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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS LEAK CASES

After A Decision By The California Court Of Appeal, Second Appellate District, Division Five, Case No. B283606

The Superior Court Of Los Angeles County,
Judicial Council Coordination Proceeding No. 4861,
The Honorable John Shepard Wiley, Jr.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF PLAINS ALL AMERICAN PIPELINE, L.P., THE ASSOCIATION OF OIL PIPE LINES, AND THE WESTERN STATES PETROLEUM ASSOCIATION IN SUPPORT OF RESPONDENT

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Plains All American Pipeline, L.P. ("Plains"), the Association of Oil Pipe Lines ("AOPL"), and the Western States Petroleum Association ("WSPA") respectfully request permission to file the *amicus curiae* brief in support of Respondent that is combined with this application.

Plains is a publicly traded master limited partnership that owns and operates midstream energy infrastructure and provides logistics services for crude oil, natural gas liquids, and natural gas both in California and elsewhere. As such, Plains has been the subject of tort claims brought by plaintiffs alleging to have suffered purely economic losses following leaks, spills, and other accidents in this State. For example, in *Venoco, Inc. v. Plains Pipeline, L.P.* (C.D. Cal. Sept. 26, 2016, No. 16-2988 PSG (JEMx)) 2016 WL 10646303, at *1, an oil platform operator seeks "damages [from Plains] in excess of $200 million" that it claims resulted from the shutdown of a Plains pipeline following a May 19, 2015 leak. The platform operator does not claim to have suffered any personal or property damage flowing from the leak; instead, it claims that it lost profits because—ever since the damaged pipeline was shut down for repair—it "has not been able to transport its crude oil from [its offshore platform] to its onshore contractors." (*Ibid.*) Because the economic loss doctrine is integral to

Plains' defense to liability in *Venoco* and other litigation,[1] Plains has a compelling interest in the proper interpretation and application of that doctrine in this case.

AOPL is a national trade association that represents owners and operators of oil pipelines across North America before state and federal agencies, legislative bodies, and the judiciary, and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the Nation's refineries and important petroleum products to our communities, through pipelines that extend approximately 211,150 miles across the United States, including California. These pipelines safely, efficiently, and reliably deliver approximately 14.9 billion barrels of crude oil and petroleum products each year. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and cost-effective method of serving energy consumption demand.

WSPA is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining,

[1] Plains has other defenses to the platform operator's claims in *Venoco*, as well, including that the governing contract does not require Plains to continue operating its pipeline and, in fact, bars the operator's claims for lost profits and business interruption resulting from the shutdown of the pipeline. (See *Venoco, Inc.*, *supra*, 2016 WL 10646303, at *2.)

transportation, and marketing in the five western states of Arizona, California, Nevada, Oregon and Washington. Founded in 1907, WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible.

As described more fully in the attached *amicus* brief, the applicants urge this Court to affirm the Court of Appeal. The economic loss doctrine is well-established in this State and has long been used by oil pipelines, natural-gas companies, telecommunications providers, and utilities to guard against the risk of unlimited exposure to tort claims lodged by plaintiffs that can allege to have suffered *only* economic losses. That doctrine thus resolves Plaintiffs' claims in this case, and this Court should reject Plaintiffs' invitation to radically depart from the majority rule in favor of vastly expanded damages liability for oil companies, natural-gas companies, and utility providers.

That conclusion is all the more appropriate in light of the fact that imposing additional liability on companies like Respondent and *amici* is unlikely to result in any material improvements to the safe operation of oil and natural-gas pipelines in this State. Utility companies and pipelines are already subject to heavy regulatory burdens at both the federal and state levels, and those regulatory regimes are more than adequate to promote safety. Moreover, by operation of federal and state law, oil companies like

amici are already obliged to cover the economic losses of certain plaintiffs following oil spills. Finally, Respondent and *amici* are already subject to significant liability in tort, given that the economic loss doctrine does nothing to prevent plaintiffs that have suffered personal or property injury following leaks or spills from also recovering their economic losses. The upshot is that Plaintiffs' preferred outcome would serve no useful purpose and cannot be squared with any correct understanding of California's economic loss doctrine.

Not only is Plaintiffs' preferred outcome unsupported by California law and unnecessary in light of the statutory, regulatory, and tort regimes that already police utilities' and other companies' behavior, but that outcome also amounts to poor policy. Respondent, the applicants, and others would be required to convince insurers to underwrite the risk of limitless liability following accidental leaks and spills in California, and then they would have to pass that increased insurance cost on to consumers in the form of substantial rate hikes. Plaintiffs have given this Court no reason why California law requires this bad-for-business and bad-for-consumers result, and thus this Court should affirm the Court of Appeal and thereby reaffirm California's commitment to the economic loss doctrine.

The applicants' attorneys have examined the briefs on file in this case and are familiar with the issues involved and the scope of the parties' presentations. The applicants have attempted to supplement, but not

duplicate, the parties' briefs, and thus they respectfully submit that this Court will benefit from the applicants' proposed additional briefing.

No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the applicants' proposed brief. The applicants certify that no other person or entity other than the applicants and their counsel authored or made any monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

This application is timely. It is being submitted within 30 days of the filing of Plaintiffs' reply brief, which was filed on August 6, 2018. (See *id.*, rule 8.520(f)(2).)

For these reasons, the applicants request that this Court accept and file the attached *amicus curiae* brief.

Respectfully submitted,

Dated: September 5, 2018 MUNGER, TOLLES & OLSON LLP

By: */s/ Henry Weissmann*
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Attorneys for *Amici Curiae* Plains All American Pipeline, L.P. *et al.*

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Court of Appeal correctly recognized, the economic loss doctrine is well-established in this State and disposes of Plaintiffs' case. That doctrine makes clear that companies like Respondent owe no duty of care to prevent the purely economic losses of Plaintiffs, who have not suffered any personal or property injury, and with whom Respondent has no "special relationship." This Court should therefore resolve this case by applying settled economic loss principles, which oil pipelines, natural-gas providers, and utilities have long relied upon in California and elsewhere to guard against indefinite and unlimited liability flowing from leaks, spills, and other accidents.

In contrast, Plaintiffs urge a radical expansion of tort liability in this State, whereby energy providers like Respondent and *amici* would be presumptively liable for *all* economic losses flowing from accidents. Under Plaintiffs' limitless tort liability rules, energy companies and utilities would face liability regardless of how far downstream from the accident economic losses may occur. As Respondent explains, however, it makes no sense to expand energy companies' tort liability beyond the plaintiff who suffers a personal or property injury as a result of an accident, or who has a "special relationship" with the defendant. Plaintiffs' proposed rule would expose energy companies to claims for economic loss, not only by the person whose property was damaged, but also to that person's "barber who

expected to cut his hair that day," or "his employer who lost all the business his best sales representative would have been able to drum up." (Resp. Br. 34–35.) The economic loss rule, as modified by the "special relationship" test, imposes reasonable limits that prevent such downstream claims.

Plaintiffs' proposed rule would serve no good ends, and plenty of bad ones. Energy companies and utilities are *already* subject to federal and state regulatory schemes. These schemes establish detailed duties and regulations governing companies' operations and activities, from the way they design their pipelines, to the materials they use when constructing pipelines, to the way they inspect pipelines for corrosion and other vulnerabilities. Because these federal and state regulations are aimed at the same objective that Plaintiffs purportedly seek to promote (*i.e.*, ensuring pipeline safety), they obviate Plaintiffs' arguments in favor of eviscerating the economic loss doctrine or establishing an unfettered duty to prevent economic loss to parties whose property or person was not damaged, and who are not in a "special relationship" with the defendant. Indeed, exposing Respondent and *amici* to additional damages liability is unlikely to come with *any* material safety benefits.

Moreover, exposing Respondent and *amici* to such additional damages liability would upend the balance already struck by Congress and the California Legislature concerning the proper compensation of plaintiffs following certain oil pipeline accidents. Both the federal Oil Pollution Act

and the California Oil Spill Prevention and Response Act, for example, allow certain plaintiffs to recover their economic losses resulting from oil spills. But both statutes also impose clear limits on defendants' liability flowing from such spills. Plaintiffs' preferred outcome in this case would invite an end-run around these statutory limits; Plaintiffs, in effect, are asking this Court to substitute *their* policy judgments concerning who should (and should not) be compensated following oil spills for those of our legislators. This Court should do no such thing.

Finally, by layering such a common-law duty on top of the extensive regulatory framework under which utilities and energy companies already operate, this Court would subject these companies to expansive liability that would be impracticable to avoid. It would not be enough for these companies to comply with the safety standards and requirements that Congress, the Legislature, and regulatory agencies deem prudent for these companies' business operations. Nor would it be enough for these companies to exercise due care in their dealings with parties directly affected by their operations, whether measured by contract, injury to property or person, or special relationship. Nor would it be enough for these companies to cover the costs of clean-up and economic losses suffered by plaintiffs consistent with their obligations under the Oil Pollution Act and the Oil Spill Prevention and Response Act. Rather, companies like Respondent and *amici* would need to ensure that their

operations and activities had no downstream economic ripple effects *whatsoever*—or risk damages liability that far exceeds the limits imposed by traditional notions of tort liability and by federal and state law.

That cannot be correct. It would distort well-established tort principles in this State and elsewhere, while causing substantial harm to California businesses. It would also harm California consumers, who would inevitably face higher prices resulting from the increased costs businesses would face as a result of dramatically expanded liability for downstream economic losses. This Court should affirm the Court of Appeal and reaffirm the traditional standards governing the economic loss doctrine.

ARGUMENT

I. THE ECONOMIC LOSS DOCTRINE IS WELL-SETTLED IN CALIFORNIA AND HAS LONG BEEN RELIED UPON TO LIMIT ENERGY PRODUCERS' AND UTILITY PROVIDERS' EXPOSURE TO LIABILITY FOR PURELY ECONOMIC LOSSES

As Respondent ably explains, the economic loss doctrine is well-established in this State and has long been relied upon to avoid the danger of exposing defendants to "potentially infinite liability" that would be "out of proportion to fault." (*Bily v. Arthur Young Co.* (1992) 3 Cal.4th 370, 397–398; see also *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [holding that plaintiffs may not bring negligence claims for purely economic damages absent a "special relationship" with the defendant];

County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal.App.4th 292, 318 ["[E]conomic loss alone, without physical injury, does not amount to the type of damage that will cause a negligence or strict liability cause of action to accrue."].) And as Respondent argues, this Court can and should resolve this case through the simple application of "th[at] well-settled economic loss doctrine." (Resp. Br. 36.)

The economic loss doctrine is a crucially important limitation on liability for energy companies and utilities in California and elsewhere. Indeed, the federal and state reporters are full of examples of courts using the doctrine to impose sensible limits on the tort liability of oil producers and utility providers following leaks, spills, and other accidents. In *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, for example, the California Court of Appeal considered the viability of certain homeowners' tort claims against an oil company for negligently manufacturing pipes used in the construction of their homes. (*Id.* at p. 206, distinguished on other grounds by *Goodman v. Lozano* (2010) 47 Cal.4th 1327.) The court held that the economic loss doctrine barred the tort claims of any homeowners whose pipes had not *actually* leaked or otherwise failed, because those homeowners could allege only "economic losses"—not any cognizable property damage sufficient to establish a duty of care. (*Id.* at pp. 211–213; cf. *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194,

1213 [holding that the Right to Repair Act supplants the economic loss doctrine for *statutory* claims in certain construction defect cases].)

More recently, the Superior Court for the County of Santa Barbara sustained a demurrer filed by *amicus* Plains All American Pipeline, L.P. ("Plains") on the basis of the economic loss doctrine. In that case, a company that "provide[d] products and services to oil companies doing business in Santa Barbara County and elsewhere" claimed that it "lost substantial revenue" when a pipeline owned by Plains was forced to shut down following a May 19, 2015 leak, which—in turn—allegedly caused some of the plaintiff's oil-industry customers "to cease or reduce [their] operations." (*Safety Equip. Corp. v. Plains All Am. Pipeline, L.P.* (Super. Ct. Santa Barbara County, Apr. 13, 2017, No. 17CV02224) [attached hereto as Exhibit A].)[2] The Superior Court rejected this claim, however, concluding that the company could not allege any "personal injury or property damage" of its own resulting from the leak, and thus it could not recover its purely economic losses in tort. (*Ibid.*)

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[2] The Court may take judicial notice of this Superior Court decision. (See Evid. Code, § 452, subd. (d)(1) ("Judicial notice may be taken of … [r]ecords of … any court of this state."); *Gilbert v. Master Washer & Stamping Co., Inc.* (2001) 87 Cal.App.4th 212, 218 n.14 ["Although the Court of Appeal opinion … is not published, we may take judicial notice thereof as a court record pursuant to Evidence Code section 452, subdivision (d)(1)."].)

Other jurisdictions have likewise consistently applied the economic loss doctrine to find that utility companies owe no duty of care to third parties that allege only economic losses. (E.g., *Excavation Techs., Inc. v. Columbia Gas Co. of Pa.* (2009) 604 Pa. 50, 57 [affirming dismissal of contractor's claims against utility company for negligently failing to mark gas lines because, among other things, "if utility companies are exposed to liability for excavator's economic losses, such costs would inevitably be passed on to the consumer; if this is to be done, the legislature will say so specifically"]; *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.* (Tex. App. 2000) 29 S.W.3d 282, 290 [holding that utility company owed no "duty of care to [third party] in the marking of its [gas] lines, in the absence of personal injury and property damage"]; *In re Ill. Bell Switching Station Litig.*, (1994) 161 Ill.2d 233, 241–242 [holding that economic loss rule barred telephone company customers from recovering economic damages incurred following loss of phone service]; *FMR Corp. v. Boston Edison Co.* (1993) 415 Mass. 393, 395 [affirming summary judgment on businesses' attempts to recover economic losses following power outage because "economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage"]; *Garweth Corp. v. Boston Edison Co.* (1993) 415 Mass. 303, 304–305 [holding that company's claims resulting from oil spill "are thwarted by the economic damage rule limiting recovery for economic losses in tort-based strict

liability or negligence cases"]; *Stevenson v. E. Ohio Gas Co.* (Ohio App. 1946) 73 N.E.2d 200, 204 ["If one who by his negligence is legally responsible for an explosion or a conflagration should be required to respond in damages not only to those who have sustained personal injuries or physical property damage but also to every one who has suffered an economic loss ... we might well be appalled by the results that would follow."].)

The cases both within and without California thus make clear that oil, natural-gas, telecommunications, and other utilities and energy providers have long relied on the economic loss doctrine to avoid exposure to limitless (and unreasonable) monetary demands from disappointed customers and other third parties. Abandoning this settled principle would be at odds with the governing law in this State, and would put California out of step with the law in other jurisdictions.

II. THIS COURT NEED NOT EXPAND THE SCOPE OF LIABILITY FOR PURELY ECONOMIC LOSSES IN ORDER TO PROMOTE THE EXERCISE OF REASONABLE CARE AMONG OIL PIPELINES AND OTHER HEAVILY REGULATED COMPANIES

In the face of California's well-settled economic loss doctrine, Plaintiffs seek a dramatic expansion of the scope of liability for companies like Southern California Gas and *amici*, who would suddenly find themselves exposed to a plethora of negligence claims from plaintiffs who have not suffered any direct injury to their person or property, and with

whom Respondent and *amici* never entered into any contractual or other special relationship. That outcome contravenes the purposes supporting the economic loss doctrine, however, which are aimed at preventing damages liability from spiraling out of control and out of proportion to a tortfeasor's fault.[3]

Before allowing injured plaintiffs to recover for their purely economic losses, courts are obliged to consider, among other factors, whether imposing liability will advance "the policy of preventing future harm." (*J'Aire Corp.*, *supra*, 24 Cal.3d at p. 804; see also *Bily*, *supra*, 3 Cal.4th at pp. 404–406 [concluding that another "pertinent" factor that a court should consider before imposing a duty of care to prevent economic

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[3] (Rest.3d Torts, Econ. Harm, § 7, cmt. b ["[E]conomic losses can proliferate long after the physical forces at work in an accident have spent themselves. A collision that sinks a ship will cause a well-defined loss to the ship's owner; but it also may foreseeably cause economic losses to wholesalers who had expected to buy the ship's cargo, then to retailers who had expected to buy from the wholesalers, and then to suppliers, employees, and customers of the retailers, and so on. Recognizing claims for these sorts of losses would greatly increase the number, complexity, and expense of potential lawsuits arising from many accidents. In some cases, recognition of such claims would also result in liabilities that are indeterminate and out of proportion to the culpability of the defendant. These costs do not seem likely to be justified by comparable benefits.]; Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill* (2011) 30 Miss C. L. Rev. 335, 360–362 ["Practically any accident will have economic ripple-effects that extend broadly over time and space. There is thus a need to set limits on liability, especially when the basis for liability is negligence, which sets a relatively low culpability threshold."].)

loss is the effect on defendants of allowing such negligence liability].) Here, expanding liability for Southern California Gas—and for other heavily regulated companies like *amici*—would do no such thing. After all, by operation of federal and state law, as well as traditional theories of tort liability, energy companies and utilities are *already* sufficiently motivated to meet their customers' needs in a safe, efficient manner. There accordingly is no need to heap an additional layer of damages liability on those companies' heads.

A. Utilities And Energy Providers Like Respondent And *Amici* Are Already Heavily Regulated At Both The Federal And State Levels

Oil pipelines, natural-gas companies, and other energy providers and utilities are already subject to robust, detailed regulatory schemes that are meant to promote the safe and efficient provision of services to California consumers. To take just one example, oil pipeline companies like *amici* operate under significant federal and state oversight.

At the federal level, oil pipelines are regulated by the Hazardous Liquids Pipeline Safety Act of 1979 and its associated regulations.[4] (See 49 U.S.C. § 60101 *et seq.*; 49 C.F.R. §§ 190–199.) "The purpose of [the Pipeline Safety Act] is to provide *adequate* protection against risks to life

[4] Natural gas companies (including Respondent) are subject to a similar, overlapping regulatory regime. (See generally 49 U.S.C. § 60101 *et seq.* [Natural Gas Pipeline Safety Act of 1968]; 49 C.F.R. §§ 190–199.)

and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation." (49 U.S.C. § 60102(a)(1) [italics added].) The Act therefore requires the Department of Transportation—which oversees pipelines through its Pipeline Safety and Hazardous Materials Administration ("PHMSA")—to "prescribe minimum safety standards for pipeline transportation and for pipeline facilities." (*Id.* § 60102(a)(2).) PHMSA has done just that, establishing a host of regulatory standards governing such topics as "the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities," as well as "qualification[]" requirements for "individuals who operate and maintain pipeline facilities." (*Id.* § 60102(2)(B)–(C).)

In overseeing pipeline safety, federal agencies have adopted extensive regulations. They have, for example, issued regulations addressing the minimum design requirements that oil pipelines are expected to meet (see 49 C.F.R. § 195, subpart C), the materials that can be used in the construction of new oil pipelines (see *id.* § 195.112 ["The pipe must be made of steel of the carbon, low alloy-high strength, or alloy type that is able to withstand the internal pressures and external loads and pressures anticipated for the pipeline system."]), the kinds of valves that can be used in oil pipelines, and where those valves should be placed (see *id.*