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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

FIRST AMERICAN WHOLESALE LENDING CORPORATION et al.,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B283606

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE CALIFORNIA CHAMBER OF COMMERCE, THE AMERICAN INSURANCE ASSOCIATION, AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANT AND PETITIONER SOUTHERN CALIFORNIA GAS COMPANY

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IN THE SUPREME COURT OF CALIFORNIA

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v.

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Real Parties in Interest.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND PETITIONER SOUTHERN CALIFORNIA GAS COMPANY

Under California Rules of Court, rule 8.520(f), the Chamber of Commerce of the United States of America (U.S. Chamber), the California Chamber of Commerce (CalChamber), the American Insurance Association (AIA), and the Property Casualty Insurers Association of America (PCI) request permission to file the attached amicus curiae brief in support of defendant and petitioner Southern California Gas Company.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part, and no person or entity other (continued...)

The U.S. Chamber is the world's largest business federation. It represents 300,000 members and indirectly represents the interests of over 3 million businesses and professional organizations of every size, from every sector, and in every geographic region of the country. In particular, the U.S. Chamber has many members located in California and others who conduct substantial business in the state and have a significant interest in the sound and equitable development of California tort law. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of concern. In fulfilling that role, the U.S. Chamber has appeared many times before this Court, the California Courts of Appeal, the United States Supreme Court, and the supreme courts of various other states.

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing businesses on a broad range of legislative, regulatory, and legal issues.

(...continued)
than amici, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community.

AIA, founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing more than 340 major property and casualty insurance companies based in California and most other states. AIA members collectively underwrite more than $134 billion in direct property and casualty premiums nationwide, including nearly $20 billion in this State, and range in size from small companies to the largest insurers with global operations. These companies underwrite virtually all lines of property and casualty insurance, including both commercial and personal lines insurance. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums nationwide. AIA also files amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace.

PCI promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is composed of approximately 1,000 member companies and 340 insurance groups, representing the broadest cross-section of home, auto, and business insurers of any national trade association. PCI members represent all sizes, structures, and regions, which protect families, communities, and businesses in the United States and across the globe. PCI members write $245 billion in annual premium, which is 38 percent of the nation's property casualty

insurance marketplace. In California, PCI members write 31.6 percent of the property casualty insurance market, including 32.6 percent of the personal lines market and 30.7 percent of the commercial lines market.

Amici believe the Court of Appeal correctly interpreted the economic loss doctrine and applied it to bar plaintiffs' negligence action seeking purely economic losses. Amici offer this brief to help explain the radical nature of plaintiffs' suggested change in tort law, the devastating impact that abolishing the economic loss doctrine in these actions would have, and why this Court should therefore continue to apply the economic loss doctrine to these actions. Accordingly, amici respectfully request that this Court accept and file the attached amicus curiae brief.

September 5, 2018

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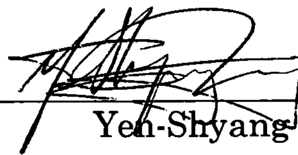
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Under the well-established economic loss doctrine, a defendant has no general duty to prevent a plaintiff's purely economic losses. This doctrine has been applied for over half a century in California, and for even longer in other jurisdictions. Indeed, the majority of all jurisdictions have adopted the doctrine.

Nevertheless, plaintiffs ask this Court to reverse this longstanding and well-reasoned doctrine, and impose upon everyone in this state a general duty to prevent purely economic losses. They essentially ask this Court to create a new cause of action that will radically change California's tort law.

The devastating effect of abolishing the economic loss doctrine should not be understated. Plaintiffs' proposed rule would create the potential for limitless liability against every defendant in every negligence action; increase litigation costs; flood the already over-burdened courts with an all new category of fact intensive cases; prevent those who have suffered physical injuries or property damage from obtaining timely and effective relief; raise costs to business and consumers; upend well-settled law upon which businesses have relied for decades; and, ultimately, damage the state's economy.

This Court should not impose such a dramatic and unwarranted change in the legal foundations underlying economic activity in California. A decision to create a new and far-reaching category of tort claims should be left to the Legislature, which can

better balance the prospective burdens of such a change in the law with any perceived benefits. This Court should affirm the Court of Appeal's decision to apply the economic loss doctrine here.

LEGAL ARGUMENT

I. For over half a century, California has applied the economic loss doctrine, guided in part by the well-reasoned policy of guarding against limitless liability for negligence.

For 60 years, California has applied in negligence actions the economic loss doctrine, under which defendants have no general duty in such actions to prevent purely economic losses.[2] (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58 [noting that recognition of a duty to prevent purely economic loss to third parties "is the exception, not the rule, in negligence law"]; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 396-399 (*Bily*) [finding auditor has no duty to prevent economic losses to third parties]; *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18 (*Seely*) [finding manufacturer has no duty to prevent purely economic losses arising from defective product]; *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636-637 [rejecting claim for purely economic

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[2] Versions of this doctrine had already been applied by other jurisdictions long before California joined the majority of jurisdictions in adopting it. (See, e.g., *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303 [48 S.Ct. 134, 72 L.Ed. 290] (*Robins*); *Ultramares Corp. v. Touche* (1931) 255 N.Y. 170, 179-180; *Byrd v. English* (1903) 117 Ga. 191; *Stevenson v. East Ohio Gas Co.* (Ohio Ct.App. 1946) 73 N.E.2d 200, 201-204 (*Stevenson*).)

losses and stating it would "constitute an unwarranted extension of liability for negligence"].)

Courts have applied a narrow exception to the general rule against a duty for purely economic losses when a plaintiff shows a special relationship with the defendant under the factors stated by this Court in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*).[3] (See, e.g., *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1013-1019 (*Centinela*) [applying general no-duty rule but finding an exceptional duty based on special relationship]; *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 (*J'Aire*) [restating factors to determine whether duty should be imposed]; *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1215 ["[E]ntities generally have no *duty* to prevent purely economic loss to a potential plaintiff. [Citation.] Under the common law, it is only where a 'special relationship' exists [citation], giving rise to such a duty, that a plaintiff may recover purely economic loss."].)

On the other hand, it is equally well established that defendants are presumed to have a duty to prevent personal injuries and property damage in negligence actions, subject to the multi-factor test developed by this Court in *Rowland v. Christian*

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[3] The *Biakanja/J'Aire* factors are: "[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja, supra*, 49 Cal.2d at p. 650.)

(1968) 69 Cal.2d 108, 112-113 (*Rowland*).[4] (See, e.g., *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 (*Vasilenko*) [applying general duty rule in personal injury action]; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142-1144 [applying general duty rule in wrongful death and premises liability action based on exposure to asbestos]; see also *Seely, supra,* 63 Cal.2d at p. 19 ["Physical injury to property is so akin to personal injury that there is no reason to distinguish them"].)

Thus, one long-standing distinction between analyzing existence of duty in negligence actions is the type of harm suffered by the plaintiff. When a plaintiff suffers only economic loss, courts begin with the presumption of no duty and then determine whether an exception exists by applying the *Biakanja/J'Aire* factors. But when a plaintiff suffers personal injuries or property damage, courts presume a duty and then determine whether an exception to the duty exists by applying the *Rowland* factors. (Compare *Centinela, supra,* 1 Cal.5th at pp. 1013-1019 [finding economic loss defendant owed exceptional duty under *Biakanja/J'Aire* factors] with *Vasilenko, supra,* 3 Cal.5th at p. 1083 [finding personal injury defendant owed no duty under *Rowland* factors].)

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[4] The *Rowland* factors are: "[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, 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 the availability, cost, and prevalence of insurance for the risk involved." (*Rowland, supra,* 69 Cal.2d at p. 113.)

The main purpose of having one standard for analyzing claims involving purely economic losses, and another for those involving injuries to persons or property, is to avoid the imposition of a potentially limitless scope of liability for purely economic losses. As recently explained by the Court of Appeal:

> The main difference between the two sets of factors is the absence of the first [*Biakanja*/*J'Aire*] factor ("the extent to which the transaction was intended to affect the plaintiff") in the physical injury context. [Citation.] This makes sense. . . . [A] hypothetical negligent driver['s] . . . lack of intent to affect the particular victim of the car crash should have no bearing on the question of whether he had a duty to drive with due care and avoid injuring other drivers. But what if the accident caused a traffic jam on the freeway? Should our driver (who we are positing had a duty of care as to the victim who suffered physical injury and property damage in the crash) have a duty to the occupants of vehicles behind the traffic jam, such that any economic damages they suffer as a result of the traffic jam are recoverable? The introduction of this additional factor into the economic loss criteria is useful in avoiding such a result.

(*Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1341, fn. 20; accord, *Bily*, *supra*, 3 Cal.4th at p. 400, fn. 11 [discussing the "frequently used illustration" of a defendant who "negligently causes an automobile accident that blocks a major traffic artery such as a bridge or tunnel"].)

It makes sense to preserve the economic loss doctrine to guard against the possibility of limitless liability for strangers' purely

economic losses.[5] Indeed, the "economic loss rule has its firmest grounding" in these types of claims. (Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort* (2006) 48 Ariz. L.Rev. 857, 861-862 (hereafter Rabin).) There is necessarily a limited, finite, and identifiable number of plaintiffs who would suffer personal injuries or property damage from a negligent act—even a mass tort. Not so for those who may have suffered purely economic damages. (See *Dundee Cement Co. v. Chemical Laboratories, Inc.* (7th Cir. 1983) 712 F.2d 1166, 1171 (*Dundee Cement*) [" '[O]nly a limited amount of physical damage can ever ensue from a single act, while the number of economic interests a tortfeasor may destroy in a brief moment of carelessness is practically endless' "]; accord, *Aikens v. Debow* (2000) 208 W.Va. 486, 501-502 (*Aikens*) [discussing examples of numerous

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[5] The economic loss doctrine applies in many different contexts with varying justifications depending on the context. (See, e.g., *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988 [noting that in products liability actions, the economic loss rule prevents the " 'law of contract and the law of tort from dissolving one into the other' "]; see generally *Southern California Gas Leak Cases* (2017) 18 Cal.App.5th 581, 591 (*Southern California Gas Leak Cases*) ["the phrase, 'economic loss rule' appears in numerous appellate opinions involving contracts, warranties, and products liability; in those decisions, the 'economic loss rule' operates as a bar to recovery in the absence of personal injury or property damage"]; Dobbs et al., The Law of Torts (2d ed. 2018) Economic Torts and Economic Loss Rules, § 608 [discussing the "core economic loss rules" (original formatting omitted)]; Johnson, *The Boundary-Line Function of the Economic Loss Rule* (2009) 66 Wash. & Lee L.Rev. 523, 534-535 ["The truth may be that there is not one economic loss rule broadly applicable throughout the field of torts, but rather several more limited rules that govern recovery of economic losses in selected areas of the law"].)

third parties who might suffer economic losses from a defendant's negligence]; ABOM 40-41, 59-60 [describing numerous third parties who might have suffered economic losses from the gas leak].)

Further, plaintiffs' lengthy arguments against "a bright-line no-recovery rule in *all* cases involving purely economic losses" are wholly misplaced. (See, e.g., RBOM 1 ["SoCalGas wants a bright-line no-recovery rule in *all* cases involving purely economic losses"], 9-10 ["nothing categorically precludes claims . . . for negligently inflicted economic losses"], 13 ["that allowing recovery for economic losses might create problems of 'indeterminate liability' in *some* cases does not justify a no-recovery rule in *all* cases"].) The economic loss doctrine in California is not, and has never been, a categorical bar to all negligence actions for purely economic losses. And Southern California Gas Company does not appear to ask for such a categorical bar. (See ABOM 24 ["plaintiffs may not bring negligence claims for purely economic damages *absent* a 'special relationship' rendering any such losses limited and finite" (emphasis added)].)

The current well-established rule in California simply presumes that a defendant has no general duty to prevent purely economic losses to a plaintiff. That presumption only *begins* the analysis; courts must then determine under *Biakanja* and *J'Aire* whether a special relationship exists between the parties. Thus, while the economic loss doctrine appropriately guards against limitless liability, the *Biakanja/J'Aire* factors permit California courts to find an exceptional duty when justified by the facts.

II. Recognizing a new category of claims for purely economic losses caused by negligence would cause California to depart from the majority rule across the country.

The vast majority of jurisdictions apply the economic loss doctrine to bar negligence actions for purely economic losses, either outright or with narrow exceptions such as when a "special relationship" exists between the parties.[6] The Restatement of Torts

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[6] See, e.g., *Rogers v. Wright* (Wyo. 2016) 366 P.3d 1264, 1275; *Lawrence v. O and G Industries, Inc.* (2015) 319 Conn. 641, 666-667 (*Lawrence*); *LAN/STV v. Martin K. Eby Const. Co., Inc.* (Tex. 2014) 435 S.W.3d 234, 238-241, 250 (*LAN/STV*); *Long Trail House Condo. Ass'n v. Engelberth Const., Inc.* (2012) 192 Vt. 322, 327-329; *Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania* (2009) 604 Pa. 50, 52-57 & fn. 3; *Lowe v. Philip Morris USA, Inc.* (2008) 344 Or. 403, 413-414; *Plourde Sand & Gravel v. JGI Eastern, Inc.* (2007) 154 N.H. 791, 794-796; *Blahd v. Richard B. Smith, Inc.* (2005) 141 Idaho 296, 300; *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.* (2001) 96 N.Y.2d 280 (*532 Madison Avenue*); *Aikens, supra*, 208 W.Va. at p. 500; *In re Chicago Flood Litigation* (1997) 176 Ill.2d 179, 198; *FMR Corp. v. Boston Edison Co.* (1993) 415 Mass. 393, 394-395; *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984) 345 N.W.2d 124, 126-129; *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local No. 226 v. Stern* (1982) 98 Nev. 409, 411 (*Stern*); *National Roofing, Inc. v. Alstate Steel, Inc.* (N.M.Ct.App. 2015) 366 P.3d 276, 277-282; *Aguilar v. RP MRP Washington Harbour, LLC* (D.C.Ct.App. 2014) 98 A.3d 979, 983 (*Aguilar*); *L & P Converters, Inc. v. Alling & Cory Co.* (1994) 100 Md.App. 563, 570; *United Textile Workers of America, AFL-CIO v. Lear Siegler Seating Corp.* (Tenn.Ct.App. 1990) 825 S.W.2d 83, 84-87 (*Lear Siegler*); *D & A Development Co. v. Butler* (Minn.Ct.App. 1984) 357 N.W.2d 156, 158-159; *Stevenson, supra*, 73 N.E.2d at pp. 201-204; see also *East River S.S. Corp. v. TransAmerica Delaval, Inc.* (1986) 476 U.S. 858, 866-876 [106 S.Ct.

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and a leading treatise on tort law recognize the widespread adoption of the economic loss doctrine in this context. (See Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 2, Apr. 7, 2014) § 7 ["Except as provided elsewhere in this Restatement, a claimant cannot recover for economic loss caused by [¶] (a) unintentional injury to another person; or [¶] (b) unintentional injury to property in which the claimant has no proprietary interest" (boldface omitted)] & com. b; accord, Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 1, Apr. 4, 2012) § 1(a) ["An actor has no general duty to avoid the unintentional infliction of economic loss on another" (boldface omitted)] & com. c(1);[7] see also Dobbs et al., The Law of Torts, *supra*, Economic Torts and Economic Loss Rules, §§ 605-615, Negligent Interference with Contracts and Economic Interests, § 647 [discussing the economic loss doctrine].)[8]

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2295, 90 L.Ed.2d 865]; *Robins, supra*, 275 U.S. at p. 309; *State of La. ex rel. Guste v. M/V TESTBANK* (5th Cir. 1985) 752 F.2d 1019, 1032 (*Testbank*); *Leadfree Enterprises, Inc. v. United States Steel Corp.* (7th Cir. 1983) 711 F.2d 805, 809 [applying Wisconsin law]; *Dundee Cement, supra*, 712 F.2d at pp. 1169-1170 [applying Illinois law]; *Marine Nav. Sulphur Carriers, Inc. v. Lone Star Indus., Inc.* (4th Cir. 1981) 638 F.2d 700, 701-702.

7 The Restatement suggests that this general rule may not apply to every negligence action for purely economic losses. (See Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 2, *supra*) § 7, com. b; Rest.3d Torts, Liability for Economic Harm (Tent. Draft No. 1, *supra*) § 1, com. e.) But whether an exception should apply in any given action does not change the general rule.

8 The American Law Institute (ALI) has approved section 1 of Tentative Draft No. 1 and section 7 of Tentative Draft No. 2, and its website states these materials "may be cited as representing the

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