No. S246669

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.

SUPREME COURT
FILED

AUG 6 2018

Jorge Navarrete Clerk

Deputy

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

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INTRODUCTION

The economic-loss rule ("ELR") has been likened to the 1958 B-Movie classic *The Blob*, an "'ever-expanding, all-consuming alien life form' [that could] 'consume much of tort law if left unchecked.'" (*Lesiak v. Central Valley Ag Co-op, Inc.* (Neb. 2012) 808 N.W.2d 67, 80, citations omitted.) The ELR started out innocently enough, but—in a minority of jurisdictions—it has grown into something that threatens to devour vast segments of tort law, leaving tortfeasors undeterred and their victims uncompensated. (See generally *id.* at 80-84.)

Southern California Gas ("SoCalGas") asks this Court to roll out the red carpet for the Blob. Not only does SoCalGas advocate a draconian version of the ELR that has been rejected by many courts, it does so—astonishingly—by portraying *Plaintiffs'* version of the ELR as a "radical," "sweeping new duty." (ABOM 1, 20.)[1]

But SoCalGas has it backwards: it is SoCalGas's version of the ELR that is radical. SoCalGas wants a bright-line no-recovery rule in *all* cases involving purely economic losses, including "stranger" cases where there is no relationship between the parties. This extreme, "Blob-like" version of the ELR is contrary to the black-letter tort law of this State and to California's longstanding tradition, as embodied in California Civil Code

[1] "ABOM" is Respondent's Answer Brief. "OBOM" is Petitioner's Opening Brief.

§ 1714(a), of holding wrongdoers presumptively liable for *all* "injur[ies] occasioned to another by … want of ordinary skill or care…" (*Id*.)

SoCalGas nonetheless contends that its version of the ELR *must* be the right rule because courts are not equipped to manage the "open-ended liability" that a rule allowing recovery of purely economic losses in the tort context would unleash. But this Court is perfectly capable of erecting limiting principles, where needed, to prevent defendants from "massive and uninsurable burdens." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1156.)

To adopt the radical rule proposed by SoCalGas—a bright-line no-recovery rule in all cases, including those involving strangers—simply because the victims suffered only economic losses, would be to throw "considerations of degree" out the window, in contravention of teachings of this Court. (*Id.* at 1156, citation omitted.) The Court should reject this extreme position and reverse the decision below.

SUPPLEMENTAL FACTS

To read SoCalGas's brief, this action arises out of a relatively minor incident that resulted in negligible losses to local businesses. (See ABOM 14-15.) In its rose-colored view, the gas leak caused by its gross negligence—an uncontrolled well blowout that lasted four months despite 8 separate "kill" attempts; released a volume of toxic methane gas 220 times greater than the volume of oil from the 2010 Deepwater Horizon Spill; caused the Governor to declare a State of Emergency; compelled a six-month evacuation of over 15,000 area residents and the closure of local schools; resulted in a 25% increase in California's greenhouse-gas emissions; caused the Federal Aviation Administration to restrict flights for fear planes could ignite fumes from the leak; made the local economy collapse; *and* contributed significantly to global warming—merely caused a "temporar[y] slow[ing]" of the local economy after "some" Porter Ranch residents "chose" to relocate. (*Id*.)

These self-serving characterizations of what actually occurred in this case would be laughable if they were not so offensive to those who actually lived through the massive disruption caused by SoCalGas's malfeasance.[2]

Contrary to SoCalGas's innocent-sounding rendition of events (ABOM 12 [recounting that SoCalGas "discovered[] a gas leak in a remote mountain area"]), this catastrophe was eminently preventable. SoCalGas should have known that the aging well that blew (well-25)—which it

[2] The facts are described in the Plaintiffs' Second Amended Consolidated Complaint, included in Exhibits to the Petition ("EP") accompanying Petitioner's Writ of Prohibition (1 EP 164-202). The facts are also described in the Superior Court's decision denying SoCalGas's demurrer. (2 EP 390-397.) Additional salient facts are in the First Amended Consolidated Complaint of Porter Ranch Development Co. and Toll Brothers, Inc. in the Coordinated Pre-Trial Proceeding below ("Developers' Complaint"), attached as Exhibit A to Plaintiffs' concurrently filed Request for Judicial Notice ["RJN"]) at 20-24.

operated and maintained—was dangerously corroded, in part because wells at the facility consistently failed safety inspections. (1 EP 176-178.) Yet SoCalGas did not take the well out of service; instead, it actually upped the pressure on this aging well. Perhaps worst of all, it removed the subsurface safety valve and then lied to regulators about having done so, for over three decades. (*Id*.)

SoCalGas also knew that its facilities posed a serious risk to neighboring communities. In its 2013 10-K filing with the U.S. Securities and Exchange Commission, SoCalGas's parent company Sempra Energy—the nation's largest gas company—acknowledged that a "catastrophic accident" to a natural gas storage facility "could result in "catastrophic…leaks[ ] or other significant damage to natural resources or property belonging to third parties…," resulting in "significant claims against us." (2 EP 259.) Although SoCalGas suggests that its wells no longer pose any threat, the reservoir under Porter Ranch remains filled with toxic gas, and countless other wells operated by SoCalGas in the same location suffer from the same safety issues as well-25. To make matters worse, these aging wells are located atop two active fault lines. (1 EP 171, 173-176, 185.)

SoCalGas also ignores that Plaintiffs seek to proceed as a class, which would greatly reduce the burden on the trial court. And, as the trial court observed, because Plaintiffs' "[b]usiness losses are quantifiable by conventional means [statistical analysis]," their lawsuit is entirely manageable. (2 EP 394.) Indeed, this method of calculating lost profit "is a familiar exercise in a trial court. There is nothing exotic about it." (*Id.*)

Even though there is nothing "exotic" about the management of this case, it is immensely important—and not just to Plaintiffs. This lawsuit involves a human-caused catastrophe of epic proportions. As the trial court observed, tort liability is crucial to ensure that these types of accidents do not happen again. (2 EP 394.)

If SoCalGas has its way, however, that crucial incentive would be eliminated. Not only would many of SoCalGas's victims go uncompensated, but Californians—and, indeed, the global environment—would be at continued risk.

ARGUMENT

I. The Origins of the Economic-Loss Rule ("ELR") Show Why SoCalGas's Approach is Radical.

Before addressing SoCalGas's arguments, it is useful to consider the ELR's origins, which show that SoCalGas is asking this Court to veer straight off the doctrinal map.[3]

[3] For a summary of the ELR's origins, see *David v. Hett* (Kan. 2011) 293 Kan. 679, 683-692.

Like the Blob itself, the ELR started out innocuously enough.[4] In California, the ELR arose in the product context, where this Court reasoned that consumers could "be fairly charged with the risk that [a defective] product will not match his economic expectations unless the manufacturer agrees [in an accompanying warranty] that it will." (*Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18.)

The ELR then grew to encompass negligence claims in cases where there is a relationship-creating "transaction" between the parties. (*E.g.*, *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799; see also *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58.) There too, application of the ELR made sense to courts because it "encourage[s] the party best situated to assess the risk of economic loss, the commercial purchaser, to assume, allocate, or insure against that risk." (Johnson, *The Boundary-Line Function of the Economic Loss Rule* (2009) 66 Wash. & Lee L. Rev. 523, 545, citation omitted ["*Boundary-Line Function*"].)

But even in those negligence cases, many courts (including this Court) began to create exceptions where tort liability between contracting parties furthered some other policy goal. (*See People Express Airlines,*

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[4] See *The Blob* (2018) Wikipedia <https://en.wikipedia.org/wiki/The_Blob> (as of Aug. 1, 2018) (explaining how the Blob began as a "small jelly-like globule" that "grows in size every time it consumes something").

Inc. v. Consolidated Rail Corp. (N.J. 1985) 495 A.2d 107, 112 [citing cases]; *David*, 293 P.3d at 688-692 [same].)[5]

As a result, many courts, even in cases involving a transactional relationship, successfully confined the ELR, with a few courts rejecting the economic loss rule altogether.[6] Many limited it to cases where losses arise from a web or chain of contracts,[7] with some limiting it to a subset of even those transactional cases.[8] Still others allowed the precise contours of the

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[5] E.g., *Robinson Helicopter Co., Inc*. v. *Dana Corp.* (2004) 34 Cal.4th 979, 991 fn.7 (allowing recovery in case involving "intentional and affirmative misrepresentations"); *Barrera v. State Farm Mutual Automobile Ins. Co.* (1969) 71 Cal.2d 659, 676 (allowing recovery on ground that "[p]ublic policy requires the recognition of this duty"); *Connor v. Great Western Savings & Loan Assn.* (1968) 73 Cal.Rptr. 369 (allowing recovery based on independent duty to purchasers to prevent the construction and sale of defective homes).

[6] *Cedarholley Investment, LLC v. Pitre* (La. App. 2016) 209 So.3d 850; *People Express*, 495 A.2d at 112; *Mattingly v. Sheldon Jackson College* (Alas. 1987) 743 P.2d 356.

[7] *Rogers v. Wright* (Wyo. 2016) 366 P.3d 1264, 1275; *Sullivan v. Pulte Home Corp.* (Ariz. 2013) 306 P.3d 1, 2-3; *Lesiak*, 808 N.W.2d at 83; *David*, 293 Kan. 679 at 688-692, 697-701; *KB Home Ind. Inc. v. Rockville TBD Corp*. (Ind. App. 2010) 928 N.E.2d 297, 304-305; *Assn. of Apartment Owners of Newtown Meadows v. Venture 15, Inc.* (Hawaii 2007) 167 P.3d 225, 295; *A.C. Excavating v. Yacht Club II Homeowners Assn., Inc.* (Colo. 2005) 114 P.3d 862, 865-866; *Quest Diagnostics, Inc. v. MCI WorldCom, Inc.* (Mich. App. 2002) 656 N.W.2d 858, 863-864.

[8] *E.g. Tiara Condominium Assn, Inc. v. Marsh & McLennan Cos, Inc*. (Fla. 2013) 110 So.3d 399, 407 ("reced[ing] from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability."); *Elcon Construction Inc. v. E. Wash. U.* (Wash. 2012) 273 P.3d 965, 969 ("we have applied the doctrine to a narrow class of cases, primarily limiting its application to claims arising out of construction on real property and real property sales."); *Pascarella v. Swift Transportation*

rule to remain unclear, but forcefully rejected a bright-line rule foreclosing recovery of negligently caused economic injury.[9]

Ultimately, the ELR became so riddled with exceptions that it lost any semblance of coherence, coming under fire as the source of "vast confusion." (*David*, 293 Kan. at 684 [citing authorities].)

Despite the national trend in the case law, a small minority of states have allowed the rule to expand to "stranger" cases, even though there is no opportunity for private risk allocation in that context, and accordingly "no boundary-line function to be performed by the economic-loss rule." (*Boundary-Line Function*, 66 Wash. & Lee L. Rev. at 555.)[10]

This expansion of the ELR outside the transactional context makes little sense, because:

(a) economic losses are routinely recoverable in tort actions where the plaintiff has *also* suffered property damage and/or personal injuries (*J'Aire*, 24 Cal.3d at 803-804 [citing cases]);

Co. (W.D. Tenn. 2010) 694 F.Supp.2d 933, 946 (declining to apply Tennessee ELD outside of contracts governed by UCC).

[9] *See, e.g.*, *LAN/STV v. Martin K. Eby Construction Co.* (Tex. 2014) 435 S.W.3d 234, 241 (noting "absence of a bright-line rule" and that, where the underlying rationales are weak or absent, the ELR should not apply).

[10] *E.g.*, *Sovereign Bank v. BJ's Wholesale Club, Inc.* (3d Cir. 2008) 533 F.3d 162, 176-77, 180; *O'Connell v. Killington, Ltd.* (Vt. 1995) 665 A.2d 39, 42.

(b) economic losses can be just as serious as (or far worse than) other types of physical harm (see *id*.); and

(c) economic losses are often more tangible (and thus easier to measure) than other forms of injury (*e.g*., emotional distress; pain and suffering).[11]

Yet SoCalGas asks this Court to reject the careful limitations erected by *J'Aire* and its progeny and expand the ELR's reach to *all* negligence cases involving "purely" economic injuries. As explained below, SoCalGas's push to have California join the fringe is contrary to law and public policy.

II. SoCalGas's Radical Version of the ELR Finds No Support in this Court's Precedents.

A. ***J'Aire* Expressly "Disapproved" of SoCalGas's Version of the ELR.**

Civil Code §1714(a) "establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 768.) This Court recognizes exceptions to this general rule only where "*clearly supported* by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112, emphasis added.)

[11] For example, the predominant physical injuries suffered by Porter Ranch residents are nosebleeds and headaches. Any claim that these injuries are somehow more "tangible" or more easily valued than economic losses to local businesses is not tenable.

These exceptions merely highlight what this Court has *never* done: outside of the transactional context, it has never recognized a bright-line no-recovery rule for economic loss. Indeed, nearly the opposite is true. While this Court has not squarely addressed a case where negligently inflicted economic injury has arisen outside the transactional context, it *has* stated that economic injury should not be treated differently from other negligently inflicted injury under Civil Code § 1714(a).

Thus, *J'Aire* itself took pains to note that § 1714(a) does not distinguish among injury to person, property, or financial interests. (24 Cal.3d at 806.) *J'Aire* went on to expressly *disapprove Adams v. Southern Pacific Transportation Co.* (1975) 50 Cal.App.3d 37, where a train explosion destroyed a nearby factory, causing plaintiffs lost employment. After discussing the ELR at length, *Adams* reluctantly held that the plaintiffs could not recover based on the "principle of *stare decisis*…" (*Id.* at 40.) In *J'Aire,* this Court went out of its way to state that *Adams* was "disapproved." (24 Cal.3d at 807.)

It is impossible to make sense of *J'Aire*'s discussion as anything other than a rejection of both *Adams*' reasoning and its result. Even under the most limited reading of *J'Aire*, the decision makes clear that nothing categorically precludes claims, like those advanced here or in *Adams*, for negligently inflicted economic losses.

B. <u>None of SoCalGas's cases recognizes a bright-line no-recovery rule.</u>

SoCalGas nonetheless claims that this Court has *already* embraced a bright-line no-recovery rule that applies whenever a plaintiff suffers only economic injury as a result of a defendant's negligence. Not so.

Thus, in *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, a paradigmatic contractual case cited on *nine* different pages of SoCalGas's brief, a nursing home contracted to provide a man with lifetime medical care. The defendant driver negligently hit and killed the man, and the nursing home sued to recovery his medical-care costs.

This Court refused the nursing home's claim, reasoning that the driver had voluntarily assumed obligations by contract. (*Id*. at 636-37.) *Fifield* had nothing to say about the recoverability of economic losses in general. Nor did *Fifield* indicate that it was adopting *Stevenson v. East Ohio Gas Co.* (Ohio App. 1946) 73 N.E.2d 200 (ABOM 25), rather than simply quoting its language. (54 Cal.2d at 636.)

Bily and *Quelimane*, too, were contract/transactional cases, as Plaintiffs have explained. (OBOM 23-24.) The Court rejected the plaintiffs' claims in both cases. *Bily* did not even hint that economic loss is not recoverable (*Bily* v. *Arthur Young & Co.* (1992) 3 Cal.4th 370, 400), and *Quelimane* merely observed that duty "is the exception, not the rule," when a breach of contract causes "purely economic loss to third parties."

(*Quelimane*, 19 Cal.4th at 58.) That is a highly qualified statement, and provides no support for SoCalGas's bright-line no-recovery rule.

Finally, and most bafflingly, SoCalGas relies on *Adams*. While *Adams* was not a transactional case of the *Fifield*, *Bily*, and *Quelimane* kind, it did not hold that economic loss as such is unrecoverable. It simply held (wrongly, as it turned out, because the case was later "disapproved" by *J'Aire*, 24 Cal.3d at 807) that California law does not recognize the tort of negligent interference with contractual relations. (*Adams*, 50 Cal.App.3d at 40.)

SoCalGas struggles to minimize this fact, but even the court of appeal below did not treat *Adams* as good law. Indeed, the lower court assumed that *Adams* was decided *wrongly*, saying that "[w]ith the benefit of hindsight, we agree" with the plaintiffs in *Adams*. (*So. Cal. Gas. Leak Cases* (2017) 18 Cal.App.5th 581, 593.) In any event, neither *Adams* nor any California decision other than the decision below has applied a bright-line no-recovery rule for economic injury. No such rule exists in California.[12]

[12] Nor, contrary to SoCalGas's legerdemain, does any such *doctrine* exist. (ABOM 32.) SoCalGas's distinction between "economic-loss rule" and "economic-loss doctrine" is imaginary. Both Dean Farnsworth and *Robinson Helicopter* use the terms synonymously. (Farnsworth, *The Economic Loss Rule* (2016) 50 Valparaiso Univ. L. Rev. 545, 49-550; *Robinson Helicopter*, 34 Cal.4th at 988, citation omitted.)

III. SoCalGas's Policy Arguments Lack Merit.

A. <u>The specter of "unlimited" liability does not justify a no-recovery rule for purely economic losses.</u>

SoCalGas's primary refrain on the policy front—that allowing recovery for purely economic losses will unleash a tsunami of claims—fails for three reasons.

First, the floodgates rationale does not provide any basis for carving out purely economic losses for special disfavored treatment in the non-contractual setting. (See *People Express*, 100 N.J. at 252 [observing that "[t]he assertion of unbounded liability is not unique to cases involving negligently caused economic loss without physical harm."].) Indeed, the idea that torts causing physical injuries (as opposed to economic harm), are somehow less likely to open the liability floodgates, makes no sense in the modern era of mass torts.

Second, 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. As *People Express* observed, "[t]he answer to the allegation of unchecked liability is not the judicial obstruction of a fairly grounded claim for redress. Rather, it must be a more sedulous application of traditional concepts of duty and proximate causation to the facts of each case." (100 N.J. at 254.)[13]

Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc. (2016) 1 Cal. 5th 994, illustrates this concept in practice. There, emergency room doctors sued health care plans for negligent delegation of financial responsibility. (*Id.* at 1001.) The plans argued that requiring them to compensate the doctors for economic losses would lead to "a vast number of suits and limitless financial liability..." (*Id*. at 1018.) *Centinela* rejected this floodgates argument, noting that the doctors "are a limited and identifiable class of potential plaintiffs, whose services can be anticipated and likely statistically estimated." (*Id.* at 1017.).

The same is true here: the class is a "limited and identifiable" group of businesses—those within the 5-mile evacuation zone—and, just as in *Centinela*, their damages can be "statistically estimated." (*Ibid*. See also *Wyman v. Ayer Properties, LLC* (Mass. 2014) 11 N.E.3d 1074, 1081 [noting that "[t]he rationale for applying the [ELR] is made even weaker where the [plaintiffs] seek damages that are finite and foreseeable"].)

Third, to the extent recognition of a duty of care in a particular context would unleash an unworkable amount of liability, this Court is

[13] *See Boundary-Line Function*, 66 Wash. & Lee L. Rev. at 543-544 (floodgate considerations "offer dubious justification for...a general economic-loss rule" because "rules are in place to guard against liability for speculative, excessive, or unforeseeable losses." [footnotes omitted]).

quite capable of erecting limiting principles. In *Kesner*, for example, the defendant argued that requiring employers to compensate *all* foreseeable victims of secondary-exposure to asbestos on workers' clothing would create "enormous costs for the courts and community." (1 Cal.5th at 1152). This Court responded by limiting the duty to members of workers' *households*. (*Id*. at 1154-1155.)

Kesner observed that "any duty rule will necessarily exclude some individuals who, as a causal matter, were harmed by the conduct of potential defendants. By drawing the line at members of a household, we limit potential plaintiffs to an *identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm*." (*Id.* at 1155, emphasis added.)

Kesner fits here like a glove: "By drawing the line [at the five-mile evacuation boundary].…plaintiffs [have limited themselves] to an identifiable category of [businesses] who, as a class, are most likely to have suffered legitimate, compensable harm." (*Ibid*.)

Further limiting principles can be found in the *Rowland* factors themselves, which allow courts to prohibit liability for economic loss when such loss would be disproportionate or indeterminate. If a driver's negligence shuts down a bridge, for example, and nearby businesses lose income, see *Aikens v. Debow* (W. Va. 2000) 541 S.E.2d 576, *Rowland* permits courts to consider the tenuous connection between economic losses and the driver's negligence, the lack of moral blameworthiness, the crushing burden of liability on a single driver, and the fact that individual drivers likely cannot obtain affordable insurance for such massive losses.[14]

B. Over-deterrence is no reason to prohibit recovery of purely economic losses.

SoCalGas's no-recovery rule cannot be defended on the ground that allowing recovery for purely economic losses would "over-deter[]" socially desirable, non-negligent conduct. (ABOM 74.) First, as with all SoCalGas's policy arguments, potential over-deterrence does not justify singling out stand-alone economic losses for a no-recovery rule. (*Boundary Line-Function*, 66 Wash. & Lee L. Rev. at 544, fn. omitted.)

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[14] Because *Aikens* would likely have come out the same way under *Rowland*, it does not support SoCalGas's bright-line rule. (ABOM 64.) SoCalGas's reliance on *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.* (N.Y. 2001) 750 N.E.2d 1097, is similarly misplaced. (ABOM 62-63.) Not only does New York lack a presumptive duty of care like Civil Code §1714(a), but *532 Madison Avenue* is distinguishable on its facts because it is more freakish than foreseeable for negligence at a construction site to cause one of the busiest, most densely populated areas in the nation to shut down. As a result, the court's decision to disallow liability for plaintiffs' purely economic losses was understandable. But where—as here—massive amounts of a volatile gas are stored underground under crushing pressure, negligence is unlikely to lead to anything other than a catastrophic event that injures "surrounding communities." (2 EP 259 [SoCalGas 10-K filing].) In that respect, a gas leak from a storage facility is more like an oil spill than a construction accident. (*Union Oil Co. v. Oppen* (9th Cir. 1974) 501 F.2d 558 [allowing recovery of economic losses from oil spill].)

Second, the over-deterrence argument "could lead unprotected plaintiffs to take excessive precautions that are far costlier than substitute precautions available to the negligent defendant tortfeasor." (Sharkey *In Search of the Cheapest Cost Avoider* (2018) 85 U. Cinn. L. Rev. 1017, 1042.)

Third, SoGalGas's over-deterrence argument ignores that the company was not the least bit deterred by the risk of liability for physical injuries and property damage. Given that, it is hard to see how the specter of additional liability could "over-deter" this kind of negligent behavior in the future.

C. **<u>The potential availability of insurance does not justify SoCalGas's no-recovery rule.</u>**

Nor does the potential availability of insurance justify a no-recovery rule for economic losses. This argument is overbroad because "it is not always the case that negligently caused economic loss is more insurable by the plaintiff than the defendant." (*Boundary-Line Function*, 66 Wash. & Lee L. Rev. at 544, fn. omitted.)

In addition, the Plaintiff class includes many small businesses, such as Polonsky Day Care, that operate on a shoe string. (2 EP 178.) For a business like Polonsky, that accommodates only twelve children, the loss of business from several families can be devastating. The idea that small business entities are somehow better able to insure against business interruptions than SoCalGas strains credulity.

Moreover, even if some Plaintiffs *were* in a position to insure against potential losses that SoCalGas never warned them about, requiring Plaintiffs to insure against their own losses would diminish the deterrent force of the tort system, as the trial court recognized. (2 EP 395 ["Companies must face the full cost of accidents they can create, or from a societal perspective they will underinvest in precautions."].)

Finally, Plaintiffs are certainly not in a better position than SoCalGas to insure against liability for economic losses. SoCalGas's parent, Sempra Energy, is publicly traded on the New York Stock Exchange with $1.2 to $1.4 *billion* in liability insurance, and (needless to say) is in a better economic position than Polonsky Day Care to insure against SoCalGas's negligence.[15] (*Compare T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal. 5th 145, 174 ["Novartis offers no reason why a brand-name drug manufacturer would be unable to insure against the risk of warning label liability"].)

D. <u>The potential strain on judicial resources does not justify SoCalGas's no-recovery rule.</u>

SoCalGas's judicial-resources argument (ABOM 20) fails for the same reason as the "floodgates" rationale: it provides no basis for

[15] See Sempra Energy's 2016 10-K, at 35 (Plaintiffs' RJN Exhibit E).

distinguishing claims for purely economic losses from claims involving injuries to person or property that are just as likely to generate "thousands of fact-intensive claims for pure economic loss from every possible accident." (*Id*. at 21.)

SoCalGas also forgets that economic-loss claims like Plaintiffs' can often be statistically measured and adjudicated on a class basis, creating far less burden on the courts than personal injury claims that arise (for example) out of a mass tort, which generally cannot be resolved in a class action because of the predominance of individual questions. (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 624.)[16]

* * *

Ultimately, the only clear point that emerges from the "confusing mass of [ELR] precedent" (*Boundary-Line Function*, 66 Wash. & Lee L. Rev. at 536) is that a "bright-line rule[ ] grounded in single dimension justifications lead[s] to undesirable policy outcomes." (Rabin, *Respecting Boundaries and the Economic-Loss Rule in Tort* (2006) 48 Ariz. L Rev. 857, 869; Dobbs, *An Introduction to Non-Statutory Economic Loss Claims* (2006) 48 Ariz. L. Rev. 713, 733 ["'[m]ore reason, less rule'…might do as a bumper sticker for the economic-loss cases"]; Farnsworth, 50 Valparaiso

[16] Indeed, this case also encompasses some 25,000 injury claims (for property damage and/or personal injuries); it is *those* claims, not Plaintiffs', that will challenge the trial court.

Univ. L. Rev. 545 ["an overbroad formulation of the [ELR] can sweep away claims or call liability into doubt in circumstances where…liability is well justified."].)

The proper approach is not to erect a *per se* bar against recovery of economic losses in the tort context, but instead to apply this Court's time-tested analysis—the *Rowland* factors—to determine whether an exception to the general duty of care should be made.

IV. The Restatement of Torts Favors Plaintiffs—Not SoCalGas.

Before turning to *Rowland*, however, SoCalGas's reliance on the Restatement of Torts cannot go unaddressed.

First, contrary to SoCalGas's argument (ABOM 35), Section 3 squarely supports *Plaintiffs*' argument that, as understood and applied by a "majority of courts," the ELR does *not* apply in the tort context. Comment (a) leaves no room for doubt on this point:

> Courts have used the expression "economic-loss rule" to refer to a variety of propositions. As noted in § 1, *a minority have used it to mean that there is, in general, no liability in tort for causing pure economic loss to another. This Restatement does **not** endorse that formulation because its breadth is potentially misleading. This Section instead states an economic-loss rule that is narrower and more robust, and that is followed by a majority of courts. **It is limited to parties who have contracts**.*

(Rest.3d Torts [Tent. Draft No. 1, Apr. 4, 2012] § 3, emphasis added.) This is the version of the rule consistently applied by this Court. (Supra at II.)

SoCalGas gets no additional help from Section 1, although it tries mightily. (ABOM 28, 34, 44.) Comment (b) echoes Section 3's statement that only "[a] *minority* of courts [reject] liability in tort for causing pure economic loss to another. *This Restatement does not use the expression in that manner or describe the law in that way*." (Rest.3d Torts [Tent. Draft No. 1, Apr. 4, 2012] §3, emphasis added.)

To be sure, Section 1 then states that "courts impose tort liability for economic loss more selectively than liability for other types of harms." (*Id*., §1, cmt. c.) Plaintiffs agree; there are some instances where liability for economic losses *should* be circumscribed, either because liability would lead to "indeterminate and disproportionate liability" (*id.*) or the risk of economic loss is amenable to "protection by contract." (*Ibid*.)

But—and this is the most important point of all—Section 1 recognizes instances where liability for purely economic losses is "no more troubling than it would be in cases of physical harm: the set of potential plaintiffs is compact, and the size of potential liability to them is clear and proportionate to the defendant's culpability." (Rest.3d Torts, §1, cmt. e.) Comment (e) further states that "[i]n some cases, too, the plaintiff is in a poor position to allocate the risk of economic loss by contract…*Where those conditions hold, a duty of care may reasonably be found*." (*Id*., emphasis added.)

"[T]hose conditions hold" here, in spades, for all the reasons stated above: (1) Plaintiffs' "losses are unquestionably real"; (2) the class only includes businesses within the evacuation zone; and (3) Plaintiffs' damages are statistically calculable. (2 EP 394.)[17]

SoCalGas's reliance on Section 7 of the Restatement (ABOM 29, 30, 35, 50) is equally futile. Section 7's prohibition on "recover[y] for economic loss caused by…unintentional injury to another person…" (Rest.3d Torts [Tent. Draft No. 2, Apr. 7, 2014] §7) only applies where "recognition of such claims would…result in liabilities that are indeterminate and out of proportion to the culpability of the defendant"—not this case. (*Id*. at cmt. b.) Comment (b) further limits Section 7's application to victims of economic injury who "can protect themselves effectively by means other than a tort suit" (*ibid*.)—not this case. Comment (b) also emphasizes that Section 7 applies only where "contractual lines of protection against economic loss" are available" (*ibid* [citing, notably, "discussion in § 1")—again, not this case.

Comment (b) goes on to state that, *even where the foregoing conditions are met*, "they do not apply equally to every claim that arises

[17] Nor is this a case where the risk of economic loss is amenable to protection by contract. As the trial court observed, "[t]ransaction costs prevent a gas company from contracting with neighbors about the risk of gas leaks…[As a result,] the market system fails and we rely on tort law." (*Id*.)

under this Section…, because "[d]enying claims by rule undeniably works a hardship on plaintiffs with claims that fall outside the policies that make the rule attractive—claims that do not lend themselves to solution by contract, for example, or that present no problems of indeterminacy." (*Ibid*.)

That *is* this case.

But if there were any room for doubt with regard to the Restatement, it would be dispelled by the 2016 article written by Dean Farnsworth himself, who is repeatedly cited by SoCalGas as *the* authoritative word on the Restatement. SoCalGas cherry-picks *Farnsworth*, citing the statement that "the emergence of the [ELR] is the most important development of the past generation…." (ABOM 21-22.) SoCalGas ignores that *Farnsworth* then states that the ELR "has also been the most confusing development…, making it a frequent source of puzzlement and dread for lawyers." (*Farnsworth*, 50 Valparaiso Univ. L. Rev. at 545.)

Farnsworth then says: "[a] much narrower form of 'economic loss rule'…is both accurate and worth stating. It is that there is no liability in tort for pure economic loss resulting from negligence *in the negotiation or performance of a contract*." (*Id*. at 545-556, emphasis added.)[18]

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[18] See also *Farnsworth,* 50 Valparaiso Univ. L. Rev. at 550 ("[s]tating a broad rule against recovery for pure economic loss…can cause legitimate claims to be snuffed out inadvertently by the sweep of the rule in the

That, of course, is what Plaintiffs have been saying all along: that the ELR ought apply only where there is a contract (*e.g.*, *J'Aire*) or warranty (*e.g.*, *Seely*). Outside of those contexts, and *particularly* in the stranger context, California courts should apply the *Rowland* factors, just as this Court does in all other negligence claims under Civil Code § 1714(a).

This is also exactly what *this* Court has been saying, and doing, in every single one of its ELR cases dating back to *Biakanja* v. *Irving* (1958) 49 Cal.2d 647, and continuing to the present day. (*E.g.*, *Centinela*, 1 Cal.5th at 994.)

V. The *Rowland* Factors Favor Imposing Liability in this Case.

This brings us to *Rowland*, which prohibits exception to the general duty of care established by Civil Code § 1714(a) except where "clearly supported by public policy." (*Rowland*, 69 Cal.2d at 112.) No such public policy reasons exist, let alone "clear" ones.[19]

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background."); *id*. at 550-551 (idea that property damage is "more worthy of protection" than economic injuries is "nonsense. Money is just a placeholder for property".)

[19] SoCalGas seeks to avoid the *Rowland* factors by suggesting that *Rowland* applies only to claims for physical injury. (ABOM 53-57.) This Court has never so held. What this Court *has* said is the precise opposite: that Section 1714(a) applies to *both* economic losses and losses due to physical injury. (*J'Aire*, 24 Cal.3d at 64.) SoCalGas also tries to undermine Plaintiffs' *Rowland* analysis by arguing that "reliance on foreseeability alone in finding a duty…when damages are sought for an intangible injury…" would lead to "limitless liability." (ABOM 55, citation omitted.) But Plaintiffs have never relied on foreseeability alone as a basis for liability in this case—and, of course, neither does *Rowland*.

A. **Foreseeability.**

Even without benefit of discovery, foreseeability is not a close question in this case. As recounted above, SoCalGas's parent company acknowledged, in its 2014 10-K filing with the SEC, that failure to maintain a facility that can hold 80 billion cubic feet of natural gas could result in a catastrophic event and "lead to significant claims against us." (2 EP 259; *see also* 2 EP 397 [holding that Sempra's 10-K filing "reinforces" the foreseeability of the hazard to SoCalGas].) The business losses here were foreseeable for that reason alone.[20]

Beyond that, in November 2014 testimony before the California Public Utility Commission ("PUC") asking for a rate increase to address "a negative well integrity trend," SoCalGas warned that without an enhanced inspection and repair program, "SoCalGas will continue to operate in a reactive mode…to address sudden failures of old equipment. In addition, SoCalGas and customers could experience major failures and service interruptions from potential hazards that currently remain undetected."[21]

[20] At all relevant times, SoCalGas was Sempra's agent with respect to the repair, operation, and maintenance of Aliso Canyon, including well-25. (Developers' Complaint at 18 [Plaintiffs' RJN Exhibit A].)

[21] Testimony of Phillip Baker before PUC (Nov. 2014), https://www.socalgas.com/regulatory/documents/a-14-11-004/SCG-06_P__Baker_Testimony.pdf (Plaintiffs' RJN Exhibit B). See also Developers' Complaint at pp. 22-24 (Exhibit A to same) (describing PUC testimony).

Thus, as of 2014, SoCalGas knew full well that its wells "could experience major failures"—and indeed, one did, the very next year.

B. <u>Certainty of Injury and Closeness of Connection.</u>

The second and third *Rowland* factors, certainty of injury and the closeness of connection between injury and misconduct, are also easy calls. Plaintiffs have alleged that the local economy "collapsed" as a result of SoCalGas's gross negligence; they have also alleged specific facts regarding each named Plaintiff's business losses. (1 EP 178-185.)

Based on these allegations, the trial court concluded that the economic losses suffered by Plaintiffs are "unquestionably real" and "quantifiable by conventional means." (2 EP 386.)

Given the direct connection between SoCalGas's misconduct (its failure to maintain and monitor its wells, resulting in the largest methane gas leak in U.S. history) and the evacuation of the surrounding community (a community on which Plaintiffs depend for their livelihood), the closeness of the connection between SoCalGas's misconduct and Plaintiffs' injuries is undeniable.[22]

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[22] SoCalGas's statement that "it is not clear that all Plaintiffs" would have suffered injury" (ABOM 48) is wrong and premature. Not only were the blowout and evacuation foreseeable to SoCalGas, but Plaintiffs have alleged specific and substantial business losses directly attributable to SoCalGas. (1 EP 178-185.) The trial court was required to accept these allegations as true at the demurrer stage, but even if it weren't, SoCalGas has given no basis for any contrary conclusion.

C. **Moral Blameworthiness.**

SoCalGas's misconduct was morally blameworthy, despite the company's assertion that negligent conduct cannot, by definition, be so. (ABOM 49.) This Court's decisions in *Novartis*, 4 Cal.5th at 174, and *Kesner*, 1 Cal.5th at 1132, among others, rebut this contention.

Of course, not all negligence is morally blameworthy. But SoCalGas's conduct was particularly egregious. Despite knowing that its aging wells posed a safety risk, SoCalGas actually *removed* safety valves that could have prevented this catastrophe and then lied to authorities about having done so. (1 EP 177-178.) Then, making matters worse, SoCalGas engaged in a calculated misinformation campaign about the blowout, falsely assuring residents and business owners that the area was safe. (1 EP 171-172.)

SoCalGas tries to whitewash its behavior on the ground that it "acted immediately to repair the leak" and "develop[ed] a plan to allow relocation of residents, and clean their homes." (ABOM 49.) SoCalGas ignores that the well would not have leaked in the first place but for SoCalGas's decades-long neglect, its flouting of regulations, and its lies to regulators about its removal of safety valves. (See 1 EP 190-191.)[23]

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[23] SoCalGas's assertion that it is not morally blameworthy because it acted "quickly" to plug the leak and "develop" relocation and cleaning plans is factually wrong. (ABOM 49, citing 1 EP 3.) SoCalGas's support for this

SoCalGas's suggestion that it should not be required to compensate Plaintiffs because its negligence "merely shift[ed consumer] spending from one business to another" (ABOM 76) is remarkably tactless, to say the least. In truth, SoCalGas's moral blameworthiness is beyond doubt.

D. <u>Prevention of Future Harm.</u>

SoCalGas claims that the "prevention-of-future-harm" factor supports a duty exception because the company has "ample incentive[s]" to take "appropriate safety precautions" in the future. (ABOM 49-51.)

This is no answer to the obvious fact that internalizing the cost of *all* injuries—rather than just *some* of them—has the potential to deter *more* bad conduct. (*Kesner*, 1 Cal.5th at 1150.) SoCalGas also ignores that these "ample incentives" did not induce SoCalGas to prevent this catastrophe in the first place. (ABOM 49-51.)

SoCalGas fares no better by arguing it is "subject to investigations by its regulators" (which could result in unspecified "fines and penalties") and "is required to comply with detailed safety regulations…" (ABOM 51.) SoCalGas contends that "[t]hese existing obligations give [it] ample

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assertion is the executive summary of its relocation plan, which ignores what actually happened: the uncontrolled well blowout was the capstone of unnoticed leaks and well corrosion for years, and SoCalGas was not able to plug the well and stop the blowout for months (1 EP 172-173); it only developed relocation and plans after it was *ordered* to do so (*ibid*.); it did not comply with the cleaning protocol it was ordered to undertake (*id.* at 175.); and it subsequently fought the relocation and cleaning in court. (Plaintiffs' RJN Ex. E, at 33.)

incentive to take appropriate safety precautions." (*Ibid.*) Wrong again, on at least two counts.

First, "the duty analysis looks to the time *when the duty was assertedly owed*"—here, November 2015. (*Kesner*, 1 Cal.5th at 1150, emphasis added.) At that time, federal and state regulations governing underground gas storage facilities like Aliso Canyon were notoriously lax, demonstrating that regulation alone was not a sufficient incentive to SoCalGas to prevent the extensive harm from the blowout.[24]

Second, even if post-2015 events were relevant to the deterrence analysis, the regulatory changes made in response to Aliso Canyon, both on the federal and state levels, are no guarantee against future accidents, particularly given that California's regulatory agency, the Department of Conservation's Division of Oil, Gas, and Geothermal Resources

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[24] See State of California Natural Resources Division, Department of Conservation, Underground Injection Control Program Report on Permitting and Program Assessment Reporting Period of Calendar Years 2011-2014 prepared pursuant to Senate Bill 855, http://www.conservation.ca.gov/dog/Documents/SB%2083%20Report%20 2016%20Mid-Year.pdf (Plaintiffs' RJN Exhibit C) (Oct. 2015) at 5, 8, and 33 (problems with State underground injection control program include "insufficient staffing to address increasing regulatory workload in addition to significant remedial programmatic work, poor recordkeeping on mostly paper forms and the lack of modern data tools and systems, outdated regulations that in some cases do not address the modern oil and gas extraction environment, inconsistent and undersized program leadership, insufficient breadth and depth of technical talent, insufficient coordination among fields districts and Sacramento, and lack of consistent, regular, high-quality technical training.")

("DOGGR") is known for failing to enforce even the weak protections that are on the books.[25]

Moreover, many heavily-regulated industries—*e.g.*, nuclear power, oil and gas, pharmaceuticals, motor vehicle manufacturing—cause serious, even catastrophic, damage to humans, property, and/or the environment, yet that does not immunize them from tort liability. That SoCalGas is subject to more regulations now than in 2015 does not mean tort liability has no role to play in protecting public health and safety. (See *Kesner*, 1 Cal.5th at 1150-1151 ["[t]he numerous regulations cited by [defendant] suggest that legislatures and agencies readily adopted the premise that imposing liability would prevent future harm."].)

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[25] See also *Ensuring Safe and Reliable Underground Natural Gas Storage: Final Report of the Interagency Task Force on Natural Gas Storage Safety* (Oct. 2016) at 55, https://www.energy.gov/sites/prod/files/2016/10/f33/Ensuring%20Safe%20and%20Reliable%20Underground%20Natural%20Gas%20Storage%20-%20Final%20Report.pdf (Plaintiffs' RJN Exhibit D) (federal inter-agency task force report concluding, *inter alia*, that "[t]he incident at the Aliso Canyon storage field has highlighted the issues of aging natural gas infrastructure…and inadequate monitoring practices for UGS wells" and noting "concerns about how many other wells in natural gas storage fields could fail and cause similar events with serious economic implications, environmental implications, or even loss of life"); see also *id*. at 55-61 (recommending "rigorous measures" operators need to implement to prevent future leaks).

E. **Burden on Defendant and Consequences to the Community.**

As to the sixth factor, SoCalGas resorts again to its floodgates argument, which fails for the reasons already discussed (*supra* at III.B.) and because the class definition here is literally bounded. Limiting the class to the evacuation zone draws a line of an "identifiable category of persons," as in *Kesner*, where this Court rejected the same floodgates argument SoCalGas advances here. (*Id*. at 1153-1155.)

SoCalGas is notably silent about Plaintiffs' arguments that requiring SoCalGas to actually follow industry-wide safety standards is not burdensome, or that the benefit of clean air, a healthy community, and vibrant commerce outweighs any such burden. This silence is not surprising in light of this Court's recent teachings that where—as here—the duty sought by Plaintiffs is already imposed by law, the burden of compliance under *Rowland* is *zero.* (*Novartis,* 4 Cal.5th at 170; *Kesner*, 1 Cal.5th at 1152.)[26]

At the same time, disallowing Plaintiffs' claims would leave them with no compensation for their substantial injuries—a result offensive to the longstanding legislative policy of this state. (Civ. Code § 3523 ["For

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[26] The final *Rowland* factor, availability of insurance, is addressed above in the discussion of SoCalGas's policy arguments. (*Supra* at III.C.) Suffice it to say that SoCalGas's parent, Sempra, has recently admitted to having between 1.2 and 1.4 *billion* dollars in applicable insurance coverage. (Sempra Energy's 2016 10-K, at 35 [Plaintiffs' RJN Exhibit E].)

every wrong there should be a remedy”]; *id.* § 3520 [“No one should suffer by the act of another”].)

In sum, all the *Rowland* factors are met. There are no policy reasons, let alone “clear” ones, to create an exception to the general duty of care established by California law.

VI. Even if Recovery of Purely Economic Losses Requires a “Special Relationship,” Plaintiffs Should Still Be Allowed to Proceed.

Because the ELR does not apply here, there is no need to consider whether Plaintiffs meet the six-factor test first enunciated in *Biakanja*, 49 Cal.2d at 650. But if the Court disagrees, the ELR still should not bar the claims here because Plaintiffs meet each of the six factors.[27]

A. Plaintiffs Satisfy the First Factor of the *Biakanja* Test.

Plaintiffs have pled sufficient facts to satisfy the first *Biakanja* factor: the existence of a “transaction” meant to benefit the plaintiff. As this Court has repeatedly held—and SoCalGas concedes—“transaction” is not narrowly construed to mean only “contract,” but is read broadly to include *conduct*, so that a “contract” is not required. (OBOM 42-43 [citing *Quelimane*, 19 Cal.4th at 58. See also *Connor*, 69 Cal.2d at 865; *Barrera*, 71 Cal.2d at 675-676.)

[27] As Plaintiffs have argued, the six-factor test requires a balancing of the factors; no single factor is dispositive. (OBOM 41-45.) But even if all six factors must be met—they need not (see, e.g., *Connor*, 69 Cal.2d at 865)—Plaintiffs meet all six factors.

In any event, Plaintiffs *have* alleged that SoCalGas entered into contracts and transactions meant to benefit them. SoCalGas is a public utility that distributed gas to residents and businesses in Porter Ranch based on its contract with the Los Angeles City Council. (1 EP 167, 218-219.) This transaction, alongside the numerous transactions with residents and businesses, was intended to benefit Plaintiffs because natural gas is a necessity of urban life, and providing natural gas to a community draws residents and businesses to live and work in that community. (1 EP 192.)

SoCalGas's response is that these transactions cannot create a special relationship because SoCalGas similarly supplies gas to millions of customers *not* in Porter Ranch. (ABOM 46.)

This argument is too convenient by half.

First, it would mean that SoCalGas definitionally lacks a "special relationship" with any class of persons that is smaller than its customer base. That cannot be the law.

Second, SoCalGas's argument ignores that its contract with the City was *necessarily* "intended to affect" Plaintiffs because SoCalGas stores and extracts gas in close proximity to Plaintiffs; thus, SoCalGas entered into its contract knowing full well that hundreds of nearby businesses would be harmed by negligence. (1 EP 170, 192-193.)

Finally, geographic proximity is relevant to determining whether a Plaintiff satisfies the first factor. In *Centinela*, for example, this Court identified the class by examining, *inter alia*, the "geographic location [of the plaintiff emergency service providers] at the time that the Health Plans negotiated and included a delegation term in their contracts" with the independent practice associations. (*Centinela*, 1 Cal.5th at 994, 1014.)

For all these reasons, Plaintiffs have alleged sufficient facts to satisfy *Biakanja*'s first factor.[28]

B. Plaintiffs Satisfy the Remaining *Biakanja* Factors.

Biakanja factors 2 through 6 mirror *Rowland* factors one through five. Accordingly, for the reasons set forth above, Plaintiffs satisfy those factors also.

CONCLUSION

Contrary to SoCalGas's refrain, Plaintiffs are not asking this Court to "make California an outlier" by allowing them to seek recovery of their economic losses. (ABOM 62-68.) Quite the opposite: Plaintiffs are merely asking this Court to hold the line it drew almost forty years in *J'Aire*, which applied the ELR in a transactional setting and refused to categorically preclude claims for negligently inflicted economic losses. In so doing,

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[28] If this Court believes Plaintiffs have failed to allege sufficient facts to meet *Biakanja*'s first factor, Plaintiffs respectfully seek leave to amend upon remand.

J'Aire placed California squarely within the mainstream of states with regard to the ELR. It is SoCalGas's bright-line no-recovery version of the ELR that would make California an outlier—indeed, it would set California's tort law back decades.

But even if SoCalGas's characterization of Plaintiffs' position as "radical" were correct (it most assuredly is not), this Court has never been shy about innovating in the tort realm. Indeed, in case after case, this Court has taken a leading role in adapting tort law to respond to the changing needs of our increasingly complex society. (E.g., *Li v. Yellow Cab* (1975) 13 Cal.3d 804, 866; *Novartis*, 4 Cal.5th at 174.) And, in case after case, this Court has looked to Civil Code §1714 as the touchstone in determining whether to allow recovery from a negligent actor. (E.g., *ibid.*; *Kesner*, 1 Cal.5th at 1142-1143.)

That touchstone should govern here as well. The ELR has no place in actions between strangers, where there is no underlying contractual relationship between the parties. Instead, the proper approach—and the approach that is consistent with the ELR as applied in the vast majority of other states—is to apply *Rowland* to determine whether there is a clear basis for creating an exception to the presumptive duty of care established by Section 1714. Here, no such basis exists.

Plaintiffs respectfully request that this Court reverse the decision below and allow them to proceed on the merits of their claims.

Dated: August 6, 2018

Respectfully submitted,

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(Petitioners) Plaintiffs' Steering Committee for the Class Action Track

CERTIFICATE OF LENGTH OF BRIEF

The text of this Petitioners' Reply Brief on the Merits, including footnotes, consists of 8,120 words. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

WILSON M. DUNLAVEY

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 275 Battery Street, San Francisco, California 94111-3339. I am readily familiar with Lieff, Cabraser, Heimann & Bernstein, LLP's practices for collection and processing of documents for mailing with the United States Postal Service and for transmission via facsimile machine. On the date listed below, I served copies of the following document(s):

PETITIONERS' REPLY BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State Bar of California that the foregoing is true and correct and that this proof of service was executed on August 6, 2018, at San Francisco, California.

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