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.

OPENING 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. STATEMENT OF ISSUES ON REVIEW

On December 11, 2012, pursuant to California Rules of Court, rule 8.548, the United States Court of Appeals for the Ninth Circuit requested that this Court grant review of the following question:

> 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?

The Court granted the Ninth Circuit's request on January 16, 2013, without further specification of the issues on review. (California Rules of Court, rules 8.516(a)(1), 8.548(f)(5).)

II. INTRODUCTION

This appeal will determine whether we live in a society where a major retailer, having a common law duty to protect invitees and assist them when ill or injured, can leave a customer gasping and dying on the floor when (in defendant's own words) there is "potentially life-saving technology that's designed to be used by virtually anyone" that "greatly increases the chance of survival if used within the first 5 mins[,] ... that crucial window until professional emergency medical help arrives." (RJN[1] #9, pp. 1-2.) The illness at issue here is no rare or obscure condition, but Sudden Cardiac Arrest, an affliction that strikes 300,000 Americans each year. (ER2 p. 122.)

Sudden Cardiac Arrest is an electrical disruption of the heart's ability to pump blood, which often strikes with no prior symptoms and can attack a heart that is otherwise healthy. Although Sudden Cardiac Arrest is readily treatable, less than 8 percent of those afflicted survive. The reason for this low survival rate is a failure to administer the necessary treatment in time – a shock from an Automated External

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[1] 'RJN' refers to appellants' Request for Judicial Notice filed contemporaneously with this brief. 'ER1' and 'ER2' refer to the separately paginated volumes one and two of the Excerpts of Record filed in the Ninth Circuit. '9th Circuit Opinion' refers to the December 11, 2012 Ninth Circuit Opinion certifying the case to this Court.

Defibrillator ('AED' or 'defibrillator') delivered within five minutes, which is usually before paramedics can arrive. (ER2 pp. 121-122; RJN #9, pp. 1-2.)

As found by Congress, defibrillators "have been demonstrated to be safe and effective, even when used by lay people." (Cardiac Arrest Survival Act of 2000, section 8 [*Post*, fn. 5].) California legislative history indicates that use of an AED, which feature sophisticated sensors and interactive voice instructions, is "uncomplicated, intuitive, and nearly foolproof;" and that there is "[n]o risk of accidental misuse." (RJN #3, p. 3.) Defendant Target Stores sells these devices on the internet for a retail price of $1,200, but it has a policy of not making AEDs available on store premises for their customers' medical emergencies. (ER2 pp. 122-123, 126.)

Sudden Cardiac Arrest struck decedent Mary Ann Verdugo while shopping at Target, and the store's failure to prepare for such an emergency by having an AED available deprived her of her one chance for survival. As explained herein, this tragic occurrence was entirely foreseeable. The burden to Target of being prepared to provide lifesaving first aid was minimal, due to California's immunity

statutes protecting businesses that acquire AEDs. Weighing the relevant policy factors, this Court should conclude that triers of fact should be allowed to determine whether a proprietor should have had an AED, unless lack of resources and staffing make it an unreasonable burden for the proprietor to meet the statutory immunity requirements.

III. PROCEDURAL HISTORY

Mary Ann Verdugo's mother and brother, Rosemary and Michael Verdugo, brought this action against Target Corporation,[2] seeking damages for Mary Ann's wrongful death and related claims. The action was originally filed on August 17, 2010 in Los Angeles County Superior Court, case no. BC443981. At Target's request, on September 17, 2010 the case was removed to U.S. District Court for the Central District of California.

On November 23, 2010, U.S. District Court Judge Otis D. Wright, II, granted Target's motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure Rule 12(b)(6), on the grounds that "there is no California common law duty requiring a department store

[2] The defendant designation was subsequently amended, at Target's insistence, to be "Target Stores, a division of Target Corporation." Defendant is referred to herein as 'Target.'

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." (ER1 p. 5.) Following entry of a defense judgment, an appeal to the United States Court of Appeals for the Ninth Circuit was filed on December 21, 2010. (ER1 p. 1; ER2 p. 4.)

On February 9, 2011, the Verdugos filed a Motion for Certification of a question of law to the California Supreme Court. (California Rules of Court, rule 8.548.) On December 11, 2012, after full briefing of the appeal on the merits, the Ninth Circuit issued an Opinion requesting that the California Supreme Court grant review of the Verdugos' question, in slightly rephrased form. (9th Circuit Opinion, p. 15.) Judge Harry Pregerson, dissenting, would have reversed Judge Wright's dismissal of the Verdugos' complaint without certifying the case for this Court's findings. (9th Circuit Opinion, p. 21.)

This Court granted the Ninth Circuit's request on January 16, 2013, without further specification of the issues on review. (California Rules of Court, rules 8.516(a)(1); 8.548(f)(5).)

IV. STATEMENT OF THE FACTS[3]

In 2008, Target operated 225 'Big Box' retail stores in California, about 14 percent of all its stores nationwide. The California stores encompassed more than 28 million square feet of retail space, an average of over 124,000 square feet per store. (RJN #1, p. 3.) In the fiscal year of Mary Ann's death, Target sold almost $65 billion in merchandise. (See RJN #2, p. 4.)

On August 31, 2008, Mary Ann Verdugo[4] was shopping at a Target store in Pico Rivera, California, accompanied by plaintiffs Rosemary Verdugo and Michael Verdugo, her mother and brother. The store is "huge" and heavily trafficked. Mary Ann was 49 years old at this time. (ER2 pp. 121-123.)

During her shopping trip, Mary Ann suffered Sudden Cardiac Arrest, an electrical disruption of the heart's ability to pump blood.

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[3] As the Judgment in this action resulted from the granting of a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), which is the equivalent of a demurrer under California law, in accord with both federal and California standards the facts are depicted in the light most favorable to the appellants, including judicially noticeable facts. (*Jenkins v. McKeithen* (1969) 395 U.S. 411, 421; *Daniels-Hall v. National Education Association* (9th Cir. 2009) 629 F.3d 992, 998-999; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *11601 Wilshire Associates v. Grebow* (1998) 64 Cal.App.4th 453, 457.)

[4] Mary Ann was developmentally disabled, and a dependent adult. (ER2 pp. 120-121.)

She lost consciousness and fell to the ground. Gasping for air and making sounds of suffering, Mary Ann died in the presence of her mother, brother, Target employees, and other customers, who were helpless to revive her. (ER2 pp. 121-122, 126; 9th Circuit Opinion, p. 5.)

Target did not have an Automated External Defibrillator ('AED' or 'defibrillator') on the premises for emergency use. A defibrillator is a device used to restart normal heart rhythm following Sudden Cardiac Arrest, and "is the only definitive treatment" for the affliction. A shock from an AED can restart a heart by correcting the misfiring of its electrical impulses. By the time an emergency medical team with a defibrillator responded to a 911 call and located Mary Ann in the store, she was dead and could not be resuscitated. (ER2 pp. 121-123; 9th Circuit Opinion, pp. 5-6, 17 [Pregerson, dissenting], 20 [same].)

Sudden Cardiac Arrest is not a rare condition, annually striking about 300,000 Americans nationwide. It often occurs with no prior symptoms, and can attack a heart that is otherwise healthy. Although Sudden Cardiac Arrest is readily treatable, less than 8 percent of those

afflicted survive. The reason for this low survival rate is a failure to administer the necessary treatment in time. Generally, if a shock from a defibrillator is not administered within five minutes of Sudden Cardiac Arrest, accompanied by CPR, the afflicted person will die. The chances of survival decrease with each minute that the shock is not administered. When CPR and AEDs are used within three to five minutes, the survival rate is as high as 50 to 70 percent. (ER2 pp. 122-123; 9th Circuit Opinion pp. 5-6, 19 [Pregerson, dissenting]; Cardiac Arrest Survival Act of 2000,[5] section 5.)

As found by Congress, defibrillators "have been demonstrated to be safe and effective, even when used by lay people." (Cardiac Arrest Survival Act, section 8.) California legislative history underlying both Civil Code section 1714.21 and Health & Safety Code section 1797.196 indicates that use of AEDs is "uncomplicated, intuitive, and nearly foolproof;" "virtually 'idiot-proof' and easy enough for a child to use;" and that there is "[n]o risk of accidental misuse." (RJN #3, p. 3; RJN#6, p. 4.) The Verdugos' complaint

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[5] The citation for the federal Cardiac Arrest Survival Act of 2000 is Pub. L. No. 106–505, Title IV, Subtitle A, § 402, 114 Stat. 2336. It is reprinted at 42 U.S.C. section 238p, and hereinafter referred to as 'Cardiac Arrest Survival Act.'

alleges that the devices are easy to use, "even with minimal or no advance training." (ER2 p. 122.)

The American Red Cross has indicated that shopping malls are one of the most likely spots for Sudden Cardiac Arrest to occur. (ER2 p. 123.) Because of the size and location of the Pico Rivera Target store, it is impossible for an emergency medical team to get to a shopper suffering Sudden Cardiac Arrest in time to successfully treat them with a defibrillator. (ER2 pp. 121-123.) Thus, stricken customers will inevitably die of Sudden Cardiac Arrest unless the store keeps a defibrillator on premises for emergency use. (ER2 p. 123.) Nonetheless, Target has a company-wide policy of not having defibrillators available at its stores for use in medical emergencies. (ER2 pp. 122-123, 126.)

Target sells defibrillators on the internet for a retail price of about $1,200. (ER2 p. 122.) Target's current internet advertisement states that its defibrillator "arms you with potentially life-saving technology that's designed to be used by virtually anyone." The device features advanced interactive voice instructions and sensors which will not allow a shock to be administered until it advises the

user to do so; and it coaches the user through performing CPR, if that is needed. The ad acknowledges that use of a defibrillator "greatly increases the chance of survival if used within the first 5 minutes of [cardiac] arrest;" and recommends purchasing one so that an AED is "[a]vailable for use in that crucial window until professional emergency medical help arrives." (ER2 p. 122; RJN, #9, pp. 1-2.)

V. ARGUMENT

A. POSSESSORS OF LAND HAVE A COMMON LAW "SPECIAL RELATIONSHIP" DUTY TO PROTECT INVITEES AGAINST UNREASONABLE RISK OF PHYSICAL HARM, AND TO PROVIDE EMERGENCY ASSISTANCE TO INVITEES IF THEY BECOME ILL OR INJURED

Under Restatement Second of Torts section 314A, a possessor of land has a special relationship with invitees that triggers a duty "to protect them against unreasonable risk of physical harm;" to provide first aid to "ill or injured [invitees], and to care for them until they can be cared for by others." As provided in the Restatement, this duty of commercial possessors of land is similar to the duties owed by

common carriers to passengers, innkeepers to their guests, and by "[o]ne who ... voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection...." (Restatement Second of Torts, section 314A, subds. (1)-(4).) Section 314A's standards have explicitly been adopted by the California Courts. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 236 fn. 14; *Williams v. State of California* (1983) 34 Cal.3d 18, 31; *Rodriguez v. Inglewood Unified School District* (1986) 186 Cal.App.3d 707, 712-713; *Soldano v. O'Daniels* (1983) 141 Cal.App.3d 443, 448.)

This Court has specifically recognized that such special relationship duties are applicable between "business proprietors such as shopping centers, restaurants, and bars, and their tenants, patrons, or invitees." (See *Morris v. La Torre* (2005) 36 Cal. 4th 260, 269-270.) Accordingly, Target has explicitly acknowledged that it had a special relationship with Mary Ann Verdugo, and that the store had a common law "duty to render first aid to a customer who becomes ill or needs medical attention." (Target's Response to 9th Cir Certification Motion at p. 5. See also ER1 p. 7 [District Court finds

that existence of special relationship is undisputed].)

In 2006, prior to Mary Ann's death, the federal Occupational Safety and Health Administration ('OSHA') issued an advisory guide on first aid, entitled "Best Practices Guide: Fundamentals of a Workplace First-Aid Program," hereinafter referred to as 'OSHA Guide.' (U.S. Department of Labor Occupational Safety and Health Administration, publication OSHA 3317-05N2006, reproduced in its entirety at RJN #8.) Target is subject to OSHA standards. (29 U.S.C. section 654.)

Echoing language from Restatement section 314A, the OSHA Guide provides that:

> First aid is emergency care provided for injury or sudden illness before emergency medical treatment is available. The first-aid provider in the workplace is someone who is trained in the delivery of initial medical emergency procedures, using a limited amount of equipment to perform a primary assessment and intervention while awaiting arrival of emergency medical service (EMS) personnel.
> (RJN #8, p. 3.)

One of the basic elements of a first aid program, according to OSHA, is having "sufficient quantities of appropriate and readily accessible first-aid supplies and first-aid equipment, such as bandages

and automated external defibrillators." (*Ibid.* [emphasis added].)

In its 2006 Guide, OSHA observes that:

> With recent advances in technology, automated external defibrillators (AEDs) are now widely available, safe, effective, portable, and easy to use. They provide the critical and necessary treatment for sudden cardiac arrest (SCA) caused by ventricular fibrillation, the uncoordinated beating of the heart leading to collapse and death. Using AEDs as soon as possible after sudden cardiac arrest, within 3-4 minutes, can lead to a 60% survival rate. CPR is of value because it supports the circulation and ventilation of the victim until an electric shock delivered by an AED can restore the fibrillating heart to normal.
>
> All worksites are potential candidates for AED programs because of the possibility of SCA and the need for time defibrillation. Each workplace should assess its own requirements for an AED program as part of its first-aid response.
>
> (*Id.* at 10.)

In evaluating the first aid duties of landholders,[6] this Court's task is not to determine whether the facts of a particular case support an exception to the general duty to assist ill or injured invitees, "but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (See *Cabral v. Ralphs Grocery Company* (2011) 51 Cal.4th 764, 772-773 and fn. 3;

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[6] As used in this brief, the term 'landholders' is used to refer to a 'possessor of land' in the parlance of section 314A, such as an owner or lessee, who invites the public to visit for commercial purposes.

Campbell v. Ford Motor Company (2012) 206 Cal.App.4th 15, 28.) Applying the proper standards, no exception applicable to Target is justified here.

B. LANDHOLDERS HAVE AN AFFIRMATIVE DUTY TO TAKE PREVENTIVE MEASURES TO PROTECT INVITEES

The law frequently imposes an affirmative duty on landholders and others to take precautions aimed at preventing damage to others, even when the defendant does not create the hazard itself. This duty to proactively take precautions for the protection of others most often occurs when a special relationship is involved.

Thus, when a store allows patrons to access and move goods within its premises, it has a heightened duty to take extra precautions to safeguard against the possibility that a customer created a dangerous condition by disarranging the merchandise. (*Ortega v. Kmart Corporation* (2001) 26 Cal. 4th 1200, 1205.) A club that is not otherwise negligent in operating a pool may still be liable for failing to keep a lifeguard on duty as a precaution against drowning. (*Rovegno v. San Jose Knights of Columbus Hall Association* (1930)

108 Cal.App. 591, 597. See also *Haft v. Lone Pine Hotel* (1970) 3 Cal. 3d 756, 762.) The owner/operator of a sports facility has a duty to implement preventive measures to minimize the risk of injury. (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1084. See also *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 176-179.) Schools owe students a duty to take precautions to reduce dangers posed by negligent third-party motorists and delivery trucks. (*Joyce v. Simi Valley Unified School District* (2003) 110 Cal.App. 4th 292, 304-305; *Taylor v. Oakland Scavenger Company* (1941) 17 Cal.2d 594, 600.) Precautions taken by a storage company for the prevention and extinguishment of fire are relevant to determining the company's negligence when it has stored property in an area susceptible to fire, even if the fire's origin is not attributable to the company. (*Dieterle v. Dieterle* (1904) 143 Cal. 683, 687.)

As this Court has observed, a landholder can even be responsible for anticipating and implementing precautions protecting invitees against third party violence:

> When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the

negligent or criminal act of a third person. (*Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 436-437. See also *Delgado, supra,* 36 Cal.4th at 240-245.)

In examining what precautions should be expected of landholders, the cases on the special relationship duties of common carriers toward passengers are particularly instructive, given that a "possessor of land who holds it open to the public is under a similar duty" to invitees as that owed by a common carrier toward passengers. (Restatement Second of Torts, § 314A, subds. (1), (3); *Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 823.) Although they are not 'insurers,' common carriers have "the highest duty of care," requiring "utmost care and the vigilance of a very cautious person." (*McGettigan v. Bay Area Rapid Transit District* (1997) 57 Cal. App. 4th 1011, 1017.) While many common carrier requirements have been subsequently ratified by statute, the standards of care originate from common law dating back to 1859. (*Gomez v. Superior Court* (2005) 35 Cal. 4th 1125, 1130.)

The analogy to common carriers is particularly apt here, because of the unique characteristics of Big Box stores like Target.

Unless an AED is kept on the premises, a 'huge' and heavily trafficked 'Big Box' store is particularly prone to creating an environment where there can be no effective alternative to death from Sudden Cardiac Arrest absent precautions, because it is impossible for emergency crews to reach a stricken invitee in time. (ER2 pp. 121-123. See *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 285 fn. 9.) Such an isolated environment is one reason that this Court has imposed heightened duties in common carrier cases:

> ... bus passengers are 'sealed in a moving steel cocoon.' .... At the same time, the means of entering and exiting the bus are limited and under the exclusive control of the bus driver. Thus, passengers ... are wholly dependent upon the bus driver to summon help or provide a means of escape. These characteristics ... significantly limit the means by which passengers can protect themselves.... We believe these characteristics ... provide a more than ample basis for finding a special relationship between common carriers and their passengers.
> (*Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 789.)

Thus, a boat owes passengers "a duty to either provide medical services or access to them." (*Nash v. Fifth Amendment* (1991) 228 Cal.App.3d 1106, 1113.) Similarly, the U.S. District Court has held in

favor of allowing a wrongful death case to go to trial on common law claims against a common carrier based on the absence of a defibrillator on an airplane. (*Ferguson v. Trans World Airlines* (N.D. Ga. 2000) 135 F.Supp.2d 1304, 1310-1312. See also *Stone v. Frontier Airlines* (D. Mass. 2002) 256 F.Supp.2d 28, 47; *Somes v. United Airlines* (D. Mass. 1999) 33 F.Supp.2d 78, 80.)

Such heightened duties are necessary because of the inherently isolating nature of public transportation, where the common carrier in effect "voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection." (Restatement Second of Torts, section 314A, subd. (4). See also *Lopez, supra,* 30 Cal.3d at 799 [by accepting common carrier's offer of transportation, passengers "have placed themselves in the care and custody" of the bus line].)

Invitees entering commercial settings where normal emergency medical services cannot effectively reach them – such as a 'Big Box' store like Target, or a sports arena like the 92,500 seat Rose Bowl – are "not required to abandon all hope as they troop[] up the gangway." (*Nash, supra,* 228 Cal.App.3d at 1113. See also *De Vera v. Long*

Beach Pub. Transportation Co. (1986) 180 Cal.App.3d 782, 793-794.) Rosemary Verdugo did not assume a risk of death if a treatable Sudden Cardiac Arrest episode occurred, simply because she was shopping at Target.

In the context of the foregoing authorities, it is no great leap to conclude that large-scale proprietors should be expected to take the precaution of including a defibrillator among its preparations for fulfilling their duty to address the emergency medical needs of their customers.

An estimated 300,000 Americans are stricken by Sudden Cardiac Arrest every year, with fatal consequences if they cannot be treated with an AED within five minutes. (ER2 pp. 121-122.) Given the uncontroverted seriousness of this problem and the gravity of the potential harm, a duty to take precautions should follow for proprietors who have the manpower and resources to fulfill the requirements of the AED immunity statutes without undue burden. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1195.)

C. APPLYING THE TRADITIONAL *ROWLAND* TEST, THE WELL-ESTABLISHED DUTY OF LANDHOLDERS TO ASSIST ILL OR INJURED INVITEES CAN REQUIRE HAVING AN AED ON SITE

The scope of a special relationship duty, such as a landholder's duty to assist ill or injured invitees, is evaluated under a series of factors enunciated in *Rowland v. Christian* and its progeny. (*C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 877 fn. 8; *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

As traditionally stated, the *Rowland* factors are:

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.

(See *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.)

The *Rowland* factors are all weighed together. Foreseeability

and the extent of the burden on defendants have evolved to be the most frequently emphasized factors, "but in a given case one or more of the other *Rowland* factors may be determinative of the duty analysis." (*Id.* at 1213.)

In determining whether a commercial property owner can be expected to make an AED available, "[t]he question is not whether a *new duty* should be created, but whether an *exception* to [the duty to assist ill invitees] should be created." (*Cabral, supra,* 51 Cal.4th 783 [emphasis in original].) As this Court held in *Cabral*:

> California law accords with the Restatement view. 'No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.' (*Id.* at p. 773, fn. 3; quoting (Restatement Third of Torts, section 7, Comment A. See also *Campbell, supra,* 206 Cal.App.4th at 28.)

Courts should create an exception to a general duty only where it is "clearly supported by public policy." (*Cabral, supra*, 51 Cal.4th at p. 771.)

An analysis of each of the seven *Rowland* factors follows.

(1) The Foreseeability Of Harm To The Plaintiff

Foreseeability of harm is often regarded as the primary and

threshold consideration in determining whether a duty exists. (*N.N.V. v. American Association of Blood Banks* (1999) 75 Cal.App.4th 1358, 1376.) Like all *Rowland* factors, foreseeability "is evaluated at a relatively broad level of factual generality":

> .... as to foreseeability, we have explained that the court's task in determining duty is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed....
> (*Cabral, supra*, 51 Cal.4th at 772 [emphasis in original].[7])

Thus, the duty of reasonable care "is the same under all these circumstances; what varies with the specific facts is whether the defendant has breached that duty. That question ... is generally one to be decided by the jury, not the court." (*Id.* at 782-783.)

This 'broad level' approach:

> ... preserve[s] the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make.
> (*Id.* at 772 [emphasis in original].)

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[7] In this brief, internal punctuation and internal citations are omitted from quotations.

In *Rowland* analysis, foreseeability of harm "is not measured by what is more probable than not," but rather "includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal. 3d 49, 57. See also *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 1003-1004 ["'foreseeability' .... means a level of probability which would lead a prudent person to take effective precautions"].)

Foreseeability is an "elastic," "somewhat flexible concept." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal. 3d 112, 125; reaffirmed in *Delgado, supra,* 36 Cal.4th at 243. See also *John B., supra,* 38 Cal.4th at 1195; *Juarez v. Boy Scouts of America, Inc., et al.* (2000) 81 Cal.App.4th 377, 402.)

> As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution. (*John B., supra,* 38 Cal.4th at 1195; quoting Prosser & Keeton on Torts (5th Ed. 1984) § 31, p. 171. See also *Castaneda, supra*, 41 Cal.4th at 1213; *Bigbee, supra,* 34 Cal.3d at 58.)

Notably, the Ninth Circuit's Opinion appears to have determined that, applying a 'broad level' approach to foreseeability, the harm of not having AEDs available was foreseeable:

> ... California courts considering foreseeability as an aspect of duty often focus on whether the *type* of harm suffered was foreseeable, not whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct. In this sense, it could be foreseeable to Target that one of its customers might suffer sudden cardiac arrest while shopping, given the fact that more than 700 people die of sudden cardiac arrest in the United States every day.
> (9th Circuit Opinion, p. 11 [emphasis in original]. See also 9th Circuit Opinion, pp. 16, 19 [concurring and dissenting opinions indicate Sudden Cardiac Arrest is foreseeable].)

Given the gravity of the harm – certain death absent timely access to an AED, only a minimal showing of foreseeability is needed to justify imposition of a duty. That threshold is easily met here.

To the extent that Target might contend that Mary Ann's death was an 'unavoidable accident' or an 'act of God,' such claims should be rejected. An 'unavoidable accident' is an occurrence "so far beyond the reasonable anticipation and control of the parties" that it "could not have been foreseen or prevented by the exercise of reasonable precautions." (*Neumann v. Bishop* (1976) 59 Cal.App.3d

451, 477; *Smith v. H.E. Anning Company* (1958) 156 Cal.App.2d 842, 852.) Here, Target knew about the dangers of Sudden Cardiac Arrest, selling defibrillators online, and yet decided not to take reasonable precautions. (ER2 pp. 121-123, and 126 [alleging company-wide policy of not having defibrillators available at its stores for emergency use]; RJN #9, pp. 1-2.)

Likewise, an 'act of God' defense is not applicable here. This defense may only be asserted in those limited cases where an unanticipated natural occurrence is the *sole cause* of a plaintiff's injury or damage. The natural event must be "so unusual in its proportions that it could not be anticipated." If the event could be anticipated and there were steps that the defendant could have taken to prevent or mitigate the damage (as there are here), the act of God defense is inapplicable. (*Mancuso v. Southern California Edison Company* (1991) 232 Cal. App. 3d 88, 103-104; *Southern Pacific Company v. City of Los Angeles* (1936) 5 Cal. 2d 545, 549.) Indeed, the Restatement expressly contemplates that the "duty to protect the other against unreasonable risk of harm extends … to risks arising from forces of nature…. The duty to give aid to one who is ill or

injured extends to cases where the illness or injury is due to natural causes [or] pure accident...." (Restatement Second of Torts, section 314A, Comment D. See also *Logacz v. Limansky* (1999) 71 Cal. App. 4th 1149, 1158-1159 [defendant's negligence is sufficient to support a claim, "even though it operated in combination with other causes, whether tortious or nontortious;" i.e. a medical condition not caused by defendant]; *Hughey v. Candoli* (1985) 159 Cal. App. 2d 231, 240-241 [same].)

The occurrence of a customer suffering Sudden Cardiac Arrest while shopping at Target was an entirely foreseeable event, and Mary Ann Verdugo's death was completely preventable. Under the circumstances, the foreseeability element weighs heavily in favor of duty.

(2) The Degree Of Certainty That The Plaintiff Suffered Injury

When a person has suffered injuries that are demonstrably real and severe, the 'degree of certainty' test is readily satisfied. (See, e.g., *FNS Mortgage Service Corp. v. Pacific General Group Inc.* (1994)

24 Cal.App.4th 1564, 1575; *Reenders v. City of Ontario* (1977) 68 Cal.App.3d 1045, 1053.) Here, it is undisputed that Mary Ann Verdugo died from Sudden Cardiac Arrest. (ER2 p. 121.) Due to the gravity of this unnecessary tragedy, the certainty that she suffered injury supports the imposition of a duty of care.

(3) The Closeness Of The Connection Between The Defendant's Conduct And The Injury Suffered

The closeness of the connection between the defendant's conduct and the injury suffered is strongly related to the question of foreseeability itself. (*Cabral, supra*, 51 Cal.4th at p. 779; *Campbell, supra,* 206 Cal.App.4th at 29-30.) An affirmative finding on foreseeability generally establishes not only the 'foreseeability of harm' element of *Rowland* analysis, but also sufficiently establishes a 'close connection between the defendants' conduct and the injury suffered.' (*Isaacs, supra,* 38 Cal.3d at 131; *Bigbee, supra*, 34 Cal.3d at pp. 59-60, fn. 14; *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1612-1613. See also *Peterson v. San Francisco Community College District* (1984) 36 Cal.3d 799, 814 [failure to take

protective measures to prevent foreseeable harm "closely connects the defendants' conduct with plaintiff's injury"].) For the same reasons explained in the foreseeability discussion, there is a sufficiently close connection between Target's refusal to install an AED as a matter of corporate policy, and Mary Ann's death from Sudden Cardiac Arrest.

(4) The Moral Blame Attached To The Defendant's Conduct

In *Rowland* analysis, 'moral blame' is considered to be a 'public policy factor.' (*Cabral, supra,* 51 Cal.4th at 781.) Generally, public policy is served by imposing liability on negligent parties, unless "outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability." (*Id.* at 781-782.) Here, there are no "laws or mores indicating approval of the conduct" of *not* having defibrillators, but rather a strong public policy *favoring* an increase in availability of AEDs at commercial premises. (See discussion of 'policy of preventing future harm' *Rowland* factor.)

The courts have used two somewhat different approaches in applying the 'moral blame' factor. One line of authority holds that

'moral blame' pertains not to the motive underlying the defendant's conduct, but rather to culpability for having created an unreasonable risk of harm to others. (*Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1113. See also *Mintz, supra,* 172 Cal.App.4th at 1612 ['moral blame' can result from an erroneous decision to withhold a medical treatment, regardless of motivation].) Moral blame "increases as a defendant's conduct moves on the fault continuum from ordinary negligence to gross negligence and wanton, reckless conduct." (*Ludwig, supra,* 65 Cal.App.4th at 1113-1114.) Thus, blameworthiness is regarded as having more to do with the degree of deviation from reasonable care than with whether the defendant acted based on immoral motives. (*Ibid.*; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081.) The other approach similarly ascribes moral blame to "the inherently harmful nature of the defendant's acts," but also emphasizes "a defendant's culpability in terms of the defendant's state of mind."[8] (See, e.g., *Adams v. City of*

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[8] The *Adams* line of cases regard "the moral blame that attends ordinary negligence" as a *neutral* factor "not sufficient to tip the balance of the *Rowland* factors in favor of liability," and hold that a higher degree of "moral culpability" than ordinary negligence is needed before the moral blame factor will be regarded as favoring duty, "such as where the defendant (1) intended or planned the

Fremont (1998) 68 Cal.App.4th 243, 270.)

It would appear that the *Ludwig* line of reasoning is more in accord than *Adams* with this Court's direction that duty be "evaluated at a relatively broad level of factual generality," and "not ... in light of a *particular* defendant's conduct." (*Cabral, supra*, 51 Cal.4th at 772 [emphasis in original].)[9] Such a conclusion is supported by this Court's holding that a landholders' failure to take protective measures can "indicate that there is moral blame attached to the defendants' failure to take steps to avert the foreseeable harm." (*Peterson, supra,* 36 Cal.3d at 814.)

In any event, there is a more than sufficient showing of 'moral blame' here. This no ordinary negligence case, but rather concerns

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harmful result; (2) had actual or constructive knowledge of the harmful consequences of their behavior; (3) acted in bad faith or with a reckless indifference to the results of their conduct; or (4) engaged in inherently harmful acts ." (*Adams, supra,* 68 Cal.App.4th at 270. Cf. ER2 pp.121-122 [complaint alleges Target was "deliberately and/or recklessly indifferent to the fact that no matter how quickly an ambulance or other paramedic vehicle could get to the store"]. See also *Isaacs, supra,* 38 Cal.3d at 131; *Mark v. Pacific Gas and Electric Company* (1972) 7 Cal. 3d 170, 178 fn. 5 ['moral blame' generally not a determinative factor].)

[9] It may also be inappropriate to presume an absence of moral blame when (as here) the plaintiff has been denied any opportunity for discovery or trial. (See *John B., supra*, 38 Cal.4th at 1192; *Randi W. v. Muroc Joint Unified School District* (1997) 14 Cal. 4th 1066, 1078.)

special relationship liability. Target had an affirmative duty to protect Mary Ann Verdugo against unreasonable risk of physical harm, and failed to take any measures to avert a foreseeable harm to her. (ER 2 pp. 121-123, 126.) Under the circumstances, moral blame "should be placed on those in present control of the circumstances who have the power to make changes, [and] take needed precautions...." (See *Preston v. Goldman* (1986) 42 Cal.3d 108, 125.) That blame belongs squarely on Target.

(5) The Policy Of Preventing Future Harm

"Ultimately, duty is a question of public policy" under California law. (*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1205.) Under *Rowland*, courts should create an exception to a common law duty of care only where that is "clearly supported by public policy." (*John B, supra*, 38 Cal.4th at 1191; *Cabral, supra*, 51 Cal.4th at 771.) "The question is not whether a *new duty* should be created, but whether an *exception*" to the duty of care "should be created." (*Cabral, supra*, 51 Cal.4th at 782-783 [emphasis in original].)

As a threshold matter, this Court should be guided by the overall policy favoring prevention of future harm, "which is ordinarily served, in tort law," by allowing liability "unless that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability." (*Id.* at pp. 781-782 [emphasis in original]; *Campbell, supra*, 206 Cal.App.4th at 34.) Here, there certainly are no 'mores' approving of not having defibrillators, and (as discussed in the 'burden' *Rowland* factor) the "undesirable consequences" of enforcing a duty are largely nonexistent.

Public policy strongly favors dissemination of AEDs. Federal and California statutes recognize that Sudden Cardiac Arrest is a major preventable cause of death, and mandate that certain buildings be equipped with defibrillators; including federal buildings, state owned and leased buildings, and health and fitness studios. (42 U.S.C. section 238p; Gov. Code section 8455; Health & Safety Code section 104113.) California has enacted extensive legislation, including immunity statutes, to further the public policy "purpose of promoting the widespread use" of AEDs and to "encourage greater availability of

these devices." (*Rotolo v. San Jose Sports & Recreation, LLC* (2007) 151 Cal.App.4th 307, 314, 318; Civil Code section 1714.21; Gov. Code section 8455; Health & Safety Code sections 1797.196, 104113.) These goals are furthered by allowing a claim against landholders who are readily capable of complying with the immunity statutes, but nonetheless choose not to make an AED available for invitees having medical emergencies.

As was noted by the district court here, it was dicta for *Rotolo* to further opine that by enacting statutes encouraging the availability of AEDs by providing those who acquire the devices qualified immunity from liability, the Legislature 'occupied the field' and "made clear that building owners and managers have no duty in the first instance to acquire and install an AED." (*Rotolo, supra*, 151 Cal.App.4th at 314; ER 7.) *Rotolo* had no occasion to address that question, as all that was at issue was whether a landholder who in fact *had* acquired an AED could be liable for failing to provide notice to invitees beyond that required in the immunity statutes and regulations. The case is therefore inapposite. (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 323.)

In any event, *Rotolo*'s reasoning should be rejected, as it would actually discourage acquisition of AEDs, render statutory provisions into nonsensical surplusage, and produce absurd results. Under *Rotolo*'s interpretation, landholders who acquire AEDs would be exposed to liability (for failure to comply with the maintenance, training, and notice/posting requirements; or for 'willful or wanton misconduct'), while landholders who do nothing would be fully immune. This absurd construction of the immunity statutes could not have been intended by the Legislature, and should be rejected. (*In re Greg F.* (2012) 55 Cal.4th 393, 406.)

If the California Legislature intended to decree that there is no common law duty to acquire or install defibrillators, it could have simply said so. Instead, the Legislature has granted "qualified immunity" from civil liability to those who install defibrillators and follow the specified maintenance, training, and notice/posting requirements. (Health & Safety Code section 1797.196, subd. (b); RJN, #3, p. 1.) There would be no purpose in providing for qualified immunity specifically limited to those who do install defibrillators in buildings, if the Legislature was abrogating *all* common law duties to

install defibrillators. Such a construction improperly renders much of the legislation meaningless. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135.)

Health & Safety Code section 1797.196, subd. (f), relied on by *Rotolo*, simply means what it says: "Nothing in this section or [Civil Code] Section 1714.21 may be construed to require a building owner or a building manager to acquire and have installed [a defibrillator] in any building." (Cf. *Rotolo, supra*, 151 Cal.App.4th at 322.) This merely means that there is no statutory requirement that buildings have defibrillators, nor *negligence per se* liability for failing to install them. The Verdugos have never claimed that there is *negligence per se* liability based on the immunity statutes – their claims are founded principally on common law. Language similar to section 1797.196, subd. (f), to the effect that 'nothing in this section may be construed as requiring...,' appears in over 200 California statutes. (*See, e.g.*, Civil Code section 51, subd. (d) [Unruh Civil Rights Act].) It is unreasonable to construe such general provisions, on their own, to confer blanket immunity, as this Court normally narrowly construes inferred statutory immunity. (*Klein v. U.S.A.* (2010) 50 Cal.4th 68,

81-83; *Van Horn v. Watson* (2008) 45 Cal. 4th 322, 332-333; *Milligan v. City of Laguna Beach* (1983) 34 Cal. 3d 829, 832.)

Public policy requires that this Court's decision not "produce manifestly adverse effects that the Legislature could not have intended," when it enacted the immunity statutes in a "continuing effort by policy-makers in California to encourage the proliferation and use of automatic external defibrillators (AEDs) in easily accessible locations." (RJN #6, p. 1.) The case should be decided in alignment with the state's strong interest in "preventing or minimizing personal injuries," including deaths from Sudden Cardiac Arrest. (See *Klein, supra,* 50 Cal.4th at 83.) Properly construed, the public policy *Rowland* factor strongly supports appellants.

(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

An important factor under *Rowland* is the extent of the burden to the defendant of imposing a duty of care. Although the courts weigh all *Rowland* elements, foreseeability and the extent of the burden are frequently regarded as the primary factors to be

considered. (*Castaneda, supra*, 41 Cal.4th at 1213.) *Rowland* analysis uses a "sliding-scale balancing formula" whereby a strong showing of foreseeability can justify imposing a greater burden, and a modest burden can reduce the need for showing foreseeability. (*Ibid.*)

The burden of imposing a duty of care here is modest, at least for large-scale proprietors like Target. The AED immunity statutes provide a 'safe haven' for landholders, available by purchasing the device for $1,200 or less and complying with the clearly stated training and maintenance requirements of the statutes. Immunity extends to all users of the device in an emergency, while only one employee (fully available for other work responsibilities) need receive training. (Health & Safety Code section 1797.196, subd. (b)(2)(D); RJN #6, p. 1; 9th Circuit Opinion pp. 20-21 and fn. 1[Pregerson, dissenting].).) Businesses that use registered security guards can hire persons already having AED training. (See 16 CCR 643, Appendix section III(I)(3).) Since 2005, Health studios of all sizes throughout the state seem to have had little difficulty complying with their AED responsibilities. (Health & Safety Code section 104113.) With massive revenues and substantial staffs, it would be no hardship for

Target to comply with the AED immunity requirements. (See 9th Circuit Opinion pp. 19-20 [Pregerson, dissenting].)

The burden proposed here pales in comparison to some of the common law burdens that have passed muster in other cases. Bars have a duty to attempt to keeping rival gang members separated, when they are aware of potential danger. (*Delgado, supra,* 36 Cal.4th at 245-246) Bus companies must implement security measures to protect passengers. (*Lopez, supra,* 40 Cal. 3d at 787-788.) Motocross racecourses have a duty to employ flaggers or use other warning methods to protect participants who have fallen. (*Rosencrans, supra,* 192 Cal. App. 4th at 1084.) Marathon race organizers may have to maintain a series of water and electrolyte stations. (*Saffro, supra,* 98 Cal.App.4th at 179-180.) Schools have a duty to protect students against sexual assaults by other students. (*C.W. v. Panama Buena Vista Union School District* (2003) 110 Cal. App. 4th 508, 524-525.) Clubs with pools may have to hire lifeguards. (*Rovegno, supra,* 108 Cal.App. at 597.)

The Verdugos are asking that very 'simple measures' to be taken to help prevent death by Sudden Cardiac Arrest, such as those

described in the OSHA Guide, which prominently includes AEDs as part of the standard equipment that should be on hand for first aid. Every Sixth through Eighth Grade student in Illinois is expected to learn how to use an AED. (105 ILCS 5/27-17.) Surely Target, with a common law duty to protect invitees and over $65 billion in revenue, can be expected to make the devices available.

Expecting superstores, often with trained pharmacists on staff, to comply with basic AED training and maintenance requirements so that lives can be saved is not an unduly burdensome requirement. This is no "radical expansion" of the duty to protect invitees, but rather a reasonable application of ordinary negligence standards to an evolving commercial and social environment. (See *Cabral, supra,* 51 Cal.4th at 782-783; *Vasquez, supra*, 118 Cal.App.4th at 279-280.)

One thing should be absolutely clear here. Plaintiffs are not contending that every landholder in California who solicits invitees must have an AED. A measure that would be a minimal burden for a large enterprise like Target may be a more significant burden for a small proprietor. (*Vasquez, supra*, 118 Cal.App.4th at 285 fn. 9 and accompanying text; *Pamela W. v. Millsom* (1994) 25 Cal.App.4th 950,

958.) Plaintiffs do not advocate a rule that would apply to a modest neighborhood drycleaner or gas station. Rather, they simply contend that if a landholder has sufficient staffing and resources to comply with the immunity statutes without hardship, a factfinder should be entitled to reach the question of whether their decision not to procure an AED was negligent. (*Cabral, supra*, 51 Cal.4th at 782-783; *Vasquez, supra*, 118 Cal.App.4th at 285 fn. 9.)

Target is a prime example of a proprietor that should have a duty to have an AED. Big Box retailers, such as Target, are well-defined under California law, and typically serve large numbers of invitees in expansive settings that present daunting challenges to delivery of timely emergency services. (Gov Code section 53084, subd. (b)(1); Health & Safety Code section 33426.7, subd. (b)(1). See also RJN #1, p. 3 [Target stores in California average over 124,000 square feet].) Big Box stores receive special treatment under the law, often reaping substantial legal advantages. (See, e.g., *Hernandez v. City of Hanford* (2007) 41 Cal. 4th 279, 283; *Costco Companies, Inc. v. Gallant* (2002) 96 Cal. App. 4th 740, 755; *Lushbaugh v. Home Depot U.S.A., Inc.* (2001) 93 Cal. App. 4th 1159, 1169-1170; *Trader*

Joe's Company v. Progressive Campaigns, Inc. (1999) 73 Cal. App. 4th 425, 437.) The size of the premises, and physical features such as having "only one entrance and one exit," have legal ramifications. (See *Costco, supra*; and *Trader Joe's, supra.*)

Just as being a large retailer has advantages, Target must also take the restrictions and responsibilities that come with being a massive enterprise serving large numbers of people in an environment where access may be restricted. (See, e.g., *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 303.) Target's burden of being prepared to assist customers suffering from Sudden Cardiac Arrest is far outweighed by the benefit to the public, and by California's public policy of strongly encouraging dissemination of AEDs. Analysis of the *Rowland* 'burden' factor strongly militates against excluding Sudden Cardiac Arrest from Target's responsibilities owed to ill invitees.

(7) The Availability, Cost, And Prevalence Of Insurance For The Risk Involved

The prevalence and availability of landholders' premises and/or business insurance for injuries suffered by invitees is ubiquitous and

already in place for most potential defendants. (See *Randi W., supra,* 14 Cal.4th at 1078.) Undoubtedly these insurance policies already cover the longstanding common law duty to assist ill invitees, and there is no indication that use of AEDs is somehow excluded. Even if additional coverage was necessary, the availability of the qualified immunity statutes suggests that the premium would be minimal, and that landholders could reasonably protect themselves without insurance by simply complying with the statutory immunity conditions. (Civil Code section 1714.21; Health & Safety Code section 1797.196.)

On the other hand, consideration of the insurance factor is weighed differently "when the risk involved is physical injury or death, rather than pure economic loss." (*Mintz, supra,* 172 Cal. App. 4th at 1616.) Invitees, like Mary Ann Verdugo, do not have an effective remedy of procuring their own insurance for their 'damages' – i.e. death – incurred due to a landholder's failure to obtain an AED. (*Ibid.*) Under the circumstances, the insurance factor weighs heavily in favor of appellants.

(8) Weighing The Totality Of The *Rowland* Factors

Based on the foregoing discussion, the totality of the *Rowland* factors strongly favor recognizing that a landholder's duty to protect invitees can include liability for failure to procure a defibrillator. The threatened harm is foreseeable and grave, public policy strongly favors a duty, and the burden is minimal for those enterprises reasonably able to avail themselves of the AED immunity statutes' protections. Under the circumstances, this Court should 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 AED, for those businesses that would not be unduly burdened by the requirements of the immunity statutes.

VI. 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: April 16, 2013

Respectfully Submitted,
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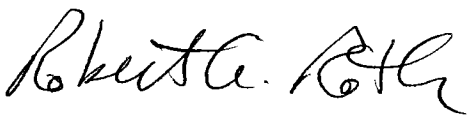
VII. CERTIFICATE OF WORD COUNT

The text of this brief consists of less than 14,000 words, as counted by the word-processing program used to generate the brief.

Date: April 16, 2013



ROBERT A. ROTH

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.

Date: April 17, 2013

Robert A. Roth