No. S207313

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROSEMARY VERDUGO, mother, successor and heir of MARY ANN VERDUGO, Decedent and MICHAEL VERDUGO, brother of Decedent

Plaintiffs/Appellants

v.

TARGET STORES, a division of TARGET CORPORATION, a Minnesota corporation

Defendant/Respondent.

Following Certification of a Question of California Law from the United States Court of Appeals for the Ninth Circuit, in Appeal No. 10-57008

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Under what circumstances, if ever, does the common law duty of a commercial property owner to provide emergency first aid to invitees require the availability of an Automated External Defibrillator ("AED") for cases of sudden cardiac arrest?

INTRODUCTION AND SUMMARY OF ARGUMENT

In seeking to impose on businesses an unprecedented duty of preparedness to protect customers from their own medical conditions, plaintiffs ask this Court to take a step that was rejected by our Legislature and by every appellate court that has considered it. Because courts are not charged with the task of prescribing measures to secure public safety, it is the province of the Legislature to decide whether to impose on commercial property owners a duty to have an AED available. The Legislature has considered that equipment-specific duty to anticipate the emergency needs of persons whose medical conditions strike them by random chance while they happen to be on commercial premises. And the Legislature explicitly decided not to impose that duty.

A duty to install AEDs would differ in kind from any recognizable exercise of the "ordinary care or skill in the management of ... property" that Civil Code section 1714(a) requires. In seeking to impose a duty to prepare for specific rescues unrelated to the property or the activity on it,

plaintiffs ask this Court to discard the well-established principle that a business proprietor satisfies its legal duty to a customer in medical distress when it promptly summons medical assistance and (at most) provides minimal first aid until assistance arrives. Premised on an implicit duty to rescue all visitors who coincidentally experience a medical emergency on a business's premises, the new duty would require businesses to be equipped and trained to rescue customers from a particular emergency that—unlike drowning in a motel swimming pool or being injured in a bar fight while patronizing a tavern—does not emanate from a risk posed by the business or its premises.

In effect, plaintiffs ask the Court to mandate that business owners provide an emergency medical infrastructure for customers with a particular health condition. The Court should reject this fundamental reallocation of legal responsibilities.

First, the Legislature occupied the field of AED regulation when it set out a comprehensive system of incentives, immunities, and affirmative obligations relating to AEDs. The Legislature explicitly disavowed any general duty to install AED equipment in Section 1797.196(f), which declares:

> Nothing in this section or Section 1714.21 of the Civil Code may be construed to require a building owner or a building manager to acquire and have installed an AED in any building.

("Section" references are to the Health & Safety Code unless otherwise indicated.) That provision expressly forecloses any general duty to purchase AEDs or train employees in their use.

Even if Section 1797.196(f) alone is not dispositive, the Legislature's AED statutes occupy the field. Those statutes reflect the Legislature's judgment that the best way to promote public safety is to provide incentives to encourage businesses to acquire and install AEDs voluntarily, not to impose a mandate—except on "health studios" (Health & Safety Code § 104113), where customers' activity increases the risk of cardiac arrest.

Second, even if the Legislature had not decided the matter, common law principles and precedent provide no basis to impose a duty on retail businesses to anticipate medical emergencies that bear no relation to any condition or commercial activity on the premises by acquiring advanced medical equipment. A business proprietor meets its legal duty to a customer in medical distress when it summons medical assistance within a reasonable time, at most providing simple first-aid measures as well. The extensive training required for a business to avoid Good Samaritan liability belies any claim that AEDs are simple, and their record of malfunction and recall belies the assertion that they are foolproof.

The landowner's duty to respond with decency to a patron facing a health emergency while on the premises cannot be stretched into the duty of preparedness that plaintiffs seek to impose. And principled limits on that proposed duty are elusive. If retailers have a common-law duty to acquire equipment to protect customers from their own cardiovascular systems, similar duties—each imposed in the wake of an unfortunate death—likely will follow for other medical conditions. Just as the Court declined to "force landlords to become the insurers of public safety" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 238 [quoting *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 679, disapproved on another ground in *Reid v. Google* (2010) 50 Cal.4th 512, 527, fn. 5]), it should not force retailers to become emergency care providers for medical conditions that happen to manifest on commercial premises.

Adopting the new tort duty would present the Court with unpalatable alternatives. The Court may not draw fine legislative lines with respect to AEDs, selecting which facilities must provide them, because "[s]uch line-drawing is the province of legislative bodies," not of courts. (*Cal. Grocers Ass'n v. City of Los Angeles* (2011) 52 Cal.4th 177, 210.) The Court could endorse the principle that *every* business has a duty to provide this specialized equipment—immediately adding a billion-dollar expense in hopes of saving a small number of people with cardiovascular conditions.

Or the Court could permit juries to decide the scope of the duty on a case-by-case basis, abrogating the settled principle that "[t]he question of 'duty' is to be decided by the court, not the jury." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572 n.6.)

No court in California or any other jurisdiction has ever imposed an affirmative duty to make specific preparations to rescue customers whose medical conditions happen to place them in medical distress while on commercial premises. Especially in light of the Legislature's contrary determination, this Court should not be the first.

STATEMENT OF FACTS

A. The Legislature Has Enacted A Comprehensive Scheme To Regulate AEDs And Encourage Their Use.

1. The Legislature Begins With Limited Good Samaritan Protections.

The Legislature first addressed AEDs in 1999, when SB 911 added Section 1797.196 and Civil Code section 1714.21. Those provisions were designed to provide "Good Samaritan protections to those who use an AED in emergency situations under certain specified conditions." (Assembly Com. on Judiciary, Background Information Request, Sen. Bill 911 (1999–2000 Reg. Sess.), p. 2., Ex. 1 to Target's Request for Judicial Notice ["Target RJN, Ex. 1"].) In particular, the statute was intended to allay

concerns "that the purchase and use of an AED could expose the business to liability lawsuits." (*Ibid.*)

The Legislature approved AEDs only "when used in accordance with Section 1714.21 of the Civil Code." (Stats.1999, ch. 163, § 1.) As originally enacted, Civil Code section 1714.21 provided a qualified immunity from "civil damages" for "any person" who used an AED to render good-faith emergency care, so long as that person had completed a certified course in AED use and cardiopulmonary resuscitation (CPR). That limited civil immunity excepts cases of "gross negligence or willful and wanton misconduct of the person" using an AED. (*Ibid.*)

Section 1797.196 sets the preconditions for that immunity for building operators, including requirements for user training, equipment testing and maintenance, and notification to local emergency medical services ("EMS") of the AED's location. (See Health & Saf. Code § 1797.196, subds. (b)-(c).) In particular, the statute requires the owner to "ensure" that the EMS system is activated (presumably by calling 911) as soon as possible whenever an AED is used.

2. Amendments Expand Good Samaritan Protections And Disavow Any Duty To Install AEDs.

In 2002, the Legislature responded to continuing business concern about "the potential legal ramifications" of acquiring and installing AEDs (Senate Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of

Assem. Bill 2041 (2001-2002 Reg. Sess.) as amended Aug. 22, 2002, p. 5 ["Senate AB 2041 Analysis"]), by significantly narrowing the scope of the AED-related legal duties while "broaden[ing] the scope of the current immunity provided" to AED owners and users. (Assembly Com. on Judiciary, Analysis of Assem. Bill 2041 (2001-2002 Reg. Sess.) as amended April 16, 2002, p. 2 ["Assembly AB 2041 Analysis"].)[1] The amendment's "goal" was to "encourag[e] more public and private building owners to buy AED devices for their businesses," but "not [to] require a building owner to buy an AED for any building." (Senate AB 2041 Analysis, *supra*, p.4.)

In amending Civil Code section 1714.21, the Legislature repealed the training prerequisite for limited Good Samaritan immunity and relaxed the requirement that building owners ensure that expected AED users complete CPR and AED training. Section 1797.196 was amended to provide immunity to those who acquire and install AEDs even if the individual actually using the device in an emergency had not been trained. (Health & Saf. Code, § 1797.196, subd. (b).)

The most telling change clarified that building owners and managers have no legal duty to acquire AEDs: "Nothing in this section or Section

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[1] "A request for judicial notice of published material is unnecessary. Citation to the material is sufficient." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46 n.9.)

1714.21 shall be construed to require a building owner or a building manager to acquire and have installed an AED in any building." (Health & Saf. Code § 1797.196(f).)[2]

3. The Legislature Adds Narrow Obligations To Acquire And Install AEDs.

Two years later, the Legislature required the Department of General Services to apply for federal funds to purchase AEDs for all state buildings. (See Gov't Code § 8455.) The Legislature also passed a resolution urging (without requiring) public schools to implement an AED program. (Assem. Res. No. 57 (2005-2006 Reg. Sess.).)

The Legislature has required AEDs to be installed only in two narrow categories of private facilities. First, in 2006, the Legislature required "every health studio" to "acquire an automatic external defibrillator." (Health & Saf. Code § 104113.) That narrow mandate addressed the "significantly higher" risk of sudden cardiac arrest during exercise. (Senate Com. on Judiciary, Analysis of Assem. Bill 1507 (2005-2006 Reg. Sess.), as amended July 12, 2005, pp. 8-9.) Two years later, the

[2] The original legislation would have expired on January 1, 2013, but was extended indefinitely in 2012. (See Sen. Bill 1436 (2011-2012 Reg. Sess.) § 2.)

Legislature temporarily required dental sedation assistant permit courses to have an AED. (See former Bus. & Prof. Code § 1756.2(c)(1).)[3]

The Legislature did try to extend the obligation to install AEDs to golf courses and amusement parks. (See Assem. Bill No. 1312 (2009-2010 Reg. Sess.), Sept. 9, 2009, §1.) The Legislature selected those facilities based on a study of locations where sudden cardiac arrest was most frequent.[4] But the Governor vetoed the bill after the Health and Human Services agency declared that it "would increase costs ... with no clear evidence that the availability of these devices would save lives." (Cal. Health and Human Services Agency, Enrolled Bill Rep. on Assem. Bill No. 1312 (2009–2010 Reg. Sess.) prepared for Governor Schwarzenegger (Sept. 29, 2009), p. 8. [Target RJN, Ex. 2]; see Governor's veto message on Assem. Bill No. 1312 (Oct. 12, 2009) Assem. J. (2009-2010 Reg. Sess.) p. 1.))

B. Background Of This Litigation

Mary Ann Verdugo was a 49-year-old, developmentally disabled

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[3] Although this statutory requirement expired in 2011, regulations impose the same requirement (see 16 Cal. Code Regs. § 1070.8), among many similar requirements imposed on medical service providers. (See fn.8, *infra*.).)

[4] See Sen. Com. on Judiciary, Analysis of Assem. Bill 1312 (2009-2010 Reg. Sess.) as amended June 17, 2009, p. 6-7 [citing Becker et al., *Public Locations of Cardiac Arrest: Implications for Public Access Defibrillation* (1998) 97 Circulation 2106].

adult with serious health issues. (9th Cir. Excerpts of Record ("ER") 120-21.) She was shopping at a Target store in Pico Rivera with her mother and brother on August 31, 2008, when she suffered sudden cardiac arrest and collapsed. (*Id.* at 121.) Responding to a 911 call, paramedics from a nearby fire station arrived within minutes but could not revive her. (*Ibid.*)

Verdugo's mother and brother filed a wrongful death action against Target in superior court. Target removed the case to federal district court, which dismissed the complaint for failure to state a claim. (See ER 1-5.) The district court held that "there is no California common law duty requiring a department store to acquire and provide a defibrillator in the event that a customer or member of the public suffers sudden cardiac arrest while on the premises." (ER 5.)

After hearing oral argument on plaintiffs' appeal, the Ninth Circuit certified the controlling question to this Court. (See *Verdugo v. Target Corp.* (9th Cir. 2012) 704 F.3d 1044.) This Court accepted the certification.

ARGUMENT

I. THE LEGISLATURE HAS PRECLUDED JUDICIAL IMPOSITION OF A DUTY TO INSTALL AUTOMATIC EXTERNAL DEFIBRILLATORS.

Plaintiffs seek to subject commercial property owners to a common-law duty to have an AED on site and available. The Legislature, however, has occupied the field of AED regulation, making the conclusive policy

decision that building owners may *not* be held liable for choosing not to install AEDs. The Legislature's contrary approach has been to encourage "building owners or others to *voluntarily* acquire" AEDs. (Assembly AB 2041 Analysis, *supra*, p.1 [emphasis added].)

A. Health & Safety Code Section 1797.196, subd. (f) Precludes Plaintiffs' Claim.

"The decision as to what losses are compensable" ultimately falls "'within the wisdom and power of the Legislature.'" (*Breaux v. Gino's, Inc.* (1984) 153 Cal.App.3d 379, 382 [quoting *Marks v. Whitney* (1971) 6 Cal.3d 250, 260–61].) Thus, although the courts are free to determine "[t]he existence and scope of [the defendant's] duty" when the Legislature is silent on a topic, once the "Legislature ... set[s] California's public policy" on an issue, its judgment must control. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477, 491). In particular, the Legislature's judgment controls the scope of the duty to exercise "'ordinary care.'" (*Id.* at 477.)

Here, the Legislature has enacted a general provision absolving business owners from liability for declining to install AEDs, with one specific exception requiring health studios—not retailers—to provide the devices. And its numerous other statutes regarding AEDs collectively occupy the field, leaving no room for the courts to undercut the Legislature's chosen no-duty rule.

1. Plaintiffs' claim is precluded by the section's plain text.

The Legislature foreclosed plaintiffs' proposed duty to provide AEDs when it "specifically considered questions of duty" related to AEDs (*Rotolo v. San Jose Sports & Entm't, LLC* (2007) 151 Cal.App.4th 307, 324) and concluded that businesses do *not* have a duty to install AEDs. Having partially abrogated Good Samaritan liability for building owners that choose to install AEDs and for individuals who use them (see Civ. Code § 1714.21; Health & Saf. Code § 1797.196), the Legislature provided that "[n]othing in [those statutes] may be construed to require a building owner or a building manager to acquire and have installed an AED in any building" (Health & Saf. Code § 1797.196(f)).

The Legislature also enacted narrow statutory exceptions to the no-duty rule in Section 1797.196(f)—but not for any kind of retailer. Rather, in light of the high risk of cardiac emergencies resulting from strenuous exercise, it required health studios to provide on-premises AEDs. (Health & Saf. Code § 104113(a).) The other, lapsed exception, for dental sedation assistant permit course locations (see former Bus. & Prof. Code § 1756.2(c)(1)), addressed the increased risk of cardiac arrest associated with the anesthetization of patients by trainees.

These statutes reflect a careful balance: the Legislature declined to subject businesses to a general duty to install AEDs, requiring installation

only by narrow classes of businesses presenting heightened risks. The Legislature thus "set California's public policy regarding" businesses' "liability under these circumstances,"; that policy "precludes" both "court[s] and jur[ies]" from separately "weighing the risks and benefits of" declining to install AEDs. (*Merrill*, 26 Cal.4th at 486, 491.)

2. Court of Appeal decisions recognize that similar provisions foreclose the creation of common-law duties.

The Court of Appeal has applied these principles in two decisions. One, *Rotolo*, addressed Section 1797.196(f). *Rotolo* held that an ice rink had no duty to advise visitors of the location of its AEDs, in part because no provision of Section 1797.196 imposed that duty and because Section 1797.196(f) "made clear that building owners and managers have no duty in the first instance to acquire and install an AED." (*Rotolo*, 151 Cal.App.4th at 314.) Imposing a duty beyond those spelled out in the statute would be inconsistent with the Legislature's decision to "limit[] the duties of a building owner with respect to providing assistance with an AED." (*Id.* at 332; accord *id.* at 337-39.) Because "there is no" statutory "duty to acquire an AED or have it available" (*id.* at 332), courts may not impose a common-law duty to provide AEDs.

Similarly, in *Breaux*, *supra*, the Court of Appeal held that statutory language closely analogous to Section 1797.196(f) foreclosed imposition of a common-law duty. The plaintiff in *Breaux* claimed that a restaurant had a

duty to provide first aid to a choking patron. (See 153 Cal.App.3d at 381.) The Court of Appeal held that claim precluded by former Health and Safety Code section 28689, which provided—in language paralleling Section 1797.196(f)—that "'[n]othing in this section shall impose any obligation on any person to remove, assist in removing, or attempt to remove food which has become stuck in another person's throat.'" (*Id.* at 381, fn.2 [quoting former Health & Saf. Code § 28689].) That no-duty language "establishe[d] as a matter of law that a restaurant meets its legal duty to a patron in distress when it summons medical assistance within a reasonable time." (*Id.* at 382.)

The Ninth Circuit's certification order mistakenly asserted that "*Breaux* relied in its reasoning on" a supposed "safe harbor from liability for restaurants" that "post[ed] ... [the] first aid instructions for choking victims." (*Verdugo*, 704 F.3d at 1047 [citing *Breaux*, 153 Cal.App.3d at 381 & fn.2].) But there was no safe harbor; Section 28689 simply said that failing to post the required first-aid instructions "'shall not in and of itself'" be sufficient to find a restaurant liable for a choking death. (*Breaux*, 153 Cal.App.3d 381 n.2 [quoting former Health & Saf. Code § 28689].) In other words, the statute provided that failing to post the instructions was not negligence *per se*, without immunizing restaurants that did post.

In fact, *Breaux* relied solely on the language providing that restaurants had no duty to assist choking patrons. (See *id.* at 382.) And because the no-duty provision in Section 1797.196(f) is functionally identical to the provision in *Breaux*, the same result follows here: Businesses and other building owners may not be held liable for declining to install an AED.

3. Plaintiffs have provided no sound reason to disregard Section 1979.196(f)'s plain language.

Plaintiffs seek to avoid the effect of Section 1979.196, subd. (f) by contending that "this Court narrowly construes inferred statutory immunity." (Br. 35.) As the word "inferred" suggests, however, plaintiffs' authorities involved statutes that "d[id] not expressly deal with the situation before the court." (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 832; see also *Klein v. United States* (2010) 50 Cal.4th 68, 71 ["vehicular negligence" not addressed by landowners' recreational use immunity]; *Van Horn v. Watson* (2008) 45 Cal.4th 322, 325 [immunity for providing emergency medical care did not cover nonmedical care], abrogated by Health & Saf. Code § 1799.102.) By contrast, Section 1797.196(f)—like the provision in *Breaux*—explicitly addresses (and precludes) any "require[ment for] a building owner or a building manager to acquire and have installed an AED in any building."

Plaintiffs also suggest (Br. 35) that Section 1797.196(f) merely forecloses assertions of negligence *per se*. But the statute imposes a *per se* rule of *non*negligence, and its protections would be meaningless if courts could impose the same duty on their own. The entire legislative scheme is premised on the idea that business are at liberty to decline to have AEDs.

Plaintiffs' suggestion that the duty to provide AEDs can be restricted to "Big Box retailers" (Br. 40) contradicts the unqualified statutory terms. The disclaimer of duty in Section 1797.196(f) is unambiguous, as is the narrow affirmative duty imposed on health studios in Section 104113. Imposing a duty to acquire AEDs on large retailers would be as inconsistent with the Legislature's statutory commands and chosen policy as imposing that duty on all businesses.

Plaintiffs try to justify the differential treatment of "Big Box stores" by arguing that such stores are treated differently "under the law." (Br. 40.) Although plaintiffs suggest that large retailers are different because they "serve large numbers of invitees in settings" that are allegedly difficult for "emergency services" to reach (*ibid.*), the statutes plaintiffs cite address entirely different concerns: They prevent certain government "agenc[ies]" from providing economic aid to "vehicle dealer[s] or big box retailer[s] ... that [are] relocating ... within the same market area." (Health & Saf. Code § 33426.7(a); Gov. Code § 53084.) Such narrow restrictions on public

subsidies do not suggest that large retailers may be treated differently from other building owners for any other purpose.[5]

And plaintiffs advance no reason why large retailers should be singled out for a duty to provide AEDs rather than other sizeable private spaces such as shopping malls, sports stadiums, hotels, golf courses, and amusement parks.

B. The Legislature's Comprehensive Statutory Scheme Precludes The Imposition Of Additional Common-Law Duties.

The Legislature has also precluded the judicial imposition of a duty to provide AEDs by occupying the field of AED regulation.

1. The Legislature has occupied the field of AED regulation.

Although "[t]he general rule is that statutes do not supplant the common law," when the "Legislature intend[s] to cover [an] entire subject," the relevant statutory enactments "totally supersede and replace the

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[5] The decisions plaintiffs cite also do not involve any state legislative policy concerning large retailers. Each deals with either a local zoning regulation or alleged restrictions on free speech. *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 282-83 [local ordinance allowing only department stores to sell furniture]; *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 303, disapproved on another ground in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 297 [ordinance prohibiting big box stores containing grocery departments]; *Costco Cos., Inc. v. Gallant* (2002) 96 Cal.App.4th 740, 753, 755 [holding that stand-alone retailer can restrict "expressive activities" and "access to its property" notwithstanding contrary rule for shopping malls]; *Lushbaugh v. Home Depot U.S.A., Inc.* (2001) 93 Cal.App.4th 1159, 1169-70 [reaching a similar result]; *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425, 437 [same].)

common law." (*I.E. Assocs. v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285 [internal quotation marks omitted].) In other words, when the Legislature "occup[ies] the field," it "cut[s] off all future judicial initiative" in that area. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 574, overruled in part on other grounds, *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.)

Intent to occupy the field is manifest where statutes spell out the relevant "course[s] of conduct, parties, things affected, limitations and exceptions" in detail. (*I.E. Associates*, 39 Cal.3d at 285 [internal quotation marks omitted].) California's AED statutes—which arise from 15 different enactments—do exactly that.[6]

First, the statutes delineate requirements relating to AEDs in certain healthcare settings. (See Health & Saf. Code § 1538.55 [Adult Residential Facilities]; *id.* § 109948.1(c)(3) [exempting AEDs from home medical

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[6] See Sen. Bill 1436 (2011-2012 Reg. Sess.) (extending civil immunity indefinitely under § 1797.196); Sen. Bill 1297 (2009-2010 Reg. Sess.) (amending AED requirements for health studios); Sen. Bill 1281 (2010) (health studios); Assem. Bill 1312 (2009-2010 Reg. Sess.) (rejecting call to require golf courses and amusement parks to install AEDs); Assem. Bill 156 (2009-2010 Reg. Sess.) (school credit for AED training); Sen. Bill 127 (2009-2010 Reg. Sess.) (health studios); Assem. Bill 2637 (2007-2008 Reg. Sess.) (dental sedation assistants); Assem. Bill 1507 (2005-2006 Reg. Sess.) (requiring AEDs and training for health studios); Assem. Bill 2083 (2005-2006 Reg. Sess.) (emergency medical services); Assem. Bill 254 (2005-2006 Reg. Sess.) (emergency medical services); Sen. Bill 962 (2005-2006 Reg. Sess.) (adult residential facilities); Assem. Res. No. 57 (2005-2006 Reg. Sess.).) (public schools); Assem. Bill 1145 (2003-2004 Reg. Sess.) (state buildings), Assem. Bill 2041 (2001-2002 Reg. Sess.) (adding § 1797.196(f)); Assem. Bill 1145 (2003-2004 Reg. Sess.), Sen. Bill 911 (1999-2000 Reg. Sess.) (partial immunity for AED users).

device service regulation].)[7] Second, they authorize the State Emergency Authority to "establish minimum standards for the training and use of" AEDs (*id.* § 1797.190), which appear in extensive regulations.[8] Third, the statutory scheme covers public entities by requiring the Department of General Services to "apply for federal funds ... for the purchase of [AEDs] to be located in" state buildings (Gov. Code § 8455(a)) and imposing specific AED requirements on "K-12 schools." (Health & Saf. Code § 1797.196(b)(5)).

Finally, and most pertinent here, the Legislature enacted detailed provisions delineating the duties of private parties who supply, acquire, use, and manufacture AEDs. The Legislature directed AED suppliers to notify local EMS agencies when a private party acquires an AED and to provide information about the AED to the purchaser. (Health & Saf. Code § 1797.196(c)). The Legislature provided that private parties who acquire AEDs are immune from civil damages for misuse of those devices if they

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[7] Regulations address AEDs in additional medical and health care settings. See Cal. Code Regs., tit. 22, §§ 70227 (licensing and certification of health facilities); 70237 (anesthesia and post-anesthesia recovery care); 79735 (out-patient surgical care); 70407 (acute respiratory care facilities); 70417 (emergency medical care facilities); 70457 (comprehensive medical care and equipment requirements); 79769 (standby emergency medical services); 80061 (community care reporting of AED use); 80075.1 (adult community care AED requirements); 82075.2 (community care facilities); 87925 (nursing homes); 87211 (nursing home licensee reporting).

[8] See 22 Cal. Code Regs. §§ 100005-06, 100020-21, 100027, 100031-100043, 100063.1.

comply with a detailed list of requirements concerning maintenance, testing, planning, notification, and training. (Civil Code § 1714.21(d); Health & Saf. Code § 1797.196(b); see pp. 53-54, *infra.*) And, of course, the Legislature stated that these requirements "may [not] be construed to require a building owner or manager to acquire and have installed an AED in any building." (Health & Saf. Code § 1797.196(f).)

The Legislature also immunized Good Samaritans who use AEDs from civil liability except in cases of "gross negligence or willful or wanton misconduct." (Civil Code § 1714.21(f).) But "manufacturer[s] and designer[s]" of AEDs *may* face product liability actions. (*Id.* § 1714.21(g).)

In short, the Legislature comprehensively delineated and "minutely described" the duties and potential liability—including "limitations and exceptions"—of every private party that is likely to come into contact with AEDs. (*I.E. Associates*, 39 Cal.3d at 285.) Because this "comprehensive" legislation "suggests a legislative intent to" supplant the common law (*K.C. Multimedia, Inc. v. Bank of Am. Tech. & Oper. Inc.* (2009) 171 Cal.App.4th 939, 957), the AED statutes provide "the exclusive source of rights, duties, and liabilities" in that area (*I.E. Associates*, 39 Cal.3d at 285).

That was the Pennsylvania Supreme Court's conclusion when addressing a similar statutory scheme. (See *Atcovitz v. Gulph Mills Tennis Club* (2002) 571 Pa. 581 [812 A.2d 1218].) The Pennsylvania court held

that a tennis club had no duty to provide an AED. Pennsylvania "lawmakers had thoroughly considered the statewide application and implications of" AED provision and use in passing the state's analogues to Section 1797.196 and Civil Code § 1714.21. (*Atcovitz*, 812 A.2d at 1223.) The Pennsylvania statutes, however, did not "impose[] a duty upon [the tennis club] to acquire, maintain, and use an AED" and the court held that it could not supplement the statutory scheme by creating such a duty. (*Id.* at 1223-24.) The same reasoning applies with greater force here, because our Legislature both expressly absolved building owners from liability for failing to provide AEDs and carved out specific exceptions to that rule.

2. A common-law duty to provide AEDs would be inconsistent with the statutory scheme.

There can be no doubt that plaintiffs' proposed new duty to acquire AEDs is inconsistent with the AED statutes. The Legislature has narrowed rather than broadened the legal duties concerning AEDs over time. As explained above (at pp. 6-8), the Legislature relaxed the training requirements for partial Good Samaritan immunity for building owners and rescuers alike, while clarifying in Section 1797.196(f) that there was no affirmative duty to provide AEDs. The affirmative duty to provide AEDs has been limited to health studios, narrowly defined to exclude hotels with fitness facilities. (See Health & Saf. Code § 104113(g).) And an effort to

extend that duty to golf courses and amusement parks—which occupy many times the acreage of the largest retailer—failed. (See p. 9, *supra*.)

In short, although the Legislature has sought to "encourage greater availability of" AEDs, the entire statutory scheme concerning AEDs expresses the Legislature's choice to promote "voluntar[y]" private actions rather than government compulsion in this area. (Assembly AB 2041 Analysis, *supra*, p. 1.) Plaintiffs' attempt to impose a new duty on businesses to provide AEDs conflicts with that policy as well as the language and structure of the statutory scheme.

3. Plaintiffs' effort to circumvent the Legislature's policy choice would produce absurd results.

Plaintiffs assert that the AED statutes cannot foreclose a common-law duty because it would be "absurd" if landholders who acquire AEDs are exposed to liability in some circumstances while "landholders who do nothing [remain] fully immune." Br. 34. But that result parallels the well-established negligent undertaking doctrine, under which one who chooses to act (for example, as a Good Samaritan) must act with reasonable care even if there is no duty to act at all. (See, *e.g.*, *Delgado*, 36 Cal.4th at 248-249.)

Nor would giving effect to the plain meaning of Section 1797.196(f) "render[] much of the [AED] legislation meaningless." (Br. 35.) The Legislature's decision not to impose a duty to install AEDs has no bearing

on the potential liability of those who *do* install and use them. Limiting the liability of the latter helped the Legislature encourage voluntary AED use.

By contrast, plaintiffs' novel tort theory *would* render some AED-related bills and statutes meaningless. If all California businesses and building owners operated under a common-law duty to install AEDs, the statutes imposing that duty on health studios would be superfluous. Section 1797.796(f), meanwhile, would be a nullity. Plaintiffs concede that provision precludes liability under a negligence *per se* theory for declining to install AEDs. (Br. 35.) But permitting juries to make the same omission tortious under a general negligence theory would render Section 1797.196(f) nugatory—and there is "no indication that ... the Legislature intended" that result. (*Merrill*, 26 Cal.4th at 477.)

II. CALIFORNIA COMMON LAW DOES NOT SUPPORT IMPOSING ON RETAILERS A CATEGORICALLY NOVEL DUTY TO PROVIDE AEDs AND TRAIN EMPLOYEES IN THEIR USE.

To the extent that the Legislature has not foreclosed any common-law duty to install AEDs, such a novel anticipatory duty remains inappropriate and without parallel in American jurisprudence. "[T]he existence of a duty is a question of law for the court" (*Ky. Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 819 ["*KFC*"]), and, as a matter of law, no duty to install AEDs applies here. The proposed duty would require retailers to undertake specific preparations, train employees, and

buy specific equipment in anticipation of the possibility that a customer will require emergency care solely as a result of her pre-existing medical condition. That would go far beyond even the disfavored duty to rescue, imposing a duty to be well-situated for a particular type of rescue if the opportunity arises.

Although businesses have a recognized duty to assist a patron who happens to become seriously ill on the premises, that duty is one to *react* or *respond* properly to the emergency, not a duty of preparedness to provide emergency services. This is no arbitrary limitation on the scope of the duty, but a principled line drawn to avoid excessive liability.

An anticipatory duty to rescue visitors from their own medical conditions using specific medical equipment is foreign to the common law. Although every state has AED legislation, none has adopted the common-law duty plaintiffs press here. (See Rodkey, Comment, *Medical Technology Meets The Maryland General Assembly: A Case Study In Handling Advances In Automated External Defibrillator Technology* (2009) 12 J. Health Care L. & Pol. 81, 87-89.) "Tort law standards are" simply the wrong means "to provide for the use of" specific equipment like AEDs. (Dobbs et al., Law of Torts (2d ed. 2013) § 7, at p.12 [discussing "four-by-four timbers"].).

A. A Duty Of Preparedness To Rescue Would Fundamentally And Categorically Distort California Tort Law.

The duty plaintiffs propose differs in kind as well as content from any duty this Court has recognized. A tort duty to provide an AED would create a preemptive, privately funded safety net for select medical emergencies that has nothing to do with the duty to "manage[] ... property" with "ordinary care." (Civil Code § 1714.) That duty of ordinary care in the "management of [one's] property" (*ibid.*) reflects the well-recognized "common law distinction between misfeasance and nonfeasance, and ... reluctance to impose liability for the latter." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129.)

Narrow exceptions to the rule precluding liability for nonfeasance arise when some "special relationship" between the parties gives rise to a specific duty to act. (*Delgado*, 36 Cal.4th at 235.) The duties attending a special relationship depend on the scope of that relationship—the extent to which one person is "particularly vulnerable and dependent" upon another. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 310 [quoting Prosser & Keeton, Torts (5th ed. 1984) § 56, p. 374].) This Court has not hesitated to draw firm lines around the affirmative duties resulting from special relationships so that their boundaries may not be infinitely expanded by juries considering whether to compensate injured plaintiffs or those who have lost a loved one. (See, *e.g.*, *KFC*, *supra*, 14 Cal.4th at 824-829.)

One limited "special relationship" arises between "business proprietors" and "their tenants, patrons, or invitees," a population that is not particularly vulnerable or dependent. (*Delgado*, 36 Cal.4th at 235.) As this Court has recognized, however, that special relationship does not give business proprietors a duty to protect their customers against every risk. (See *KFC*, 14 Cal.4th at 817 [no "duty to comply with the unlawful demand of an armed robber"].)

In particular, the duty businesses owe to customers is limited to protecting them from perils posed by the property or the activities on it: "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another." (*Williams v. State of Cal.* (1983) 34 Cal.3d 18, 23.) Thus, while landowners must protect visitors from "dangerous condition[s]" of the property (*Ann M.*, 6 Cal.4th at 682), "[u]nder well-established common law principles," there is no general "duty to come to the aid of another"—no general duty to rescue. (*Van Horn v. Watson* (2009) 45 Cal.4th 322, 324.)[9] Business owners therefore have no anticipatory duty to equip themselves for medical emergencies unrelated to the commercial premises or the activities on them.

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[9] See 6 Witkin, Summary (10th ed. 2005) Torts, § 1038, p. 332; Rest.(2d) Torts § 314; Rest.(3d) Torts § 37; see also, *e.g.*, Harel and Jacob, *An Economic Rationale for the Legal Treatment of Omissions in Tort Law: The Principle of Salience* (2002) 3 Theoretical Inquiries L. 413; Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83, 101 (1978).

1. The limited special relationship between retailers and their customers does not support an anticipatory duty to make preparations to rescue.

A property owner who becomes aware of an invitee's serious injury incurs a "duty to undertake relatively simple measures such as providing 'assistance [to] their customers who become ill or need medical attention.'" (*Delgado*, 36 Cal.4th at 241 [quoting *Breaux*, 153 Cal.App.3d at 382].) That is, the law demands that the proprietor show some basic decency to a stricken customer.

Under this "duty to respond" (*Rotolo*, 151 Cal.App.4th at 329), however, the landowner need only respond once an invitee is in distress, rather than anticipate the possibility that an invitee may be injured. And the reactive duty is "minimally burdensome": it is discharged by "simple measures" such as "placing a 911 call." (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 278; see *Breaux*, 153 Cal.App.3d at 382.)

As an exception to the general rule of no duty, this minimal reactive duty should be construed clearly and narrowly to avoid unpredictability. Plaintiffs, however, ask the Court to expand that duty beyond recognizable or predictable bounds.

That proposed duty to acquire AEDs would, for the first time, require businesses to *anticipate* medical emergencies that strike randomly and are related solely to the customer's physical condition rather the

condition of the premises or the activities conducted there. A retailer would have to acquire sophisticated medical equipment and train employees to use it to address the remote possibility that a customer *might* fall ill in a way that the equipment *might* treat. That is far beyond the recognized reactive duty of commercial proprietors.

The California courts have not yet squarely addressed whether, as the Restatement of Torts suggests, businesses must provide first aid as part of their "assistance [to] their customers who become ill." (*Delgado*, 36 Cal.4th at 241; see Rest.2d Torts § 314A(a)(1)(b), (3) & com. (f).)).[10] The Restatement (Second) of Torts contemplates that a commercial landowner who "knows or has reason to know that" an invitee is "ill or injured" may have a duty to "give such first aid as [it] reasonably can" until the stricken person may be turned over "to a physician[] or to those who will look after him and see that medical assistance is obtained." (Rest.2d Torts § 314A(a)(1)(b), (3) & com. (f).) .

But any duty to provide first aid does not encompass the acquisition or use of AEDs. The Restatement makes clear that the first-aid duty, like

[10] In asserting that in the Ninth Circuit Target acknowledged a "common law 'duty to render first aid to a customer who becomes ill or needs medical attention'" (Br. 11 [citing Target's Response to the Motion for Certification at p.5, actually p.2]), plaintiffs omit that Target said the *scope* of that duty is satisfied by "summon[ing] the police or medical services for a distressed customer." (Target's Response at p.2.)

the recognized duty to call 911 when a customer suffers a medical emergency, is reactive instead of anticipatory: A landowner is "not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured." (Rest.2d Torts § 314A, com. (f).)

Furthermore, courts in other jurisdictions have defined the Restatement's first-aid duty consistent with this Court's view that landowners need take only responsive measures that are "relatively simple" (*Delgado*, 36 Cal.4th at 241) and "minimally burdensome" (*Morris*, 36 Cal.4th at 278). The first-aid duty does not "require defendant[s] to provide, or be prepared to provide, all medical care that ... might be needed by a patron." (*Salte v. YMCA of Metropolitan Chicago Foundation* (Ill.App.Ct. 2004) 814 N.E.2d 610, 615.) Rather, the duty "requires no more assistance than that which can be provided by an untrained person" (*L.A. Fitness Intern., LLC v. Mayer* (Fla.Dist.Ct.App. 2008) 980 So.2d 550, 559): "simple procedures that can be performed with minimal equipment and training, such as bandaging and repositioning." (*Abramson v. Ritz Carlton Hotel Co., LLC* (3d Cir. 2012) 480 Fed. Appx. 158, 162 (unpublished).) These limitations accord with the National First Aid Science Advisory Board's definition of "first aid as assessments and

interventions that can be performed by a bystander (or by the victim) with minimal or no medical equipment."[11] Cf. *L.A. Fitness*, 980 So.2d at 558.

Courts nationwide have declined to expand that minimal, reactive duty to encompass procedures that require specific training or sophisticated equipment. The duty thus "does not encompass the duty to perform skilled treatment, such as CPR" (*L.A. Fitness*, 980 So.2d at 559), which necessarily accompanies use of an AED (*e.g.*, Health & Saf. Code § 1797.196(b)(2)(D)). Businesses also have no legal duty to train employees to respond to medical emergencies. (See *Baker v. Fenneman & Brown Props., LLC* (Ind.Ct.App. 2003) 793 N.E.2d 1203; *Coccarello v. Round Table of Coral Gables, Inc.* (Fla.Dist.Ct.App. 1982) 421 So.2d 194.)[12] A restaurant's duty to respond to a choking patron does not require administering the Heimlich maneuver. (*Lee v. GNLV Corp.* (Nev. 2001) 22 P.3d 209, 214). And "maintaining ... the capability of performing an intubation" on a cardiac arrest victim "goes far beyond" the Restatement

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[11] American Heart Association, *First Aid* 112 Circulation III-115, at p. III-115 (Nov. 29. 2005), available at http://circ.ahajournals.org/content/112/22_suppl/III-115.full.pdf+html). The same issue of Circulation covered defibrillation as a separate topic. (See *Defibrillation*, 112 Circulation III-17, available at http://circ.ahajournals.org/content/112/22_suppl/III-17.full.pdf+html.)

[12] A rule compelling employees "to perform first aid against their better judgment" would cause problems of its own, because "[t]he only persons expected to perform rescue techniques regardless of the circumstances are the professional medical responders called for just that purpose." (*Drew v. LeJay's Sportmen's Café, Inc.* (Wyo. 1991) 806 P.2d 301, 305-306.)

duty. (*Lundy v. Adamar of New Jersey, Inc.* (3d Cir. 1994) 34 F.3d 1173, 1179.)

Unsurprisingly, this "common understanding of 'first aid'" also "does not encompass the use of an ... AED." (*Abramson*, 480 Fed. Appx. at 162.) As the California statutes and regulations recognize (see pp. 18-20, *supra*), AED use, like CPR, "require[s] training" and is not "routine" for anyone except "first responders" and other medical professionals. (*L.A. Fitness*, 980 So.2d at 559 [discussing CPR].) And because "[t]he use of a defibrillator requires specific training," it "is far beyond the ... 'first aid' contemplated by the Restatement." (*Salte*, 814 N.E.2d at 615.) The Restatement therefore does not support a duty to equip commercial facilities with AEDs.

Indeed, several courts have held that when a customer's distress cannot be alleviated by untrained first aid, a business owner satisfies its duty to assist stricken customers by summoning "medical assistance ... within a reasonable time." (*Drew*, 806 P.2d at 306 [citing *Breaux*, *supra*]; accord, *e.g.*, *Lee*, 22 P.3d at 214.) The *Drew* court, for example, concluded that "a specific requirement of first aid, rather than aid in the form of a timely call for professional medical assistance, would place undue burdens on food servers and other business-invitors." (*Drew*, 806 P.2d at 305.) As another court observed, a restaurant has no duty to provide "medical rescue

services to its customers who become ill or injured through no act or omission of the restaurant or its employees." (*Campbell v. Eitak, Inc.* (Pa. Super. 2006) 893 A.2d 749, 752; see *Parra v. Tarasco* (Ill.App.Ct. 1992) 595 N.E.2d 1186, 1188.)

No broader duty properly applies to retailers, who have far less connection than restaurants with their customers' injuries. The duty is one of common decency, not specific medical aid. And for sudden cardiac arrest, where only trained assistance is likely to make a difference, summoning such aid is all that should be required.

2. Premises liability principles weigh against imposing novel and expansive anticipatory duties on businesses whose conduct has nothing to do with the risk of sudden cardiac arrest.

a. Plaintiffs try to root their novel proposed duty in principles of premises liability, but those principles—which address landowners who cause or contribute to a risk of harm—tilt the other way. An anticipatory duty to acquire AEDs and make them available would largely erase "the common law[] distinction between ... misfeasance and nonfeasance" (*Zelig*, 27 Cal.4th at 1129) by requiring property owners and managers to equip their sites and train their employees to respond to risks presented solely by a customer's own medical condition.

The injury here "is wholly idiopathic, *i.e.,* it is of an internal, personal origin." (*Parra, supra*, 595 N.E.2d at 1188.) The absence of any

relation between the commercial property and activity and the risk of harm from a customer's medical condition—and the fact the risk derives solely from the customer's pre-existing physical condition—separates the proposed duty to install an AED from any recognized duty of a landowner.

A business owner cannot take "any precautionary measures" to "prevent[] or protect[] against" cardiac arrest. (*Rotolo*, 151 Cal.App.4th at 328.) Plaintiffs nonetheless contend (Br. 19) that retailers have a duty to "take the precaution of including a defibrillator among its preparations for fulfilling their duty to address the emergency medical needs of their customers." But there is no duty to make "preparations" to address the general population's "emergency medical needs" unrelated to any condition of or activity on the property. (See *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1244.) While hospitals and EMS facilities have such specialized duties, other commercial property owners and managers do not.

b. These considerations undermine plaintiffs' proposed analogy between a duty to install an AED and the narrow duty to protect patrons from the criminal conduct of third parties when characteristics of the property or business itself foreseeably attract criminal activity. Those decisions all focus on the property owner's awareness that some aspect of the property or the business on it presents an unusual risk of violent third-party conduct. (See *Delgado*, 36 Cal.4th at 245 [bar fight]; *Ann. M.*, 6

Cal.4th at 674 [break-in at shopping center]); *Sharon P. v. Arman Ltd.* (1999) 21 Cal.4th 1181, 1195 [assaults in parking garages], disapproved in part on unrelated grounds, *Reid*, 50 Cal.4th at 527 fn.5, and *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn.19.) Poor lighting might make a common area attractive to criminals, and the combination of alcohol and clientele might increase the likelihood of violence.

Yet even where criminal activity is foreseeable, the Court has not imposed a duty to hire security guards or to take other anticipatory actions apart from improving the condition of the property to prevent an attack on patrons by third parties. (*Delgado*, 36 Cal.4th at 245.) The Court has only required a proprietor to respond reasonably with the resources it has when an emergency arises, which might include "telephoning the police or 911 for assistance" or "providing an escort by *existing* security personnel to a car in th[e] parking lot." (*Id.* at 241 [emphasis added]; see *Morris*, 36 Cal.4th at 277 [assault in restaurant's shared parking lot prompted only "an obligation to make a [911] call, or to take other similar minimal measures"].)

c. None of the other premises liability decisions that plaintiffs cite (Br. 14-15) imposed a duty to prevent injuries unrelated to property or commercial activity on it. Those decisions simply reflect landowners' duty to take reasonable measures to protect invitees from risks related to

conditions or activities on the property. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1204 ["puddled milk" on store floor]; *Haft v. Lone Pine Hotel* (1970) 3 Cal.3d 756, 776 [swimming pool]; *Rovegno, supra,* 108 Cal.App. at 595 [same]; *Dieterle v. Dieterle* (1904) 143 Cal. 683, 686 [owner leased part of building to "paper box factory" that posed "dangers of fire"]; *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1084 [collisions on motocross track]; *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 176, 179 [duty to provide "adequate water and fluids" during marathon because of risk of "dehydration"]).[13]

Plaintiffs also cite two cases involving schools held liable for injuries to their students. (See Br. 15.) But liability there hinged on the failure to "provide adequate safeguards against a known dangerous condition." (*Joyce v. Simi Valley School District* (2003) 110 Cal.App.4th 292, 299-300 [open gate]; see also *Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 599-600 [delivery trucks].) And, of course, schools have a heightened special relationship with their vulnerable young students. (See *Taylor*, 17 Cal.2d at 600; *Joyce*, 110 Cal.App.4th at 304 n.8.)

In contrast, a retailer does not create or increase the risk that a customer may suffer sudden cardiac arrest, nor does it create the risk that paramedics might not reach her in time any more than does anyone who

[13] *Saffro* and *Rosecrans* reflect the duty "not to *increase* the risks inherent in the plaintiff's activity" on the property. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [emphasis added].)

locates a business (or a sidewalk) anywhere not adjacent to an EMS provider. Plaintiffs' proposed duty would require a retailer to make the interior of its store *safer* than surrounding buildings or public spaces by making special preparations to care for specific medical emergencies. But "a business proprietor is not an insurer of an invitee's safety." (*KFC*, 14 Cal.4th at 819.) Just as a business operator has no duty to reduce the "risks inherent in the plaintiff's activity" (*Parsons*, 15 Cal.4th at 482), there is no duty to reduce the "risks inherent" in the plaintiff herself. Requiring landowners to anticipate specific medical conditions and to prepare to treat them with particular equipment would deputize landowners as a species of EMS provider. Using the common law to impose such an unfamiliar role would sweep away well-established, "socially and judicially acceptable limit[s] on recovery of damages" (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 668) by creating liability in those who operate the property where a person's medical condition happened to strike.

3. A retailer is not a common carrier, nor is there any basis to single out large retailers for similarly enhanced duties.

Casting about for a basis to require retailers to protect customers from their own health conditions, plaintiffs suggest (Br. 19) that large retailers should be subjected to common carriers' statutory duty of "utmost care and diligence" (Civ. Code § 2100). The Restatement does suggest that the duties of "[a] possessor of land who holds it open to the public" are

"similar" to those of a common carrier. (Rest.2d (Torts) § 314A(3).) The analogy, however, does not help plaintiffs: the heightened duty applies only to the passengers' "safe carriage" (Civ. Code § 2100), "exempting other activities of the carrier even if on the same property" (*Simon v. Walt Disney World Co.* (2004) 114 Cal.App.4th 1162, 1170 [citing *Falls v. San Francisco & N. Pac. R.R.* (1893) 97 Cal. 114, 119]). And unlike passengers in transit, retail customers are not enclosed in a conveyance that restricts their movement and makes them inaccessible to emergency services

It is a long way from the requirement to "provide everything necessary" for "safe carriage" (Civ. Code § 2100) to requiring that a noncarrier stock specific medical equipment in case a customer who walks in with a heart condition suffers sudden cardiac arrest before she walks out. Plaintiffs provide no means to bridge that gap, but they misleadingly suggest (Br. 17-19) that common carriers have a per se duty to acquire and install AEDs. No such duty exists. Notwithstanding their heightened duty of care, "[c]ommon carriers are not ... insurers of their passengers' safety." (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1130 [internal quotation marks omitted].) Rather, their required "degree of care and diligence" depends on "the character and mode of conveyance adopted and the practical operation of the business." (*Ibid.* [internal quotation marks

omitted].) A cruise ship thus may need a well-stocked infirmary, and an airliner may need an enhanced first-aid kit—including, by federal regulation, an AED. (See 14 C.F.R. § 121.803(c)(4).) But as a general matter, even a common carrier's duty to customers injured through no fault of its own extends no further than "to see that they are cared for if injured." (*DeVera v. Long Beach Pub. Transp. Co.* (1986) 180 Cal.App.3d 782, 793.)

Seeking other means to impose heightened duties, plaintiffs contend that the Court should subject large retail facilities to *ad hoc* "restrictions and responsibilities that come with being a massive enterprise serving large numbers of people in an environment where access is limited." (Br. 40.) Plaintiffs cannot explain why a retailer's size should prompt the creation of anticipatory duties that differ categorically from those recognized now. Nor can plaintiffs explain how "access is limited" to a space where emergency medical service personnel may arrive within minutes (as they did here), presumably to be directed promptly by staff to the stricken individual. Indeed, emergency personnel would seem more likely to be summoned and directed promptly to a stricken individual in a large and crowded retail store than on the street or in quieter establishments.

Plaintiffs strain to contend that "Rosemary Verdugo did not assume a risk of death" from sudden cardiac arrest "simply because she was shopping at Target." (Br. 19.) But Target did not create that risk; Ms.

Verdugo brought it with her. And the risks she brought with her were no greater in a retail store without an AED than in a car, in a park, or on the street. In each of these settings, she might have hoped that someone had made preparations to provide her with emergency assistance, should she need it. But the only risk she assumed was the risk we all assume in going about our lives: than a medical condition may strike unexpectedly. Yet just as "well-established policy" prevents the creation of tort duties that would make landlords into "insurers of public safety" (*Ann M.*, 6 Cal.4th at 679), public policy likewise precludes using tort law to transform landowners into mandated providers of emergency medical services in order to decrease the risks of certain medical conditions.

B. An Anticipatory Duty To Install An AED Would Place California Outside The Mainstream of American Law.

Imposing a common-law duty to provide AEDs would place this Court far outside the mainstream of American law. Every reported decision to address the issue has rejected that duty, even where the risk of sudden cardiac arrest was arguably enhanced by activities on the premises.

The Pennsylvania Supreme Court declined to impose a duty on a tennis club to acquire and maintain an AED. (See *Atcovitz*, *supra*, 812 A.2d 1218.) The New York courts have declined to impose a common law duty to install an AED on health clubs, though they have entertained claims for health clubs' negligent *use* of AEDs after an intervening statute required

AED installation. (See *Miglino v. Bally Total Fitness of Greater New York, Inc.* (N.Y. 2013) 20 N.Y.3d 342, 351 [985 N.E.2d 128, 134] [citing *Rutnik v. Colonie Center Court Club Inc.* (N.Y. App. Div. 1998) 672 N.Y.S.2d 451, 452; *Putrino v. Buffalo Athletic Club* (N.Y. App. Div. 1993) 598 N.Y.S.2d 648, aff'd (1993) 82 N.Y.2d 779 [624 N.E.2d 676]; *Digiulio v. Gran, Inc.* (N.Y. App. Div. 2010) 903 N.Y.S.2d 359, aff'd (2011) 17 N.Y.3d 765 [952 N.E.2d 1064].) And the U.S. Court of Appeals for the Third Circuit applied New Jersey law to hold that hotels have no duty to maintain AEDs for use on guests who suffer cardiac arrest. (*Abramson*, 480 Fed. Appx. at 162.)

Appellate courts in Illinois and Georgia refused to impose a similar duty on a health club (see *Salte*, *supra*, 814 N.E.2d 610) and arts center (see *Boller v. Robert W. Woodruff Arts Cntr., Inc.* (Gal.App. 2011) 716 S.E.2d 713). The Florida courts have gone the same way. (*L.A. Fitness*, 980 So.2d at 561-562; see also *Limones v. School Dist. of Lee Cnty.* (Fla.Dist.Ct.App. 2013) 111 So.3d 901 [no common law duty to provide AED to student athletes].)[14]

Plaintiffs seek federal support for their position by suggesting that "Target is subject to ... standards" published by the Occupational Safety

[14] The Ninth Circuit's certification order cited unpublished trial court decisions purporting to recognize a duty to acquire and maintain AEDs for health clubs (see 704 F.3d at 1050). We are unaware of any court in any jurisdiction that has imposed a similar duty on any other business.

and Health Administration ("OSHA") (Br. 12), citing a 2006 pamphlet that lists AEDs as part of a suggested "workplace first-aid program." (Verdugo RJN #8, at 3.) But as the OSHA pamphlet itself makes clear, it "is *not* a standard or regulation, and it creates no new legal obligations," but is purely "advisory in nature." (*Id.* at 1 [emphasis added].) The actual OSHA regulations do *not* require an on-site AED.[15] Second, the pamphlet does not even *suggest* that every workplace must have an AED. Instead, it merely states that "[e]ach workplace should assess its own requirements for an AED program." (*Id.* at 10.) The pamphlet thus is consistent with the flexibility afforded by California statutes and the common law.

C. The *Rowland* Factors Do Not Support A Duty To Acquire and Maintain AEDs.

Because the novel duty proposed here does not come within the general duty of reasonable care in Civil Code section 1714(a), no further analysis is necessary. But even if that were a closer issue, some proposed duties fall so far outside common-law norms that they are barred by "the rules specifying the duty of a landowner to its tenants and patrons. (*Ann M.*, 6 Cal.4th at 675.)

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[15] OSHA interprets its own standards to provide that "AEDs are not required first-aid supplies." (See https://www.osha.gov/SLTC/aed/ (linking to advice letter at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24919).)

This is such a case. The "factors" that may "weigh[] for and against the imposition of a duty on [a] landowner" include: [1] the "foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved." (*Ann M.*, 6 Cal.4th at 675 & fn.5 [quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113].) The *Rowland* factors do not support imposing on retailers or other commercial property owners a duty to install AEDs and train their employees in their use.

1. The harm resulting from the lack of an installed AED does not satisfy the "high degree of foreseeability" necessary to support the imposition of this anticipatory duty.

"[W]hen analyzed to determine the existence or scope of a duty," foreseeability "is a question of law to be decided by the court." (*Ann. M.*, 6 Cal.4th at 678.) Foreseeability in the abstract does not by itself "provide[] a socially and judicially acceptable limit on recovery of damages" for even a foreseeable injury. (*Thing*, 48 Cal.3d at 668.) But a duty that would involve anticipatory commitments of equipment and personnel requires a

"high degree of foreseeability" of the harm to be prevented or mitigated. (See *Delgado*, 36 Cal.4th at 237-38 [quoting *Ann. M.*, 6 Cal.4th 666 at 678-79]; *Sharon P.*, 21 Cal.4th at 1190-91.) That is, "the degree of foreseeability must be high enough to charge the defendant with a duty to act" (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 465), displacing the assumption that nonfeasance is not negligent.

The specific harm at issue here is the incremental risk of harm from a marginally later response to sudden cardiac arrest that occurs purely by chance on particular business property. That risk does not rise to the necessary "high degree of foreseeability."

"[F]oreseeable ... does not mean simply imaginable or conceivable." (*Jefferson v. Qwik Korner Mkt., Inc.* (1994) 28 Cal.App.4th 990, 996.) Foreseeability has few limits in the abstract; "almost any result [is] foreseeable with the benefit of hindsight." (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 269; see also *Thing*, 48 Cal.3d at 668.)

Thus, it is not enough simply to cite statistics showing that many people—perhaps one in a thousand each year—experience sudden cardiac arrest. A duty to take precautions arises only when some particular harm in a particular place is reasonably and categorically foreseeable. (See *Ann M.*, 6 Cal.4th at 678.) As this Court observed, "[i]t is difficult, if not impossible, to envision any locale open to the public where the occurrence

of violent crime seems improbable." (*Ibid.*) And so it is with sudden cardiac arrest, which can happen anywhere, though the American Heart Association reports that 88% occur at home. (See http://www.heart.org/HEARTORG/CPRAndECC/WhatisCPR/CPRFactsandStats/CPR-Statistics_UCM_307542_Article.jsp.)

In fact, the odds of sudden cardiac arrest in any particular retail location in a given year are quite small. Hundreds of thousands of California businesses are open to the public, including more than 95,000 retailers, 42,000 financial institutions, 17,000 nightclubs, stadiums, and movie theaters, 11,000 schools and educational institutions, 63,000 restaurants and bars, and other businesses ranging from laundromats to auto repair shops to real estate brokers to convention halls.[16] And in enacting Section 1797.196, the Legislature estimated that 460 cardiac arrests occurred outside the home each month.[17] An American Heart Association study indicates that about half of these cardiac arrests occur in private

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[16] California Employment Development Dept., Size of Business Data For California (Quarterly), Payroll and Number of Businesses by Size of Business – Classified by Industry (Table 2A) (Qtr. 2, 2012), available at http://www.labormarketinfo.edd.ca.gov/Content.asp?pageid=1045

[17] Assembly Com. on Judiciary, Analysis of Sen. Bill 911 (1999-2000 Reg. Sess.), as amended June 8, 1999, p. 3. Those numbers likely have declined; according to the California Department of Public Health "California's age-adjusted heart disease death rate dropped from 237.6 in 2000 to 169.5 in 2008, a 28.7 percent decrease." See Loran Sheley, MA, California Department of Public Health, Heart Disease Mortality Data Trends, California 2000-2008 (Jan. 10, 2011), available at http://www.cdph.ca.gov/programs/ohir/Pages/Heart2008PrinterVersion.aspx).

vehicles or outdoors, and that sudden cardiac arrest is far more likely to occur in places such as airports, county jails, sports venues, and golf courses than in any retail store. (See Becker, et al., *Public Locations of Cardiac Arrest: Implications for Public Access Defibrillation* (1998) 97 Circulation 2106.)[18] Indeed, the odds of cardiac arrest occurring at any particular retail site in a given year were only 1 in 2000. (*Id.* at 2108.) That was the second lowest cardiac arrest rate out of 23 surveyed categories. (*Ibid.*)[19]

The distant possibility that a customer may suffer sudden cardiac arrest in a particular retail facility does not approach the high degree of foreseeability required to impose the affirmative, precautionary duty plaintiffs seek. And the harm at issue—cardiac arrests that would be alleviated AED—is still more remote, because only cardiac arrests that involve ventricular fibrillation are potentially responsive to AEDs. (See Becker, *supra*, at 2108.) One study found that just 60% of cardiac arrests

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[18] This study contains the type of "legislative facts" that may be considered without judicial notice. (See *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 776 fn. 5.)

[19] By contrast, public sports arenas and golf courses—the subject of failed mandatory AED legislation (see p. 9, *supra*), ranked fourth (1 in 3) and sixth (1 in 5). (*Id.* at 2107.) "Large shopping malls" had higher rates (1 in 2), but a large mall typically covers up to a million square feet of retail space and includes several large retailers along with dozens of small and medium-sized stores, restaurants, and common areas where visitors congregate and linger. (See *Costco*, *supra*, 96 Cal.App.4th at 755; *Trader Joe's*, *supra*, 73 Cal.App.4th at 433.).

involved ventricular fibrillation (*Ibid.*; see Weisfeldt et al., *Ventricular Tachyarrhythmias After Cardiac Arrest in Public Versus at Home* (2011) 364 New Eng. J. Med. 313, 314 [60% of cardiac arrests in public places involve fibrillation, but proportion is declining].) And under half (and perhaps as few as 10%) of ventricular fibrillation victims would be likely to survive as a result of AED use. (Becker, *supra*, at 2108.)

Some few retail customers may be stricken by the cardiovascular disease they walked in with. But that fact of the human condition does not support imposing a duty on retailers to take substantial precautions to protect customers from medical emergencies brought on only by the customers' own health conditions.

2. There is no substantial causal connection between the choice not to install an AED and any injury in a particular case.

The second and third *Rowland* factors address "the degree of certainty that the plaintiff suffered injury" from the act or omission that the duty is designed to address and "the closeness of the connection between the defendant's conduct and the injury." (*Rowland*, 69 Cal.2d at 113.) The "close connection" factor considers the "causal connection between defendants' conduct and the injury suffered" (*Nally*, 47 Cal.3d at 296; *accord, e.g.*, *Tucker v. CBS Radio Stations, Inc.* (2011) 194 Cal.App.4th 1246, 1254; *Sakiyama v. AMF Bowling Ctrs., Inc.* (2003) 110 Cal.App.4th 398, 409.)

Although the fact of injury from sudden cardiac arrest is clear, it is far from certain that any given arrest will involve ventricular fibrillation, let alone fibrillation that can be relieved with an AED.

Moreover, the connection between that injury and the absence of an AED on site is highly attenuated at best. Even under the best of circumstances, with highly trained personnel and immediate intervention, AEDs fail more often than they succeed. The U.S. Congress has found that, when an AED is used immediately, only 30 percent of those experiencing cardiac arrest survive. (Cardiac Arrest Survival Act of 2000, Pub.L. No. 106–505, § 402(4), 114 Stat. 2314.) The chance of survival decreases by 10 percent for every minute that passes before the heart's rhythm is restored. (*Id.* § 402(5).) That greatly diminishes the odds of survival in a setting where lay customers and store employees may panic or simply fail to locate an AED and a trained employee soon enough.

Another reason that "AEDs are not foolproof" is their susceptibility to malfunction. (See Sen. Com. on Judiciary, Analysis of Sen. Bill 1281 (2009-2010 Reg. Sess.) May 4, 2010, p. 13.) The Food and Drug Administration (FDA) recognizes "persistent safety problems with all types of external defibrillators, across all manufacturers," reflected in dozens of recalls affecting hundreds of thousands of AEDs. (FDA, External

Defibrillator Improvement Initiative Paper (Nov. 2010), p. 4.)[20] The FDA has also received thousands of reports of external defibrillator malfunctions, including some during rescue attempts. (*Id.* at 5-6.) Indeed, 613,000 defibrillators of the kind formerly sold on Target.com (see Br. 2 [citing Verdugo RJN #9, at 1-2]) were recently recalled by their manufacturer, Philips Medical Systems.[21]

Plaintiffs also overlook the logistical challenges in administering emergency first aid in a large retail environment crowded with shoppers. If someone notices within 60 seconds that a customer has collapsed; and if that person immediately recognizes the signs of cardiac arrest and can flag down a sales associate; and if that sales associate can locate or summon an employee specifically trained in the use of AEDs; and if the trained layperson can grab the AED and race through crowded retail aisles; and if the trained layperson does not panic and the AED doesn't malfunction; and if the customer's cardiac arrest involves ventricular fibrillation, then the stricken customer might be revived. The long odds against all of this happening successfully in the space of five minutes explain why successful lay intervention is far from certain. And it makes especially uncertain any

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[20] See http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/CardiovascularDevices/ExternalDefibrillators/ucm232621.htm.

[21] FDA, Class 2 Recall Philips and Laerdal Brands of HeartStart HS1 Defibrillator Family, Recall No. Z-0643-2013 (Jan. 4, 2013), available at http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfres/res.cfm?id=113133

incremental improvement over immediately dialing 911 upon (or before) finding a sales associate.

In fact, a 2010 study by the Centers for Disease Control and Emory University School of Medicine reported that the cardiac arrest survival rate when bystander AEDs were used was only 23.5% (275 of 1,172).[22] Other studies estimate that the chance of survival is only 33% even when CPR and defibrillation were provided by lay rescuers within three and a half minutes.[23] The OSHA pamphlet submitted by plaintiffs cites "a 60% survival rate," but examination of its support makes clear that means 60% of the 60% of cardiac arrest victims undergoing ventricular fibrillation, or 36% of the total.[24] Other studies estimate survival rates between 38% and

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[22] Levins, *The Automated External Defibrillator: Medical Marvel But Measurement Mystery* (May 2012) U. Penn. LDI Health Economist, available at http://ldihealtheconomist.com/he000019.shtml; see also Hazinski, et al., Lay Rescuer Automated External Defibrillator Programs (2005) Circulation 111: 3336, available at http://circ.ahajournals.org/content/111/24/3336.full (30 of 128 of victims, or 23%, survived after AED treatment by lay-responders).

[23] Drezner et al., *Automated External Defibrillator Use at NCAA Division II and III Universities* (2011) 45 Brit. J. Sports Med. 1174, available at http://bjsm.bmj.com/content/early/2010/11/15/bjsm.2009.070052.abstract

[24] See Verdugo RJN #8, at 10 (citing Amer. Heart Ass'n, *Guidelines 2000 for Cardiopulmonary Resuscitation and Emergency Cardiovascular Care* (2000) 102 Circulation Supp. I-60, at I-61, Fig. 1). The cited figure in *Guidelines 2000* in turn references (102 Circulation at I-61, Fig. 1 & fn.41) Larsen, et al., *Predicting Survival from out-of-hospital cardiac arrest: a graphic model* (Nov. 1993) Annals of Emergency Med. 1652, available at http://www.annemergmed.com/article/S0196-0644(05)81302-2/abstract, which concedes that its figures were limited to a "group with a higher

49%.[25]

The presence of an AED is thus less likely than not to change the outcome of any particular cardiac arrest. Unsurprisingly, the hundreds of thousands of bystander AED units have had little impact on overall survival: A 2010 review of 79 studies of U.S. resuscitation trends concluded that "[s]urvival from [out-of-hospital cardiac arrest] has not significantly improved in almost 3 decades." (Sasson et. al, *Predictors of Survival From Out-of-Hospital Cardiac Arrest: A Systematic Review and Meta-Analysis* (2010) 3 Circulation: Cardiovascular Quality and Outcomes 63.)[26]

Because of the remote connection between death from sudden cardiac arrest and the absence of an AED on commercial premises, any harm from that absence is not sufficiently certain to support imposition of a common law duty to install AEDs. Moreover, because the "close

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likelihood of survival" because the "patients were in ventricular defibrillation." (*Id.* at 1653.)

[25] See Starr, *Automated External Defibrillation in the Occupational Setting* (2012) J. Occupational & Emergency Med. 1170 (estimating survival rate at 38%), available at http://www.acoem.org/uploadedFiles/Public_Affairs/Policies_And_Position_Statements/Guidelines/Position_Statements/Automated%20External%20Defibrillation%20in%20Occup%20Setting.pdf; Valenzuela, et al., *Outcomes of Rapid Defibrillation by Security Officers after Cardiac Arrest in Casinos* (2000) 343 New Eng. J. Med. 1206, available at http://www.nejm.org/doi/full/10.1056/NEJM200010263431701 (49%); Weisfeldt, *supra*, 364 New Eng. J. Med. 313 (42%).

[26] See http://circoutcomes.ahajournals.org/content/3/1/63.long

connection" factor is "strongly related to the question of foreseeability itself," the fact that any injury from sudden cardiac arrest "is connected only distantly and indirectly" to the decision not to install AEDs confirms that the injury was "unforeseeable" as a matter of law. (*Cabral*, 51 Cal.4th at 779.)

3. No moral blame attends a choice not to install an AED.

The moral blame factor in the *Rowland* analysis requires a greater degree of culpability than would be found in the ordinary negligence case; otherwise it would be redundant with the other factors. (See *Adams*, 68 Cal.App.4th at 270.) This factor comes into play only when a defendant (1) intended the harmful result; (2) had actual or constructive knowledge of the harmful consequences of its behavior; (3) acted in bad faith or with reckless indifference, or (4) engaged in inherently harmful conduct. (*Ibid.* [summarizing cases].)[27]

There is nothing morally blameworthy about not installing an AED. The Legislature's express determination that "building owner[s]" have no duty "to acquire and have installed an AED in any building" (Health & Saf.

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[27] The contrary, pro-redundancy suggestion that negligence alone is enough (see Verdugo Br. 29-30 [citing *Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1113]) has few adherents. This Court's decision in *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 814, involved extraordinary inaction in the face of repeated assaults on the same stairway.

Code § 1797.196(f)) precludes a finding of any kind of moral blame, let alone reckless indifference or intent to harm. And given the remote chance either that (1) a customer would have a heart attack on store premises or that (2) the presence of an AED would make a difference, no retailer can be said to have actual or constructive knowledge that the absence of an AED would have harmful consequences. It certainly cannot be enough that plaintiffs (like those here) can always *plead* reckless indifference. (See Br. 30 fn.8.) This factor, too, weighs against imposition of a duty here.

4. The additional factors—the policy of preventing future harm, consequences of imposing duty, and availability of insurance—do not support imposition of a duty to install AEDs.

The remaining *Rowland* factors do not support the imposition of a duty to install AEDs. As the discussion of foreseeability and causation above confirms, the policy of preventing future harm would be advanced only tangentially and randomly.

The burden, however, would be significant. Plaintiffs insist that they do not seek to require "every landholder in California who solicits invitees [to] have an AED" (Br. 39) and claim that they "do not advocate a rule that would apply to a modest neighborhood drycleaner or gas station" (Br. 40). But that is the practical effect of the duty they propose. Plaintiffs try to bootstrap the tort duty onto the immunity statute, "contend[ing] that if a landholder has sufficient staffing and resources to comply with immunity

statutes without hardship, a fact finder should be entitled to reach the question of whether their decision not to procure an AED was negligent." (*Ibid.*) Yet the practical effect of allowing juries to decide whether any particular business had enough revenue or employees to warrant imposing liability would be that every business would have to acquire at least one AED—the exact opposite of what the Legislature declared in Health and Safety Code section 1797.196(f).

Moreover, a duty to install AEDs would involve costs far beyond the minimum $1200 for each device. Such a duty would carry with it not only the cost of needed accessories, but the training and maintenance requirements in Section 1797.196 needed to avoid a risk of liability every time an AED was used—not to mention the affirmative duties imposed in the "lay rescuer" regulations applicable to all who install AEDs. (See 22 C.C.R. §§ 100031, 100037-100041.) Those requirements include:

- *Maintenance and regular testing*, including "check[ing]" the device "for readiness after each use and at least once every 30 days." (Health & Saf. Code § 1797.196(b)(2)(A)-(B).)
- *Paperwork*, including maintaining records of equipment "checks"; reporting any AED use; drafting and updating a "written plan that describes [emergency] procedures" involving the AED; and annually notifying any tenants of

AED locations and providing them with a brochure describing proper AED use. (*Id.* § 1797.196(2)(B)-(C) & (E), 1797.196(b)(3)-(4).)

- *Employee time* for half-day trainings in AED use and CPR at least "every two years" along with "periodic training and skills proficiency demonstrations." (22 C.C.R. § 100041(a); Health & Saf. Code § 1797.196(b)(2)(D).)[28]
- *Professional fees* for AED/CPR instructors and for the "currently licensed California physician and surgeon" who must oversee AED training and "review each incident" involving CPR and AED use. (22 C.C.R. §§ 100040(b)-(c); 100041(a)(9).)
- *Compliance with* "all regulations governing the placement," "operation and maintenance" of AEDs promulgated by any "applicable state and federal authority." (Health & Saf. Code § 17971.196(b)(1) & (2)(A).)

Even then, any business where a customer suffered sudden cardiac arrest would remain exposed to a lawsuit any time a plaintiff was willing to plead that the store was "grossly negligent" and thus circumvent the limited

[28] If "employee turnover ... is high"—as it is in the food service and retail industries—"continual training efforts might be required to provide a staff capable of providing first aid." (*Drew*, 806 P.2d at 305.)

civil immunity. (See Civ. Code § 1714.21(f).)[29] Once a duty to rescue is imposed, limited civil immunity statutes are not sufficient to deter litigation. And no doubt plaintiffs would allege that a business should have had more than one AED whenever the response with one was not quick enough.

These burdens would not, as plaintiffs contend, "pale[] in comparison to the ... burdens that have passed muster in other cases." (Br. 38.) The recurrent training and maintenance costs, plus equipment costs, would reach into the thousands of dollars per AED—soon exceeding a billion dollars for the hundreds of thousands of potentially affected businesses.

More important, in each of plaintiffs' authorities, the danger at issue was intimately tied to the property or the usual activity there.[30] Here, by contrast, the proposed duty to provide AEDs involves a danger no more likely to strike in a retail store than anywhere else. And while plaintiffs

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[29] Illustrating the ease of pleading around limits, plaintiffs here pleaded that Target was "reckless" and "grossly negligent" (ER 122)—indeed, committed a felony (see ER 125)—by not providing an AED that no statute, regulation, or legal decision required it to provide.

[30] See *Delgado*, 36 Cal.4th at 230–31 [altercation among bar patrons]; *Lopez v. S. Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 784 [fight on bus on route with history of violence]; *Rosencrans*, 192 Cal.App.4th at 1077–78 [collision on motocross course]; *M.W. v. Panama Buena Vista Union Sch. Dist.* (2003) 110 Cal.App.4th 508, 524–25 [sexual assault between students at school]; *Saffro*, 98 Cal.App.4th at 179 [dehydration from lack of fluids on marathon course]; *Rovegno*, 108 Cal.App. at 597 [drowning in swimming pool].

suggest that training is not burdensome for those retailers who have "trained pharmacists on staff" (Br. 39), the point is a red herring: no statute or regulation requires pharmacists to undergo and maintain AED training, and a wide range of retailers (including large retailers) have no pharmacists on staff. Moreover, although plaintiffs do not say that every pharmacy or grocery store with a pharmacy also has a duty to have an AED, their logic suggests that conclusion.

The insurance factor weighs against plaintiffs because the premise of the duty here would require insurance to be extended or construed to cover a new category of risk: medical emergencies bearing no relation to the property or the business, but that might befall customers while on the premises. If a customer's sudden cardiac arrest can be a wrongful death chargeable to the business proprietor, then effective insurance would have to cover those random incidents, necessarily increasing premium costs.

Plaintiffs' proposed duty would generate similarly negative consequences for the community at large. "Ultimately," all of the costs imposed on businesses by any duty to acquire and maintain AEDs would be "borne by the consumer" in the form of higher prices. (*Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 33 [internal quotation marks omitted].) In addition, a duty to acquire AEDs would create substantial legal uncertainty because of the conflict with the Legislature's "clearly

expressed ... policy" foreclosing liability for declining to install AEDs. (*Quigley v. First Church of Christ, Scientist* (1998) 65 Cal.App.4th 1027, 1041.)

As discussed above (at pp. 42-51), the possibility that a customer will suffer cardiac arrest while shopping—and that the customer's life will be saved because a retailer installed an AED—is remote. Essentially, then, plaintiffs are arguing that any possibility of avoiding a death, no matter how small, forms a sufficient basis for imposing an onerous duty of preparedness. But the unfortunate fact of a death cannot, and does not, tip the balance in favor of imposing a duty in every case. Tort law does not force everyone to take every step that may help someone else in the future.

The insurance factor also weighs against plaintiffs, who provide no reason to believe that property insurance includes coverage for such an unusual category of risk: every medical emergency that might randomly befall customers while on the premises without any relation to the premises or activities carried out there. (See *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 477 [insurance factor does not favor a duty where the Court is "not confident that" most potentially liable actors were insured against the risk].) More likely, premiums would have to be increased to cover that entirely new risk category. (See *Delgado*, 36 Cal.4th at 258 [Kennard, J., dissenting].) The duty plaintiffs propose here would make retailers into

insurers against their customers' unrelated medical trauma.

Finally, "California's public policy ... encourag[ing] dissemination of AEDs" (Verdugo Br. 41) stops short of any mandatory duty. As the statutes and their legislative history make clear (see pp. 5-9, *supra*), California public policy supports voluntary—not mandatory—acquisition and use of AEDs. By explicitly rejecting imposition of an affirmative duty to install AEDs in Section 1797.196(f), the Legislature dispelled any doubt on this score. Because this Court's "role ... is not to sit in judgment of the Legislature's wisdom in" striking that particular "balanc[e]" (*L.A. Cnty. Metro. Transp. Auth. v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1113 [internal quotation marks omitted]), any mandatory AED installation duty should be rejected as "inconsistent with the public policy" articulated by the Legislature (*KFC*, 14 Cal.4th at 829).

5. The *Rowland* factors—and the lack of limiting principles—confirm that no new duty should be imposed here.

In these circumstances, the *Rowland* factors weigh against using tort law to do exactly what the Legislature declined to do: require business owners to prepare for the emergency needs of any customer susceptible to sudden cardiac arrest. Moreover, it would likely prove impossible to restrict the expansion of such a fundamental alteration in the duty to manage property with ordinary care.

Line-drawing would be practically impossible. If retailers must be equipped to provide special assistance to those with heart disease, why should an allergic child or a diabetic adult not benefit from a similar duty? (Indeed, the Legislature has considered legislation on the model of Section 1797.196 to encourage the acquisition of epinephrine injectors for just that purpose. (See Sen. Bill 669 (2013-2014 Reg. Sess.).) If a duty is imposed to prepare to attend to customers with heart conditions, any person who succumbs to a medical condition on business premises (or her survivors) would be entitled to have a jury determine whether the business should have had better medical supplies or better-trained employees.

Every prudent retailer would thus need both a thorough collection of medical equipment and a staff trained to use it. This Court has never imposed a burden of that kind. Just as it would be "contrary to well-established policy" to make landlords "the insurers of public safety" (*Ann M.*, 6 Cal.4th at 679), it would be equally inappropriate to force retailers to become public health service providers with substantial duties of prediction and preparedness.

In addition, as discussed above (at pp. 4-5), plaintiffs have provided no principled basis for restricting their duty to any particular subset of businesses. And they cannot define the subset of businesses they believe

should be required to have AEDs.[31] They ultimately say that the test should be how well a jury thinks any given business could absorb the costs of equipment and training. (See Br. 40.)

Thus, if this Court recognized *any* duty to install AEDs that went beyond the statutory requirement for health studios, the demarcation would occur case by case and jury by jury. As a result, if plaintiffs prevail, "every landholder in California who solicits invitees" *would* be potentially subjected to a duty to "have an AED" (Br. 39)—and to the substantial cost of lawsuits alleging such a duty.

The Legislature has already confronted the precise question certified to the Court, and explicitly disavowed the duty that plaintiffs ask this Court to impose instead. This Court should not displace the Legislature's voluntary AED adoption scheme with a compulsory tort duty.

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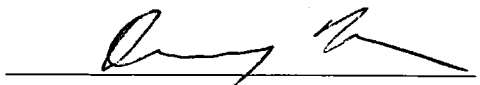
[31] Although plaintiffs assert that the category of "Big Box retailers" is "well-defined under California law" (Br. 40), the definitions—which address far different considerations—vary widely. The economic-aid statutes identify "store[s] of greater than 75,000 square feet of gross buildable area." (Gov. Code § 53084(b)(1); Health & Saf. Code § 33426.7(b)(1).) By contrast, the cases plaintiffs cite involved store sizes ranging from an "approximately 11,000 square-foot stand-alone structure" (*Trader Joe's*, 73 Cal.App.4th at 428) to "retail stores of greater than 100,000 square feet" (*Wal-Mart Stores*, 138 Cal.App.4th at 280).

CONCLUSION

The certified question should be answered in the negative.

Dated: August 9, 2013

Respectfully submitted,



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CERTIFICATE OF WORD COUNT
(California Rule of Court 8.520(c)(1))

According to the word count facility in Microsoft Word 2007, this brief, including footnotes, but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 13,954 words, and therefore complies with the 14,000-word limit contained in Rule 8.520(c)(1).

Dated: August 9, 2013

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I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306. On August 9, 2013, I served the foregoing document(s) described as:

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Kristine Neale

Kristine Neale