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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,
Respondent to Petition for Review,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent to Petition for Writ of Mandate.

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

After a Decision by the 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 Hon. John Shepard Wiley, Jr., Judge

PLAINTIFFS' CONSOLIDATED ANSWER BRIEF IN RESPONSE TO AMICI BRIEFS FILED IN SUPPORT OF SOCALGAS

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Pursuant to Rule of Court 8.520, subdivision (f)(7), Plaintiffs file this consolidated answer to the five amicus-curiae briefs filed in support of SoCalGas.[1]

INTRODUCTION AND SUMMARY

Amici fail to provide any persuasive rebuttal to the arguments in Plaintiffs' Opening and Reply Briefs on the Merits ("OBOM" and "RBOM," respectively). Before addressing amici's arguments, however, it may be useful to summarize Plaintiffs' overall position.

First, the Court of Appeal should have begun its analysis with California Civil Code § 1714(a), which sets forth the "basic policy of this state" with regard to negligence claims. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 118-119.) The language of Section 1714(a), which "has been unchanged in our law since 1872" (*id.* at 112), is broad and unequivocal. It provides that "[e]very one is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Cal. Civ. Code § 1714(a).) Because Section 1714(a) "does not distinguish among injuries to one's person, one's property *or one's*

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[1] Because these amici have lengthy names, we refer to them as follows:
"Chamber": Chamber of Commerce of the United States, *et al.*
"Civil Justice": Civil Justice Association of California,
"Plains": Plains All American Pipeline, L.P., *et al.*
"Private Utilities": Southern California Edison Company, *et al.*
"Tort Scholars": California Tort Law Scholars.

financial interests," it should be the starting point for analyzing *all* negligence claims, including those seeking redress for purely economic losses. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 806 fn. 3 [emphasis added].)

Second, the Court of Appeal should have then analyzed the factors set forth in *Rowland* to determine whether an exception to Section 1714(a)'s presumptive duty of care for the general category of conduct at issue—i.e., a private utility's negligent failure to protect members of the surrounding community from foreseeable economic losses caused by a catastrophic gas-well blow-out—is "clearly supported by public policy." (*Rowland, supra,* 69 Cal.2d at 112.)

Rowland applies here because this Court has never recognized any broad, categorical exception to Section 1714(a)'s duty of care for *all* negligence cases involving purely economic loss. Instead, this Court has only found such exceptions in two categories of economic-loss cases: (1) product cases involving breach of warranty (e.g., *Seely v. White Motor Corp.* (1965) 63 Cal.2d 9); and (2) cases involving breach of contract (e.g, *Biakanja v. Irving* (1958) 49 Cal.2d 647). Neither transactional category applies here, and thus Plaintiffs' claims should be subject to the presumptive duty of care set forth in Section 1714(a).

Third, there is no reason why this Court *should* recognize another categorical exception to Section 1714(a), one for *all* negligence cases

involving purely economic losses that has the potential to dwarf in size the existing two categories. This Court has recognized an exception in the *transactional* setting to preserve the boundary line between contract and tort. (*See Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.) But this rationale has no application in economic-loss cases between *strangers*, where the parties' "economic expectations" are not already "protected by commercial and contract law." (*Id.*)

At the same time, recognizing another categorical exception from Section 1714(a) for all negligence cases involving economic loss would inflict serious social costs, including stripping tort victims of their ability to seek compensation from the wrongdoing party and undermining this State's "overall policy of preventing future harm." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1150.)

Fourth, and relatedly, limiting application of the economic loss rule ("ELR") to the transactional context is consistent with the overall rationale and approach of *Rowland* itself. There, the Court jettisoned the common-law approach to tort liability for occupiers and owners of land, which distinguished between the duties owed to "invitees, licensees, and trespassers," in favor of the presumptive duty rule of Section 1714(a). (*Rowland*, *supra*, 69 Cal.2d at 116.) In so doing, *Rowland* recognized that "a man's life or limb does not become less worthy of protection by the law" based on his relationship with the defendant, and accordingly "stripped

away" those "ancient concepts." (*Id.* at 118-119.) *Rowland* further observed that the traditional approach was not only unduly rigid and contrary to Section 1714(a), but had also generated "confusion, complexity, and fictions" in the case law. (*Id.* at 120.)

The same could be said of the ELR, which has been described as "the most confusing development in the law." (Dean Ward Farnsworth, *The Economic Loss Rule* (2016) 50 Valparaiso Univ. L. Rev. 545, 545 ["*Farnsworth*"].) The way to resolve this confusion, however, is *not* to adopt a bright-line no-duty approach to the ELR, as SoCalGas and some of its amici urge, or the presumptive no-duty approach of the new Restatement (Third) of Torts (which is subject to various categorical exceptions). The former is unduly draconian; the latter resurrects the type of scheme rejected in *Rowland*; and, critically, *both* approaches are directly contrary to Section 1714(a). Rather, the proper approach is to follow *Rowland* and make clear that *all* economic-loss claims outside the transactional context are subject to the presumptive duty rule of Section 1714(a).

Fifth, and finally, not only should the Court of Appeal have begun its analysis with Section 1714(a), but it should have concluded its analysis by applying *Rowland*'s various factors to determine whether there are reasons "clearly supported by public policy" to exempt Plaintiffs' claims from Section 1714(a). (*Rowland, supra,* 69 Cal.2d at 112.) Plaintiffs have shown that those factors, properly applied, do not warrant an exception

from the general rule that SoCalGas had a duty to act with reasonable care to prevent the economic injuries suffered by Plaintiffs. The Court should so conclude here.

* * *

This brings us to SoCalGas's amici, which largely overlook Section 1714. Instead, they urge this Court to presume the absence of a duty of care in *all* cases involving purely economic losses because (they say) such a rule is (1) mandated by this Court's existing case law; (2) consistent with the law in most other jurisdictions; and (3) essential to prevent opening the floodgates of unlimited liability. None of these arguments is correct.

First, amici ignore that the duty of care in this case *already* exists (by virtue of Section 1714(a)). SoCalGas and its amici seek a broad duty *exception* to that duty of care applicable to *all* economic-loss cases arising in negligence. Such an exception would represent a radical break from this Court's existing case law and render negligence law a nullity in a large swath of cases.

Second, amici's approach is inconsistent with the rule in the majority of other states. By an ample majority, most other states have never applied the ELR to negligence actions outside the transactional context—that is, to cases among or between strangers. And a growing number of states have expressly rejected exactly the type of broad, no-duty rule advocated by SoCalGas.

Third, amici's argument that a bright-line no-duty rule is needed to prevent "limitless liability" ignores the concrete facts of this case and the way the tort law works in practice. The argument should be seen for what it is: a scare tactic. Other states that allow tort claims for economic losses in the non-transactional context have not experienced the type of apocalyptic results predicted by SoCalGas's amici, and there is no reason to expect a different result in California.

At bottom, amici's arguments suffer from the same fatal flaw as SoCalGas's: they focus on only one side of the liability coin, failing to recognize the harsh impact of their proffered rule on victims of tortious misconduct. As Dean Farnsworth himself recently wrote: "a serious monetary loss may be a far graver thing than a less substantial personal injury." (*Farnsworth, supra,* 50 Valparaiso L. Rev. at 546.) That being so, "the difficulties of adjudication [should not] frustrate the principle that there be a remedy for every substantial wrong." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 739).

ARGUMENT

I. Amici Misrepresent Existing California Law on Recovery of Purely Economic Losses.

Amici pay little to no heed to Section 1714(a). Instead, they leapfrog over the statute—and yet also contend that Plaintiffs are asking this Court to "radically change" California law by "revok[ing] the economic loss rule." (Chamber Br. at 14, 26. *See also* Private Utilities Br. at 6 [criticizing Plaintiffs for advocating an "ill-advised doctrinal redo" that would "gut the economic loss doctrine."].)

These arguments mischaracterize the law. Although this Court has recognized limitations on recovery of economic losses in cases involving breach of contract and product warranty (in order to prevent the law of contract and the law of tort from "dissolving one into the other," *Robinson Helicopter, supra*, 34 Cal.4th at 988), this Court has *never* recognized any such exceptions outside these "transactional" contexts. (*See* OBOM 22-28; RBOM 11-12.) This is not surprising, for any such rule would be directly contrary to the presumptive duty of care set forth in Section 1714(a)—a duty that, in California, "serves as the foundation of our negligence law." (*Rowland, supra,* 69 Cal.2d at 112.)

Beyond that, *J'Aire* strongly suggests that no categorical exception exists for economic losses outside the transactional setting. *J'Aire* allowed a restaurant that suffered economic losses due to the defendant's

construction delays to recover its damages from the defendant despite the absence of any contract between the parties. Although *J'Aire* analyzed the plaintiff's claim by applying the "special-relationship" test of *Biakanja, supra*, 49 Cal.2d 647, the Court's language swept far more broadly in several crucial respects. (*J'Aire, supra*, 24 Cal.3d at 805.)

First, in finding that the plaintiff had the right to recover its purely economic losses from the defendant despite the lack of a contractual relationship between the two, the Court's principal focus was on the foreseeability of the plaintiff's injuries. (*See id.* at 804.) *J'Aire* repeatedly emphasized that "it was clearly foreseeable that any significant delay...would adversely affect [plaintiff's] business..." (*Id.* at 804-805. *See also id.* at 805 ["[w]here the risk of harm is foreseeable..., an injury to the plaintiff's economic interests should not go uncompensated merely because it was unaccompanied by any injury to his person or property."].)

J'Aire emphasized that its analysis was grounded in the presumptive duty rule of Section 1714(a): "This holding is consistent with the Legislature's declaration of the basic principle of tort liability, embodied in Civil Code section 1714, that every person is responsible for injuries caused by his or her lack of ordinary care." (*Id.* at 806 [citing *Rowland, supra*, 69 Cal.2d at 119].)

J'Aire then stated that Section 1714(a)'s presumptive duty rule is applicable to claims involving stand-alone economic losses, including lost

profits from business interruptions. The Court observed that Section 1714(a) "does not distinguish among injuries to one's person, one's property *or one's financial interests*." (*Ibid.* [emphasis added].) To the contrary, "[r]ecovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, *should not be foreclosed* simply because it is the only injury that occurs." (*Ibid.* [emphasis added].)

Then, perhaps most telling of all, *J'Aire* expressly "disapproved" the holding in *Adams v. Southern Pac. Transportation Co.* (1975) 50 Cal.App.3d 37, a decision that applied the ELR to bar recovery of purely economic losses in the stranger context. In *Adams*, a load of military bombs carried by a freight train detonated in a railroad's freight yard, destroying a nearby manufacturing plant. The plant's employees sued the railroad, the County, and the State for damages resulting from their lost employment, including lost wages. (*Id.* at 39.)

The *Adams* court opined that, under the longstanding tort rules of this State, the plaintiffs *should* be allowed to recover their economic losses. *Adams* cited, among other things, Section 1714(a), stating that "nothing in the [statute's] language, purpose, or history...confines it to suits against land possessors." (*Id.* at 42.) *Adams* noted that a long line of this Court's cases, including *Rowland* itself, "denigrate[d] the precedential value of crystallized rules of duty"—rules, like the ones in pre-*Rowland* premises

law, that short-circuited the normal duty analysis, instead relying on archaic formal distinctions. (*Id.* at 44 [discussing cases].)

Adams further observed that this Court had repeatedly "recognize[d] liability for economic loss inflicted upon third persons with whom the defendant had no direct dealing." (*Id.* at 46 [citing, *inter alia*, *Dillon, supra*, 68 Cal.2d 728; *Barrera v. State Farm Mutual Automobile Ins. Co.* (1969) 71 Cal.2d 659; and *Connor v. Great Western Savings & Loan Ass'n* (1968) 69 Cal.2d 850].) *Adams* then noted the incongruity between these decisions and *Fifield Manor* v. *Finston* (1960) 54 Cal.2d 632, which disallowed the recovery of purely economic losses between unrelated parties. (*See Adams*, supra, 50 Cal.App.3d at 46 [describing "the doctrinal discord between *Fifield Manor* and later decisional developments."])

Despite these observations, *Adams* reluctantly denied the plaintiffs' claims on *stare decisis* grounds, even though (in the court's view) their economic injuries were arguably just as foreseeable to the defendants as the economic losses deemed recoverable in prior cases like *Connor*. (*See id.* at 46.)

It was against this backdrop that this Court decided *J'Aire*. Because *Adams* was a Court of Appeal decision that did not involve any underlying transaction or contract, one would have expected the Supreme Court in *J'Aire* to simply ignore *Adams*. But the Court did not ignore *Adams*. Instead, *J'Aire* went out of its way to "disapprove" *Adams*' holding that the

claim for negligent interference with prospective economic advantage was not cognizable. (*J'Aire, supra*, 24 Cal.3d at 807.) *J'Aire* observed that, although cases like *Adams* pose a theoretical risk of excessive liability, "judicial attention on the foreseeability of the injury and the nexus between the defendant's conduct and the plaintiff's injury" place a natural "limit on recovery..." (*Id.* at 808.)[2]

Everything about *J'Aire*—its focus on foreseeability, its embrace of Section 1714(a), its rejection of categorical duty rules, and its "disapproval" of *Adams*—suggests that the Court would not have established a categorical rule barring recovery of economic losses outside the transactional settling. *J'Aire* did not reach that issue because it was not presented by the facts, so the Court left unanswered the question presented here: whether a defendant may be liable to a *stranger* for foreseeable economic losses inflicted by its negligence. But *J'Aire* strongly suggests that the right way to answer this

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[2] Contrary to amici's contention, *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (Chamber Br. at 15), did not signal a departure from *J'Aire*'s focus on foreseeability. *Bily* wrestled with a vexing question: whether investors could recover economic losses from an auditor whose negligence caused massive financial losses to a huge class of persons. In denying the investors' negligence claim against the auditor, *Bily* emphasized "the lack of any effective limits on access to audit reports once they reach the client," which meant that "an auditor can foresee its reports coming into the hands of practically anyone." (*Id.* at 390.) In this context, *Bily* held that auditors cannot be held liability to "all foreseeably injured third parties," particularly given the "prospect of private ordering" through contract. (*Id.* at 402.) Nothing in *Bily*, however, suggested an intent to dilute the importance of foreseeability in cases like *J'Aire*, where foreseeability is not boundless and, as a result, there *are* "effective limits" on the defendant's liability.

question is to apply Section 1714(a) and *Rowland*, not to erect a categorical bar on liability.

Amici largely overlook Section 1714(a) and *J'Aire*. Instead, they rely on *transactional* decisions that rejected recovery of purely economic losses involving warranty or contract. The Chamber of Commerce, for example, cites *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58, for the proposition that "recognition of a duty to prevent economic losses to third parties 'is the exception, not the rule.'" (Chamber Br. at 15.) *Quelimane*, however, was a transactional case that featured multiple contractual relationships, as Plaintiffs have explained. (OBOM 23-24; RBOM 11.) The Court said nothing about what the rule should be in cases *outside* the contractual setting—i.e., in cases, like this one, where there are no underlying "financial transactions" and, as a result, no opportunity for voluntary risk allocation between the parties.[3]

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[3] Amici's other cases from this Court arise in the transactional setting as well. In *Bily, supra,* 3 Cal.4th 370 (Chamber Br. at 15), the Court noted that "the generally more sophisticated class of plaintiffs in auditor liability cases (e.g., business lenders and investors) *permits the effective use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering.'*" (*Id.* at 398 [emphasis added].) In *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994 (Chamber Br. at 16), the Court denied the plaintiffs' economic losses because the defendant's "specific contractual delegation of [their] statutory obligation...was necessarily intended to have an effect on plaintiffs." (*Id.* at 1015.) In *Seely, supra*, 63 Cal.2d at 19 (Chamber Br. at 15), the Court barred recovery losses arising out of breach of warranty on the ground that a consumer "could be fairly charged with the risk that the product would not match his economic expectations, unless the

None of amici's cases holds that Section 1714(a) has no application to negligence actions outside the transactional setting. If this Court had ever recognized such a radical, broad exception to the presumptive duty created by Section 1714(a), one would have expected the Court to have stated as much in no uncertain terms. It never has.[4]

Amici's inaccurate portrayal of California law is also contrary to this Court's oft-repeated justification for applying an ELR in the transactional

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manufacturer agreed that it would." And in *Fifield Manor, supra,* 54 Cal.2d at 636-637 (Chamber Br. at 15), this Court refused a nursing home's claim for medical care provided to a car-injury victim on the ground that the defendant had voluntarily assumed obligations by contract.

[4] The cases cited by amici Plains All American Pipeline *et al.* ("Plains) are not to the contrary. Plains argues that "federal and state reporters are full of examples of courts using the [ELR] to impose sensible limits on the tort liability of oil producers and utility providers...." (Plains Br. at 19). But amici only cite two California cases for this proposition. The first, *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.5th 204, is a transactional case involving a defective product, and thus has no bearing here. The second, *Safety Equip. Corp. v. Plains All Am. Pipeline, L.P.* (Super. Ct. Santa Barbara County, Apr. 13, 2017), No. 17CV02224, is an unpublished decision that disallowed economic losses caused by an oil spill based on the Court of Appeal's ruling in this very case. (*See* Plains Br. at 20.) That decision is wrong for the same reason the decision below is wrong. The remaining cases are all from other jurisdictions and have no bearing here, either because they are factually distinguishable or involve different underlying state law. (*See id.* at 21-22 [citing, *inter alia*, *Excavation Techs., Inc. v. Columbia Gas Ca. of Pa.* (2009) 985 A.2d 840, 842-843 (disallowing recovery of economic losses related to gas-line rupture where governing statute did not contain private cause of action); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.* (Tex. App. 2000) 29 S.W.3d 282, 288 (disallowing recovery of economic losses caused by gas utility's failure to mark its lines and distinguishing *J'Aire*); *In re Illinois Bell Switching Station Litig.* (Ill. 1994) 641 N.E.2d 440, 444 (barring telephone customers' economic losses caused by service interruption because "contract law and the Uniform Commercial Code offer the appropriate remedy for economic losses occasioned by diminished commercial expectations...").