

Case No. S247677

**IN THE  
SUPREME COURT OF THE STATE OF CALIFORNIA**

---

**LUIS GONZALEZ,**

Plaintiff and Appellant,

vs.

**JOHN R. MATHIS AND JOHN R. MATHIS AS  
TRUSTEE OF THE JOHN R. MATHIS TRUST,**

Defendants and Respondents.

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**SUPREME COURT  
FILED**

DEC 20 2018

Jorge Navarrete Clerk

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Deputy

After A Decision By the Court of Appeal,  
Second Appellate District, Division Seven  
Case No.: B272344

Los Angeles Superior Court, Case No. BC542498,  
Honorable Gerald Rosenberg, Judge

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**AMICUS CURIAE BRIEF IN SUPPORT OF JOHN R.  
MATHIS AND JOHN R. MATHIS AS  
TRUSTEE OF THE JOHN R. MATHIS TRUST**

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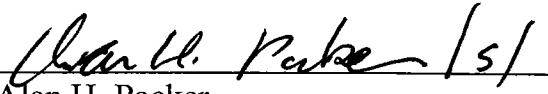
**S247677 – GONZALEZ v. MATHIS**

<b><u>Full Name of Interested Entity/Person</u></b>	<b><u>Party/Non-Party Nature of Interest</u></b>
Not Applicable	Not Applicable

Dated: December 10, 2018

Respectfully submitted,

NEWMYER & DILLION LLP

By:  /s/

Alan H. Packer

Attorneys for Amicus Curiae the  
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## AMICUS CURIAE BRIEF

### IN SUPPORT OF JOHN R. MATHIS AND JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST

Amicus curiae the California Building Industry Association (“CBIA”) hereby submits the following amicus curiae brief in support of defendants/respondents John R. Mathis and John R. Mathis as Trustee of the John R. Mathis Trust (“Mathis”).

#### 1. INTRODUCTION

The *Gonzalez* decision fails to strike an appropriate balance between fairness concerns for the litigants involved therein and the potential impact on housing in this state. It will increase the costs of construction and therefore the cost of housing, thereby exacerbating the already substantial housing crisis in California. In doing so, it detrimentally impairs the interests of both the entire California building industry (including homebuilders, trade contractors, architects, engineers, designers, suppliers, and industry professionals in the homebuilding, multi-family, and mixed-use development markets) and the California general public.

#### 2. THE BUILDING INDUSTRY HAS ACTED IN REASONABLE RELIANCE ON THE *PRIVETTE* DOCTRINE AND ITS WELL ESTABLISHED EXCEPTIONS FOR YEARS

As California appellate courts have long recognized, the *Privette* doctrine at issue in the recent *Gonzalez* decision reflects a strong policy in favor of delegation of responsibility and assignment of liability where parties hire independent contractors to perform inherently dangerous work. (See, e.g., *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671.) The doctrine plays an important role in the construction industry, where owners and general contractors hire subcontractors with specialized skill and knowledge to perform various types of construction work at projects. Thus,

the parties best suited to evaluate risks associated with work in a particular specialty area bear the primary risk of performing that type of work.

The limited judicial exceptions to the *Privette* doctrine are well established. This enables property owners and construction professionals across the board to effectively plan for and manage the risks associated with future projects. Over the last decade, builders and their subcontractors have spent millions of dollars each year (directly or indirectly) to obtain insurance coverage to cover their risks, and they have entered into thousands of construction contracts further allocating project risks amongst themselves to protect against the known risks associated with the construction process. This has necessarily been informed by the parties' expectation that clearly established legal principles will be applied in a predictable manner so they can properly evaluate risk.

**3. THE GONZALEZ DECISION WILL HARM THE BUILDING INDUSTRY AND CONSUMERS ALIKE BY ELIMINATING CERTAINTY AND INCREASING BUILDING COSTS AND LITIGATION**

The *Gonzalez* decision threatens to both expand and cloud the boundaries of the 'hazardous condition' exception to the doctrine—boundaries the construction industry has relied upon in evaluating construction risks since 2005. By redrawing the boundaries of this established exception and indefinitely extending potential liabilities for owners and contractors, the decision will undoubtedly result in cost increases across the building industry as insurance companies reevaluate the premiums they charge and contractors reevaluate project costs in light of these new risks. *Gonzalez* not only upsets the applecart of certainty, but also appears to require virtually every case to go to trial on the hazardous condition exception by imposing an impossible burden for the defendant to satisfy on summary judgment.

*Gonzalez* will also likely lead to additional litigation as parties seek judicial guidance regarding the contours of the ‘hazardous condition’ exception. For example, *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, involved similar circumstances to those in *Gonzalez*—i.e., an employee of a window cleaner sued the property owner claiming *Privette* did not apply because the owner had not equipped its building with structural roof anchors—yet a separate division of the Second District reached the opposite conclusion just four days *Gonzalez* was decided. Further litigation will be required to flesh out the nuance necessary to reconcile these apparently contradictory decisions and clarify the principles set forth in *Gonzalez*.

**4. THE GONZALEZ DECISION WILL NEGATIVELY IMPACT THE GENERAL PUBLIC HOPING TO BUY A HOME IN THIS STATE**

Increased construction costs will also undoubtedly impact those members of the general public wanting to buy a home in this state. In its March 2015 report, *California’s High Housing Costs: Causes and Consequences*, the Legislative Analyst’s Office (“LAO”) outlines the serious impacts the lack of new housing construction is having on the state economy and working families—many of which are felt most acutely in large coastal urban centers. According to the report, the average cost of a home in California is \$440,000—two-and-a-half times the average national home price. This is not a recent phenomenon: the LAO states that housing prices first began escalating between 1970 and 1980, but that alarming trend has continued and exhibits no signs of abating. The state’s average rent is also outpacing the national average at \$1,240 per month—50% higher than the rest of the country. With increasing demand in coastal communities and not enough housing stock, steep competition increases



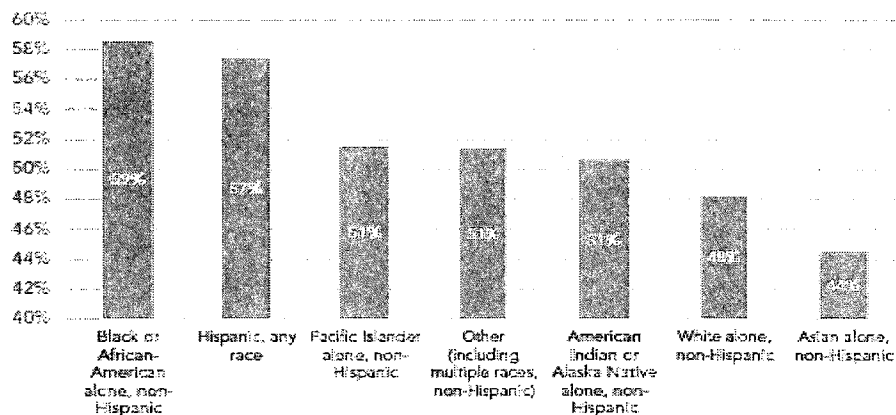
both purchase prices and rents and forces people inland to find housing they can afford.

In 2016, a \$1,000 increase in home cost prices out 15,328 households from being able to afford a roof over their head. (See NAHB Releases the 2016 “Priced Out” Estimates, at <http://eyeonhousing.org/2016/12/nahb-releases-the-2016-priced-out-estimates/>.) Therefore, the greater the increase in the price of a home (whether to subsidize affordable housing or any other reason), the fewer number of qualified people there are available to purchase or rent.

According to the February 2018 California Department of Housing and Community Development’s State Housing Assessment (“2018 SHA”) at [http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA\\_Final\\_Combined.pdf](http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf), those hardest hit by high housing costs are communities of color:

Housing cost burden is experienced disproportionately by people of color. Figure 1.22 [below] looks across all income levels in the state and shows that the percentage of renters paying more than 30 percent of their income toward rent is greater for households that identify as Black or African-American, Latino or Hispanic, American Indian or Alaska Native, or Pacific Islander, compared to renter households that identify as White. This may become an even greater factor in the need for affordable housing as population trends suggest that California will become increasingly diverse in the coming decades.

Figure 1.22  
**Housing Cost Burden Is Distributed Unevenly Across Race and Ethnicity**  
 Average Housing-Cost Burden by Race and Ethnicity 2009-2013



Source: HUD CHAS Data Sets based on 2009-2013 ACS. Graphic by HUD.

(See 2018 SHA, p. 28.) This fact has also been recognized in the codification of Government Code section 65589.5, subdivision (a)(2)(F):

Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.

High housing costs are also a significant cause of homelessness, as discussed in the May 2017 publication “Regulation & Housing: Effects on Housing Supply, Costs & Poverty,” issued by the California Center for Jobs and the Economy:

In 2015, nearly half of the homeless population surveyed in San Francisco responded they were still homeless because they could not afford rent.

“Respondents were also asked what prevented them from obtaining housing. The greatest percentage (48%) reported they could not afford rent. Twenty-eight percent (28%) reported a lack of job or income. Most other respondents reported a mixture of other income or access related issues, such as the lack of available housing (17%), difficulty with the housing process (13%), or an eviction record (6%). Twelve percent (12%) of respondents reported that a criminal record prevented them from obtaining housing, and 8% reported a medical illness. Eight percent (8%) of respondents reported they did not want housing. (San Francisco, 2015)”

(Regulation & Housing: Effects on Housing Supply, Costs & Poverty (May 2017), pp. 34–35, at <<https://centerforjobs.org/ca/special-reports/regulation-housing-effects-on-housing-supply-costs-poverty>>.)

Housing costs also deprive people of health care and make them more dependent on government-subsidized services:

When Californians have access to safe and affordable housing they have more money for food and health care, they are less likely to become homeless and need government subsidized services, their children are apt to do better in school, and businesses do not have as hard a time recruiting and retaining employees.

(Gov. Code, § 65589.5, subd. (h).)

The LAO therefore concludes that increases in housing costs force Californians to spend more of their income on housing, which, in turn, reduces family disposable income, creates the potential for longer commutes, increases poverty rates, and puts greater stress on the delivery of public services. The bottom line is California needs to build a minimum of 100,000 units a year more than we are building today to seriously mitigate its housing affordability problems. (See LAO, California's High Housing Costs: Causes and Consequences, p. 4, at <<http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.aspx>>).

In fact, the California legislature has repeatedly found that we are in a housing *crisis* caused by the placement of extra costs and burdens on the building industry. As the Legislature declared in 2017 when it passed SB-167, the Housing Accountability Act, in Government Code section 65589.5:

(a) The Legislature finds and declares all of the following:

(1) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.

(2) California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and

require that high fees and exactions be paid by producers of housing.

(3) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.

Policies, whether driven by the Legislature, by local municipalities, or through judicial action, that increase the burdens on the housing sector jeopardize the State's ability to meet the challenge posed by the housing crisis. The Court of Appeal's decision in this case, by extension, will increase costs relating to construction by creating a new rule of law that undermines the very protections that the *Privette* doctrine put into place, as discussed below.

**5. THE LOWER COURT'S DECISION CREATES A NEW, UNCONTAINABLE EXCEPTION TO THE PRIVETTE DOCTRINE, IS WRONGLY DECIDED, AND UNDERMINES THE VERY REASONING AND PURPOSE OF PRIVETTE AND ITS PROGENY**

As an amicus, CBIA views its primary purpose here as providing a broader context for the Court, identifying impacts beyond the scope of the particular litigants whose dispute is before the Court. CBIA is also keenly aware that the litigants have already touched upon the substantive legal issues before the Court. With that said, the probable impacts of the Court of Appeal's decision on CBIA's members, the buying public, the California

housing shortage, and the thousands of small to medium to large businesses whose futures and fortunes are tied to construction, do impel some discussion of the legal basis upon which those parties have reasonably expected that matters such as those at issue in the *Gonzalez* case should have been resolved favorably for the defendants. On that basis, CBIA believes there are four substantive reasons, aside from policy considerations, why the Court of Appeal's decision should be overturned.

First, the jurisprudence under *Privette* is well developed, in recognition of the fact that injured construction workers have recourse to workers compensation to recover for injuries that occur on construction projects. In its decision, the Court of Appeal carves out a new exception premised upon dicta in *Kinsman*. However, the new exception it has created swallows the rule whole. Under the Court of Appeal's logic, effectively *any* allegation of improper maintenance by the project owner will be sufficient to defeat summary judgment in a worker injury case. Under *Hooker*, landowners are not liable unless they affirmatively contribute to the injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202.) This opinion would effectively subject property owners and builders to potential liability *simply for delegating responsibility to specialist contractors*—the very basis of the *Privette* doctrine in the first place.

Second, the opinion represents a departure from similar cases. See, for example, the *Tverberg* decision, in which this Court described *Privette*'s holding as follows:

[T]he hirer of an independent contractor is not vicariously liable to the contractor's employee who sustains on-the-job injuries arising from a *special or peculiar risk inherent in the work*.

(*Tverberg v. Filner Construction* (2010) 49 Cal.4th 518, 521, emphasis added.) The risks of falling off a roof when the independent contractor is hired to clean windows on that roof, and describes itself as an “expert” in hard to reach windows with years of knowledge of the conditions on the roof, certainly fall well within this category. Between Johnny Mathis in his hospital bed, and this well-qualified contractor with knowledge of the conditions on site, how could California law place the burden on Mr. Mathis to demonstrate that the contractor could have safely performed its work?

Third, the Court must take into account that the new rule of law created by the Court of Appeal will impact millions of transactions per year. The Court of Appeal’s new limitation on *Privette* would force all defendants to satisfy a nearly impossible burden on summary judgment, which will result in increased litigation costs across the board in construction injury cases, increased burdens on insurers, and increased costs of construction—all at a time when California’s Legislature has declared that the lack of adequate available housing is an emergency requiring immediate action.

Fourth, ultimately, the Court of Appeal’s decision is premised upon an unwarranted and misreading of *dicta* in the *Kinsman* case. The Court of Appeal not only got the law wrong, it created a new rule of law that threatens to undermine the very purpose of the *Privette* doctrine, under which a mere allegation of improper maintenance is enough to force every landowner and contractor to trial.

## 6. CONCLUSION

The *Gonzalez* decision fails to strike an appropriate balance between fairness concerns for the litigants involved therein and the potential impact on housing in this state. It will increase the costs of construction and therefore the cost of housing, thereby exacerbating the already substantial

housing crisis in California. In doing so, it detrimentally impairs the interests of both the entire California building industry and the California general public. For these reasons, CBIA respectfully requests that this Court reverse the Second Appellate District's decision.

Dated: December 10, 2018

Respectfully submitted,

NEWMeyer & DILLION LLP

By: Alan H. Packer /s/

Alan H. Packer

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California Building Industry  
Association



**CERTIFICATE OF COMPLIANCE**

Counsel certifies that pursuant to C.R.C. Rule 8.204(c)(1), the enclosed AMICUS CURIAE BRIEF IN SUPPORT OF JOHN R. MATHIS AND JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST is produced using 13 point Roman type and contains 3,346 words, which is less than the 14,000 words permitted by Rule.8.204(c)(4). Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: December 10, 2018

  
Alan H. Packer

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From a Decision of the Second District Court of Appeal  
Division Seven, 2nd Civil No. B 272344  
Los Angeles County, Hon. Gerald Rosenberg, Judge presiding  
[LASC Case No. BC 542498 ]

STATE OF CALIFORNIA )  
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COUNTY OF CONTRA COSTA )

I, Caroline Pfahl, declare:

I am a citizen of the United States and employed in Contra Costa County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1333 N. California Blvd, Suite 600, Walnut Creek, California 94596. On **December 10, 2018**, I served a copy of the within document(s):

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CAROLINE PFAHL

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12-10-2018

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Signature

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Last Name, First Name (PNum)

Newmeyer & Dillion, LLP

Law Firm