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,

vs.

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

Defendant/Respondent.

REPLY BRIEF ON THE MERITS

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

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I. INTRODUCTION

Respondent Target Corporation's Answer Brief on the Merits fails to meaningfully address why the Legislature would enact and amend conditional qualified immunity legislation *six times*, if it did not recognize that an underlying common law liability exists. Nor does Target explain how the Legislature could possibly have intended a statutory construction that gives proprietors *who do nothing* a broader immunity than the Good Samaritans the legislation meant to protect – especially when such a rule inevitably would *discourage* dissemination of lifesaving capability that the law was expressly intended to promote. If the Legislature intended blanket immunity, it would have said so, and no amount of sophistry can obscure that basic fact.

Target's statutory construction is the result of blind self-interest, and stands the law on its head. They are the ones who seek an exception from ordinary rules of liability, in contradiction to a plain reading of the statutes, not the Verdugos. Applying common law principles in this case will not create the 'parade of horribles' decried by respondent, and certainly imposes no overwhelming

burden on a retailer of Target's dimensions.

The Answer Brief seeks to substitute adjectives for analysis, in an effort to manipulate this Court. The reader hears about appellants' nonexistent advocacy of an AED 'requirement' approximately 73 times. 'Training' is complained of 44 times. 'Anticipatory' duties are objected to 22 times, and the burden of 'equipment' is invoked 27 times. Appellants trust that is Court see through such annoying tactics, and focus on the legitimate and important public policy principles at issue here.

Unlike Target, appellants seek no blanket rules or judicial legislation, just an opportunity prove a common law claim that the Legislature has acknowledged, based on individualized facts and with safe-harbor immunity readily available. Mary Ann Verdugo and the many future lives that could be saved by furthering the statutory goals of the AED legislation deserve that much.

II. ARGUMENT

A. THIS COURT SHOULD DISREGARD TARGET'S NONSENSICAL STATUTORY CONSTRUCTION

Most of the first 23 pages of the Answer Brief are devoted to a circular and unfounded analysis of the Legislature's intent. (ABM 1-23.) Yet, the obvious (and troublesome for Target) questions go unanswered. If, as Target contends, the Legislature intended to 'occupy the field' and preclude all premises liability claims based on lack of an AED, why didn't it simply say so? Why would the Legislature instead expressly create a conditional qualified immunity scheme, when there is no liability at all? How can statutes that were expressly created to encourage dissemination of AED's reasonably be construed to impose liability on those who install the devices, while purportedly absolving those who do nothing?[1]

The Legislature has acted *six times* in enacting and amending Health and Safety Code section 1797.196, creating conditional qualified immunity while never expressing an intent to abrogate

[1] Certainly Target's lame argument that the Legislature intended to punish Good Samaritans under the 'negligent undertaking' doctrine while purportedly creating blanket immunity for those who do nothing is no answer. (ABM 22.)

common law premises liability principles when AED's are involved. (See SB 911 (1999), AB 2041 (2002), SB 600 (2003), AB 2541 (2005), AB 2083 (2006), SB 1436 (2012).) As this Court has held, unless expressly provided, statutes "should be construed to avoid conflict with common law rules," and "[t]here is a presumption that a statute does not, by implication, repeal the common law." (*California Association of Health Facilities v. Department of Health Services* (1997) 16 Cal. 4th 284, 297.)

The Legislature has expressly chosen a conditional qualified immunity scheme. Even Good Samaritans who fully comply with the conditions of Health and Safety Code section 1797.196, subd. (b), have exposure to potential civil tort liability. (Civil Code section 1714.21, subd. (f); Health and Safety Code section 1797.196, subd. (e).) Nothing in the legislative scheme suggests an intent to confer broader protections on those who do nothing, and this Court should reject Target's invitation to impose blanket immunity through judicial legislation.

Target's invocation of the *Breaux* case, no less than twelve times, is woefully misplaced. *Breaux* simply found that a restaurant

had no duty to try to remove food from a choking patron's mouth, because the Legislature had "established standards for restaurants' actions with respect to patrons who have food stuck in their throats" by enacting a statute that expressly declined to 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 . . . ." (*Breaux v. Gino's, Inc.* (1984) 153 Cal. App. 3d 379, 382) There is nothing remotely analogous in the statutory scheme here.[2]

Paeans to a supposed 'comprehensive scheme' purportedly 'occupying the field' are no substitute for reasoning and statutory construction. A plain reading of the applicable statutes reveals that the Legislature chose how it wanted to address liability by enacting a conditional qualified immunity statute that unquestionably does not protect those who decline to participate. The Legislature has addressed the 'liability problem,' and this Court should not second-guess its choices.

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[2] Also inapplicable is the *Rotolo* case, cited six times, for reasons explained at OBM 33-35, and will not be repeated here. (*Rotolo v. San Jose Sports and Entertainment, LLC* (2007) 151 Cal.App.4th 307.)

B. TARGET'S COMMON LAW ANALYSIS SHOULD BE REJECTED

Target's common law argument begins with the bombastic claim that "[t]o the extent that the Legislature has not foreclosed any common-law duty," this Court should judicially overturn this choice to preclude a duty "without parallel in American jurisprudence." (ABM 23.) Thus, with incredible hubris, Target directs this Court to second-guess the Legislature's choices and redefine the limits of immunity though judicial legislation. To the contrary, the Court should defer to the Legislature's carefully balanced approach.

Target's hyperbole continues with its incessant repetition, 73 times, that failing to expand the statutory qualified immunity to a blanket ban on negligence claims would result in 'requiring' that retailers install AED's. (See, e.g., ABM 23-24.) That is nonsense. To the contrary, [n]othing [in the legislative scheme] may be construed to require a building owner or a building manager to acquire and have installed an AED in any building." (Health and Safety Code section 1797.197, subd. (f).)[3]

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[3] As installation of AED's is in no way required, Target's complaints about 'excessive costs to society' are misplaced. (ABM 53.)

Similarly misguided is Target's assertion, repeated 21 times, that there is something untoward about expecting proprietors to anticipate the first aid needs of business invitees. (See, e.g., ABM 23-36, 39-41.) Target gets there largely by distorting and misapplying the few California authorities it relies on. (See, e.g, ABM 25-26; citing *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129 [Target invokes misfeasance v. nonfeasance distinction, while failing to mention that nonfeasance liability is available in cases of special relationship]; *Williams v. State Bar of California* (1983) 34 Cal.3d 18, 23 [misquoting case for proposition that there is no liability "for failure to take affirmative action to assist or protect another" while leaving out the rest of the sentence: "...unless there is some relationship between them which gives rise to a duty to act"]; *Van Horn v. Watson* (2009) 45 Cal.4th 322, 324 [not a special relationship case].)

While this case presents a somewhat different context, there is nothing unusual about expecting proprietors to anticipate hazards, especially when there is a special relationship. (See, e.g., *Lugtu v. California Highway Patrol* (2001) 26 Cal. 4th 703, 716; *Sprecher v.*

Adamson Companies (1981) 30 Cal. 3d 358, 367; *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal. 2d 114, 212; *Cole v. Town of Los Gatos* (2012) 205 Cal. App. 4th 749, 780; *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal. App. 4th 1072, 1084.)

This Court should reject Target's implicit invitation to play 'junior scientist,' and decide this case by relying on Target's cherry-picked citations to the effect that "presence of an AED is ... less likely than not to change the outcome of any particular cardiac arrest." (ABM 50.) Note that there are certainly data to the contrary. (See, e.g., CAOC Judicial Notice Motion; Verdugo Judicial Notice Motion.) Making determinations on the efficacy of AED's contrary to the Legislature, especially in the absence of formal fact finding pursuant to Code of Civil Procedure section 909, would be wholly inappropriate.

Appellants stand by their rendition of the Rowland factors, which need not be repeated here. (OBM 20-43; *Rowland v. Christian* (1968) 69 Cal.2d 108.)

III. CONCLUSION

For the reasons stated herein, plaintiffs and appellants Rosemary Verdugo and Michael Verdugo respectfully request that this Court answer the Ninth Circuit's Certified Question by holding that the common law duty of a commercial property owner to provide emergency assistance to invitees can require the availability of an Automated External Defibrillator. Appellants further request such other relief as this Court deems appropriate.

Date: October 2, 2013

Respectfully Submitted,
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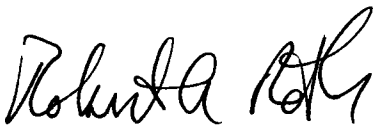

By: ROBERT A. ROTH
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IV. CERTIFICATE OF WORD COUNT

The text of this brief consists of less than 8,400 words, as counted by the word-processing program used to generate the brief.

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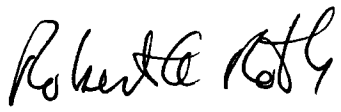

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PROOF OF SERVICE

I declare that I am a citizen of the United States, that I have attained the age of majority, and that I am not a party to this action. My business address is 2711 Alcatraz Avenue, Suite 3, Berkeley, CA 94705-2726. I am familiar with this firm's practice of collection and processing of correspondence to be deposited for delivery via the U.S. Postal Service as well as other methods used for delivery of correspondence. On the below stated date, in the manner indicated, I caused the within document(s) entitled:

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

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