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In the

Supreme Court

of the

State of California

SUPREME COURT
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SOUTHERN CALIFORNIA GAS LEAK CASES

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

RESPONDENT SOUTHERN CALIFORNIA GAS COMPANY'S RESPONSE TO BRIEFS OF *AMICI CURIAE*

JAMES J. DRAGNA (SBN 91492)
DAVID L. SCHRADER (SBN 149638)
YARDENA R. ZWANG-WEISSMAN (SBN 247111)
MORGAN, LEWIS & BOCKIUS, LLP
300 South Grand Avenue, Suite 2200
Los Angeles, California 90071-3132
(213) 612-2500 Telephone
(213) 612-2501 Facsimile
jim.dragna@morganlewis.com
david.schrader@morganlewis.com
yardena.zwang-weissman@morganlewis.com

*KATHLEEN M. SULLIVAN (SBN 242261)
DANIEL H. BROMBERG (SBN 242659)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065
(650) 801-5000 Telephone
(650) 801-5100 Facsimile
kathleensullivan@quinnemanuel.com
danbromberg@quinnemanuel.com

Attorneys for Respondent Southern California Gas Company

COUNSEL PRESS · (213) 680-2300

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INTRODUCTION

The four amicus briefs filed in support of the Plaintiffs do not accurately describe the economic loss doctrine under current California law, and fail to make any persuasive policy argument for the radical change to that law they advocate. This Court should reject their arguments and instead rely on the correct and practical arguments made by the amici who have filed in support of Respondent Southern California Gas Company ("SoCalGas").[1]

The Plaintiffs' four amici argue that California law imposes a sweeping duty of care that extends even to preventing purely economic loss, subject to only a narrow no-duty exception where a harm arises from a contract or transaction. That turns the economic loss doctrine on its head. The decisions of this Court in fact hold

[1] The amici filing briefs in support of SoCalGas and affirmance are (1) the U.S. and California Chambers of Commerce and American Insurance and Property Casualty Insurers Associations ("Chamber"), (2) Southern California Edison, Pacific Gas & Electric, Southwest Gas, Edison Electric Institute and American Gas Association ("Utilities"), (3) American Pipeline, Association of Oil Pipe Lines and Western States Petroleum Association ("American Pipeline"), and (4) the Civil Justice Association of California ("CJAC"). A fifth amicus brief filed by California Tort Law Scholars In Support Of Affirmance ("Restatement Scholars") also supports affirmance on a different ground discussed below.

that claims for pure economic loss in negligence are generally barred, subject only to a narrow "special relationship" exception. Plaintiffs' amici fail to even mention this Court's repeated holdings that a duty to prevent purely economic loss to third parties is "'the exception, not the rule, in negligence law.'" (*Centinela Freeman Emergency Medical Associates v. Health Net of Cal., Inc.* (2016) 1 Cal.5th 994, 1013 ("*Centinela*"), quoting *Quelimane Co. v. Steward Title Guaranty Co.* (1998) 19 Cal.4th 26, 58 ("*Quelimane*").)

Plaintiffs' amici likewise fail to reconcile their position with the Restatement, the overwhelming weight of authority in other jurisdictions, or the vast number of cases recognizing that the economic loss doctrine applies to cases like this one where there is no contract or other transaction that could give rise to a "special relationship." Indeed, to the extent Plaintiffs' amici cite any case law addressing the economic loss doctrine, they rely upon cases that have been widely rejected or cases that allow fishermen to recover for injuries to fisheries under a narrow exception to federal maritime law's economic loss doctrine—a scenario that is not remotely

presented here.

In addition to failing to offer any persuasive authority supporting their position, Plaintiffs' amici fail to offer any persuasive policy rationale for allowing pure economic loss claims like Plaintiffs' here to proceed. They argue that claims for purely economic loss generally must be permitted in order to make injured parties whole and to ensure adequate deterrence. They fail to acknowledge, however, that tort law often fails to compensate for intangible harms or that existing liability for personal injury and property damage already creates substantial deterrent effect. They likewise downplay the danger of overdeterrence posed by allowing claims for purely economic loss, and understate the burden that litigating such claims would impose on the courts.

Plaintiffs' amici also err in urging this Court to replace the well-settled economic loss doctrine with new tests that purport to guard against unlimited, rippling liability by other means, such as case-by-case analysis of the duty to avoid purely economic loss, or a so-called "particular foreseeability" test. These new tests would

depart from settled law and the overwhelming weight of authority outside this State. They would also disrupt the State's economy and be highly impractical to implement. Plaintiffs' amici fail to show why such new law should be made by this Court rather than the Legislature, which has been active in modifying the economic loss doctrine where it deems appropriate.

For these reasons, and those offered by SoCalGas' answer brief and the amici supporting SoCalGas, the Court of Appeal's decision should be affirmed.

ARGUMENT

I. THE COURT SHOULD REJECT THE ARGUMENTS OF PLAINTIFFS' CALIFORNIA TORT LAW PROFESSORS

A. Plaintiffs' Law Professors Mischaracterize California Law

According to Plaintiffs' law professors, California law generally presumes a duty of care to avoid all losses from negligence, even purely economic losses, and presumes the absence of such a duty only in the narrow "realm of transaction-based cases." (Br. 18; see *id.* at pp. 15-18.) That premise is demonstrably false, for this Court's precedents make clear that as a general rule

pure economic loss is *not* recoverable in negligence cases. Plaintiffs' law professors simply ignore this Court's statement in *Centinela* that "recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions *is the exception, not the rule, in negligence law.*" (*Centinela, supra,* 1 Cal.5th at p. 1013, quoting *Quelimane,* 19 Cal.4th at p. 58, italics added.)

Plaintiffs' law professors likewise ignore or mischaracterize this Court's other articulations of the economic loss doctrine. They conspicuously fail to mention this Court's decision in *Fifield Manor v. Finston* (1960) 54 Cal.2d 632 ("*Fifield*"), which was not a "transaction-based" case. *Fifield* held that an actor has no duty of care to avoid purely economic losses to a third party (there, the financial interests of a nursing home) when it negligently injures an individual in a car accident, even when downstream economic losses are foreseeable. (*Fifield, supra,* 54 Cal.2d at pp. 636-637.)

Plaintiffs' law professors also mischaracterize *Quelimane* (Br. 17-18)—another case in which this Court held there was no duty to

prevent purely economic losses to strangers—as a "transaction-based" case. In *Quelimane,* a would-be property seller alleged that its property declined in value and was harder to market because the defendant title insurance companies would not sell title insurance to potential buyers. (19 Cal.4th at p. 36.) This Court rejected the claim, ruling that the insurance companies had no duty to protect the purely financial interests of the sellers. (*Id.* at pp. 58–60.) Plaintiffs' law professors assert that *Quelimane* involved a "transaction-based economic loss" because the plaintiff's ability to contract with potential home buyers was hampered. The title insurance companies in *Quelimane,* however, were strangers both to the plaintiffs, who were the attempted sellers of the property, and to the buyers to whom the companies refused to issue insurance. Thus, contrary to amici's assertion, the plaintiffs' claim in *Quelimane* was not transaction-based.

Thus, Plaintiffs' law professors are incorrect to assert (Br. 13) that under California law "a duty of care is owed in non-transaction-based economic loss cases." (See generally Utilities Br. 9-13.)

B. Plaintiffs' Law Professors Err In Proposing A New "Particular Foreseeability" Test

Plaintiffs' law professors propose replacing the economic loss doctrine with a "particular foreseeability" test that would presumptively impose upon defendants an unlimited duty to avoid all economic losses to third parties, and would instead attempt to solve the problem of potentially unlimited liability by applying a "particular foreseeability" test at the proximate causation stage. (Br. 12, 27–29.) According to Plaintiffs' law professors (Br. 11), a loss is "particularly foreseeable" where it harms a "special interest" that is "not shared by the general community"—a vague standard that they do not otherwise define. This Court should reject their proposal as both unsupported and unworkable.

1. The "Particular Foreseeability" Test Lacks Any Supporting Authority

In advancing their new "particular foreseeability" test, Plaintiffs' law professors admittedly cite not a single California case or case applying California law that employs this test. Plaintiffs' law professors are also wrong in asserting (Br. 23, 25) that the proposed "particular foreseeability" test is "consistent with the Restatement

(Third) of Torts" and "builds on [] existing case law." The "particular foreseeability" test contradicts the Restatement and the overwhelming weight of authority from outside of California. It is instead built upon a three-decade old case that is widely recognized as an outlier and expressly rejected by the Restatement, and cases concerning commercial fishermen and fisheries that fall outside the economic loss doctrine for reasons distinctive to maritime law.

To begin with, contrary to Plaintiffs' law professors' assertion, the Restatement does not support the proposed "particular foreseeability" test. The eight sections on unintentional infliction of economic loss in the Restatement (Third) of Torts: Liability for Economic Harm never once use the term "particular foreseeability" in discussing duty, or proximate cause, or otherwise. To the contrary, as the Restatement Scholars confirm (Br. 11–16), the Restatement provides that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another" (Rest.3d, Torts, Econ. Harm, § 1), and recognizes that this principle applies in non-transaction based cases where a party causes purely economic

loss to a stranger (see *id.*, § 7, illus. 4). Indeed, the Restatement cites this Court's decision *Fifield* as an example of this general no-duty rule and uses it as the basis for one of its illustrations. (Rest.3d, Torts, Econ. Harm § 7, Reporter's Note A [discussing illustration 2].)

Plaintiffs' law professors also misplace reliance (Br. 20) on the nearly universally ignored 1985 New Jersey Supreme Court decision in *People Express Airlines, Inc. v. Consolidated Rail Corp.* (N.J. 1985) 495 A.2d 107. *People Express* is a "lonely outpost" that has never been cited by a California court and has been rejected by "the highest courts in other states" with "a striking degree of unanimity" since the decision was issued. (Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort* (2006) 48 Ariz. L. Rev. 857, 858.) For example, *People Express* was explicitly rejected in *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.* (N.Y. 2001) 750 N.E.2d 1097, 1103 ("*532 Madison Avenue*"). The Restatement likewise expressly rejects *People Express*:

> The rule stated here [that there is no recovery for purely economic losses resulting from physical injury to a third party] is often associated with *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (Holmes, J.), but

> appeared in many earlier cases as well. [citations]. Contrary positions have been taken only occasionally in the case law. *See People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985).

(Rest.3d, Torts, Econ. Harm § 7, Reporter's Note A.)

Plaintiffs' law professors fare no better in citing (Br. 20–22) a line of cases involving commercial fishermen and fisheries, including *Union Oil v. Oppen* (9th Cir. 1974) 501 F.2d 558 ("*Union Oil*") and *Curd v. Mosaic Fertilizer, LLC* (Fla. 2010) 39 So.3d 1216 ("*Curd*"). This line of cases recognized a special, limited duty to commercial fishermen and fisheries, despite the general rule that one need not act to protect the economic interests of other kinds of businesses, because commercial fisherman have a special, historical, quasi-property interest in marine life that is different in kind from the interest of the general business community in the continued patronage of their customers. Plaintiffs in such cases have successfully argued that this interest "qualifies as a property right," and so courts are willing to recognize that "commercial fisherman fall into a recognized exception to th[e] general [no-duty] rule." (*Curd, supra* 39 So.3d at p. 1224; see also *Union Oil, supra*, 501 F.2d at

p. 567 [noting that "the familiar principle that seaman are the favorites of admiralty and their economic interests ... give rise to a special right comparable to that of a master to sue for loss of the services of his servant, or the right of husband or father to sue for the loss of services of wife or child"].) Commercial fisheries have a similar interest as well in riparian rights to fishing in specific geographic areas. (See *Shaughnessy v. PPG Indus., Inc.* (W.D. La. 1992) 795 F.Supp. 193, 196; *Masonite Corp. v. Steede* (Miss. 1945) 23 So.2d 756, 758; *Hampton v. North Carolina Pulp Co.* (N.C. 1943) 27 S.E.2d 538, 546–547.) Thus, *Union Oil, Curd,* and other fishermen and fisheries cases do not recognize a "particular foreseeability" test or analyze the recoverability of economic loss based solely on proximate cause, as the proposed test would do.

2. The "Particular Foreseeability" Test Is Unworkable And Would Have Harmful Practical Consequences

Adoption of Plaintiffs' law professors' "particular foreseeability" test would also be extraordinarily impractical and harmful. Where does a "particular foreseeability" test draw the line when communities are harmed by wide-scale disasters? At an

arbitrary five-mile radius? As to what types of businesses that might be affected? According to Plaintiffs' law professors' test, so long as a negligent act led to an economic harm considered by any one judge to be "particularly foreseeable," there would be a corresponding duty to prevent it. Their test thus would vastly expand potential liability and create overdeterrence through its vagueness and uncertainty.

For example, under such a test, banks would be subject to suit by adversely affected businesses when they negligently refuse to approve loans, municipalities when they negligently fail to plow the snow fast enough, and so on, because their actions are likely to cause particularly foreseeable economic losses to certain businesses in their communities. Or suppose that an anchor tenant in a shopping center decided to relocate because a drunk driver crashed into its storefront, or temporarily closed shop when someone's drone hit a power line causing an outage. Would the negligent driver or drone operator then be subject to lawsuits from every smaller business in the shopping center that lost money when the anchor tenant closed

temporarily? Or what about the bridge hypothetical (see *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 440, fn. 11 ("*Bily*"))—which, notably, not one of Plaintiffs' amici even mentions? Does the mere fact that the driver was negligent in causing the accident mean that he is liable for all the "particularly foreseeable" economic losses of the hourly workers in the cars behind him who are late to their shift? Or to all the businesses on the other side of the bridge that are cut off from their customers? The answer to all these questions is "no"—not because the harms fall outside the zone of "particular foreseeability," but because there is no general duty to avoid economic losses to others.

Plaintiffs' law professors cannot justify such far-reaching consequences by suggesting that, once a duty to *someone* has been breached, anyone else who suffered losses can piggyback on their claim, even if no duty was owed to them. California courts have held that, under "[w]ell-settled principles of negligence," in determining whether a duty of care is owed, courts ask whether there is a "duty owed directly to the plaintiff." (*Wooden v. Raveling*

(Ct. App. 1998) 61 Cal.App.4th 1035, 1038, quoting *Burgess v. Superior Court* (2011) 2 Cal.4th 1064, 1073; see also Benson, *The Problem with Pure Economic Loss* (2009) 60 S.C. L. Rev 823, 878 [negligence plaintiffs cannot "attempt[] to piggyback" on a duty owed to someone else].) Plaintiffs' law professors offer no reason to depart from this rule.

Moreover, Plaintiffs' "particular foreseeability" test would if anything have a perverse effect. It would protect as "particularly foreseeable" large companies like People Express, which have access to first-party insurance to protect against economic interruption. But it would fail to protect many smaller enterprises with fewer resources to insure against economic loss—especially mobile or itinerant business actors like taxi drivers, ice cream vendors or door-to-door salesmen, whose presence in any one location is not "particularly foreseeable."

Finally, Plaintiffs' law professors test would increase judicial burdens by replacing duty analysis with an exclusive focus on proximate cause. Duty analysis is categorical; proximate cause

analysis is necessarily fact-intensive. As the Restatement Scholars explain (Br. 13), "[d]uty rules perform a gate-keeping function" because they "enable trial courts to decide on the pleadings what negligence claims are actionable." Inquiring into "particular foreseeability" rather than duty would thus require factual development and deprive courts of the ability to dispose of meritless economic loss claims quickly and effectively at the outset of a case.

C. The Proposed "Particular Foreseeability" Test Would Not Affect The Outcome Here

Even if Plaintiffs' law professors' "particular foreseeability" test were adopted, SoCalGas would prevail under it on the record here. According to Plaintiffs' law professors (Br. 11), a loss is "particularly foreseeable" only where it harms a "special interest" that is "not shared by the general community." In *Union Oil,* for instance, the Ninth Circuit held that fishermen could recover for purely economic losses, in part, because they suffered an injury as a result of an oil spill that was of a "special nature," different in kind from those suffered by the business community as a whole. (501 F.3d at p. 570). But in so holding, the Ninth Circuit explicitly

recognized that it was applying a narrow exception to the general rule that there is no duty to prevent purely economic loss, which would not save the claims of ordinary businesses:

> [I]t must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fisherman, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969.... Nothing said in this opinion is intended to suggest, for example, that every decline in commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which defendants may be responsible.

(*Ibid.*; see also *Burgess v. The M/V Tamano* (D. Me. 1973) 370 F.Supp. 247, 251 [permitting claims by fisherman and claim diggers but not businesses hurt by decline in tourist trade].)

This case falls squarely within the general rule because Plaintiffs seek to recover for "every decline in commercial activity of every business in the [Porter Ranch] area following the occurrences of [2015]." Indeed, if there ever was a general, non-special interest, this is it. The new test proposed by Plaintiffs' law professors thus would not change the outcome here and therefore need not be considered.

II. THE COURT SHOULD REJECT THE ARGUMENTS OF THE TOLL BROTHERS

Although Toll Brothers is not a party to the current suit, it is an interested party and its arguments should be assessed accordingly. Like Plaintiffs, Toll Brothers seeks to recover from SoCalGas in the same Coordination Proceeding for economic losses allegedly caused by the Aliso Canyon gas leak to real estate development in Porter Ranch. Not surprisingly, Toll Brothers supports Plaintiffs, and discusses at length (Br. 16–20) SoCalGas' alleged negligence based on allegations in its own complaint and other extrajudicial materials that are not part of the record in this case and therefore not properly before the Court.

Even setting aside this problem, Toll Brothers' arguments fail on their merits. Toll Brothers argues (Br. 11–23) that economic losses should be presumed nonrecoverable only in the contractual context in order "to avoid 'tortification' of contracts" (Br. 13). It thus mischaracterizes this Court's precedent and ignores the concerns about limitless and disproportionate liability, litigation cost and excessive deterrence that have led to the application of the economic

loss doctrine in the transaction and non-transaction context alike.

A. Toll Brothers Mischaracterizes California Law

Toll Brothers attempts to paint the Court of Appeal's decision as a "radical expansion of the economic loss rule" that would make California an "outlier in tort jurisprudence" and "bar recovery in virtually all cases involving purely economic loss." (Br. 9.) These statements are simply untrue.

First, contrary to Toll Brothers' assertion, SoCalGas is not seeking to bar recovery "in virtually all cases involving purely economic loss." To the contrary, SoCalGas recognizes that purely economic losses may be recovered for negligence in cases like *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, where the *Biakanja* factors are satisfied. (Ans. Br. 42.) In addition, the economic loss doctrine that this Court has long recognized applies only to bar negligence and strict liability causes of action, not other tort claims. Purely economic losses may be recovered, for example, for intentional interference with prospective economic advantage, or for misrepresentation, defamation, public nuisance, unjust enrichment or fraud—so long as the specific elements for those causes of action

are met. (See *Bily, supra,* 3 Cal.4th at pp. 415–416 [dismissing negligence claim seeking purely economic losses but permitting claim for intentional misrepresentation]. See generally Dobbs, *An Introduction to Non-Statutory Economic Loss Claims* (2006) 48 Ariz. L. Rev. 713, 721–722 [discussing defamation].) The economic loss doctrine thus serves only the limited purpose of avoiding the creation of a general, free-ranging "duty" to avoid harming a stranger's purely economic interests where no other cognizable cause of action could be brought.

Second, applying the economic loss doctrine here would not be an "expansion" of that rule at all. To make this argument, Toll Brothers argues that California courts have previously applied the economic loss doctrine only to claims that contractual obligations were negligently performed—*i.e.,* to transaction-based cases. (Br. 11-14.) That is not true. As this Court has explained, "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." (*Centinela, supra,* 1 Cal.5th at p.

1013.) That general rule holds whether the defendant negligently performed a contract, as in *J'Aire*, or negligently caused a car accident, as in *Fifield*, or negligently transported bombs, as in *Adams v. Southern Pacific Transportation Co.* (1975) 50 Cal.App.3d 37. Toll Brothers does not dispute that this Court applied the economic loss doctrine to bar recovery in a stranger case in *Fifield*; rather, it fails to address this Court's ruling at all.

Third, Toll Brothers' assertion (Br. 9) that the decision below is an "outlier in tort jurisprudence" is fanciful. To the contrary, as the Restatement Scholars explain (Restatement Scholars' Amicus Br. 11–16, 30–31), there is a widely-recognized "general principle of no duty when an actor causes pure economic loss," which California follows and was followed in the decision below. Indeed, SoCalGas's answer cited numerous cases from other jurisdictions barring claims for purely economic losses outside the contractual context in cases just like this. (Ans. Br. 62–68; see also Chamber Br. 21–22, fn. 6 [listing additional cases].) As these cases demonstrate, courts routinely apply the economic loss doctrine to bar recovery for purely

economic losses to strangers, for example when a defendant's negligence causes an office tower to partially collapse, forcing the closure of fifteen city blocks (see *532 Madison Avenue, supra,* 750 N.E.2d 1097), or when a truck driver's negligence damages a bridge, closing it for weeks (see *Aikens v. Debow* (W. Va. 2000) 541 S.E.2d 576). Toll Brothers ignores these decisions.

B. Toll Brothers Fails To Offer Any Persuasive Policy Grounds For Restricting The Economic Loss Doctrine

Toll Brothers invokes *Rowland v. Christian* (1968) 69 Cal.2d 108, and purports to engage in a "robust duty and policy analysis." (Br. 11–12.) But Toll Brothers ignores the concerns underlying the economic loss doctrine.

Toll Brothers recites (Br. 15–16) that one of the "aims of tort law" is to provide compensation for injured parties and that businesses may not be made whole if the economic loss doctrine bars their claims. That is tautological: if SoCalGas owes Plaintiffs no duty to avoid purely economic loss, Plaintiffs cannot bring a claim for, and thus cannot recover, purely economic losses from SoCalGas, at least based on negligence. And in fact, negligence law

does not provide redress for all harms. People and businesses incur "losses" for all sorts of reasons—a power outage occurs, a car accident makes them late for work, the stock market collapses, a mega chain opens a competing business next door—for which there is no recourse in the courts. As the answer showed (Ans. Br. 54–55), damages are not always recoverable for intangible harms such as emotional distress or loss of consortium. Even in *Kesner*—which involved claims of physical harm (and death) from second-hand asbestos exposure—this Court ruled that an employer has no duty to prevent harm to anyone outside of its employee's household, even if their injuries were both physical and foreseeable. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 ("*Kesner*").)

Toll Brothers also asserts (Br. 16) that public safety would be "incentivize[d]" by requiring SoCalGas to bear the full cost of its negligence. The answer already pointed out (Ans. Br. 49–51, 70–71) the flaw in this argument: the question here is not whether imposing liability will provide incentives to take proper safety precautions, but rather whether *adding* liability for purely economic

loss on top of the existing liability for personal injury and property damage, as well as government regulation, will provide useful *additional* incentive justifying the costs of imposing such additional liability.

Toll Brothers also turns a blind eye to the significant liability for personal injury and property damages facing SoCalGas. SoCalGas already has spent over $450 million in remediation efforts (Ans. Br. 50), and it recently entered into a proposed settlement with government plaintiffs for nearly $120 million (Utilities Br. 23). Moreover, these $570 million-plus payments are just the beginning: as previously shown (Ans. Br. 13), SoCalGas is also facing more than 350 separate actions involving nearly 50,000 individuals. Toll Brothers cannot explain why the threat of this enormous liability fails to provide SoCalGas adequate incentive to act with reasonable care.

Toll Brothers' policy analysis largely ignores these concerns, instead discussing at length (Br. 16–20) SoCalGas' alleged negligence, based on improper extra-record material. But as this

Court explained in *Kesner,* duties should be evaluated on a "categorical" basis and "not … on the facts of the particular case before" the Court. (*Kesner, supra,* 1 Cal.5th at pp. 1143–1144.)

Toll Brothers also asserts (Br. 20–22) that requiring plaintiffs to prove foreseeability provides an adequate check against the danger of rippling, disproportionate liability. It does not. As this Court has recognized, on "clear judicial days . . . a court can foresee forever." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 668.) Indeed, the reporter of the new Restatement has explained that the economic loss doctrine bars recovery of pure economic loss precisely because negligence's foreseeability requirement does *not* protect against unlimited and disproportionate liability:

> The … destruction of a bridge that the plaintiff did not own but that the plaintiff's customers relied upon to reach the plaintiff's business [may harm the business]—and every other business in the neighborhood.… All of them may have economic losses, all of which were foreseeable when I [crashed my car into the bridge]. [But i]mposing liability for such harms, *even limited by the criterion of foreseeability,* would result in a great increase in the litigation over many negligent incidents. The costs of that litigation do not seem likely to be justified by a commensurate improvement in safety or security. On the contrary, the indeterminate scope of

> such liabilities might well put an exaggerated pressure on some potential defendant to avoid activities altogether if those ripple effects are a possible consequence.

(Farnsworth, *The Economic Loss Rule* (2016) 50 Valparaiso Univ. L. Rev. 545, 554, italics added.)

Relying on foreseeability is also perilous because foreseeability is prone to hindsight bias. Toll Brothers argues, for instance (Br. 16), that Plaintiffs' alleged economic losses were foreseeable because, "[g]iven that the Blowout lasted nearly four months, caused the County to order relocation of thousands of residents in the Porter Ranch community, and forced the closure of schools, it is obvious that businesses in the area would suffer serious economic harm." But if you take the first three links in the Palsgrafian chain in this case as "given," the final link may very well become "obvious." That does not mean that the ultimate harm was foreseeable from the vantage point of the allegedly negligent actor *ex ante*. Thus, far from undermining the Court of Appeal's decision, Toll Brothers' argument shows why replacing "duty" with "foreseeability" would be so dangerous.

Finally, Toll Brothers errs in relying on an unpublished district court decision for the proposition that the *Biakanja* test requires weighing all six factors, even absent a requisite transaction. (Br. 23-25, citing *Andrews v. Plains All American Pipeline* (C.D. Cal. Feb. 6, 2018), CV 15-4113, ECF No. 418 at p. 2).) Unlike *Rowland*, the entire purpose of the *Biakanja/J'Aire* analysis is to determine whether there is a "special relationship" between the plaintiff and defendant that could justify an exception to the no-duty rule. (Ans. Br. 41-51.) A contract or transaction of some kind is plainly required. Moral blame standing alone, for example, does not turn a stranger case into one in which there is a "special relationship" between the parties. Nor does the "policy of preventing future harm." (*J'Aire, supra*, 24 Cal.3d at p. 804.) Only a transaction can do that.

Accordingly, California courts have routinely found the first, transaction-intended-to-affect-plaintiff factor to be dispositive. (See, e.g., *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1231 ["Midtec's sale of the fittings was not intended to affect

Greystone in a manner sufficient to give rise [to] a duty on Midtec's behalf to use due care to avoid economic injury to Greystone. As in [other cases], this conclusion is dispositive of the *J'Aire* analysis."]; *Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1455 ["[N]either the pleadings nor the evidence suggests the 1970 milking system was 'intended to affect' the plaintiffs in any way particular to plaintiffs, as opposed to all potential purchasers of the equipment. The absence of this foundation precludes a finding of "special relationship" as required by *J'Aire*"].) This Court should not depart from past precedent and create a new rule that there can be a "special relationship" by balancing the remaining factors even when no basis for any relationship under the first factor exists.

III. THE COURT SHOULD REJECT THE ARGUMENTS OF THE CONSUMER ATTORNEYS OF LOS ANGELES

The Consumer Attorneys of Los Angeles[2] urge the Court to eliminate the economic loss doctrine altogether in favor of a test that would "allow each case to be analyzed under general tort principles and allow the courts to decide whether, in any given case, the

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2 These amici initially filed their amicus brief captioned the "Consumer Attorneys of California," but later corrected the caption.

defendant owed a duty." (Br. 9–10, 27.) Far from following settled law, this case-by-case analysis would radically change this Court's settled jurisprudence.

A. The Los Angeles Consumer Attorneys' Proposed Case-By-Case Analysis Would Create A Sea Change In California Tort Law

1. The Proposed Analysis Contravenes This Court's Well-Settled Categorical Approach

This Court has held that tort duties should be evaluated on a "categorical" basis and not "on the facts of the particular case before" the court. (*Kesner, supra,* 1 Cal.5th at pp. 1143–1144; see also *id.* at 1145 [examining foreseeability based on the "category of negligent conduct" rather than examining whether "a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct"].) "In this respect, duty differs from the other elements of a tort" because duty is for the court, rather than the jury, to decide, and a duty will be found "only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases." (*Id.* at p. 1144, quoting Rest.3d, Torts, Econ. Harm § 7, cmt. a; see also CJAC Br. 10-15

[explaining history and benefits of the bright-line, categorical nature of the economic loss doctrine].)

The Consumer Attorneys of Los Angeles propose the precise opposite. Rather than evaluating whether there is a categorical exception to the no-duty rule in cases of pure economic loss, amici would have courts conduct an individualized assessment that "consider[s] the facts on a case-by-case basis." (Br. 24.) This proposal cannot be reconciled with this Court's decisions concerning the determination of duty.

Although amici invoke this Court's decision in *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 ("*Cabral*"), the decision directly contradicts them. Amici assert (Br. 22) that *Cabral* "refus[ed] to set forth a categorical exception" for drivers who stop alongside a freeway. In fact, far from applying the *Rowland* factors to the particular facts of the case before it, as amici suggest, this Court stated that "the *Rowland* factors are evaluated at a relatively broad level of factual generality." (*Cabral, supra,* 51 Cal.4th at p. 772.) Moreover, it continued, in applying the *Rowland* factors this Court

has "asked not whether they support an exception to the general duty of reasonable care of the facts of the particular case before us" but instead analyzed "whether carving out an entire category of cases from that general duty rule is justified." (*Ibid.*) Thus, the Consumer Attorneys of Los Angeles' proposal contradicts the very authority they cite.

2. The Proposed Analysis Would Undermine Other Areas Of Tort Law

The Los Angeles Consumer Attorneys also fail in their argument that their broad, case-by-case negligence analysis could co-exist with other tort law. (Br. 12-13.) To support this argument, amici argue that "[c]auses of action often overlap, and when they do, courts are perfectly capable of erecting parameters for resolving any conflict." (Br. 13.) The issue, however, is not that claims for negligence may sometimes "overlap" with claims for public nuisance. It is rather that, if the economic loss doctrine were eliminated, claims for negligence would wholly subsume all public nuisance and many other specific torts, such that there would be no need to ever meet the more stringent requirements of nuisance, or

defamation, or unfair competition, or intentional interference with a contract, etc. (See Ans. Br. 73.)

Professor Dobbs has illustrated this concern using defamation as an example:

> Negligent misstatements about the plaintiff, or about a third person, can cause harm even if they are not defamatory. But if the statements are not defamatory of the plaintiff, no action for libel or slander will lie even if the harm is done and even if the statements defame someone else. That is the law of defamation. *The effect of the economic loss rule is to channel the claim* into the law of defamation which is aimed at covering reputational harm: A plaintiff who knows that the economic loss rule will bar her claim in negligence must try to recover under the defamation rules or not at all.

(Dobbs, *supra,* 48 Ariz. L. Rev. at 721–22, italics added.) Tellingly, although the answer pointed out this problem (Ans. Br. 72–74), the Los Angeles Consumer Attorneys do not explain how a party would be forced to prove the elements of a defamation or public nuisance claim, rather than seek refuge in the all-encompassing "negligence" test they propose. They thus fail to show how restrictions imposed by specialized torts such as defamation and public nuisance would be preserved under their proposal, or why their far-reaching new rule of negligence would not swallow the rest of tort law.

B. The Los Angeles Consumer Attorneys' Approach Would Burden Courts

The Los Angeles Consumer Attorneys also fail to rebut SoCalGas' demonstration (Ans. Br. 70–71) that eliminating the economic loss doctrine in the "stranger" context would impose massive new burdens on already overburdened courts. While amici deny (Br. 14–16) that their proposal would impose new burdens, they do not, and cannot, dispute that such a ruling would lead to numerous new lawsuits. They merely assert that trial courts have tools to deal with these new actions. But while they repeat (Br. 15) the trial court's assertion that damages issues "may also be susceptible to statistical techniques," they do not even attempt to explain how an issue as individualized as a business's lost profits can be fairly and reliably determined through statistics. To the contrary, as the Los Angeles Consumer Attorneys later acknowledge (Br. 30), in certain cases plaintiffs' claims may be "too remote" and in others "their damages may be deemed too speculative" to recover, and the line between those claims that survive and those that do not can only be determined by courts and juries "based on

the facts" of each individual case. This individualized, case-by-case assessment is inadministrable, fails to provide actors with the ability to predict future liability, and would require significant additional judicial resources to adjudicate.

C. The Los Angeles Consumer Attorneys' Policy Arguments Are Unpersuasive

The Los Angeles Consumer Attorneys argue (Br. 11-12) that adopting their new approach would not displace the legislative function, but fail to explain why this Court, rather than the Legislature, should make sweeping changes to the economic loss doctrine. In previous litigation involving purely economic loss, this Court has refused absent "a sufficiently compelling reason to preempt the legislative process with a judicially created rule of tort liability," and instead invited the Legislature to "add whatever additional protections it deems appropriate." (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 653.) Taking up this invitation, the Legislature enacted, for example, the Right to Repair Act in response to this Court's decision applying the economic loss doctrine to homeowners claiming economic loss resulting from negligent

construction work. (See Civ. Code §§ 895–945.5.) In addition, as the answer showed (Ans. Br. 68–70), both the Legislature and Congress have enacted legislation permitting recovery of purely economic losses caused by oil spills. Ignoring the Right to Repair Act, amici contend (Br. 11–12) that the oil pollution statutes are inapposite because both impose strict liability. This is a distinction without a difference. As this Court recognized more than a half century ago, the economic loss doctrine applies to strict liability claims as well as negligence claims. (See *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 15.)

The Los Angeles Consumer Attorneys also stress the amount of harm the gas leak supposedly caused and the importance of providing full compensation for "tort victims." (Br. 16-18.) But if there is no duty to protect the expected profits of strangers, then the businesses who failed to earn as much profit as they had hoped are not "tort victims" because no tort has been committed against them.

Moreover, the Los Angeles Consumer Attorneys improperly distort the facts of this case. They suggest (Br. 26) that the public has

an interest in preserving the businesses that were "unable to survive as a result of the Defendant's conduct." But there is no allegation, in the Complaint or elsewhere, that even a single business was forced to close down. At most, the Complaint alleges a temporary "20-30 percent" reduction in sales in one business, asserts that sales were "stagnant" in others, and uses only qualitative descriptors of lost profits for the rest. (1 EP 17.)

In addition, the Los Angeles Consumer Attorneys turn a blind eye to the significant liability that SoCalGas already faces. SoCalGas has already spent over $450 million in remediation efforts, has entered into a proposed settlement with state and local government agencies for nearly $120 million more, and faces lawsuits from tens of thousands of additional plaintiffs who are seeking damages based on alleged damage to property or physical harm. The Los Angeles Consumer Attorneys' assertion (Br. 26) that disallowing claims from this particular subset of plaintiffs would provide SoCalGas with a "get out of jail free" card thus defies credulity.

Further, the Los Angeles Consumer Attorneys distort cited

academic authority. They quote Professor Parisi as stating that, "to maintain efficient precaution incentives, parties should under most circumstances face the full range of economic consequences of their activities." (Br. 19, quoting Parisi, *The Comparative Law and Economics of Pure Economic Loss* (2007) 27 Int'l Rev. L. & Econ. 29, 36.) But as the very next section of the article explains, the economic consequences that Professor Parisi is referring to are net losses to society as a whole, not (as here) mere "losses" to private businesses in one area that may inure to the benefit of other private businesses somewhere else. (*Id.* at p. 37.)

The Los Angeles Consumer Attorneys also mischaracterize a 2009 law review article (Johnson, *The Boundary-Line Function of the Economic Loss Rule* (2009) 66 Wash. & Lee L. Rev. 523) in contending (Br. 13-14) that claims for pure economic loss should be allowed in "stranger" cases. The article expressly states that the observation in the quoted passage is "[w]ith respect to the boundary-line function of the economic loss rule" (*id.* at p. 555) and thus does not consider the economic loss doctrine's other functions such as protecting

against unlimited and disproportionate liability, which the article acknowledges "carry weight" in appropriate circumstances (*id.* at p. 543).

Finally, the Los Angeles Consumer Attorneys deny (Br. 31–32) that the availability of business interruption insurance supports application of the economic loss doctrine here, arguing that it is always possible to assert that a plaintiff could have avoided a loss by obtaining insurance. SoCalGas, however, did not argue that the economic loss doctrine should be applied merely because plaintiffs may obtain insurance. It argued (Ans. Br. 61) that it is more efficient and thus more socially beneficial for plaintiffs to insure against economic losses because, as respected commentators have recognized, insurance against business interruption insurance for plaintiffs is more readily available than insurance against economic losses for third parties for defendants. (See Dobbs, *supra,* 48 Ariz. L. Rev. at p. 717; Farnsworth, *supra,* 50 Valparaiso Univ. L. Rev. at p. 555; James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 Vand. L. Rev. 43, 53; see

also Utilities Br. 24.) The Los Angeles Consumer Attorneys are unable to dispute this point; indeed, their own cited authority (Br. 32) acknowledges that the ability to spread loss and minimize costs through insurance is "an important consideration" in shaping liability rules. (Johnson., *supra*, 66 Wash. & Lee L. Rev. at p. 544.)

IV. THE COURT SHOULD REJECT THE ARGUMENTS OF THE CONSUMER ATTORNEYS OF CALIFORNIA

The Consumer Attorneys of California focus on a single issue: whether government regulation of natural gas storage eliminates the need for tort liability. (Br. 8–9.) This is a straw man. SoCalGas did not argue that government regulation obviates the need for any tort liability. It argued (Ans. Br. 50–51) that liability for purely economic loss is not needed to provide SoCalGas with an adequate incentive to protect the public because SoCalGas is already subject to liability for damages to personal injury and property; to claims for public nuisance, health and safety code violations and impairment of natural resources; to regulatory investigations and potential fines and penalties; and, finally, to "detailed safety regulations and requirements imposed by the California Public Utilities Commission

and other public obligations." (See also American Pipeline Br. 24–31.) The Consumer Attorneys of California focus solely on the last consideration and ignore the rest. Thus, they do not dispute that these considerations, in combination, justify the economic loss doctrine.

Indeed, the Consumer Attorneys of California say nothing at all about economic loss. They argue (Br. 10, 17–19) that "the tort system is an important adjunct to government regulation." They fail, however, to explain when the tort system should impose a duty in negligence to avoid purely economic loss. Thus, the Consumer Attorneys of California shed no light on the question before the Court, which is whether SoCalGas should be subject to negligence claims for purely economic loss in addition to negligence claims for personal injury and property damage.

V. THE RESTATEMENT SCHOLARS CORRECTLY DESCRIBE THE LAW AND THE OUTCOME THIS COURT SHOULD REACH

Three tort scholars involved in the drafting of the Restatement have submitted a brief in support of affirmance, confirming (Br. 11–16) SoCalGas' position that, under the Restatement, there is

generally no duty to avoid economic losses and in particular that there is no duty to avoid purely economic losses resulting from injuries to the person or property of another. But the Restatement Scholars urge (Br. 24–26) the Court to treat Plaintiffs' claims as nuisance claims and hold that the claims fail instead under Section 8 of the Restatement. That section bars recovery of purely economic losses alleged under a nuisance theory unless the plaintiff can show that such loss constitutes a special injury, an exception the Restatement Scholars argue Plaintiffs fail to allege and cannot show (*id.* at pp. 24-26).

Although SoCalGas agrees with the Restatement Scholars' description of the law and the ultimate conclusion they reach, it respectfully disagrees with their analysis of the case because Plaintiffs chose to bring a claim here based not on public nuisance, but rather on negligence that allegedly caused their customers to temporarily relocate and reduce their purchases of local goods and services. (1 EP 173, 180, 188–194.) Plaintiffs do not allege that they suffered any impairment in the use or enjoyment of their own

property as a nuisance claim would have required. If they could have done so, then they could have joined other nuisance claims arising from the leak rather than advancing their negligence claims.

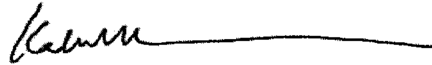
In the end, however, any disagreement on whether this is a nuisance case is not material. If Plaintiffs are alleging that they lost business when their customers left town because of physical harms like nausea and nosebleeds, then the economic loss claims here are barred under Section 7 of the Restatement. As the Restatement Scholars themselves acknowledge (Br. 27), Section 7 articulates a "categorical rule that precludes a plaintiff from recovering for economic loss caused by unintentional injury to another person or property of another." But if Plaintiffs are instead deemed to allege that they lost business when their customers left town because of impairment to a public resource (the air quality in the area of Aliso Canyon and Porter Ranch), the same result would obtain: the economic loss claims would be barred under Section 8 of the Restatement for failure to meet the special injury requirement that provides the only exception to the economic loss doctrine in the

nuisance context. Either way, Plaintiffs fail to state a valid cause of action and the demurrer should be sustained.

CONCLUSION

For all of these reasons, as well as those in SoCalGas' answer brief and the amicus briefs supporting SoCalGas, the Court of Appeal's decision should be affirmed.

DATED: October 26, 2018 Respectfully submitted,



James J. Dragna (SBN 91492) David L. Schrader (SBN 149638) Yardena R. Zwang-Weissmen (SBN 247111) MORGAN, LEWIS & BOCKIUS, LLP 300 South Grand Ave., Ste. 2200 Los Angeles, CA 90071-3132 Telephone: (213) 612-2500 Facsimile: (213) 612-2501	Kathleen M. Sullivan (S.B. No. 242261) Daniel H. Bromberg (S.B. No. 242659) QUINN EMANUEL URQUHART & SULLIVAN LLP 555 Twin Dolphin Drive, 5th Fl. Redwood Shores, CA 94106 Telephone (650) 801-5000 Facsimile (650) 801-5100

Attorneys for Respondent Southern California Gas Co.

CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, rule 8.204)

Pursuant to California Rule of Court 8.204, the foregoing Respondent's Response to Amicus Briefs is double spaced and printed in proportionally spaced 13-point Palatino Linotype typeface. It is 49 pages long and contains 7,655 words (excluding the tables, this certificate, and the proof of service). In preparing this certificate, I relied upon the word count generated by Microsoft Word 2003.

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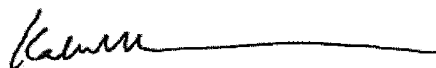

Kathleen M. Sullivan

State of California)
County of Los Angeles)
)

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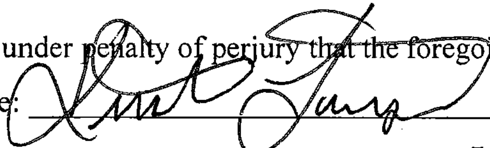
Signature: 

SERVICE LIST

<table>
<tr>
<td>Raymond P. Boucher
Shehnaz M. Bhujwala
Maria L. Weitz
BOUCHER LLP
21600 Oxnard Street, Suite 600
Woodland Hills, California 91367

Attorneys for Real Party in Interest,
First American Wholesale Lending Corporation</td>
<td>Roland K. Tellis
BARON & BUDD, P.C.
15910 Ventura Boulevard
Suite 1600
Encino, California 91435

Attorneys for Real Party in Interest,
First American Wholesale Lending Corporation</td>
</tr>
<tr>
<td>Taras Peter Kick
THE KICK LAW FIRM
815 Moraga Drive
Los Angeles, CA 90049-1633

Attorneys for Real Party in Interest,
First American Wholesale Lending Corporation</td>
<td>R. Rex Parris
Patricia Oliver
R. REX PARRIS LAW FIRM
43364 10th Street West
Lancaster, California 93534

Attorneys for Real Party in Interest,
First American Wholesale Lending Corporation</td>
</tr>
<tr>
<td>Robert J. Nelson
Sarah R. London
Wilson M. Dunlavey
LIEFF CABRASER HEIMANN AND BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, California 94111-3339

Attorney for Real Parties in Interest,
GKM Enterprises, Inc., Genuine Oil Company,
SoCal Hoops Basketball Academy Corporation,
King Taekwondo, Inc., Polonsky Family Day Care,
Babak Kosari, DPM, Inc. and First American
Wholesale Lending Corporation</td>
<td>Leslie A. Brueckner
Charles Lederer
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, California 94612

Attorney for Real Parties in Interest,
GKM Enterprises, Inc., Genuine Oil Company,
SoCal Hoops Basketball Academy Corporation,
King Taekwondo, Inc., Polonsky Family Day Care,
Babak Kosari, DPM, Inc. and First American
Wholesale Lending Corporation</td>
</tr>
<tr>
<td>Christopher G. Caldwell
Michael R. Leslie
Andrew Esbenshade
Kelly L. Perigoe
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524

Attorneys for Amicus Curiae,
Toll Brothers, Inc. and
Porter Ranch Development Company</td>
<td>David Boies
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, New York 10504

Attorney for Amicus Curiae,
Toll Brothers, Inc. and
Porter Ranch Development Company</td>
</tr>
</table>

Henry Weissmann Fred A. Rowley MUNGER TOLLES & OLSON LLP 350 South Grand Avenue, 50th Floor Los Angeles, California 90071-3426 *Attorneys for Amicus Curiae,* *Plains All American Pipeline, L.P.,* *The Association of Oil Pipe Lines and* *The Western States Petroleum Association*	Aaron D. Pennekamp MUNGER, TOLLES & OLSON LLP 560 Mission Street, 27th Floor San Francisco, California 94105 *Attorney for Amicus Curiae,* *Plains All American Pipeline, L.P.,* *The Association of Oil Pipe Lines and* *The Western States Petroleum Association*
Julia E. Stein Sean B. Hecht Nathaniel Logar UCLA SCHOOL OF LAW 405 Hilgard Avenue Los Angeles, California 90095 *Attorneys for Amicus Curiae,* *California Tort Law Professors*	John C. Hueston Moez M. Kaba Douglas J. Dixon HUESTON HENNIGAN LLP 523 West 6th Street, Suite 400 Los Angeles, California 90014 *Attorneys for Amicus Curiae,* *Southern California Edison Company,* *Pacific Gas & Electric Company,* *Edison Electric Institute, Southwest Gas* *Corporation and American Gas Association*
Raymond A. Cardozo REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, California 94105 *Attorney for Amicus Curiae,* *California Tort Law Scholars*	Gretchen M. Nelson KREINDLER & KREINDLER, LLP 707 Wilshire Boulevard, Suite 3600 Los Angeles, California 90017 *Attorney for Amicus Curiae,* *Consumer Attorneys of Los Angeles*
Gabriel S. Barenfeld NELSON & FRAENKEL, LLP 707 Wilshire Boulevard, Suite 3600 Los Angeles, California 90017 *Attorney for Amicus Curiae,* *Consumer Attorneys of Los Angeles*	Yen-Shyang Tseng Jeremy Brooks Rosen Eric S. Boorstin HORVITZ & LEVY LLP 3601 West Olive Avenue, 8th Floor Burbank, California 91505-4681 *Attorneys for Amicus Curiae,* *Chamber of Commerce of the United States,* *California Chamber of Commerce and* *Property Casualty Insurers Association of America*
Sharon J. Arkin The Arkin Law Firm 1720 Winchuck River Road Brookings, Oregon 97415 *Attorney for Amicus Curiae,* *Consumer Attorneys of California*	Fred J. Hiestand Attorney at Law 3418 Third Avenue, Suite 1 Sacramento, California 95817 *Attorney for Amicus Curiae,* *The Civil Justice Association of California*

Paul R. Kiesel Helen Zukin Mariana Aroditis KIESEL LAW LLP 8648 Wilshire Boulevard Beverly Hills, California 90211-2910 *Courtesy Copy*	Derek W. Loeser Amy Williams-Deny Ben Gould KELLER ROHRBACK L.L.P. 1129 State Street, Suite 8 Santa Barbara, California 93101 *Courtesy Copy*