S274191

IN THE SUPREME COURT OF CALIFORNIA

CORBY KUCIEMBA and ROBERT KUCIEMBA,

Plaintiffs-Appellants,

v.

VICTORY WOODWORKS, INC., a Nevada Corporation,

Defendant-Appellee

On Grant of Request to Decide Certified Questions from the United States Court of Appeal for the Ninth Circuit Pursuant to California Rules of Court, Rule 8.548
Ninth Circuit No. 21-15963

APPLICATION TO FILE *AMICUS CURIAE* BRIEF; AND *AMICUS CURIAE* BRIEF OF CONSTRUCTION EMPLOYERS' ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Construction Employers' Association ("CEA") requests permission to file the attached *amicus curiae* brief in support of Defendant and Appellee Victory Woodworks, Inc. ("Victory").

CEA is a California non-profit trade association representing more than 100 of the largest union commercial building contractors in Northern California. For over 35 years, CEA has protected and promoted the interests of its members by monitoring legislation and lawsuits concerning California's construction industry and filing *amicus curiae* briefs in significant cases before federal and state courts, including this Court, on issues that will impact its members and the construction industry generally.

CEA's proposed brief will address the second question certified by the Ninth Circuit, *i.e.,* does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19? That question raises an issue of particular importance to CEA and its members, particularly in the context of this case where the employer, Victory, is a construction contractor that, during the period in question, was performing essential construction services pursuant to Governor Newsom's Executive Order N-33-20. As an organization that represents numerous employers throughout this state, including many that performed essential construction services during this pandemic, CEA is interested in ensuring the fair, correct, and practical application of the laws concerning the tort liability of California contractors like Victory. Accordingly, CEA has reviewed the briefs in this case and authorized the filing of the attached *amicus curiae* brief in order to assist this Court in reaching a decision that will not only benefit CEA's members and the construction industry, but all Californians who rely upon the work of contractors during a pandemic.

CEA's proposed brief is not being offered to restate the parties' arguments but, rather, to assist the Court by addressing additional legal principles and policy considerations that concern the duty of care owed by essential service contractors to third-parties, which were not otherwise considered or argued by the parties, or have been misconstrued. CEA will also provide its construction industry perspective through which the Court can more comprehensively analyze the applicable policy considerations, including the practical ramifications and unintended negative consequences of imposing a duty on essential service contractors.

In accordance with Rule 8.520(f)(4) of the California Rules of Court, CEA hereby certifies that no party to this case, and no counsel for any party to this case, authored this brief, in whole or in part. Neither did any party to this case nor any counsel for any party to this case make any monetary contribution toward or in support of the preparation of this brief. Other than CEA, no person or entity made a monetary contribution intended to fund the preparation or submission of the attached brief.

On behalf of CEA, I respectfully request that this Court accept the filing of the attached brief.

DATED: October 12, 2022

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INTRODUCTION

Construction Employers' Association ("CEA") submits this *amicus curiae* brief in response to the second question certified to this Court by the Ninth Circuit, which asks:

> Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

Phrased differently, the question is whether employers have a duty to protect third-parties from harm caused, not by their own activities or products but, by a novel, highly contagious virus? As discussed in the answering brief filed by Defendant-Appellee Victory Woodworks, Inc. ("Victory"), there is no such duty in the absence of a "special relationship" and, because a special relationship does not exist between employers and their employees' household members, the answer to the question certified should be "no."

In their reply, Plaintiffs reject Victory's application of the no-duty-to-protect rule. Instead, Plaintiffs theorize that all employers owe a presumptive duty under Civil Code §1714 to protect third-parties from COVID-19, which the Court should recognize as a matter of policy, *e.g.*, the *Rowland* factors. For support, Plaintiffs rely primarily on the Court's rule of "take-home exposure" liability in *Kesner v. Superior Court*, 1 Cal.5th 1132 (2016) ("*Kesner*"). As CEA will demonstrate, Plaintiffs' theory violates basic tenets of California tort law and stretches the Court's holding in *Kesner* well beyond its intended application.

In brief, the presumptive duty under Civil Code §1714 applies only to defendants that create an unreasonable risk of harm, which does not include exposure to a naturally occurring illness like COVID-19, particularly when that risk was, by state order, deemed necessary for the

performance of "essential" services during a pandemic. Moreover, presumptive duty or not, the *Rowland* factors counsel against imposing a duty that would require essential service employers to contain a difficult to control and detect novel virus that cannot, with any degree of certainty, be causally linked to any one person, let alone an employer. There is no precedent for imposing such a duty on employers and that should not change now.

Plaintiffs' troubled legal positions aside, of particular importance to CEA is the impact of Plaintiffs' proposed duty, and not just on contractors like Victory, but on all those who rely upon the work of essential service contractors during a pandemic – which is everyone. When much of the state shut down on March 19, 2020, pursuant to Governor Newsom's Executive Order N-33-20, employers like Victory continued to work. They did so despite being asked to adapt, in real-time, to numerous unprecedented and evolving health and safety protocols because their work was vital to the "health and well-being" of all Californians.[1]

To now subject those employers to potential liability for failing to implement numerous, never-before-seen health and safety protocols to perfection is grossly unjust and sets bad precedent. The torrent of litigation that will inevitably follow could spell doom for many employers still trying to regain their footing in a post-pandemic world and those that persevere will be deterred from performing critical, lifesaving work during the next pandemic. Given the stakes and abundance of countervailing authority, CEA urges this Court to reject the duty being proposed by Plaintiffs.

[1] Ca. Exec. Order No. N-33-20 (March 19, 2020), https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf (accessed September 29, 2022).

ARGUMENT

I. The Court Should Apply Its "Two-Step" Duty To Protect Inquiry, Including Requiring A "Special Relationship," And Not Presume All Employers Owe A Duty Under Civil Code §1714

The second question certified by the Ninth Circuit concerns a duty to protect third-parties from harm, *i.e.,* the duty of employers to prevent COVID-19 from spreading to their employees' households. As this Court reaffirmed just this past year, a "two-step" inquiry must be made and met before that duty can be realized:

> [W]hether to recognize a duty to protect is governed by a two-step inquiry. First, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect. Second, if so, the court must consult the factors described in *Rowland* to determine whether relevant policy considerations counsel limiting that duty.

Brown v. USA Taekwondo, 11 Cal.5th 204, 209 (2021).

Plaintiff, however, asks the Court to forego its two-step inquiry and, instead, create precedent by presuming, under Civil Code §1714, that all employers owe a general duty to protect third-parties from a virus-induced illness, COVID-19. The Court should decline to do so.

Although Civil Code §1714 codifies a presumptive duty that everyone must take ordinary care in managing their own "property or person" for the safety of others, "it has limits," namely, the presumption does not apply unless the defendant has: (1) "created a risk" of harm that is (2) "unreasonable." *Brown,* 11 Cal.5th at 214; *see also Lugtu v. California Highway Patrol,* 26 Cal.4th 703, 716 (2001); *see also Weirum v. RKO General, Inc.*, 15 Cal.3d 40, 47 (1975). Invoking Civil Code §1714 in this instance exceeds the boundaries of both limitations.

A. Employers Do Not Create Or Increase The Risk Of COVID-19

Contrary to Plaintiffs' theory, COVID-19 is not a risk that employers create, including construction contractors like Victory. It is a virus-induced illness, *i.e.,* SARS-CoV-2, that was created by nature, not any employers' "property or person," and that spreads through basic human interaction (*e.g.*, breathing, talking, laughing, coughing), not due to activities intrinsic to any business.

While risk-creation, for purposes of a presumptive duty, includes situations where a defendant makes "the plaintiff's position worse," this is not one of those situations. *Lugtu,* 26 Cal.4th 716; *see also Brown,* 11 Cal.5th at 214. Although going to work generally requires human interaction and, for that reason, risks COVID-19 infection, the same is true for every other activity in life. The unfortunate reality is that COVID-19 is now like the water we drink and the air we breathe – it is everywhere. As a result, going to work does not put employees or their households in a "worse" position with respect to COVID-19 because the risk of infection exists every time anyone breaks isolation and comes within six feet of another human being.

Thus, singling out and subjecting employers to a presumptive duty on the ground that going to work increases a risk of COVID-19 is arbitrary. That same logic applies to any situation where people congregate, *i.e.,* churches, gyms, fundraisers, parades, country clubs and any other organized or unorganized group activity. In other words, the line cannot reasonably be drawn at employers because, under Plaintiffs' theory, every person or organization that facilitates human interaction has a duty to prevent the transmission of COVID-19, and not just to the individuals participating, but to all of their household members as well. That should not and cannot be the law.

Despite Plaintiffs' assertion, *Kesner* is not relevant authority for applying Civil Code §1714 to this case. Although the Court in *Kesner* presumed the employer owed a general duty to its employees' households under Civil Code §1714, the Court reached that conclusion based on materially different facts. In the Court's words:

> Because Civil Code section 1714 establishes a general duty to exercise ordinary care in one's activities, which includes the use of asbestos in one's business or on one's premises, we rely on [the *Rowland*] factors to determine "whether … an *exception* to Civil Code section 1714 … should be created."
>
> …
>
> [T]he general duty to take ordinary care in one's activities applies to the use of asbestos on an owner's premises or in an employer's manufacturing process.

Kesner, 1 Cal.5th at 1143-1144 (underlining added). As shown above, the decisive factor for applying Civil Code §1714 in *Kesner* was that the employer's business activities included the "use of asbestos." *Id.*

Thus, *Kesner* is not authority for applying Civil Code §1714 to employers that fail to prevent a naturally occurring, dangerous condition from entering or leaving the workplace. The statute applied because the employer intentionally brought the dangerous condition into the workplace and, in doing so, "created and maintained" a hazardous condition through its own activities and, indeed, its own property. *Id*. at 1159. SARS-CoV-2 and asbestos are not comparable agents of harm. Unlike asbestos, employers do not use, produce, or introduce SARS-CoV-2 into the workplace, nor is it unique or specific to any employers' business activities. It is a product of nature that health and safety protocols are used to combat, not create.

The Court's application of Civil Code §1714 in *Kesner* is in accord with countless other judicial opinions that have applied and interpreted that statute since its inception, and which consistently involve defendants that created a risk through their own "property or person" by introducing a dangerous product or activity into society. For example, businesses that install and operate high-voltage power lines have a general duty to "make [their] wires safe under all the exigencies created by the surrounding circumstances." *Scally v. Pacific Gas And Electric Co.*, 23 Cal.App.3d 806, 815 (1972). Ammunition manufacturers have a general duty to prevent harm caused by their product that is "dangerous to human life." *Warner v. Santa Catalina Island Co.*, 44 Cal.2d 310, 317 (1955). Individuals handling firearms are "bound to use ordinary care to prevent injury to others" (*Rudd v. Byrnes*, 156 Cal. 636, 640 (1909). An "operator of a motor vehicle" has a general duty to drive their vehicle safely. *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82 (1925).

Unlike the asbestos user, power-line operator, ammunition manufacturer, firearm handler, and automobile driver, a virus like SARS-CoV-2 is not employer made or employer used. It is a new hazard of everyday life that exists because of nature, not employers, and spreads through basic human interaction, not business-specific activities. Civil Code §1714 has been the law of the land for nearly 150 years and, yet, it has never been interpreted to mean employers are duty-bound to prevent the spread of a virus-induced illness like COVID-19. While COVID-19 is novel, getting sick at work is not. The complete lack of any factually analogous precedent to support Plaintiffs' interpretation of Civil Code §1714 speaks volumes.

In its reply brief, Plaintiffs acknowledge a "typical" no duty to protect case does not trigger Civil Code §1714 and, therefore, claim Victory is an atypical defendant. (Pls.' Reply Br., p. 15-16). Specifically,

Plaintiffs refer to allegations in their First Amended Complaint that purport to show Victory took affirmative steps to create the risk of infection by transferring COVID-19-infected workers to the San Francisco construction site in violation of health and safety protocols. *Id.*

In making this argument, Plaintiffs appear to be putting the cart before the horse. While Victory's alleged violation of health and safety protocols may show the breach of a duty to prevent the spread of COVID-19, the issue presented by the Ninth Circuit is whether employers have a duty to take those preventative measures for the benefit of third-parties in the first place. To address that issue, Victory and all other employers should be placed on equal footing, which means the question of risk-creation for purposes of Civil Code §1714 is whether spreading COVID-19 to third-parties is a risk inherent to all businesses. As explained above, the answer is no, and Plaintiffs' Victory-specific allegations of breach do not bear on the broader more general question of whether a duty is categorically owed by all employers.

B. The Risk Was Not "Unreasonable"

Even if employers create or even increase the risk of COVID-19 by conducting business, the presumptive duty under Civil Code §1714 still does not apply unless that risk was "unreasonable." *Lugtu,* 26 Cal.4th at 716; *see also Dillon v. Legg*, 68 Cal.2d 728, 739 (1968) (general duty turns on conduct that "involves unreasonable risk of great injury"); *see also Richards v. Stanley*, 43 Cal.2d 60 (1954) (general duty owed means to "not create an unreasonable risk of harm to others"); *see also Brown,* 11 Cal.5th at 214, citing *Lugtu,* 26 Cal.4th at 716 (general duty is to "not create an unreasonable risk of injury to others"); *see also Richardson v. Ham*, 44 Cal.2d 772, 776 (1955) (creating "extreme danger" justifies imposing general duty); *see also* Restatement (Second) of Torts §302 (Am. Law Inst. 1965) (risk of harm in negligence defined as an "act or omission … which

involves an unreasonable risk of harm to another ..."). The rationale being that "virtually every act involves some conceivable danger" and, therefore:

> Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable – i.e., the gravity and likelihood of the danger outweigh the utility of the conduct involved.

Wierum, 15 Cal.3d at 47 (emphasis added).

This case concerns employers that conducted business between May 6, 2020 and July 10, 2020, which is the period when Ms. Kuciemba's spouse worked for Victory. (Pls.' Opening Br., p. 11.) That timing is significant because, pursuant to Governor Newsom's March 19, 2020 Executive Order No. N-33-20 ("Stay-Home Order"), only essential service employers, which included Victory, could and were performing work during that time.[2] Thus, for contractors like Victory to have created an "unreasonable" risk, the gravity and likelihood of spreading COVID-19 must outweigh the utility of their essential services. *Wierum,* 15 Cal.3d at 47. That is clearly not the case.

First, the Stay-Home Order confirms that the risk was not unreasonable. The state's highest executive weighed the risk that essential service employees could contract and spread COVID-19 by continuing to work and, by executive order, determined that the risk was not only reasonable, but "so vital to the United States that their incapacitation … would have a debilitating effect on security, economic security, public health or safety, or any combination thereof."[3]

Second, aside from being state-sanctioned, the actual services that employers provided during the Stay-Home Order show their utility outweighed the risk of spreading COVID-19. The work of our healthcare

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[2] Ca. Exec. Order No. N-33-20 (March 19, 2020), *supra* note 1.
[3] *Id.*

providers speaks for itself, but the work of contractors should not be overlooked. Not only did contractors ensure California's basic infrastructure needs like roads and utilities remained available and operative during the state-wide shutdown, they helped to maintain, build, and expand hospitals, medical centers, and COVID-19 test labs that were critical to treating and saving the lives of countless individuals that either contracted COVID-19 or, due to other ailments, were otherwise at risk of being denied care due to the unprecedented surge in patients.

Considering the healthcare crisis that California faced when the pandemic started, the unreasonable risk would have been for essential service contractors to have ceased operations during the Stay-Home Order. If they had, far more Californians would have been denied access to healthcare when they needed it most and the already devastating statistics on COVID-19 cases and fatalities would have been far worse.

For all of the foregoing reasons, as well as those already advanced by Victory, this Court should reject Plaintiffs' extreme and unsound invitation to create new precedent by presuming employers have a duty to protect third-parties from a viral infection like COVID-19. Civil Code §1714 is not intended to apply to risks of nature that are inherent to all activities, and certainly not when that risk was state-encouraged and vital to the health and welfare of Californians, including the Plaintiffs.

II. The *Rowland* Factors Do Not Support Imposing A Duty On Employers Like Victory

Even when a general duty is presumed under Civil Code §1714, the Court can and should still refrain from recognizing that duty when doing so is not "supported by policy considerations." *Rowland v. Christian*, 69 Cal.2d 108 (1968). To make that determination, courts apply a multi-factor test that consists of balancing the following "*Rowland* factors": (1) the foreseeability of the harm to the plaintiff, (2) the degree of certainty that the

plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. *Id.*; *Brown,* 11 Cal.5th at 209.

Plaintiffs rely heavily on the first *Rowland* factor, "foreseeability," emphasizing it is foreseeable that failing to follow COVID-19 safety recommendations at work can lead to secondary infection at an employee's home. That point is not meaningful or determinative because "foreseeability is not synonymous with duty; nor is it a substitute."*Erlich v. Menezes*, 21 Cal.4th 543, 552 (1999); *see also Elden v. Sheldon*, 46 Cal.3d 267, 274 (1988). As this Court observed:

> "[S]ocial policy must at some point intervene to delimit liability" even for foreseeable injury, and "policy considerations may dictate a cause of action should not be sanctioned *no matter how foreseeable the risk."*

Parsons v. Crown Disposal Co., 15 Cal.4th 456, 476 (1997) (emphasis in original), citing *Elden,* 46, Cal.3d at 274 and *Borer v. American Airlines, Inc.*, 19 Cal.3d 441, 446 (1977).

Thus, no single *Rowland* factor controls this discussion and, instead, a duty is only owed when "the sum total" of those factors "lead the law to say that a particular plaintiff is entitled to protection." *Dillon v. Legg*, 68 Cal.2d 728, 734 (1968). As explained below, the *Rowland* factors, on balance, as well as this Court's holding in *Kesner*, weigh against subjecting employers to liability for failing to prevent the spread of a pervasive, largely uncontrollable virus-induced illness like COVID-19, particularly in the case of essential service contractors like Victory.

A. Foreseeability

Despite Plaintiffs' insistence, even the first factor of foreseeability does not bolster Plaintiffs' arguments in any persuasive sense. It is just as "foreseeable" that an individual will contract COVID-19 in any garden-variety interaction with another person, whether at home or out in public, as it is that a person will get COVID-19 at work and bring the illness home. As extensively demonstrated throughout this brief, there is nothing unique about the work environment (especially in the construction context) that makes it any more likely, or foreseeable, that a person will catch the illness there.

As a result, the potency of the first *Rowland* factor, foreseeability, is diluted down to nothingness in this context. It does not differentiate this case or this type of defendant from any other and, if that factor carries the day such that employers owe a duty to prevent the spread of COVID-19, so do we all.

B. The Closeness Of The Connection Between The Conduct And Injury

The third *Rowland* factor looks to the "closeness of the connection between the defendant's conduct and the injury suffered." (*Rowland,* 69 Cal.2d at 113). Critically, this factor "accounts for third-party or other intervening conduct." *Vasilenko v. Grace Family Church*, 3 Cal.5th 1077, 1086 (2017). Any such conduct that is not derivative of the defendant "diminish[es] the closeness of the connection between the defendant's conduct and the plaintiff's injury." *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP*, 59 Cal.4th 568, 583 (2014); *see also Vasilenko,* 3 Cal.5th at 1086.

When the injury is COVID-19, connecting that injury to the conduct of any one person, or in this case employer, is an exercise in futility due to

the nature of the virus that causes the infection. Specifically, SARS-CoV-2 is a virus that:

- is not visible;
- may not produce any discernable symptoms in an estimated 30% of those infected;[4]
- if there are symptoms, they can take anywhere from two to fourteen days to develop;[5]
- is easily transmitted from person-to-person by routine bodily functions, like breathing, talking, singing, coughing or sneezing;[6]
- 50% of the time is transmitted before any symptoms develop,[7] and
- is extremely pervasive, now infecting an average of at least 3,336 new Californians every day.[8]

In light of these characteristics, COVID-19 cannot be traced, with any degree of certainty, to any particular person, employer, or conduct because, in addition to being widespread and easily transmitted, half of all infections are transmitted anonymously by individuals with no symptoms. As one study explained, the high percentage of "silent transmission[s]" is what makes COVID-19 uniquely difficult to suppress:

> [T]he majority of transmission is attributable to people not exhibiting symptoms … silent

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[4] Johns Hopkins Medicine, *What Is Coronavirus?* (Last updated July 29, 2022), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus (accessed Oct. 5, 2022); Centers for Disease Control and Prevention, *COVID-19 Pandemic Planning Scenarios,* Table 1, *https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html* (last accessed Sept. 30, 2022).

[5] Johns Hopkins Medicine *What Is Coronavirus?* (Last updated July 29, 2022), *supra* note 4.

[6] *Id*.

[7] Centers for Disease Control and Prevention, *COVID-19 Pandemic Planning Scenarios,* Table 1, *supra* note 4.

[8] Ca. Dept. of Public Health, *Tracking COVID-19 in CA,* https://covid19.ca.gov/ (last accessed Oct. 10, 2022).

> disease transmission during the presymptomatic and asymptomatic stages are responsible for more than 50% of the overall attack rate … such silent transmission alone can sustain outbreaks even if all symptomatic cases are immediately isolated. [9]

In short, the connection between an employer's conduct and a household member's infection is tenuous for the simple reason that every third-party individual (*i.e.*, anyone not under an employer's direct control at work) with whom either the employee or household member interacts is a potential source of infection and, as such, is an "intervening third-party" that caused the plaintiff's harm through no fault of the employer.

For example, and as Victory explained in its answering brief, every human interaction outside of work presents countless opportunities for infection that attenuate the connectivity between an employers' conduct and an employee or their household member's infection (*e.g.,* trips to the grocery store, commuting on public transit, buying a sandwich at lunch, etc.). Taking that one step further, even an employee's normal interactions inside of work diminish that connection. For example, the vast majority of employers operate from office buildings where employees share floors, elevators, restrooms and reception areas with numerous other employers and their other employees. All of these routine, daily interactions at work present more opportunities for infection that are unconnected to the employer's conduct.

When the employer is a contractor, identifying the source of an employee's infection is even more difficult than usual. Construction is

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[9] Seyed M. Moghadas, *The Implications of Silent Transmission for the Control of COVID-19 Outbreaks* (July 6, 2020), https://www.pnas.org/doi/10.1073/pnas.2008373117 (accessed Sept. 30, 2022).

unique in that most employees do not work at an office where everyone within the employee's bubble is a coworker being controlled by the same employer and the same COVID-19 preventative measures. Construction sites are a melting pot of legally distinct third-party employers such that, on any given day, those present on a job site may include individuals that work for an owner, a general contractor, various subcontractors and suppliers, design professionals, consultants, construction managers, and third-party inspectors just to name a few. Moreover, all of those different employers and their employees usually, and often must, work together at the same time in the same confined spaces to ensure the work is coordinated and performed safety.

Put simply, in the normal employment setting, there are numerous intervening events that not only diminish but may sever the connection between an employer's conduct and the employee's infection. When the employer is a contractor like Victory, those intervening events increase ten-fold.

Accordingly, Plaintiffs suspend disbelief by claiming that a "direct line" can be drawn between Victory's conduct and Ms. Kuciemba's injury. (Pls.' Reply Br., p. 24.) That ignores everything that we know, and science has confirmed, about COVID-19 and all of the other "direct lines" that can just as easily be drawn to every other human being that Ms. Kuciemba and her spouse touched, talked to, or simply walked past during the period in question.

The inability to connect conduct with viral transmissions explains why there is no precedent establishing liability for take-home exposure in the context of a virus. The closest this Court has come was creating liability for take-home exposure in the context of asbestos, *i.e., Kesner,* and a review of the Court's rationale in *Kesner* shows no logical comparison can be made between these two cases.

In *Kesner,* the causal connection between the employer's conduct and the plaintiff's injury was unassailable. That conduct was using asbestos – a product that is rare and scientifically proven to release physical particles that, through sustained exposure, cause the even rarer form of cancer that the plaintiff developed. *Kesner,* 1 Cal.5th 1150. Connecting the dots between the employer's conduct and the plaintiff's harm was possible because science provided the dots. The same logic does not apply when, instead of asbestos, the agent of harm is a virus that is not rare but pervasive and can be transmitted by anyone at any time without anyone knowing that it happened, merely by occupying the same air space.

In its reply brief, Plaintiffs downplay the significance of COVID-19 being untraceable to any particular source, stating that "causation arguments are inappropriate at this stage." (Pls.' Reply Br., p. 24.) However, this Court has repeatedly considered the "causal relationship" between a defendant's conduct and the plaintiff's injury when analyzing duty. *See Bily v. Arthur Young & Co.*, 3 Cal.4th 370 (1992) (refusing to impose duty, in part, due to "tenuous causal relationship between audit reports and economic losses from investment")*; see also Kesner,* 1 Cal.5th at 1149 (noting relevance of "causal connection between defendant's negligent conduct and the intervening negligence of a third party" to the third *Rowland* factor); *see also Beacon Residential Community Assn.,* 59 Cal.4th at 587 (discussing "causal link" and "lack of causation" being a factor that informs a court's "duty analysis"). As the Court of Appeal explained:

> [T]he nexus between the questioned conduct and the injury is "significantly different from that needed to satisfy a factual determination of proximate cause." Proximate causation requires simply that the act or omission of the defendant be a 'substantial [contributing] factor' to the harm suffered. <u>In determining the existence of a</u>

> duty, we must assess not only the fact that a causative relationship exists but also we must quantify that connection in balance with the other *Rowland* factors."

Adams v. City of Fremont, 68 Cal.App.4th 243, 269 (1998) (emphasis added), disapproved on other grounds in *Brown,* 11 Cal.5th 204. When, as here, the link between a defendant's actions and a plaintiff's injury "are indirect and inferential," the closeness of connection is too remote to find a duty. *Id.* at 269-270.

The Court's holding in *Bily*, 3 Cal.4th at 370 is particularly instructive. The Court rejected the theory that a negligent auditor owed a duty to a third-party investor due, in part, to "the difficult and potentially tenuous causal relationships between audit reports and [the plaintiff's] economic losses from investment and credit decisions." *Id.* at 398. The Court concluded that there was "something less than a close connection" despite plaintiff's "litigation-focused" allegations that blamed only the auditor and its report. *Id.* at 401. To reach that conclusion, the Court recognized that, while it was foreseeable that an erroneous audit report may have caused the plaintiff's harm by influencing the decision to invest, such decisions are "complex and multifaceted" and the record showed the plaintiff's decision to invest may have been based on something other than the defendant's audit, *e.g.,* the plaintiff may have "misjudged a number of major factors (including, at a minimum, the product, the market, the competition, and the company's manufacturing capacity)…" *Id*.

Viral illnesses and investment losses are clearly two very different types of harm. However, what matters is the Court's reasoning in *Bily*, which was that, if determining the actual cause of a plaintiff's harm is complex and may be due to any number of different factors beyond just the defendant's alleged negligence, the connection between the defendant's

conduct and the plaintiff's harm is tenuous. Those are the circumstances with which we are dealing here. The causation analysis in this case is not linear but, like *Bily,* it is multi-faceted. While it is possible Victory's alleged negligence caused Plaintiffs' infection, it is equally if not more likely that the infection was caused by numerous other intervening events over which Victory had no control, *i.e.*, every instance where Ms. Kuciemba and her spouse interacted with another person who was not under Victory's control at the job site.

In *Kesner*, the Court similarly recognized the significance of causation in its duty analysis in two instances. First, when it distinguished *Bily,* stating:

> Unlike the causal relationship between auditor mistakes and investor losses, the causal relationship between preventable asbestos exposure of sufficient intensity and duration and the type of injuries plaintiffs allege here is clear and scientifically well established.

Kesner, 1 Cal.5th at 1157. The above rationale for distinguishing *Bily* is not present here. While mesothelioma can be uniquely and scientifically linked to an employer's use of asbestos, science does not connect COVID-19 to any one person or employer because it is pervasive and spreads through normal bodily functions – conduct that has a "causal relationship" to every person on earth.

Second, in limiting the scope of the employer's duty to only household members in *Kesner*, the Court did so as "as a causal matter" because that was the class "most likely to have suffered legitimate, compensable harm." *Id.* at 1155. Thus, the Court was concerned about broadening liability to anyone besides household members because doing so increased the employer's odds of being liable for cancer that was not connected to, or caused by, its use of asbestos. That is the risk that exists

here irrespective of whether the Court limits the employer's duty to just household members. Any time a household member contracts COVID-19, their housemate's employer will be the target of liability regardless of whether the infection is connected to anything the employer did or did not do because no one can prove or disprove whether that connection actually exists.

In sum, the third *Rowland* factor does not support Plaintiffs' cause. The connection between an employer's conduct and secondary transmission of COVID-19 is too tenuous because that injury can be causally linked to any person with whom either the employee or household member interacted, all of whom are intervening third-parties and none of whom are under the employer's control. Contrary to the Plaintiffs' contention, this is exactly the situation where the Court can and should factor causation into its duty analysis. Asking a jury to assign liability when the causal link between the plaintiff's harm and defendant's conduct is no more scientific than a roll of the dice will avoid "expensive and complex lawsuits of questionable merit." *Bily,* 3 Cal.4th at 406.

C. Moral Blame

The fourth *Rowland* factor, moral blame, also does not support imposing a duty on employers like Victory. The Court can look no further than its analysis in *Kesner* to see why. Every justification for why the Court assigned moral blame in *Kesner* is missing here, namely: (1) employers do not benefit from violating COVID-19 protocols, (2) employers that fall short of ensuring 100% compliance with COVID-19 protocols are not inherently culpable in terms of their "state of mind," and (3) employers cannot easily prevent third-party exposure to COVID-19.

1. Employers Do Not Benefit From Violating COVID-19 Protocols

Historically, this Court has assigned moral blame when a defendant benefits financially from the risks that it creates. *See Beacon Residential Community Assn.,* 59 Cal.4th at 586 ("defendants' unique and well-compensated role" in creating risk showed "significant moral blame attached to defendants' conduct."). Thus, in *Kesner,* the employer was blameworthy because it used asbestos commercially and, therefore, "benefitted financially" from the very risk that it created. *Kesner,* 1 Cal.5th at 1151.

In the case of COVID-19, employers gain no benefit, financial or otherwise, by violating health and safety protocols. Doing so increases the chances that employees will be sick and unable to work and every business depends on a productive workforce to be successful. That is particularly true for contractors. Unlike many jobs, construction cannot be performed remotely from a laptop or over Zoom. If COVID-19 spreads through a job site, the work will not get done, the contractor will not get paid and, in many instances, the contractor will be exposed to liability to their customers for delays and liquidated damages. Accordingly, contractors have nothing to gain and much to lose if they fail to prevent the spread of COVID-19.

2. Employers That Fall Short Of Ensuring 100% Compliance With COVID-19 Protocols Are Not Inherently Culpable In Terms Of Their "State Of Mind"

When assigning moral blame, courts also consider "a defendant's culpability in terms of the defendant's state of mind and the inherently harmful nature of the defendant's acts." *Adams,* 68 Cal.App.4th at 270 (emphasis added). In *Kesner,* the employer's state of mind warranted blame because it intentionally used asbestos, which was inherently dangerous, offered no redeemable value other than to help the employer make a profit and, by the time of the plaintiff's exposure, forty-years of science and laws

should have informed the employer how to safely handle asbestos at work so as to prevent offsite exposure. *Kesner,* 1 Cal.5th at 1145-1148.

The "state of mind" analysis tells a different story in this case. Contractors like Victory do not intentionally violate COVID-19 protocols because, as noted above, doing so prevents them from being productive and profitable. More importantly though are the distinctions between the asbestos laws that existed and informed the employer's "state of mind" in *Kesner* and the various COVID-19 safety recommendations that informed employers like Victory during the Stay-Home Order.

At the time of the Stay-Home Order, the pandemic was still in its infancy such that both the virus and various health and safety recommendations had only been in our collective consciousness for a period of weeks. That is a far cry from the decades of scientifically-backed asbestos literature and laws that tainted the employer with bad faith in *Kesner*. Expecting essential service employers, particularly those with a significant number of employees, to have mastered how to implement and ensure 100% compliance with new and unprecedented health and safety protocols is not a reasonable expectation to put on any employer and, more to the point, employers are not morally to blame for falling short of that unrealistic expectation.

Bear in mind, contractors must also deal with many other competing and equally significant risks on a construction site. Construction work typically involves things like heavy equipment, scaffolding, high voltage transmission lines, and power tools, all of which put a unique and concerted burden on contractors to ensure their day-to-day work is performed safely. A contractor might, in the midst of trying to avoid all of the potential work-related injuries on a construction site, neglect to enforce one of many COVID-19 safety recommendations that, a few weeks prior, did not exist.

While doing so may not be professionally acceptable, it is morally excusable.

Furthermore, by the time of the exposure in *Kesner,* the laws concerning the use of asbestos at work were uniform and unchanging because the science behind those laws was "well established." *Kesner,* 1 Cal.5th at 1147-1148. The same is not true for the COVID-19 safety recommendations, particularly during the early stages of the pandemic. There was not one true standard from which due care could be ascertained. Instead, from the outset, safety "recommendations" came from many different sources (*e.g.*, local public agencies, state agencies, federal agencies, global organizations). Moreover, because COVID-19 is novel, those recommendations were, and still are, in a constant state of change depending on a variety of factors, including new scientific discoveries, the pervasiveness of the virus in certain areas, the availability of vaccines and booster shots, the communal desire to reopen schools and work, and, unfortunately, mixed messaging from government officials.

Plaintiffs all but concede this point, being unable to settle on any one standard and, instead pointing to a "San Francisco County Health Order …, CDC Guidelines, and other regulations." (Pls.' Opening Br., p. 11, emphasis added.) Again, while it may not excuse an employer's non-compliance, an employer is not morally to blame for making a mistake in complying with one of many safety recommendations that are the first of their kind, coming from different sources, constantly changing, and, in the case of Victory, were in place for less than two months by the time Ms. Kuciemba's spouse started work.

Finally, the very reason employers like Victory were performing work in the first place was because the government explicitly determined that the employers were performing an essential function, critical for the "health and well-being" of Californians. It contradicts logic and common

sense to contend that an employer performing such vital and necessary services is somehow morally blameworthy in doing so.

3. Employers Cannot Easily Prevent Third-Party Exposure To COVID-19

A final distinction between this case and *Kesner* concerns the employer's ability to control third-party exposure. The Court in *Kesner* assigned moral blame to the employer because the plaintiff's mesothelioma was "preventable." *Kesner,* 1 Cal.5th at 1157. Obviously, the employer could have stopped using asbestos altogether. But even beyond that, the Court emphasized that the defendant also had "greater … control over the hazard than employees' households" because it could have but "failed to control the movement of asbestos fibers" so as to prevent its employees from acting "as a vector in bringing asbestos fibers into his or her home." *Id.* at 1132, 1148-1151.

To be clear, the harm in *Kesner* was preventable by keeping the asbestos fibers physically contained at work and, to reach that conclusion, the Court cited to numerous health regulations that dated back to the 1920s and demonstrated how that could be done:

> [B]roadly applicable regulations identified the potential health risks of asbestos traveling outside of the work site. … the OSHA Standard required employers to take precautions for employees and others who may be exposed … Some precautions contemplated asbestos traveling within a work site … Others protected nonemployees from asbestos traveling outside of a worksite on employees' clothing. Under the regulations, employers were required to provide their asbestos-exposed employees with special clothing and changing rooms. Employers were required to inform launderers of asbestos-exposed clothing of the asbestos contamination and to transport asbestos-exposed clothing "in sealed impermeable bags, or other closed,

> impermeable containers" that were appropriately labeled as containing asbestos. Moreover, employers were required to provide "two separate lockers or containers for each employee, so separated or isolated to prevent contamination of the employee's street clothes from his work clothes."
>
> Well before OSHA issued the 1927 standard, the federal government and industrial hygienists recommended that employers take measures to prevent employees who worked with toxins from contaminating their families by changing and showering before leaving the workplace. … The international Labour Office's Standard Code of Industrial Hygiene (Geneva 1934) recommended washing accommodation and cloakrooms for workers "[i]n dusty trades."

Id. at 1146-1147 (emphasis added).

Unlike asbestos, an employers' failure to contain COVID-19 at work is not nearly as blameworthy because it is substantially more difficult. COVID-19 is caused by a virus that is not physically containable, may not reveal itself through symptoms, and can, and often is, silently transmitted during a single interaction by nothing more than breathing. Thus, an employer often cannot even know if there is a jobsite infection, much less take steps to prevent that infection from spreading to third-parties.

Furthermore, even if an employer does confirm an infection or exposure at work, it still is not in the best position to stop the virus from spreading to third-parties outside of the workplace. Unlike the extensive list of asbestos regulations that detail how to protect an employees' household members from exposure (*e.g.*, cloakrooms, change of clothes, washing areas, laundering services), OSHA's COIVD-19 guidelines for workplace safety provide no information or recommendations for protecting

individuals outside of work.[10] In fact, the following OSHA recommendation for handling a workplace exposure would technically increase the risk of transmission at home:

> Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay home from work.[11]

The reality is that, because COVID-19 is caused by a virus that is carried and transmitted by people, the only way for employers to effectively prevent the virus from spreading outside of work is to control the exposed or infected people outside of work, such as by regulating where an exposed employee goes after leaving the job site or forcing the employee and its household members to follow safety protocols at home. Even assuming an employer could exercise that level of control, its ability to do so certainly is not "greater" than the employee and/or its household members, which further separates this case from *Kesner* and further shows why *Rowland's* moral blame factor does not support a duty in this case. *See Kesner,* 1 Cal.5th at 1151 (moral blame considers whether employer had "greater … control over the hazard than employees' households.").

D. The Policy Of Preventing Future Harm

The fifth *Rowland* factor considers the policy of preventing future harm, which "is ordinarily served, in tort law, by imposing the costs of negligent conduct on those responsible." *Cabral v. Ralphs Grocery Co.*, 51 Cal.4th 764, 781 (2011). The rationale being that forcing the wrongdoer to

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[10] United States Dept. of Labor, Occupational Safety and Health Administration, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace,* (updated June 10, 2021), https://www.osha.gov/coronavirus/safework (last accessed Sept. 30, 2022).

[11] *Id*. (Emphasis added).

pay damages for its conduct will "induce changes in that behavior and make it safer." *Kesner,* 1 Cal.5th 1150.

Here, subjecting employers to tort liability will not induce employers' to prevent the spread of COVID-19 because there is already an incentive in place that is just as, if not more, effective – staying in business. As noted in section II.C.1, above, every employer relies on the availability of their workforce to be productive and profitable and, if employers allow COVID-19 to spread to their employees, they will be neither. That is especially true for contractors that are generally required to complete their work by a specific deadline and cannot afford delays due to staffing shortages. Thus, while the employer in *Kesner* had no "business interest, apart from potential liability" to prevent exposure to asbestos, the business interests of employers, particularly contractors, very much depend on preventing exposure to COVID-19. *Kesner,* 1 Cal.5th at 1157.

Moreover, the policy of preventing future harm is generally not served when "there is no reason to think [the defendant] will be able to exert any control" over the conduct of others that causes the harm. *See O'Neil v. Crane Co.*, 53 Cal.4th 335, 365 (2012). There are several reasons why employers cannot control the spread of COVID-19, even by complying with safety protocols.

First, COVID-19 can be, and an estimated 50% of the time is, "silently" transmitted by individuals that have no symptoms.[12] Employers cannot control what they cannot see.

Second, employers cannot force all third-parties who regularly interact with their employees to comply with COVID-19 protocols. As noted in section II.B, above, it is commonplace for employers to share their

[12] Centers for Disease Control and Prevention, *COVID-19 Pandemic Planning Scenarios,* Table 1, *supra* note 4.

places of business, or construction sites in the case of contractors, with many other employers and their other employees. One employer cannot control the conduct of any of these other third-parties that are in regular, close contact with their employees, and anyone of whom may cause COVID-19 to spread to an employee and their household members before symptoms, if any, are ever observed or developed at work.

Third, in every instance where an employee transmits the virus to a member of their household, the transmission necessarily occurs outside of work. Employers have very little ability, much less the authority, to intervene in the conduct of their employees and household members outside of work. At that point, the individuals that are best situated to prevent transmission is the employee and their household members.

At bottom, because COVID-19 is caused by a virus that is often not detectable and so easily transmitted from person-to-person, it is not an injury that employers can readily control. The fact that we are now well over two years into this pandemic with vaccines and booster shots at our disposal and Californians are still being infected at a rate of 3,336 every day illustrates just how uncontainable this virus truly is.[13] Asking employers to control the uncontrollable does not promote the policy of preventing future harm. It will promote having employers compensate for harm that, in many instances, they did not cause and could not prevent, which is contrary to both settled law and social policy. *O'Neil,* 53 Cal.4th at 365.

E. Extent Of The Burden To Defendants And Consequences To The Community

The sixth *Rowland* factor considers the "extent of the burden to the defendant and consequences to the community of imposing a duty to

[13] Ca. Dept. of Public Health, *supra* note 8.

exercise care with resulting liability for breach." *Rowland,* 69 Cal.2d at 113. When the burden is such that a duty "might deter socially beneficial behavior," it is generally unacceptable. *Southern California Gas Leak Cases*, 7 Cal.5th 391, 402 (2019). As this Court explained:

> A duty of care will not be held to exist even as to foreseeable injuries … where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability.

Merill v. Navegar, Inc., 26 Cal.4th 465, 502 (2001). As Plaintiffs note, this factor is "forward-looking" and the future is bleak if another pandemic strikes and the rule of law is that all employers, particularly essential service employers, owe a duty to prevent the spread of novel, hyper-contagious viruses to their employees' household members.

The burden of such a duty on employers is far greater than the Plaintiffs care to admit. As explained in section II.D, above, we would be asking employers to control viruses that are often undetectable, widespread, instantaneously transmitted through normal human interaction, and easily brought into the workplace by third-party individuals (*e.g.*, another employer's employees) through no fault of an employer.

Exacerbating the burden is the fact that viruses like SARS-CoV-2 are novel, which means the methods for preventing transmission are also novel. As we experienced with COVID-19, learning how to mitigate the spread of a new virus happens in real-time. Employers during a pandemic must not only do their jobs and provide essential services, but also learn and implement a myriad of new safety "recommendations" that are not always uniform and are continually evolving when new information is

learned about the virus. Mistakes are unavoidable and, therefore, Plaintiffs' proposed duty sets all employers up for failure and unavoidable liability.

Moreover, even when mistakes are not made or are not the cause of infection, the risk of liability remains significant. That is because (i) actually proving or disproving the causal link between an employer's conduct and a viral infection is all but impossible for the reasons explained in section II.B, above, and (ii) during a pandemic the local and international financial instability and turmoil inherent with such an unprecedented event gives greater incentive to pursue litigation. A study conducted by California's Legislative Analyst's Office noted that the loss of 1.6 million California jobs during the first seven months of this pandemic was "steeper and faster than the Great Depression."[14]

Thus, even the innocent employer will be inundated with claims if a duty is owed. When that happens, employers will have the option of paying to settle the claim or spending months if not years litigating only to have a jury decide an unanswerable question – who is responsible for the plaintiff's infection? In finding no duty on the part of auditors, the Court addressed this problem in *Bily*, and the Court's logic applies equally here:

> According to [plaintiff's] argument, if the auditor's error is too attenuated, the trier of fact will simply find "no negligence" or "no proximate cause." We are not so confident. In applying the *Biakanja* factors, we are necessarily required to make pragmatic assessments of the consequences of recognizing and enforcing particular duties. In our judgment, a foreseeability rule applied in this context inevitably produces the large numbers of expensive and complex lawsuits of

[14] Chas Alamo, Legislative Analyst's Office, *COVID-19 and the Labor Market: Which Workers Have Been Hardest Hit by the Pandemic?* (Dec. 8, 2020), https://lao.ca.gov/LAOEconTax/article/Detail/531 (last accessed Oct. 5, 2022).

> questionable merit as scores of investors and lenders seek to recoup business losses.

Bily, 3 Cal.4th at 406.

In addition to the weighty burden on employers, the societal impact could be severe. The Construction industry, which is responsible for employing more than 1.2 million Californians, [15] is still being plagued by COVID-19-related supply-chain disruptions, material unavailability, and labor shortages.[16] Adding extensive third-party liability to that list of burdens would only further depress an industry that is vital to California's economy.

Perhaps more significant though is the impact on the availability of essential services at a time when they are needed most – during a pandemic. If a duty is owed to prevent COVID-19, employers must assume the same duty will be owed when the next pandemic hits. Therefore, the essential service employers that kept our lights on, water running, and hospitals functioning during COVID-19 may rationally respond to the increased risk of liability by not performing essential services during future pandemics. The calculus being that liability will be mostly unavoidable irrespective of the care taken to prevent infection and, as result, shutting down like everyone else makes more sense than becoming a target of liability. In other words, the duty being proposed by Plaintiffs would not just "deter socially beneficial behavior," but socially essential behavior, which tilts the scales

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[15] U.S. Bureau of Economic Analysis, Table Annual Personal Income And Employment By State: Total Full-Time and Part-Time Employment by Industry, Construction, 2021 (SAEMP25), https://apps.bea.gov/itable/iTable.cfm?ReqID=70&step=1&acrdn=1 (accessed Oct. 10, 2021)

[16] AGC, 2022 Construction Inflation Alert (Feb. 2022), https://www.agc.org/sites/default/files/users/user21902/Construction%20Inflation%20Alert%20Cover%20-%20Feb%202022_000.pdf (accessed Oct. 5, 2022).

on this sixth *Rowland* factor against recognizing that duty. *California Gas Leak Cases,* 7 Cal.5th at 402.

While Plaintiffs again cite to *Kesner* to argue the sixth *Rowland* factor weighs in their favor, the Court could not have envisioned extending its rule of take-home exposure liability this far because the burden and societal consequences in *Kesner* and this case are drastically different. A duty to prevent exposure to asbestos implicates only a small pool of employers (*i.e.,* those that actually use asbestos), an even smaller pool of plaintiffs (*i.e.,* those that experience sufficient, long-term exposure to develop cancer), and there is no societal drawback for doing so because, at worst, the duty deters the use of a toxic, socially destructive substance.

Here, the duty proposed by Plaintiffs implicates every employer in California because viruses invade every place people congregate. Likewise, the pool of plaintiffs is exponentially larger because one infection at work can easily pass to every employee and their household members within a period of days. The numbers speak for themselves. Between 1999 and 2010 – a period of 11 years – there was an estimated 3,407 deaths attributable to asbestos in California,[17] whereas, in less than 3 years, COVID-19 has already caused 95,000 deaths in California, not to mention the additional 10.4 million cases of infection that, while not fatal, would still be actionable under Plaintiffs' proposed duty.[18]

Most people live with someone who works. Therefore, almost every case of infection will come with a risk of employer liability and, with that, another reason for employers to abstain from performing essential services

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[17] Ki Moon, Bang, PhD, MPH, *Diseases Attributable to Asbestos Exposure: Years of Potential Life Lost, United States, 1999-2010* (Sept. 20, 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4522907/ (accessed Oct. 4, 2022).

[18] Ca. Dept. of Public Health, *supra* note 8.

during a pandemic. While there is no drawback to reducing the number of employers that use asbestos, losing essential service providers during a pandemic would, in Governor Newsom's words, "have a debilitating effect on security, economic security, public health or safety, or any combination thereof."[19]

If there was ever a "floodgates" situation, this is it. The consequence of recognizing and enforcing Plaintiffs' proposed duty will be large numbers of expensive and complex lawsuits that require juries to guess at answers to a scientifically unsolvable question of causation. The financial toll on California employers will be considerable and society will feel even greater pain during the next pandemic when there is a shortage of employers willing to perform essential services when they are needed most.

CONCLUSION

For the foregoing reasons, CEA urges the Court to answer "no" to the second question certified by the Ninth Circuit. Employers do not, and should not, owe a duty to the households of their employees to prevent the spread of COVID 19.

DATED: October 12, 2022

O'CONNOR THOMPSON MCDONOUGH KLOTSCHE LLP

By: /s/ John W. Klotsche

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[19] Ca. Exec. Order No. N-33-20 (March 19, 2020), *supra* note 1.

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I, John W. Klotsche, counsel for *Amicus Curiae* Construction Employers' Association, hereby certify, in reliance on a word count by Microsoft Word, the program used in preparing the above *Amicus* brief, that the brief contains 9,087 words, not including the cover information, tables of contents and authorities, signature blocks and this certification.

DATED: October 12, 2022

O'CONNOR THOMPSON MCDONOUGH KLOTSCHE LLP

By: /s/ John W. Klotsche

JOHN W. KLOTSCHE
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PROOF OF SERVICE

Corby Kuciemba and Robert Kuciemba

Plaintiffs-Appellants,

v.

Victory Woodworks, Inc., a Nevada Corporation,

Defendant-Appellee.

Case No. S274191

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Shelby Goodrich

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Plaintiffs-Appellants,

v.

Victory Woodworks, Inc., a Nevada Corporation,

Defendant-Appellee.

Case No. S274191

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