply Section 1714(a) and *Rowland*, not to erect a categorical bar on liability.

Amici largely overlook Section 1714(a) and *J'Aire*. Instead, they rely on *transactional* decisions that rejected recovery of purely economic losses involving warranty or contract. The Chamber of Commerce, for example, cites *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58, for the proposition that "recognition of a duty to prevent economic losses to third parties 'is the exception, not the rule.'" (Chamber Br. at 15.) *Quelimane*, however, was a transactional case that featured multiple contractual relationships, as Plaintiffs have explained. (OBOM 23-24; RBOM 11.) The Court said nothing about what the rule should be in cases *outside* the contractual setting—i.e., in cases, like this one, where there are no underlying "financial transactions" and, as a result, no opportunity for voluntary risk allocation between the parties.[3]

[3] Amici's other cases from this Court arise in the transactional setting as well. In *Bily, supra,* 3 Cal.4th 370 (Chamber Br. at 15), the Court noted that "the generally more sophisticated class of plaintiffs in auditor liability cases (e.g., business lenders and investors) *permits the effective use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering.'*" (*Id.* at 398 [emphasis added].) In *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994 (Chamber Br. at 16), the Court denied the plaintiffs' economic losses because the defendant's "specific contractual delegation of [their] statutory obligation...was necessarily intended to have an effect on plaintiffs." (*Id.* at 1015.) In *Seely, supra*, 63 Cal.2d at 19 (Chamber Br. at 15), the Court barred recovery losses arising out of breach of warranty on the ground that a consumer "could be fairly charged with the risk that the product would not match his economic expectations, unless the

None of amici's cases holds that Section 1714(a) has no application to negligence actions outside the transactional setting. If this Court had ever recognized such a radical, broad exception to the presumptive duty created by Section 1714(a), one would have expected the Court to have stated as much in no uncertain terms. It never has.[4]

Amici's inaccurate portrayal of California law is also contrary to this Court's oft-repeated justification for applying an ELR in the transactional

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manufacturer agreed that it would." And in *Fifield Manor, supra,* 54 Cal.2d at 636-637 (Chamber Br. at 15), this Court refused a nursing home's claim for medical care provided to a car-injury victim on the ground that the defendant had voluntarily assumed obligations by contract.

[4] The cases cited by amici Plains All American Pipeline *et al.* ("Plains) are not to the contrary. Plains argues that "federal and state reporters are full of examples of courts using the [ELR] to impose sensible limits on the tort liability of oil producers and utility providers…." (Plains Br. at 19). But amici only cite two California cases for this proposition. The first, *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.5th 204, is a transactional case involving a defective product, and thus has no bearing here. The second, *Safety Equip. Corp. v. Plains All Am. Pipeline, L.P.* (Super. Ct. Santa Barbara County, Apr. 13, 2017), No. 17CV02224, is an unpublished decision that disallowed economic losses caused by an oil spill based on the Court of Appeal's ruling in this very case. (*See* Plains Br. at 20.) That decision is wrong for the same reason the decision below is wrong. The remaining cases are all from other jurisdictions and have no bearing here, either because they are factually distinguishable or involve different underlying state law. (*See id.* at 21-22 [citing, *inter alia, Excavation Techs., Inc. v. Columbia Gas Ca. of Pa.* (2009) 985 A.2d 840, 842-843 (disallowing recovery of economic losses related to gas-line rupture where governing statute did not contain private cause of action); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.* (Tex. App. 2000) 29 S.W.3d 282, 288 (disallowing recovery of economic losses caused by gas utility's failure to mark its lines and distinguishing *J'Aire*); *In re Illinois Bell Switching Station Litig.* (Ill. 1994) 641 N.E.2d 440, 444 (barring telephone customers' economic losses caused by service interruption because "contract law and the Uniform Commercial Code offer the appropriate remedy for economic losses occasioned by diminished commercial expectations…").

context: to "prevent the law of contract and the law of tort from dissolving one into the other." (*Robinson Helicopter, supra*, 34 Cal.4th at 988 [citation omitted]. *See generally* OBOM 22 [explaining how ELR only applies to losses arising from contract and breach of warranty and is meant to separate the law of contract from tort law].)

It makes sense to preclude recovery of purely economic losses in the product-liability context in order to prevent tort law from shifting back to sellers a specific risk that more appropriately rests with buyers. (*See Seely, supra*, 63 Cal.2d at 18-19.) It also makes sense to preclude economic-loss recovery in the contractual setting, given that a principal goal of contract law is to make the cost of contractual relationships predictable. (*See Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683.) Permitting a party to recover in tort for a risk it assumed by contract interferes with the contractual allocation of risk—hence the ELR in that context. (*See Quelimane, supra*, 19 Cal.4th at 58 [declining to allow recovery in tort "[for] a risk that the seller assumed when the property was acquired."].)

These arguments have no application outside the transactional setting, where there is no underlying warranty or contractual allocation of risk. Rather, in the "pure" negligence context, where a tort action arises between or among strangers, a *per se* bar against recovery of purely economic losses only serves to immunize wrongdoers from liability for the

damages caused by their wrongdoing—a result contrary to Section 1714(a) and this Court's jurisprudence.

II. Amici Fail to Rebut Plaintiffs' Showing that the *Rowland* Factors Do Not Justify SoCalGas's Bright-Line, No-Duty Rule.

Amici also fail to rebut Plaintiffs' showing that the *Rowland* factors favor imposing liability in this case. (*See* RBOM 24-28.) Under *Rowland*, the underlying question is whether an exception to the duty rule established by Section 1714 is "clearly supported by public policy" (*Rowland, supra*, 69 Cal.2d at 112)—a test this Court has applied with rigor when *declining* to recognize exceptions to the duty of care. (*See Kesner*, *supra,* 1 Cal.5th 1132; *T.H. v. Novartis* (2017) 4 Cal.5th 145, 174.)

SoCalGas's amici either ignore *Rowland* completely (*e.g.*, Civil Justice Br.) or they mischaracterize it as merely addressing the "foreseeability" of harm (*e.g.*, Chamber Br. at 27). None of the amici seriously addresses the *Rowland* factors in any detail, much less rebuts Plaintiffs' showing that those factors do not justify the type of bright-line no-duty rule proposed by SoCalGas. (*See* RBOM at 24-32.)

In particular, none of the amici disputes that the most important *Rowland* factor—foreseeability—is met here. Nor could they, given that SoCalGas knew that there were widespread problems with the gas injection wells long before the Aliso Canyon disaster occurred, including aging wells "located within close proximity to residential dwellings or high

consequence areas." (Amici Curiae Br. of Toll Brothers, Inc. ["Toll Brothers Br."], at 19 [quoting Exhibit B to Plaintiffs' Request for Judicial Notice ("RJN"), at PEB-17].)

Nor do amici dispute that SoCalGas's misconduct, which included removing the safety valve from its aging well and then lying to authorities for over three decades about having done so (RBOM at 4), is morally blameworthy as a factual matter. Nor could they, given that SoCalGas could have prevented the leak if it had properly maintained its wells (*see generally* Toll Brothers Br. at 16-20)—another factor that counsels in favor of a finding of moral blame. (*See Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1091 ("[w]e have said that if there were reasonable ameliorative steps the defendant could have taken, there can be moral blame 'attached to the defendants' failure to take steps to avert the foreseeable harm.'"] [citation omitted].)

Rather, a few amici suggest that negligence is not "morally blameworthy" as a matter of law—a proposition this Court has repeatedly rejected, especially "in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue." (*Kesner, supra,* 1 Cal.5th at 1151. *See also Novartis, supra*, 4 Cal.5th at 174.)

Regarding prevention of future harm, all amici offer is citation to various federal and state laws and regulations that *post-date* the 2015

blowout, which amici suggest will prevent future accidents like the well blow-out at Aliso Canyon. (*See* Private Utilities Br. at 14.) The same argument was made in *Kesner*, which rejected it, holding that "the duty analysis looks to the time the duty was owed." (*Kesner, supra*, 1 Cal.5th at 1150.) At the time the "duty was owed" here (2015), the regulations governing underground gas storage facilities like Aliso Canyon were manifestly inadequate. (*See* RBOM at 29 & fn. 24; Toll Brothers Br. at 19-20.)[5]

The fact that California substantially strengthened the laws governing underground gas storage wells after the 2015 Alison Canyon

[5] On January 6, 2016, in response to the Aliso Canyon disaster, Governor Brown directed the Department of Conservation's Division of Oil, Gas, and Geothermal Resources ("DOGGR") to promulgate emergency safety standards for all underground gas storage facilities in California. (*See* https://www.gov.ca.gov/2016/01/06/news19264/.) DOGGR's newly finalized regulations for underground gas storage projects are set forth in Cal. Code Regs. Title 14, division 2, chapter 4, subchapter 1 at §§ 1726 *et seq*. (effective Oct. 1, 2018). The complete history of DOGGR's rulemaking in response to Aliso Canyon is on DOGGR's website. (*See* http://www.conservation.ca.gov/dog/general_information/Pages/UGSRules.aspx.) In its Final Statement of Reasons for the new regulations, DOGGR emphasized that its prior regulations were not "specific to underground storage projects" and that its new regulations, which contain extensive requirements "specifically tailored to underground gas storage projects," are necessary "to ensure the integrity of gas storage wells, and to prevent damage to public health and the environment." (*See* http://www.conservation.ca.gov/index/Documents/Final%20Statement%20of%20Reasons.pdf at 4.)

disaster only underscores "the strong public policy" behind allowing SoCalGas to be held liable in tort. (*Kesner*, *supra*, 1 Cal.5th at 1151.)[6]

Amici also do not seriously contest that the burden on SoCalGas from allowing Plaintiffs to proceed is not legally cognizable. In measuring this factor, *Kesner* emphasized that "our duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care." (*Id.* at 1152.) Where the duty advocated by the plaintiff is *already* imposed by federal or state law, the value of the burden is "zero." (*See Novartis*, *supra*, 4 Cal.5th at 170.)

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[6] Amici Plains All America Pipeline *et al.* ("Plains") argue that "oil pipelines, natural-gas companies, and other energy providers are already subject to robust, detailed regulatory schemes to promote the same and efficient provision of services to California consumers." (Plains Br. at 24.) Because the laws and regulations cited by Plains do not concern underground gas wells, they have no bearing on the *Rowland* analysis in this case. (*See id.* at 24-42 [citing federal Oil Pollution Act ("OPA") and California's Oil Spill Prevention and Response Act].) But even if Plain's arguments were relevant here (they are not), Plain's contention that, in the oil-spill context, allowing "additional damages liability would upend the balance already struck by Congress and the California legislature" (*id.* at 16) fails on its merits. As Plains admits, California's oil-spill legislation compensates only "*certain* injured plaintiffs." (*Id.* at 34 [emphasis added]; *see also* Cal. Gov't Code § 8670.56.5 (West) [listing restrictions].) The same is true of OPA, which also does not permit punitive damages. (33 U.S.C. § 2702(b)(2); *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010* (E.D. La. 2011) 808 F.Supp.2d 943, 962 , *aff'd sub nom. In re DEEPWATER HORIZON* (5th Cir. 2014) 745 F.3d 157.) That is why both regimes contain savings clauses that explicitly preserve common-law remedies. (*See* Cal. Gov't Code § 8670.56.5(g) (West); 33 U.S.C. § 2718(c); *St. Joe Co. v. Transocean Offshore Deepwater Drilling, Inc.* (D. Del. 2015) 774 F.Supp.2d 596, 605 [finding tort claims not preempted by OPA].)

That may well be the case here, given that the State responded to SoCalGas's well blowout by passing industry-wide safety standards designed to prevent catastrophic well blowouts in the future. (*Supra* at fn. 5. *See also* Cal. Pub. Res. Code § 3180 [effective Jan. 1, 2017] [requiring testing regimes for gas wells); *id.* § 3181 [effective January 1, 2017] [requiring risk management plans for same].) Indeed, amici repeatedly argue that this industry is subject to "robust, detailed regulatory schemes," Plains Br. at 24, perhaps not realizing that the existence of such schemes cuts against SoCalGas when it comes to *Rowland*'s "burden" factor.

Amici also get no purchase from the final *Rowland* factor: availability of insurance. In particular, they do not dispute that SoCalGas's publicly-traded parent company, Sempra, has substantial liability insurance to cover accidents just like this one. (RBOM at 18.) Rather, they argue that liability would "lead to increased scarcity and cost of insurance coverage" (Private Utilities Br. at 24) and that Plaintiffs should have purchased "business-interruption insurance" to cover their losses. (Plains Br. at 49.)

These arguments merit little consideration. First, amici ignore that "the relevant insurance policies are those that were available to defendant[ ] at the time of exposure" (*Kesner*, *supra*, 1 Cal.5th at 1151), not what the

imposition of tort liability *might* mean for the availability of such insurance in the future.

Second, amici ignore that "business-interruption insurance" typically only applies where a "covered peril" is accompanied by property damage (*see* 11A *Couch on Insurance* § 167:12 (2018)*; see also id.* at § 167:15) *and* where business operations have been completely suspended. (*Id.* at § 167.13. *See also Buxbaum v. Aetna Life & Casualty Co.* (2002) 103 Cal.App.4th 434, 444 [business-interruption insurance requires total cessation of business activities, rather than slowdown or reduction in operations].)

Third, amici assume that Plaintiffs, many of whom are tenants operating on shoe strings, are eligible for such insurance *and* have sufficient resources to purchase enough coverage to protect against the type of catastrophic disruptions at issue here—unlikely in the extreme.

But even if business-interruption insurance *were* available to cover Plaintiffs' losses, a central goal of tort law is to require negligent actors to bear the costs of their own misconduct in order to deter such actions in the future. (*See Kesner, supra,* 1 Cal.5th at 1153 [noting that "the tort system contemplates that the cost of an injury, instead of amounting to a 'needless' and 'overwhelming misfortune to the person injured,' will instead 'be insured by the [defendant] and distributed among the public as a cost of doing business.'"] [citation omitted].) Amici's proposed solution—that the

little guy be forced to bear the losses so the big guy doesn't have to dip into its insurance coverage—gets it backwards.

III. Amici's Arguments Regarding the Ruinous Effects of "Unlimited Liability" Lack Merit.

Rather than address these *Rowland* factors in a serious way, most of SoCalGas's amici urge this Court to adopt a bright-line no-duty rule for *all* economic losses outside the transactional setting. (*E.g.*, Civil Justice Br. at 16.) Such a rule, they argue, is particularly warranted in the natural gas industry, which (they say) could be crippled by allowing Plaintiffs' claims like to proceed. (*See* Private Utilities Br. at 17-22.) Neither argument withstands scrutiny.

A. Amici Offer No Valid Normative Justification for a Bright-Line Across-the-Board Economic Loss Rule.

As a threshold matter, however, it is worth noting that SoCalGas's amici do not make a serious effort to justify their no-duty version of the ELR on normative grounds. This is no surprise, because the unfairness and incoherence of such a rule is readily apparent.

First, as the New Jersey Supreme Court observed, "[t]he assertion of unbounded liability is not unique to cases involving negligently caused economic loss without physical harm." (*People Express Airlines v. Consolidated Rail Corp.* (N.J. 1985) 100 N.J. 246, 252-253 ["[a] single overturned lantern may burn Chicago"].) In fact, "there is simply no limit on potential damage awards for mass torts…"—yet the courts have devised

ways to manage liability in the mass-tort context. (Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss* (1999) 32 U. Mich. J. L. Rev. 403, 408-409.)

Second, stand-alone economic losses can be ruinous, even if the injury victim didn't also lose a limb or a house. (*See* Farnsworth, *supra*, 50 Valparaiso L. Rev. at 552 ["It requires no tutoring to see that a purely monetary loss can be just as devastating to its victim as any other kind.") Singling out purely economic losses for a no-duty rule can be especially harsh in the present day, where electronic data breaches (among other economic crimes) have become commonplace. (*See generally* David W. Opderbeck, *Cybersecurity, Data Breaches, and the Economic Loss Doctrine in the Payment Card Industry* (2016) 75 Md. L. Rev. 935.)

Third, purely economic losses can be far easier to measure than damages arising out of personal injuries, which include not just medical expenses, but also noneconomic damages such as pain and suffering. (*See Beagle v. Vasold* (1966) 65 Cal.2d 166, 172 ["One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering"].) Business losses, in contrast, can be calculated using statistical analyses, as Plaintiffs propose here. (*See Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1710 ["[I]t is easy

to determine [] lost profits" where they are "a natural and direct consequence of the breach."].

Finally, of course, economic losses *are* recoverable when sustained in connection with property damage or personal injuries, which illustrates the "logical inconsistency between rules denying pure economic loss and the rules permitting consequential damages for economic injury associated with personal and property damage..." (Silverstein, *supra*, *On Recovery in Tort for Pure Economic Loss,* 32 U. Mich. J. L. Ref. at 413.)

Why, then, should stand-alone economic losses be singled out for uniquely disfavored treatment? Amici's main argument is purely utilitarian: that, absent a bright-line, no-duty rule for stand-alone economic losses, the liability floodgates will open wide and society as a whole will suffer. This argument fails on several levels.

B. Amici's Floodgates Argument Has No Valid Application to this Case.

First, as Plaintiffs have explained (and the trial court recognized), the floodgates argument does not justify a no-duty exception in this case. The proposed class is finite, consisting of roughly 400 small businesses located within the 5-mile relocation zone. The trial court, in overruling SoCalGas's demurrer, stated that Plaintiffs' losses are quantifiable by "conventional means" that are neither "exotic" nor burdensome. (RBOM at 5; 2 EP 94.)

Amici do not argue that the proposed class in this case is "unlimited." They contend, rather, that the five-mile zone is "arbitrary," which ignores that the zone was defined by the County of Los Angeles, not Plaintiffs (*see S. California Gas Leak Cases* (Ct. App. 2017) 18 Cal.App. 5th 581, 584), and that businesses within the zone undoubtedly incurred more damage than entities outside the zone.

The fact that *some* businesses outside the zone may have also suffered economic loss due to the SoCalGas's negligence is not a reason to deny liability to *all* of Southern California Gas's economic-loss victims. (*See Kesner*, *supra*, 1 Cal.5th at 1155 [noting that "any duty rule will necessarily exclude some individuals who, as a causal matter, were harmed by the conduct of potential defendants. By drawing the line at members of a household, we limit potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm"].)

One of the amici nonetheless insists that the five-mile limitation is meaningless because "nothing would stop others outside of that arbitrary distance from filing their own actions." (Chamber Br. at 20 fn. 29.) This argument falls into the trap of making the perfect the enemy of the good. Just as in *Kesner*, the 5-mile boundary line here "strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and

protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims." (*Kesner, supra,* 1 Cal.5th at 1155.)

C. Amici's Floodgates Argument Ignores Other Aspects of California Tort Law that Constrain Liability in Meaningful Ways.

Beyond the context of this case, amici's contention that a no-duty ELR is required to prevent limitless liability ignores that duty rules are not the only way courts constrain liability. Once a duty has been established, a plaintiff still must prove breach, proximate causation, and damages. (*See* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule* (2009) 33 Wash. & Lee L. Rev. 523 ["general principles of damages and proximate causation…guard against liability for speculative, excessive, or unforeseeable losses…] [footnotes omitted].)

This Court has repeatedly emphasized that "a finding of duty is not a finding of liability." (*Kesner*, 1 Cal.5th at 1157. *See also Cabral v. Ralph's Grocery Co.* (2011) 51 Cal.4th 764, 772-773.) At the duty stage, a court's task is merely "to determine whether [the plaintiffs' injuries were] *categorically* unforeseeable and, if not, whether allowing the possibility of liability would result in such significant social burdens that the law should not recognize such claims." (*Kesner, supra,* 1 Cal.5th at 1145 [emphasis in original].) Once a duty is found, the plaintiff *still* "must prove that the defendant breached its duty of ordinary care *and* that the breach proximately caused the [] injury." (*Id.* at 1144 [emphasis added].) On top

of that, "the defendant may assert defenses and submit contrary evidence on each of these elements." (*Ibid.*)

With regard to the relationship between duty and breach, *Cabral* emphasized that a "rejection of a [duty exception]" for a particular category of conduct" (there, parking along a freeway for rest breaks during non-emergency conditions) "does not mean all parking alongside freeways can result in negligence liability…" (*Cabral, supra*, 51 Cal.4th at 783.) To the contrary, "whether the duty of ordinary care has been breached depends on the particular circumstances, including those aggravating or mitigating the risk created…" (*Ibid.*) *Cabral* then emphasized that the defendant "offer[ed] no support for its assertion that juries cannot be trusted to weigh these considerations under the particular facts of each case, as they do in deciding negligence generally." (*Ibid.*) The same is true here: amici offer no reason why juries cannot be trusted to weigh aggravating or mitigating considerations when determining whether a duty has been breached in cases involving purely economic losses.

Proximate causation is another protection against unlimited liability. (*See J'Aire, supra*, 24 Cal.3d at 808 [holding that "the foreseeability of the injury[,] the nexus between the defendant's conduct and the plaintiff's injury[,]…and *ordinary principles of tort law such as proximate cause* are fully adequate to limit recovery without the drastic consequence of an

absolute rule which bars recovery in all such cases."] [emphasis added; citation omitted].)

"Proximate cause involves two elements." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315.) One is "cause in fact. An act is a cause in fact if it is a necessary antecedent of an event." (*Ibid.* [citing *Prosser & Keeton on Torts* (5th ed. 1984) § 41, p. 265] ["*Prosser*"].) Because "the causes of an event go back to the dawn of human events, and beyond," *Prosser, supra*, § 41 at 264 (cited in *PPG Industries, supra*, 20 Cal.4th at 315), this factor requires a showing that the defendant's act or omission was a 'substantial factor' in bringing about the injury." (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 778 [citations omitted].) The "substantial-factor" test "imposes rational limits on liability which otherwise attaches under the judiciary's expansive view of duty." (*Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 438.)

The second element of proximate causation is even more restrictive: it requires a showing that there is a "sufficient connection between the risks created by a defendant's conduct and the injury [plaintiff] suffered to hold defendants responsible." (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 196.) Multiple factors bear on this inquiry, including foreseeability and whether "intervening forces operat[e] independent of defendant's conduct." (*Prosser, supra,* § 42, at 279.)

Proximate causation would help to cabin liability in the extreme hypotheticals posed by amici. The Civil Justice Association ("CJA"), for example, posits the tired example of "the driver who carelessly switches lanes in [a tunnel] during a heavy morning work commute, causing several cars to pile-up and block the tunnel for hours." (Civil Justice Br. at 17.) CJA posits that, under Plaintiff's theory, the negligent driver could be liable to fellow travelers "destined for important airline connections where a missed flight occasioned by the negligent traffic tunnel delay may mean a lost contract or job." (*Id.*)

This hypothetical improperly assumes that foreseeability is the only limitation on proximate causation. That is not the law in California. Courts and juries also consider various policy considerations that go to whether it would be "unjust" to hold the defendant liable. (*Novak, supra,* 22 Cal.App.5th at 196-197. *See also PPG Industries, supra*, 20 Cal.4th at 315-316.) It is hard to imagine that a jury would deem it "just" to hold a negligent driver liable for economic losses suffered by a traveler who lost a significant business opportunity when she missed an airline flight as a result of a traffic delay. Indeed, it is hard to imagine such a case getting to a jury at all. (*See Novak, supra*, 22 Cal.App.5th at 198 [noting that "[a] number of courts have found, as a matter of law, that a defendant is not liable for an injury only distantly connected to a defendant's conduct].)

Proximate cause aside, the *Rowland* factors themselves would likely prevent amici's tunnel hypothetical from ever making it past the demurrer stage. *Rowland*'s second factor (degree of certainty that a plaintiff suffered injury as a result of the defendant's conduct) weighs strongly against a duty, because it would be extremely difficult—if not impossible— to know whether the delayed traveler would have really gained the job or won the contract absent the defendant's negligence.

The third *Rowland* factor, the closeness of the connection between the injury and the negligence, also weighs against a duty. Whether the commuter actually loses a job or contract will depend on the uncertain reaction of the possible employer or customer to a delay that lies outside the commuter's control. That unpredictable factor greatly attenuates the closeness of the connection between the injury and the negligence.

The fourth *Rowland* factor—moral blame—also disfavors recognizing a duty of care. Ordinary negligent driving is highly common. It is regrettable, but it is not morally offensive.

The last *Rowland* factors—the burden on the defendant, consequences to the community, and availability of insurance—supply further reasons to find an exception to the presumptive duty of care in the tunnel hypothetical. If all delayed travelers could recover their economic losses caused by a traffic accident, drivers would be saddled with enormous liability out of all proportion to fault. The cost of insuring against that

liability, if insurance were available at all, would likely be astronomical. The result would be overdeterrence, and consequent discouragement of socially beneficial driving. This outcome would be disastrous, particularly in a state where so many residents are dependent on their vehicles for daily needs.

Thus, in the tunnel hypothetical, at least *five* of the seven *Rowland* factors counsel against recognition of a duty. Amici do not explain why or how California law would impose a duty in these circumstances.

E. **If the Court is Concerned About Excessive Liability, it Could Adopt a "Particularized Foreseeability" Approach in the Stranger Context.**

But if this Court is concerned that standard rules of duty, breach, and proximate causation—on top of the *Rowland* factors—may be inadequate to the task of limiting liability in the economic-loss context, it could adopt a "particular foreseeability" test along the lines of *People Express, supra,* 495 A.2d 107. There, an airline sued a railroad for economic damages it suffered following an accident in a nearby railroad yard. After observing that "judicial reluctance to allow recovery for purely economic losses is discordant with contemporary tort doctrine," the New Jersey Supreme Court held that a defendant "owes a duty of care to take reasonable measures to avoid the risk of causing [pure] economic damages...to plaintiffs comprising *an identifiable class* with respect to whom defendant

knows or has reason to know are likely to suffer such damages from its conduct." (*Id.* at 111, 116 [emphasis added].)

In so holding, the Court emphasized that "an identifiable class of plaintiffs *is not simply a foreseeable class of plaintiffs*." (*Id.* at 116 [emphasis added].) Thus, for example, "persons traveling on a highway near the scene of a negligently caused accident...[w]ho are delayed in the conduct of their affairs and suffer varied economic losses"—exactly the hypothetical discussed above—would *not* be entitled to recovery, because their "presence within the area would be fortuitous, and the particular type of economic injury that could be suffered by such persons would be hopelessly unpredictable and not realistically foreseeable." (*Ibid.*)

Rather, *People Express* held, "[a]n identifiable class of plaintiffs must be *particularly foreseeable* in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted." (*Id.* [emphasis added]. *See also id.* at 116-117 [giving illustrative examples of particularized foreseeability in economic-loss context].)

Amici criticize *People Express* as an ill-advised "minority rule" (*see* Chamber Br. at 14), suggesting that adoption of a similar approach here would inevitably lead to "increased costs for litigants, the judicial system, the state economy, and every resident in the state, with little benefit." (*Id.*

at 30.) Yet amici present no evidence—none—that the *People Express* rule has proven the least bit unworkable in practice, either in New Jersey or in Alaska, which adopted the *People Express* approach two years later, in 1987. (*See Mattingly v. Sheldon Jackson College* (Alaska 1987) 743 P.2d 356, 360.)

In fact, an analysis of the caselaw in New Jersey since *People Express* refutes the "floodgates" argument that SoCalGas and amici repeat time and again. Research has revealed only *seven* cases since 1985 applying *People Express* in which the court recognized a duty of care to prevent purely economic damages inflicted on a "stranger." Tellingly, three involve environmental disasters.[7]

The other four cases involve other types of economic losses caused by negligence. (*See Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Grp., Inc.* (N.J. 1994) 638 A.2d 1288, 1289 [insurance broker had duty of care to insurance beneficiaries to select financially secure insurer]; *Lone*

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[7] *See Donald Wilson v. Consol. Rail Corporation; Owen Haynes (In re Paulsboro Derailment Cases)* (D.N.J. Oct. 4, 2013) No. CIV. 12-7586 RBK/KMW, 2013 WL 5530046, at *4 (railway and transportation companies that caused a train to derail and release vinyl chloride had duty of care to local businesses located near the spill for their economic losses); *Paulsboro Pub. Sch. v. Consol. Rail Corporation; Walter C. Quint* (*In re Paulsboro Derailment Cases*) (D.N.J. June 8, 2015) No. 13-784 RBK/KMW, 2015 WL 3545247, at *4 (same companies had duty of care to area schools); *Complaint of Nautilus Motor Tanker Co., Ltd.* (D.N.J. 1995), 900 F. Supp. 697, 705 (motor tanker that caused oil spill liable to berth operator for its economic losses when tanker ran aground after nearby oil spill).

Star Nat. Bank, N.A. v. Heartland Payment Sys. Inc. (5th Cir. 2013) 729 F.3d 421, 423 [applying New Jersey law and holding that processor of credit-card transactions had a duty to credit-card issuer banks for losses resulting from data breach]; *Kurash* v. *Layton* (Law. Div. 1991) 251 N.J. Super. 412, 415 [holding defendant liable to neighbor for veterinarian bills caused by dog assault].)[8]

The same is true in Alaska, post-*Mattingly*. Research has revealed only two Alaska cases since 1987 holding, under *Mattingly,* that a defendant has a duty to prevent purely economic damages inflicted on a

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[8] Courts applying the *People Express* framework have also refrained from finding liability for economic losses for various reasons, including absence of breach (*see Moskow v. K. Hovnanian at Jackson, LLC* (N.J. Super. Ct. App. Div. Aug. 3, 2012) No. A-6114-10T3, 2012 WL 3140241, at *11 [developer did not breach duty of care to homebuyers for improper tax assessment of plaintiffs' property where developer had no control over tax assessment]; availability of contract remedy (*see Boyes v. Greenwich Boatworks, Inc.* (D.N.J. 1998) 27 F.Supp.2d 543, 549 [contract law was proper remedy for defective fishing boat that failed to meet performance standards]); failure to establish proximate cause (*see Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.* (D.N.J. 2000) 123 F.Supp.2d 245, 264, *aff'd*, (3d Cir. 2001) 273 F.3d 536 [causation too attenuated to substantiate county's negligence claim against gun manufacturers for negligent marketing]); or where economic injuries were neither particularly foreseeability nor identifiable due to lack of proximity between parties. (*See Paramount Aviation Corp. v. Augusta* (D.N.J. Dec. 2, 2003) No. CIV.A.91-4954 (DMC), 2003 WL 25265596, at *8, *aff'd*, (3d Cir. 2005) 124 F.App'x 85 [helicopter manufacturer had no duty to lessee of helicopter involved in crash where manufacturer's operations were geographically and causally removed from lessee's charter company].)

"stranger."[9] Similarly, courts applying *Mattingly* have also refrained from finding liability for economic losses for various reasons, such as the availability of a contract remedy.[10]

In short, neither Alaska nor New Jersey has experienced any kind of a liability explosion in the wake of the decisions in *People Express* and *Mattingly*. As time has passed, moreover, a growing number of state courts have joined New Jersey and Alaska in refusing to draw bright-line rules against recovery of economic losses. (*See infra* at Part IV.) If a bright-line no-duty rule were necessary to constrain limitless liability, then surely the floodgates would have opened in one of the many jurisdictions that allows recovery of stand-alone economic losses. Tellingly, they have not.

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[9] *See S. Peninsula Hosp. v. Xerox State Healthcare LLC* (D. Alaska 2016) 223 F.Supp.3d 929, 933 (healthcare service could be liable in negligence for healthcare providers' economic losses caused by service's failure to take reasonable care in designing and implementing health service); *Municipality of Anchorage v. Integrated Concepts & Research Corp.* (D. Alaska Oct. 31, 2016) No. 3:13-CV-00063-SLG, 2016 WL 6471010, at *12 (denying defendant's motion for summary judgment for purely economic losses against municipality for defectively designing and constructing port expansion in stranger context because of factual dispute as to whether defendants should have foreseen that municipality was particularly foreseeable plaintiff).

[10] *See, e.g., St. Denis v. Dep't of Hous. & Urban Dev.* (D. Alaska 1995) 900 F. Supp. 1194, 1201 (holding that a plaintiff claiming that product was defective and seeking only damages for economic loss must sue in contract); *Land Title Co. of Alaska v. Anchorage Printing Inc.* (Alaska 1989) 783 P.2d 767, 769 (holding that escrow agent of seller in real estate deal did not have duty to perform gratuitous undertaking in addition to duty under contract).

F. **Amici's Argument that a No-Duty Version of the ELR is Needed to Protect California's Privately Owned Utilities Lacks Merit.**

The Private Utilities argue that "exposing California's privately owned utilities...to untethered liability" would "jeopardize their financial health," force them to "limit their activities and the scope of their services," and actually "set back California's environmental agenda" because Private Utilities "will not have the resources to make other socially beneficial investments in California. (Private Utilities Br. at 17-19.) These arguments fail on several levels.

First, amici ignore the standard of care in this case, which places a natural limit on the extent of any future liability. Unlike private utilities' exposure for wildfire damage, which is subject to the strict-liability standard applicable in inverse-condemnation cases, *see Pacific Bell Telephone Co. v. Southern California Edison Co.* (2012) 208 Cal.App.4th 1400, 1408, Plaintiffs seek to impose liability for SoCalGas's failure to exercise reasonable care. To avoid liability, utilities merely have to exercise due diligence with regard to their underground storage facilities.

Second, and relatedly, amici's contention that tort liability would spell economic ruin is contradicted by their contention that "the [existing] regulatory framework" governing "the type of businesses engaged in by [a]mici" provides "*strong incentives* deterring them from inflicting harm on others and, relatedly, prompting them to invest in safety measures." (Public

Utilities Br. at 14 [emphasis added].) If amici already have "strong incentives" to behave themselves, then they have nothing to fear from potential liability for negligent misconduct. But to the extent these "strong incentives" are insufficient to deter disasters like Aliso Canyon, then allowing lawsuits like this one would further the goal of preventing future harm. (*See Kesner, supra*, 1 Cal.5th at 1150.)

Third, holding bad actors like SoCalGas liable for damages caused by exploding gas wells substantially furthers California's "overriding policy" of preventing disasters like Aliso Canyon from recurring in the future. Senate Bill 887, the legislation enacted in response to the Aliso Canyon blowout, *see* Pub. Res. Code § 3180, emphasized that "safe operation of gas storage wells…*is essential in order to provide for public, environmental, and occupational health and welfare*…" (*See* 2016 Cal. Legis. Serv. Ch. 673 (S.B. 887) at Section 1[b] [filed Sept. 26, 2016] [emphasis added].)[11]

Fourth, and finally, amici have provided no reason to believe that cases like this one would seriously threaten their bottom lines. Instead, they merely assert that certain amici "currently face increasingly hostile

[11] Senate Bill 887 further stated that "[t]he standards for natural gas storage wells *need to be improved* in order to reflect 21st century technology, disclose and mitigate any risks associated with those wells, recognize that these facilities may be in locations near population centers, and ensure a disaster like Aliso Canyon leak does not happen again." (*Id.* at Section 1[i] [emphasis added].)

capital markets." (Private Utilities Br. at 20 fn. 33). Amici neglect to point out that the defendant in *this* case, SoCalGas, is the wholly owned subsidiary of the country's largest natural gas company, Sempra Energy, which is not exhibiting any signs of financial peril. According to Sempra's 2016 SEC 10-K filing, the aggregate market value of company's stock is $28.4 *billion.* (Plaintiffs' RJN Exhibit E at 2.)

In short, amici's argument that this lawsuit would "jeopardize California's ability to retain businesses in-state and secure economic growth" smacks of hyperbole. This Court has never allowed such unsupported predictions to form the basis for a categorical, no-duty exception to Section 1714(a)'s presumptive duty of care. (*See Kesner, supra*, 1 Cal.5th at 1144; *Novartis, supra*, 4 Cal.5th at 163.) It should not do so now.

IV. California's Approach to the ELR Is Consistent with the Rule in Most Other Jurisdictions.

Amici, like SoCalGas, contend that Plaintiffs seek a "minority" version of the ELR that would make California an outlier jurisdiction. (*See* Chamber Br. at 21 [arguing that "[t]he vast majority of jurisdictions apply the [ELR] to bar negligence actions for purely economic losses, either outright or with narrow exceptions such as when a 'special relationship' exists between the parties."].) That contention is just wrong. In reality, most states, like California, have merely adopted some version of the ELR

in the *transactional* context. These states' case law indicates, moreover, that jurisdictions that apply the ELR to transactional cases would *not* impose a blanket ban on economic losses in stranger cases.[12] While only a few states have had the opportunity to directly address the availability of stand-alone economic losses in stranger cases, state courts are increasingly confining the ELR to product-liability cases, to cases where the parties are enmeshed in a contract or web of contracts, or to some subset of those cases.

The ELR is being limited, in short, to the transactional context—a result that logically precludes its application to the stranger context. What is more, other states, while often applying the ELR to the transactional context, have explicitly *declined* to apply the ELR to stranger cases. That is a result consistent with this Court's prior rulings in this area, and it is the best approach from a policy perspective.

A. Twenty-Four States Have Either Limited the ELR to the Transactional Context or Have Never Applied the ELR Outside That Context.

1. A number of states limit the ELR to the transactional context.

Over the past two decades, several states have expressly limited the ELR to cases that involve a contract, in recognition that the rule is intended

[12] Plaintiffs' survey focuses on decisions from state courts, rather than *Erie* decisions by federal courts, since the latter decisions can merely predict, rather than establish, state law. Plaintiffs cite federal decisions only insofar as they discuss the legal questions that state courts have or have not yet decided.

to protect the contractual allocation of risks. The Arizona Supreme Court, for example, has recently held that the ELR "protects the expectations of contracting parties, but, *in the absence of a contract, it does not pose a barrier to tort claims that are otherwise permitted by substantive law.*" (*Sullivan v. Pulte Home Corp.* (Ariz. 2013) 306 P.3d 1, 3 [emphasis added].)

Intermediate appellate courts in Indiana, Michigan, and North Carolina have limited the ELR in the same way, holding that the rule only applies where there is an underlying contract. (*See Quest Diagnostics, Inc. v. MCI WorldCom, Inc.* (Mich. Ct. App. 2002) 656 N.W.2d 858, 863-864 ["[F]or the [ELR] to bar recovery in tort, there must be a transaction that provides an avenue by which the parties are afforded the opportunity to negotiate to protect their respective interests."]; *accord KB Home Indiana Inc. v. Rockville TBD Corp.* (Ind. App. 2010) 928 N.E.2d 297, 304-306 (because the core purpose of the ELR is "to maintain the fundamental distinction between tort law and contract law," the rule did not preclude negligence claim for economic losses] [citation omitted]); *Lord v. Customized Consulting Specialty, Inc.* (N.C. App. 2007) 643 S.E.2d 28, 33 ["Because there was no contract between [plaintiffs and defendants], we further find that the [ELR] does not apply…"].)

In other jurisdictions, the ELR is even more limited in scope: application of the ELR requires not only that a contract *exist* between the parties, but also that the plaintiff's claims arise out of a breach of a purely

contractual duty. Only if both conditions are satisfied will the ELR be applied. (*See Donatelli v. D.R. Strong Consulting Engineers, Inc.* (Wash. 2013) 312 P.3d 620, 623-24 [parties to contract may be liable for purely economic damages if they breach a duty "arising independently of the terms of the contract"]; *accord Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC* (Ky. 2017) 540 S.W.3d 770, 791-92; *David v. Hett* (Kan. 2011) 270 P.3d 1102, 1109, 1114-1115; *Hermansen v. Tasulis* (Utah 2002) 48 P.3d 235, 240; *Town of Alma v. AZCO Construction, Inc.* (Colo. 2000) 10 P.3d 1256, 1262; *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.* (S.C. 1995) 463 S.E.2d 85, 88.)

2. A number of states only apply the ELR to a subset of transactions.

In recent years, other states have adopted a still narrower approach, limiting the ELR to a *subset* of transactional cases—*i.e.*, solely to the product-liability context. In 2013, for example, the Florida Supreme Court noted that the ELR can be traced to *Seely, supra,* which foreclosed recovery of economic losses in the product-liability context on the ground that a product's warranty already allocates risks between parties. (*Tiara Condominium Assn., Inc. v. Marsh & McLennan Cos.* (Fla. 2013) 110 So.3d 399, 407 [citing *Seely, supra,* 63 Cal.2d at 19].) Rejecting an "unprincipled extension of the rule" outside its origins in product-liability law, *Tiara* held that "the economic loss rule applies *only* in the products

liability context." (*Ibid.*) Minnesota has reached the same result by statute. (*See* Minn. Stat. § 604.101 [limiting rule to product-liability context].)[13]

Nebraska's Supreme Court had come to a similar conclusion the year before. It "expressly limit[ed] the doctrine's application" to "products liability" or cases "where the alleged breach is only of a contractual duty." (*Lesiak v. Central Valley Ag Co-op., Inc.* (Neb. 2012) 808 N.W.2d 67, 82.)

Meanwhile, two other states—New Mexico and Rhode Island—limit the ELR to a *different* subset of transactional cases: commercial—as opposed to consumer—transactions. (*See In re Consol. Vista Hills Retaining Wall Litig.* (N.M. 1995) 893 P.2d 438, 446 ["damages for such economic losses *in commercial settings* in New Mexico may only be recovered in contract actions."] [citation omitted; emphasis added]; *Rousseau v. K.N. Construction, Inc.* (R.I. 1999) 727 A.2d 190, 193 ["We explicitly limit [the ELR] to commercial transactions....We conclude...that the economic loss doctrine is not applicable to consumer transactions".)[14]

In keeping with *this* Court's jurisprudence, these states' limitations are grounded in the main rationale for the ELR: protecting contractual

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[13] The Minnesota decision cited by the Chamber (Br. at 21, fn. 6) is not to the contrary, because it arose from a transactional context. (*See D & A Development Co. v. Butler* (Minn. Ct. App. 1984) 357 N.W.2d 156 [real estate developer's suit against designer and architect].)
[14] The New Mexico case cited by the Chamber (Br. at 21) is inapposite, because it arose from a commercial transaction where the defendant had hired the plaintiff. (See *National Roofing, Inc. v. Alstate Steel, Inc.* (N.M. Ct. App. 2015) 366 P.3d 276.)

allocations of risk. Thus, Rhode Island's Supreme Court noted that, while it would hold sophisticated *commercial* entities to their bargains, it would "provid[e] increased protection" to *consumers* against commercial entities with more bargaining power. (*Id.*) The New Mexico high court similarly limited the ELR to "commercial transactions, when there is no great disparity in bargaining power of the parties," to "allow commercial parties to freely contract." (*Vista Hills Retaining Wall, supra*, 893 P.2d at 446 [quotation marks and citation omitted].)

3. **A number of states have never applied the ELR outside the transactional context.**

While not expressly limiting the ELR to the transactional context, at least nine states have *impliedly* done so by never applying the ELR to anything *but* transactional cases. (*See In re Syngenta AG MIR 162 Corn Litigation* (D. Kan. 2015) 131 F.Supp.3d 1177, 1198-1206 [noting that Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, and Wisconsin, among others, have not applied the ELR to the stranger context]; *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP* (Md. 2017) 155 A.3d 445; *Israel Discount Bank of New York v. First State Depository Co.* (Del. Ch. Sept. 27, 2012) No. 7237-VCP, 2012 WL

4459802; *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc.* (Me. 1995) 659 A.2d 267.)[15]

These jurisdictions apply the ELR to the transactional context to preserve the line between contract and tort and encourage contracting parties to privately allocate risk. (*See, e.g.*, *Grams v. Milk Products, Inc.* (Wis. 2005) 699 N.W.2d 167, 171 [ELR's purpose is "to maintain the fundamental distinction" between tort and contract, preserve parties' freedom to allocate risk, and to encourage "the commercial purchaser" to "assume, allocate, or insure against that risk"].) These reasons, of course, do not apply in the stranger setting.

B. Several States Have Expressly Precluded Blanket Application of the ELR in the Stranger Context.

Finally, several states have *expressly* rejected the ELR in the stranger context. As discussed above, Alaska and New Jersey have both explicitly refused to apply SoCalGas's bright-line no-duty rule to stranger cases. (*See Mattingly, supra,* 743 P.2d at 360; *People Express, supra,* 495 A.2d at 116.)

[15] This list is almost certainly underinclusive. In an abundance of caution, Plaintiffs have excluded states that, although they have not *applied* the ELR outside the transactional context, have *stated* the rule in arguably broader terms. For example, while Idaho has applied the rule only to transactional cases, it has stated that "[u]nless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another." (*Blahd v. Richard B. Smith, Inc.* (Idaho 2005) 108 P.3d 996, 1000; *see also City Express, Inc. v. Express Partners* (Haw. 1998) 959 P.2d 836, 839 ["The [ELR] bars recovery in tort for purely economic loss."].)

West Virginia, too, has rejected a bright-line ELR in the stranger context. (*See Aikens v. Debow* (W.Va. 2000) 541 S.E.2d 576, 589-91 ["*Aikens*"].) *Aikens* held that where a "special class of plaintiffs" is "particularly foreseeable to the tortfeasor," there exists a "special relationship" supporting liability for economic loss. (*Id.* at 590; *see also id.* at 592 (conc. opn. of Starcher, J.) ["I applaud the majority opinion's…recognition that a tortfeasor may owe a certain, clearly foreseeable party a duty of due care to avoid causing 'an interruption in commerce' which results in purely economic loss."].)[16]

Tellingly, New Jersey, Alaska, and West Virginia have reached these results in stranger cases while *also* applying the ELR to certain transactional contexts. (*See Geotek Alaska, Inc. v. Jacobs Engineering Group, Inc.* (Alaska 2015) 354 P.3d 368, 378-379 [barring recovery of economic losses in a transactional case]; *Dean v. Barrett Homes, Inc.* (N.J. 2010) 8 A.3d 766, 776 [ELR precluded homeowners from recovering costs

[16] SoCalGas's amici rely heavily on *Aikens* (*see* Chamber Br. at 21, 23; Civil Justice Br. at 17), which actually *rejected* the bright-line no-duty version of the ELR advocated by SoCalGas and most of its amici. That *Aikens* ultimately denied recovery on its facts, which involved the closure of a bridge, is of no moment, in light of the factual differences between this case and *Aikens*. Specifically, in *Aikens*, liability had no natural geographical stopping place and would have imposed vastly disproportionate liability on a single negligent truck driver. Here, by contrast, liability is limited to the geographically bounded evacuation zone surrounding Aliso Canyon. Nor would liability be disproportionate to SoCalGas's fault—indeed, if anything, just the opposite is true, given the company's allegedly gross negligence. (*See* RBOM 2-3, 13-14, 15-16 & fn. 14.)

of replacing defective siding]; *Capitol Fuels, Inc. v. Clark Equipment Co.* (W. Va. 1989) 382 S.E.2d 311, 313 [economic losses barred in product-liability cases except where they arise from a sudden calamitous event].) These cases, along with all the other cases limiting the ELR to the transactional context, illustrate the fallacy in amici's citations to transactional case law: application of the ELR in a transactional context by no means requires—or even suggests—its application outside that context.

More recently, in a case involving a chemical spill that kept customers away from several nearby businesses, the Louisiana Court of Appeal held that the trial court erred by failing to apply the normal rules of tort law in determining that those businesses could not recover for lost income. (*Cedarholley Investment, LLC v. Pitre* (La. Ct. App. 2016) 209 So.3d 850, 853.)

Likewise, the Arkansas Supreme Court, while not mentioning the ELR by name, affirmed an award of purely economic damages where the plaintiffs and the defendant were strangers. In *Mine Creek Contractors, Inc. v. Grandstaff* (Ark. 1989) 780 S.W.2d 543, the plaintiffs owned a gas station that lost profits because a construction company hired by the state to repair a bridge had done its work negligently. The court allowed the plaintiffs to recover its lost profits. (*See also Erdman Co. v. Phoenix Land & Acquisition, LLC* (W.D. Ark. Feb. 25, 2013) No. 2:10-CV-2045, 2013

WL 685209, at *2-3 [stating that Arkansas has not yet applied the ELR to *any* case].)

Finally, Montana has rejected the ELR outright, stating that "the clear trend in other jurisdictions is to allow a negligence action for economic loss without direct privity of contract." (*Jim's Excavating Service, Inc. v. HKM Associates* (Mont. 1994) 878 P.2d 248, 253.) By rejecting the ELR altogether, Montana necessarily rejected its application to the stranger context.

The upshot, then, is that *15* states have limited the ELR to the transactional context, *nine* states have never applied the ELR outside that context, and *six* have expressly rejected its application to the stranger context. A majority of states—*30* in total—do not apply the type of bright-line no-duty rule advocated by SoCalGas and most of its amici.

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Amici nonetheless argue that "[t]he vast majority of jurisdictions apply the economic loss doctrine to bar negligence actions for purely economic losses." (Chamber Br. at 21 & fn. 6.) In so doing, they get the case law wrong by failing to distinguish between transactional and stranger cases. While most jurisdictions apply the ELR to *transactional* cases, they have *not* done so in the stranger context, which presents a very different jurisprudential picture.

Thus, as explained above, many jurisdictions have expressly limited the ELR to the transactional context—which, by necessary implication, means that it *cannot* apply to the stranger context. Amici overlook that logical inference when they assume that these jurisdictions would apply the ELR not only to transactional cases, but also to the stranger context.

Other states, meanwhile, have simply never applied the ELR outside the transactional context, and their reasoning—protecting the private ordering of risk—suggests that these courts would *not* apply the ELR in the stranger setting. Amici make the opposite assumption, but the reasoning of these cases belies their conclusion.

And finally, out of those jurisdictions that *have* directly addressed stranger cases, *six* have expressly rejected the ELR's blanket application to that context. This case law, taken as a whole, means that a supermajority of American jurisdictions either do not or would not apply a bright-line no-duty rule to cases like this one.

In the final analysis, then, it is SoCalGas and its amici, not Plaintiffs, who are advocating a minority position. Only a handful of jurisdictions—Connecticut, the District of Columbia, Illinois, Iowa, Massachusetts, New York, and Pennsylvania (*see* Chamber Brief at 21, fn. 6)—have squarely foreclosed the recovery of purely economic losses in the stranger context.

Critically, none of the these seven jurisdictions appears to have anything like Civil Code Section 1714(a)'s presumptive duty of care. The

persuasiveness of decisions from those jurisdictions is limited, given the importance of Section 1714(a) to the analysis here. (*See, e.g.*, *supra* at Part I.)

Further, in at least four of these states (Illinois, Iowa, New York, and Pennsylvania), recognition of a duty of care often depends on a preexisting relationship between the plaintiff and the tortfeasor. (*See Kesner*, *supra*, 1 Cal.5th at 1162 [surveying the law of New York, Illinois, and Pennsylvania]; *see also Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 698.)

In light of the legal importance those states place on a relationship, it makes sense that those these four states have adopted a broad version of the ELR. But "the *irrelevance* of the relationship between the plaintiff and the defendant" to the duty analysis "is the central holding of *Rowland*." (*See Kesner*, *supra*, 1 Cal.5th at 1163 [emphasis added].) That analytical difference matters, for the question here is whether the Court should recognize a duty of care in the *absence* of a relationship between the parties.

In the majority of other jurisdictions, the ELR would provide no barrier to recognizing such a duty of care, because the courts have only applied the ELR in the transactional setting. Such a holding in this case would put California squarely in the mainstream of case law on this issue.

V. **The Restatement Does Not Justify a Departure from Longstanding California Law.**

Finally, an *amicus* brief filed by three California tort scholars ("Tort Scholars") argues that the not-yet-published Third Restatement of Torts (the "Restatement") obligates courts to "reject a claim in the absence of a specific duty rule." (Tort Scholar Br. at 13.) This argument should be rejected for several reasons, as explained below.[17]

As a threshold matter, however, it is worth noting that the Tort Scholars do not defend—nor do they advocate—the type of bright-line no-duty rule sought by SoCalGas and its other amici. Instead, they urge this Court to adopt a presumptive no-duty rule subject to certain exceptions—an approach they argue is supported by the new Restatement. That SoCalGas's own Tort Scholars do not defend the company's radical no-duty approach is highly telling, in and of itself.

But beyond that, the Tort Scholars argue that Section 7 of the Restatement—which is heavily relied on by SoCalGas (*see* ABOM at 28, 29, 30, 35, 50)—does not apply *at all* to this lawsuit. (*See* Tort Scholars' Br. at 27-28 [arguing that the "categorical no-duty rule in Section 7," which

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[17] The Tort Scholars' brief, notably, was not joined by the actual Reporter to the Restatement—Dean Ward Farnsworth. Instead, it was submitted on behalf of three law professors who constitute only two of the Restatement's 33 Advisors (Profs. Gergen and Keating) and only one of the more than 200 scholars and practitioners who served on the Restatement's "Members Consultative Group" (Prof. Sugarman). (*See* https://www.ali.org/projects/show/torts-liability-economic-harm-3rd/#_participants.)

precludes a plaintiff from recovering for economic loss caused by in unintentional injury to another person or to the property of another person, "would not apply to the claim" in this case].) They further admit that Restatement Section 3, which sets forth the classic formulation of the ELR (i.e., that "there is no liability in tort for economic loss caused by the negligence in the performance or negotiation of a contract between the parties" [*id.* at 30]), "is not pertinent to this case." (*Ibid.*)

Having conceded away a substantial portion of SoCalGas's position, the Tort Scholars proceed to make an argument that SoCalGas and its other amici do not advance: that Plaintiffs' lawsuit *should* be analyzed (and then dismissed) under Section 8 of the Restatement, which governs "public-nuisance" claims—even though this lawsuit seeks recovery for negligence, not nuisance. This argument, too, fails on its merits. (See *infra* at Part D.)

A. **The Tort Scholars' Presumptive No-Duty Approach is Contrary to California Law.**

The Tort Scholars' position, boiled to its essence, is that the Court should *presume* the absence of a duty in all cases involving purely economic losses, making exceptions only in certain categories of cases. The first—and most fatal—flaw in this argument is that a presumptive "no-duty" approach is directly contrary to Section 1714(a), which recognizes a presumptive duty of care that may *only* be overcome where an exception is

"clearly supported by public policy." (*Rowland, supra,* 69 Cal.2d at 112; *see also J'Aire*, *supra*, 24 Cal.3d at 806 fn. 3.)

Like SoCalGas's other amici, the Tort Scholars do not even acknowledge Section 1714. Instead, they argue that "[t]his Court's caselaw is consistent with the Third Restatement of Torts [because] [i]t makes the background principle for negligence claims involving pure economic loss one of no duty." (Tort Scholar Br. at 11. *See also id.* at 13-14 [same, citing *Quelimane, supra*, 19 Cal.4th at 57, and *Centinela*, *supra*, 1 Cal.5th at 1013].)

That is incorrect. This Court—in keeping with the majority of courts in other jurisdictions (*see supra* at Part IV)—has recognized such a "background principle" only in the context of *transactional* cases (*i.e.*, those involving contracts or warranties). (*See supra* at Part I.) *J'Aire*, moreover, strongly suggests that there should be no presumptive limitation on claims for stand-alone economic loss outside the transactional context. (*See id.*)

It is also telling that the Tort Scholars do not mention *J'Aire,* even though the Restatement specifically identifies *J'Aire* as *contrary* to the Restatement's presumptive no-duty approach. Thus, Section 1 includes a number of "Illustrations" to show how its presumptive no-duty approach should work in practice. The accompanying Reporter's Note explains that

Illustration 3 is directly based on *J'Aire*, "but with a different [and opposite] result." (Reporters' Note cmt. [e].)[18]

Whatever one thinks about the Reporter's characterization of *J'Aire* as wrongly decided (it was not), this Court has never hesitated to chart its own path in the realm of tort law, even where doing so was inconsistent with a majority of other courts and/or a Restatement of Law. (*See, e.g., Novartis, supra*, 4 Cal.5th at 191-192 ["We do not doubt the wisdom of crowds in some settings. But the value of an idea conveyed by or through a crowd depends not on how loudly it is proclaimed or how often it is repeated, but on its underlying merit relative to the specific issue at hand."]; *Kesner, supra*, 1 Cal.5th at 1163-1164 [rejecting other states' restrictive approaches to tort liability that "begin[ ] from a principal of tort law this Court has long rejected"].)

B. A Presumptive No-Duty Approach is Inconsistent with *Rowland*'s Approach to Determining the Existence of a Duty.

The Tort Scholars' presumptive no-duty approach is also in tension with *Rowland, supra*, which rejected a common-law approach to determining tort liability based on distinct "duty" categories reflecting the status of the plaintiff vis-à-vis the defendant. *Rowland* discarded these

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[18] The Reporter's Note goes on to state that *J'Aire*'s conclusion is "questionable," citing a federal bankruptcy decision (*In re County of Orange* (C.D. Cal. 1997) 245 B.R. 138, 149) and a law review article from 1986.

"ancient" distinctions as archaic and confusing, holding instead that Section 1714(a)'s presumptive duty applies across-the-board to all comers, subject to exceptions only where "clearly supported by public policy." (69 Cal.2d at 112.)

The approach of the Restatement is strikingly reminiscent of the "archaic and confusing" approach rejected in *Rowland.* Section 1 generally provides that there is no duty of care "to avoid the unintentional infliction of economic loss on another." The remainder of the Restatement sets forth a hodgepodge of categorical *exceptions* to this general rule, based on either the status of the plaintiff, the type of defendant, or the relationship between the two.[19]

This approach to tort liability is exactly the sort of categorical hair-splitting that was rejected in *Rowland.* (*See Kesner*, *supra*, 1 Cal.5th at 1163 [noting that "the irrelevance of the relationship between the plaintiff and the defendant is the central holding of *Rowland*"].) It does not fare any better in the economic-loss context.

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[19] Thus, for example, Section 4 exempts "professional negligence resulting in economic loss"; Section 5 exempts claims for "negligent misrepresentation"; Section 6 exempts "negligent performance of services"; and Section 8 exempts "public nuisance resulting in economic loss. (The remaining Sections are not exemptions: Section 2 defines economic losses; Section 3 precludes "tort liability arising from contract"; and Section 7 bars economic-loss claims arising out of injury to someone else's person or property.)

The Restatement's drafters are perhaps not to be faulted for this approach, given that the ELR has long been viewed as a "potent source of confusion" in the law. (Reporter's Note to Section 1 at [a].) As the Restatement's Reporter (Dean Farnsworth) explains, "[c]ourts have long assumed, often without much discussion, that no recovery can be had in tort for certain types of economic loss." (*Ibid.*) This "assumption"—which, the Reporter notes, was rooted in *transactional* cases like *Seely, supra*, 63 Cal.2d at 9—"created uncertainty about whether well-established causes of action still were valid." (*Ibid.*)

This "uncertainty," in turn, led to courts adopting a mishmash of exceptions to the ELR over time, in order to ameliorate the harsh and counterproductive effects of a bright-line no-duty ELR. The Restatement represents an attempt to sort this jumble into something resembling a coherent framework. Whatever one thinks about the workability of that attempt, it is dramatically inconsistent with *Rowland*'s categorical rejection of an approach to tort liability: an approach that presumes the *absence* of a duty subject to exceptions based on the relationship between the tortfeasor and the injured party.

C. <u>Plaintiffs' Claims Fall Within the Restatement's "Residual-Duty" Exception.</u>

The Tort Scholars' reliance on the Restatement as a basis for denying Plaintiffs' claims is further undermined by the fact that the

Restatement contains an exception for "residual duties" that fits this lawsuit like a glove. As Plaintiffs' have explained (RBOM at 21), this exception applies where liability for stand-alone economic losses is "not more troubling than it would be in cases of physical harm: the set of potential plaintiffs is compact, and the size of potential liability to them is clear and proportionate to the defendant's culpability." (Restatement Section 1, cmt. [e].) For all the reasons previously argued (RBOM at 22), that is this case.

SoCalGas's Tort Scholars concede that the Restatement's exception for "residual claims" could be applied to this case. (Tort Scholars' Br. at 15.) But they argue that even though Plaintiffs' claims *could* be analyzed under Section 1's residual-claims category, the Court *should* analyze them under Section 8, which addresses public nuisance. (*Id.* at 15 [stating that "little turns on whether the claim is analyzed under Section 1 or Section 8 for the principles in Section 8 implement the principles in Section 1"].)

This argument is puzzling, because Plaintiffs have not sought to recover under a public-nuisance theory; instead, they merely seek to recover under standard principles of negligence. The Tort Scholars' contention that there is an "advantage" to analyzing Plaintiff's claims under Restatement Section 8 because it "focuses on the relevant principles" (*id.*) disregards the way this lawsuit is pled.

The Tort Scholars' argument also ignores that, where a nuisance claims alleges negligence by the defendant, the claim essentially *must*

become one of negligence. "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence.'" (*City of Pasadena v. Super. Ct.* (2014) 176 Cal. Rptr. 3d 422, 428 [citations omitted].) "However, where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved." (*Ibid.* [citations omitted].) (*See also El Escorio Owners' Ass'n v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1349 [under California law, "[w]here negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim."].) The Tort Scholars' suggestion that there is a meaningful distinction between negligence and nuisance in a case like this one, involving alleged negligence on the part of the defendant, does not accurately reflect California law.

But even if one were to accept the Tort Scholars' approach, ignore the way this lawsuit is pled, *and* ignore the residual category of Section 1, there would *still* be room for Plaintiffs to recover under the Restatement's approach. As the Tort Scholars admit, the bottom-line question under Section 8 is "whether permitting the plaintiffs' claim would multiply the amount of litigation or the defendant's liabilities unduly, and whether plaintiffs who are allowed to sue can be separated in a principled fashion from those who are not." (*Id.* at 17-18 [quoting Tentative Draft No. 2 (April 7, 2014), at 29].)

Neither concern is present here. Taking into account all of the *Rowland* policy factors—in particular, foreseeability, moral blame, prevention of future harm, burden on the defendant, and availability of insurance—allowing Plaintiffs to recover their damages would not multiply SoCalGas's liability "unduly." And the five-mile relocation zone established by the County of Los Angeles is almost tailor-made for separating Plaintiffs from businesses outside the zone "in a principled fashion." Thus, even if this Court were to apply the Restatement in the manner urged by the Tort Scholars, this lawsuit would still state viable claims against SoCalGas.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to reverse the decision below and find that SoCalGas owes Plaintiffs a duty of care to prevent foreseeable economic losses resulting from its negligent failure to prevent the catastrophic gas-well explosion at Aliso Canyon.

Dated: October 26, 2018

Respectfully submitted,

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CERTIFICATE OF LENGTH OF BRIEF

The text of this Plaintiffs' Consolidated Answer Brief in Response to Amici Briefs Filed in Support of SoCalGas, including footnotes, consists of 13,856 words. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

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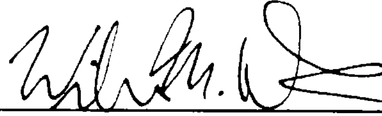

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