Case No. S274191

IN THE SUPREME COURT OF CALIFORNIA

CORBY KUCIEMBA and ROBERT KUCIEMBA,

Plaintiffs/Petitioners,

v.

VICTORY WOODWORKS, Inc.,

Defendant/Respondent.

Certified from the United States Court of Appeals for the Ninth Circuit
Case No. 21-15963

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CALIFORNIA WORKERS' COMPENSATION INSTITUTE, THE CALIFORNIA CHAMBER OF COMMERCE, THE RESTAURANT LAW CENTER, AND THE NATIONAL RETAIL FEDERATION IN SUPPORT OF DEFENDANT AND RESPONDENT

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Application to File Amici Curiae Brief

Amici curiae the Chamber of Commerce of the United States of America (the "Chamber"), the National Federation of Independent Business ("NFIB"), the National Association of Manufacturers ("NAM"), the California Workers' Compensation Institute ("CCWI"), the California Chamber of Commerce ("CalChamber"), the Restaurant Law Center ("Law Center"), and the National Retail Federation ("NRF") hereby apply pursuant to California Rule of Court 8.520(f) and this Court's inherent powers for leave of Court to file the attached amici curiae brief in support of Respondent. "Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14.)

As explained below, amici have a significant interest in the outcome of this case and believe that the Court would benefit from additional briefing on the issues addressed in the attached brief.[1]

Interest of Amici Curiae

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies

[1] No party or counsel for a party in the pending case authored the proposed amici curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

and professional organizations of every size, in every industry sector, and from every region of the country, including California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

NFIB is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.8 million Americans, contributes roughly $2.77 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-

thirds of private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The CCWI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 78% of California's workers' compensation premium, and self-insured employers with $90B of annual payroll (31.7% of the state's total annual self-insured payroll). Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in numerous cases as amicus curiae before the California Supreme Court and Courts of Appeal.

The CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues.

The Law Center is the only independent public policy organization created specifically to represent the interests of the

food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's amicus briefs have been cited favorably by state and federal courts.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs—52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies. NRF regularly submits *amicus curiae* briefs in cases raising significant legal issues for the retail community, including the multiple and serious impacts of COVID-19.

Here, Petitioners asserted negligence claims against Respondent after Respondent's employee, Mr. Kuciemba, allegedly contracted COVID-19 at work and then transmitted the

disease to his wife, Ms. Kuciemba. Petitioners contend that these so-called "take home" COVID-19 claims are not barred by the Workers Compensation Act or public-policy interests limiting an employer's duty to non-employees. If this Court agrees with Petitioners, *millions* of potential plaintiffs could assert "take home" COVID-19 claims against California employers for injuries they allegedly sustained as a result of an employee's infection in the workplace. This potential avalanche of lawsuits would cripple California businesses and likely force many to close their doors or leave the state. *Amici* and their members thus have a significant interest in this case. As set forth in greater detail below, *amici* urge the Court to hold that lawsuits by employees' family members for "take home" COVID-19 injuries are barred by the derivative-injury rule and that employers do not owe a duty to protect non-employees from cases of "take home" COVID-19.

Accordingly, *amici* respectfully request that this Court accept and file the attached *amici* brief.

DATED: October 12, 2022

Respectfully submitted,

EIMER STAHL LLP

By: /s/ Robert E. Dunn
Robert E. Dunn

Attorney for *Amici Curiae the Chamber of Commerce of the United States of America, the National Federation of Independent Business, the National Association of Manufacturers, the California*

Workers' Compensation Institute, the California Chamber of Commerce, the Restaurant Law Center, and the National Retail Federation

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INTRODUCTION

For the past two-and-a-half years, California businesses have weathered government shutdown orders, constantly shifting safety regulations, supply-chain issues, and numerous other daunting challenges. Small businesses have borne the brunt of these pandemic-induced hurdles, and tens of thousands of such businesses have closed permanently since January 2020.[1] Those that survived now face the highest inflation in decades and a looming recession. The last thing California businesses can afford is massive new tort liability for harms arising out of a global pandemic. Yet that is exactly what Petitioners are asking this Court to create.

If Petitioners prevail, every employer in the state could be held liable for COVID-19-related injuries suffered by non-employees, so long as those employees can plausibly allege that they contracted the disease from an employee and that the employee was infected at work because of the employer's negligence. The state health agency reports that over 11 million Californians have tested positive for COVID-19, millions more have likely had positive antigen tests in their home that were never reported to the State, and still more asymptomatic Californians have been unknowingly positive. Many, if not most, of these infected individuals live, or are in regular close contact with, an employee of a California business. There are thus millions of potential

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[1] See Nellie Bowles, *Hurt by Lockdowns, California's Small Businesses Push to Recall Governor* (Feb. 19, 2021) N.Y. Times ["Nearly 40,000 small businesses had closed in the state by September [2021]—more than in any other state since the pandemic began, according to a report compiled by Yelp. Half had shut permanently, according to the report[.]"], https://tinyurl.com/3bn44rht.

plaintiffs who could assert "take home" COVID-19 claims if this Court rules for Petitioners.

To avert this potential wave of litigation and protect California's struggling businesses, this Court should affirm that two well-established legal doctrines bar employer liability to non-employees who contract COVID-19 from an employee. The first is the derivative-injury rule, a principle that establishes workers' compensation as the exclusive remedy for all claims that are derivative of an employee's covered workplace injury. The derivative-injury rule is vitally important to the policies underlying the workers' compensation bargain enacted by the Legislature. Petitioners' proposed rule, which would authorize every infected person to sue their family member's employer, would subject California businesses to overwhelming uncertainty, massive additional costs, and protracted legal battles.

Petitioners contend that the rule applies only if the plaintiff must legally prove the employee's injury as part of the plaintiff's prima facie case. But even if that is a correct reading of this Court's seminal decision in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, causation is an element of every negligence claim, and the employee's workplace infection is an essential causal link in every "take home" COVID-19 case. This Court should thus answer the first question presented in the affirmative and hold that the derivative-injury rule bars an employee's family member from asserting a negligence claim against the employer when the employee allegedly contracted COVID-19 at the workplace and transmitted the disease to the spouse at home.

The second barrier to Petitioners' theory of recovery is that employers do not owe a duty of care to protect third parties from "take home" COVID-19 infections. In *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, this Court established a two-part test for deciding whether a defendant "has a legal duty to take action to protect the plaintiff from injuries caused by a third party." (*Id.* at p. 209.) Here, even if Petitioners can satisfy the first step and demonstrate a "special relationship" between an employer and the family members of its employees—or can show some "other set of circumstances giving rise to an affirmative duty to protect" (*ibid.*)—the factors first announced in *Rowland v. Christian* (1968) 69 Cal.2d 108 preclude liability because the injury resulting from the employer's alleged negligence is not foreseeable and other public-policy considerations militate strongly against the imposition of a duty.

Petitioners contend that this Court greenlighted "take home" exposure cases in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, which involved asbestos fibers carried home on the employee's clothing. But the differences between "take home" asbestos exposure and COVID-19 outbreaks are both stark and dispositive. Unlike the manufacturer in *Kesner*, an employer cannot prevent its facilities from being contaminated with COVID-19 because the virus is ubiquitous, airborne, and extremely contagious. Employers cannot control their employees conduct outside of work or prevent them from becoming infected while off duty. And many infected employees are asymptomatic and unaware that they are contagious. Nor can employers dictate where their employees go or who they visit after work. An employee who contracts the disease in the workplace from a coworker could infect

dozens of people in his household, gym, church, or favorite restaurant before he even realizes he is contagious.

Imposing liability on employers for these third-party infections would thus be manifestly unjust and require employers to shoulder the costs of a worldwide pandemic they did not start and over which they have no control. To prevent California businesses and the judicial system from being overwhelmed by an onslaught of "take home" COVID-19 lawsuits, this Court should answer the second question presented in the negative and hold that employers do not owe a duty to protect their employees' family members from COVID-19.

ARGUMENT

I. The Court Should Hold That Petitioners' Claims Are Barred By The Derivative-Injury Rule.

As California businesses recover from the COVID-19 pandemic, employers and employees rely more than ever on the certainty of the legal rules governing the workers' compensation system. The Workers' Compensation Act ("WCA")—and the derivative-injury rule encompassed within it—subjects any injury that is derivative of a workplace injury suffered by an employee to the statutory exclusive remedy provision. Petitioners seek an exception to that rule where an employee infected with COVID-19 transmits the disease to a member of his or her household. That proposed exception, if adopted by this Court, would undermine the WCA's underlying policies, resulting in deeply destabilizing consequences for businesses across the state.

A. The derivative-injury rule is a critical feature of the workers' compensation bargain.

The WCA "offers protection with one hand even as it removes access to civil recourse with the other." (*Gund v. County of Trinity* (2020) 10 Cal.5th 503, 527.) The Legislature enacted the statutory scheme to balance two competing goals: (1) offering employees "relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury" regardless of fault, and (2) limiting the amount of liability faced by employers by requiring employees to "give[] up the wider range of damages potentially available in tort." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Insurance Fund* (2001) 24 Cal.4th 800, 811 (*Vacanti*); see *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 298 (*South Coast Framing*) [workers' compensation system provides certainty to employers, employees, and the public by "ensur[ing] that the cost of industrial injuries will be part of the cost of goods rather than a burden on society"] [citation omitted].) To that end, where a "remedy is available as an element of the compensation bargain[,] it is exclusive of any other remedy to which the worker might otherwise be entitled from the employer . . . ." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1052 (*King*); see Lab. Code, § 3600, subd. (a) ["Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment"]; *id.*, § 3602, subd. (a) ["[T]he right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer."].)

The compensation bargain—and the bar on civil actions based on injuries to employees—encompasses injuries "collateral to or derivative of a compensable workplace injury." (*Vacanti*, *supra*, 24 Cal.4th at p. 814.) An employer's compensation obligation is "in lieu of any other liability whatsoever to *any person*" (Lab. Code, § 3600, italics added), including the employee's dependents (*id.*, § 3602), for work-related injuries to the employee. Consistent with this broad statutory language, this Court has liberally construed the scope of the derivative-injury rule: It precludes "third-party cause[s] of action" against the employer that "would not have existed in the absence of injury to the employee." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 998 (*Snyder*).)

The derivative-injury rule is critical to advancing the policies underlying the WCA. Courts must rigorously apply that rule to ensure that "the work-connected injury engenders a single remedy against the employer"—no matter who that injury affects—that is "exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals . . . ." (*Williams v. State Comp. Insurance Fund* (1975) 50 Cal.App.3d 116, 122 (*Williams*).) The derivative-injury rule enforces the "compensation bargain" that is "[a]t the core of the WCA" by "limit[ing] an employee's remedies against an employer for work-related injuries to those remedies provided by the statute itself." (*King*, *supra*, 5 Cal.5th at pp. 1046, 1051.)

B. Claims that derive from a workplace injury are barred by the derivative-injury rule.

Petitioners' claims in this case are encompassed by the derivative-injury rule and therefore foreclosed by the exclusive remedy provision of the WCA. Petitioners alleged that Respondent's employee, Mr. Kuciemba, contracted COVID-19 at his jobsite in mid-July 2020 and was subsequently hospitalized. (ER-89 ¶24, 157 ¶17, 88 ¶19.) Petitioners further allege that his spouse, Ms. Kuciemba, contracted the disease from her husband and that she too was hospitalized. (ER-157 ¶¶17–18, 89 ¶24, 159 ¶24, 90 ¶30.)

Accepting these allegations as true, it is clear that had Mr. Kuciemba not contracted COVID-19 on the job, Ms. Kuciemba's injuries "simply would not have existed." (*Snyder*, *supra*, 16 Cal.4th at p. 998.) There is no allegation that Ms. Kuciemba was ever on Respondent's premises or was otherwise directly harmed by Respondent. Instead, her injury necessarily requires "alleg[ing] injury to another person—the employee." (*Ibid.*) [2] That brings Ms. Kuciemba's claims squarely within the derivative-injury rule and the WCA's exclusive-remedy provisions.

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[2] Petitioners also seek to advance an alternative theory that Ms. Kuciemba was infected by COVID-19 particles on Mr. Kuciemba's clothing. (Pet'r. Op. Br. at 32.) But the question this Court chose to answer does not reach that strained theory, which is contrary to scientific evidence regarding the mechanism for disease transmission. Instead, the Court accepted review to decide whether the derivative injury doctrine bars a spouse's claims "if an employee *contracts* COVID at his workplace and brings the virus home to his [non-employee] spouse." (Pet'r Op. Br. at 3 [emphasis added].) *Amici* thus focus on Petitioners' primary theory of injury, which is that Mr. Kuciemba was infected at work and transmitted the disease to his wife by exhaling viral particles in the home.

Because Mr. Kuciemba's infection was the alleged causal link between the alleged workplace injury and Ms. Kuciemba's injury, her injuries were derived from injuries suffered by the employee spouse; they were not independent of the employee's injury. Petitioners rely heavily on *Snyder*, but that case is distinguishable from the facts here: most significantly, the plaintiff in that case was injured directly *on the employer's premises* from carbon monoxide that passed unaltered through the mother. (*Id.* at p. 1000.) Here, Petitioners do not claim that Ms. Kuciemba was ever on Respondent's premises or was otherwise directly harmed by particles released at Respondent's workplace.

Petitioners are thus asking for the judicial creation of a vast new category of cases not subject to the derivative-injury rule. The Court should decline that invitation. In a global pandemic involving a highly transmissible virus, *every* employee could be a potential vector under Petitioners' construct. Petitioners' proposed new exception to workers' compensation exclusivity would expose all employers, large and small alike, to an assortment of tort and premises claims from third parties whose only connection to the place of employment is that they came into contact with an infected employee. And it need not stop there: Petitioners' proposed exception would encompass not only the infected employee's family and friends who contract COVID-19, but also the family and friends of each of those individuals who become infected with the virus, and anyone else who might claim some derivative injury. Such a never-ending chain of derivative injuries and unchecked liability is antithetical to the WCA. The Legislature enacted the WCA to provide predictability to employers and limited remedies to employees for workplace injuries.

In this uncertain and evolving environment created by the COVID-19 pandemic, employers and employees rely more than ever on the workers' compensation system and the derivative-injury rule in structuring their employment relationships. This is especially true for small employers, which consistently identify the workers' compensation system as among their top problems and sources of frustration.[3] Petitioners' proposed exception to the derivative-injury rule would only exacerbate these frustrations. It would mean that employers would continue to incur the costs of the workers' compensation system *and* they would have to litigate a vast new array of third-party tort claims derived from covered workplace injuries. This double-liability regime would deprive employers of the promised benefits of workers' compensation exclusivity and frustrate the Legislature's carefully crafted balance between employers' and employees' rights and competing interests. A proper interpretation of the WCA and faithful application of the derivative-injury rule, in contrast, would ensure expeditious and efficient resolution of all covered workplace injuries for employers and employees alike.

Courts in other jurisdictions have reached the same conclusion when addressing parallel WCA regimes. For example, the New York Supreme Court dismissed claims by an employee brought after she allegedly contracted COVID-19 in the course of employment and transmitted it to her family members on the ground that the claims were "barred by

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[3] See, e.g., Holly Wade and Andrew Heritage, NFIB Research Center, *Small Business Problems & Priorities*, pp. 10, 84 (2020), https://tinyurl.com/fnxv68k9 [identifying the workers' compensation system as the 10th most important issue facing small businesses in California].)

the exclusive remedy provision" of New York's workers' compensation scheme. (*Lathourakis v. Raymours Furniture Co.* (N.Y.Sup.Ct. Mar. 8, 2021) No. 59130/2020.) State courts in Illinois and Maryland have dismissed similar claims. (Order of Dismissal, *Iniguez v. Aurora Packing Company, Inc.* (Ill.Cir.Ct., Kane County, Mar. 31, 2021) No. 20L372; Order of Dismissal, *Kurtz v. Sibley Memorial Hospital* (Md.Cir.Ct., Montgomery County, Mar. 25, 2021) No. 483758V.)

C. The derivative-injury rule should apply whenever the employee's injury is an essential causal link in the plaintiff's claim.

Petitioners contend that a claim is "derivative" of an employer's injury—and thus barred—only if the "non-employee spouse must prove legal causation, i.e., the Plaintiff must prove, as part of their prima facie case, injury to the employee spouse." (Pet'r Reply Br. at 7.) According to Petitioners, the derivative-injury rule does not bar Ms. Kuciemba's claims here because she "does not need to *legally prove* that Mr. Kuciemba was injured as part of her prima-facie case." (*Id.* at 8.) But at least as to Petitioners' primary theory of injury—that Mr. Kuciemba was infected at work and transmitted the disease to his spouse—that is clearly incorrect. Causation is an essential element of every negligence claim, and if the factfinder concludes that Mr. Kuciemba was not infected with COVID-19 (or was infected somewhere other than his workplace), her claim fails as a matter of law. (See *Hassaine v. Club Demonstration Services, Inc.* (2022) 77 Cal.App.5th 843, 850 ["The essential elements for both negligence and premises liability are duty, breach, causation, and damages."].)

Petitioners urge this Court to follow the decision in *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles* (2021) 73 Cal.App.5th 66, which held that the derivative-injury rule does not apply when the "employee is merely the conduit of a toxin or pathogen," because in that circumstance "whether the employee herself was harmed by the toxin or pathogen is not relevant to the claims of the injured family member." (*Id.* at p. 85.) But while an employee may be merely a "conduit" in certain situations, such as where asbestos fibers are carried home on the employee's clothing, that is not how COVID-19 or other viral diseases work. Mr. Kuciemba would have been contagious—and thus able to transmit the virus—only if he was *infected*. In other words, Mr. Kuciemba could not have transmitted the disease to Ms. Kuciemba absent a physiological change to the cells in his own body.[4] Once a person has become infected, the virus replicates and viral particles are expelled as droplets and aerosols when the infected person breathes.[5] Accordingly, to prove that she contracted COVID-19 from her husband, Ms. Kuciemba must prove, as part of her prima facie case, that Mr. Kuciemba was himself infected with the disease.

It thus makes no sense to say that Mr. Kuciemba was simply a "vector" or "conduit"—as if the viral particles he inhaled at work

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[4] See Megan Scudellari, *How the coronavirus infects cells—and why Delta is so dangerous* (July 28, 2021) Nature, https://tinyurl.com/yzrwkxx5; *How does the novel coronavirus infect a cell?*, Scripps Research, https://tinyurl.com/v8sv7fnz.

[5] See Olha Puhach, et al., *Infectious viral load in unvaccinated and vaccinated individuals infected with ancestral Delta or Omicron SARS-CoV-2* (April 8, 2022) Nature Medicine, https://tinyurl.com/e2dfehkv.

somehow "passed through" him and into Ms. Kuciemba. (Pet'r Op. Br. at 22; see also *id.* at 24 [asserting that the "virus entered the employee's body . . . and then passed on to the non-employee family member"].) If Mr. Kuciemba did not contract the disease—*i.e.*, if his body was not physically altered at the cellular level—he could not have been the source of Ms. Kuciemba's infection. This case is thus clearly distinguishable from *Snyder*, where the carbon monoxide at the employer's workplace simply passed through the mother without alteration and injured her *in utero* child. (16 Cal.4th at 1005 [describing unborn child's injury as "logically and legally independent of [the] employee's injury"].) In short, Mr. Kuciemba's injury is a legally necessary element of Ms. Kuciemba's claim. To the extent that *Snyder* was ambiguous as to whether the derivative-injury rule applies whenever proof of the employee's injury is necessary to prove the element of causation, the Court should eliminate the confusion and hold that claims dependent on such proof are barred.

Petitioners suggest that a person infected with COVID-19 may not be "injured" if they are asymptomatic and suffer no "distress as a result of the infection." (Pet'r Op. Br. at 24–25.) But Petitioners disclaimed that dubious theory at oral argument in the district court, (ER-108-09, 132–33), and California law defines "injury" in terms of *disease*, not *symptoms*. (See Lab. Code § 3208 ["'Injury' includes any injury or disease arising out of the employment"]; *id.* § 3212.86(i)(1) ["'COVID-19' means the 2019 novel coronavirus disease."].) Moreover, medical experts have found evidence that COVID-19 can inflict damage on the body even if the patient does not experience fevers or other symptoms

typically associated with the disease.[6] In all events, it does not take an epidemiologist or physician to recognize that being infected with a potentially deadly disease is an "injury," even if one has no obvious symptoms. Petitioners' contention that a COVID-19 infection does not qualify as an "injury" is thus meritless.

* * *

This Court's precedent is clear that a negligence claim asserted against an employer by an employee's family member is barred by the WCA if the family member's claim is derivative of the employee's injury. To eliminate any lingering doubt, this Court should make clear that the derivative-injury rule applies whenever the employee's injury is an essential link in the causal chain leading to the plaintiff's injury. And because a workplace infection is an essential causal link anytime a non-employee claims to have contracted the disease from an employee, the derivative-injury rule bars all such third-party claims, including those asserted here.

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[6] See Amy McKeever, *Why some COVID-19 infections may be free of symptoms but not free of harm* (June 21, 2021) National Geographic, https://tinyurl.com/4c8rfbnc ["CT scans showed that 54 percent [of asymptomatic individuals infected on a cruise line] had lung abnormalities—patchy gray spots known as ground glass opacities that signal fluid build-up in the lungs"]; Brenda Goodman *Asymptomatic COVID: Silent, but Maybe Not Harmless* (Aug. 11, 2020) WebMD ["Researchers who have scanned the heart and lungs of people who tested positive for COVID-19, but never felt ill, have seen telltale signs of distress."], https://tinyurl.com/2p8zb94s.)

II. This Court Should Reject Petitioner's Invitation to Impose a Duty on Employers to Protect Non-Employees from "Take-Home" COVID-19 Infections.

Read literally, Civil Code § 1714(a) would extend liability to *every* injury resulting from a "negligent act," creating "potentially infinite liability." (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750 [citation omitted]; see Civ. Code 1714, subd. (a) ["Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property"].) To avoid imposing such an "intolerable burden on society," courts have required that the defendant owe the plaintiff a "duty" before being held liable. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552 (*Erlich*); see also *Bily v. Arthur Young & Co.*, (1992) 3 Cal.4th 370, 397 (*Bily*); *Dillon v. Legg* (1968) 68 Cal.2d 728, 734 (*Dillon*) [describing development of this "legal device" in the "latter half of the nineteenth century"].) The existence of a duty is thus the "threshold element" of a negligence claim. (*Bily*, *supra*, 3 Cal.4th at p. 397.) But duty does not have any technical definition in law—it is simply "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (*Dillon*, *supra*, 68 Cal.2d at p. 734.)

To determine whether the defendant owes a duty to "protect the plaintiff from injuries caused by a third party," the court first asks whether "there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 209 (*Brown*).) If so, the court "consults the factors described in *Rowland* to determine whether relevant policy considerations counsel limiting" that

duty. (*Id.* at 209 [citing *Rowland v. Christian* (1968) 69 Cal. 2d 108, 113 (*Rowland*)]; see also Rest.3d Torts: Phys. & Emot. Harm, § 7 [a court has discretion to modify or limit a duty when a "countervailing . . . policy warrants denying or limiting liability in a particular class of cases"]; *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 n.2.) These factors include the foreseeability of harm, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability cost, and prevalence of insurance for the risk involved. (*Rowland*, *supra*, 69 Cal.2d at p.113.)

Courts have been especially willing to limit the duty of care where they can "promulgate a relatively clear, categorical, bright-line rule[] of law applicable to a general class of cases." (Rest.3d Torts: Phys. & Emot. Harm, § 7, cmt. A.) Here, the Court can (and should) issue just such a bright-line rule: an employer does not owe a duty to protect non-employees from contracting infectious diseases from employees infected in the workplace. As at least one Court of Appeal has recently recognized, the relevant public-policy considerations support a rule barring liability in "take home" cases involving infectious diseases.[7]

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[7] Respondent has argued that Petitioners cannot satisfy the first step of the two-step inquiry established in *USA Taekwondo* because there is no "special relationship" between Respondent and Ms. Kuciemba. (Resp. Ans. Br. at 35–36.) If the Court agrees with that argument, it need not reach the *Rowland* factors. (See *USA Taekwondo*, *supra*, 11 Cal.5th at

(See *City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 142–44 [rejecting imposition of duty for case of "take home" typhus].) And as courts in other jurisdictions have held, such a rule is especially warranted in the context of COVID-19 given the prevalence of the disease in society, employers' inability to prevent transmission, the crushing liability a duty to third parties would likely entail, and the burden on the judicial system. (See *Estate of Madden v. Southwest Airlines, Co.* (D. Md. June 23, 2021, No. 1:21-CV-00672-SAG) 2021 WL 2580119; *Ruiz v. ConAgra Foods Packaged Foods LLC* (E.D. Wis. June 8, 2022, No. 21-CV-387-SCD) --- F. Supp. 3d ---, 2022 WL 2093052.)

A. The foreseeability factors in take-home cases weigh against the imposition of a duty on employers.

The first three *Rowland* factors are each tied to the issue of foreseeability and, therefore, can be considered together. (*Cabral*, *supra*, 51 Cal. 4th at 774.) An injury is less likely to be characterized as foreseeable where it is "connected only distantly and indirectly to the defendant's negligent act." (*Id.* at p. 779.) Yet this Court has held that the general duty of care "includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1148 [citation omitted].) The foreseeability question in a "take-home" exposure case is whether an employer's negligent conduct—*i.e.,* failing to take reasonable

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p. 212–13.) *Amici* will not repeat that argument here, but instead explain why the *Rowland* factors do not support imposition of a duty even if the Court reaches step two.

precautions to ensure a safe work environment—would expose employees' family members and others to an unreasonable risk of harm through the employee's reasonably foreseeable conduct.

In *Kesner*, this Court answered that question in the affirmative, holding that it was foreseeable that an employee whose regular working conditions involved repeated exposure to asbestos fibers would, in the absence of proper safety measures, carry those asbestos particles home on their person, presenting the employee's family members with an unacceptable risk of exposure to asbestos. (*Id.* at p. 1148.) Because the employer's negligence was the immediate cause of asbestos fibers being on the employee's clothing, the only intervening conduct the employer needed to foresee was that the employee would "return[] home at the end of the day" because other family members would then be exposed the hazardous asbestos fibers. (*Ibid.*)

The situation employers confront with respect to COVID-19—and other infectious diseases—is starkly different. First, it will be all-but impossible to establish that an employer's negligence is the but-for cause of any employee's infection. This is because, unlike asbestos fibers, COVID-19 is *everywhere*, making it impossible for an infected employee to determine whether she contracted the disease while riding the bus, shopping for groceries, getting a haircut, having dinner at a friend's house, or working at her place of business. (See *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821, 838 ["the comparison [of an asbestos infiltration] to a ubiquitous virus transmissible among people and untethered to any property is not apt."]; *In re Univ. of San Diego Tuition and Fees COVID-19 Refund Litigation* (S.D. Cal., Mar. 30, 2022, No. 20CV1946-LAB-WVG) 2022

WL 959266, at *1 [characterizing the nature of COVID-19 as "ubiquitous and deleterious"].)

Thus, unlike the situation in *Kesner*, where the presence of asbestos fibers on the employee's clothes could plausibly have resulted only from the employee's duties at work, an employee's COVID-19 infection could have been acquired anywhere. (See *Madden*, *supra*, 2021 WL 2580119, at *5 ["Although a close COVID-positive contact is certainly a possible cause of a given infection, that is little guarantee that the particular infection originated from that contact as opposed to some other source, given how hard it is to completely isolate oneself from other, ubiquitous infection vectors."].) Indeed, because of the obvious difficulties involved in determining the source of any given COVID-19 infection, the Legislature temporarily authorized infected employees to file a workers' compensation claim without proving that they were infected *at work*. (See Lab. Code § 3212.86 [presuming that an "injury" for purposes of workers' compensation statute includes "illness or death resulting from COVID-19 if" the employee tested positive for COVID-19 "within 14 days after a day that the employee" worked for the employer].)[8] The lack of any clear, testable connection between the

[8] Although the "presumption" created by this statute is "rebuttable," the same features of COVID-19 that make it difficult for an employee to prove she was infected at work make it all-but impossible for an employer to prove that the employee was *not* infected at work. (See Lab. Code § 3212.86(f).) This provision applies only to work performed between March 19, 2020 and July 5, 2020, and it will automatically be repealed on January 1, 2023. (*Id.* §§ 3212.86(b)(2), (j).) For infections on or after July 6, 2020, the presumption applies whenever there is an "outbreak" at the employee's place of employment. (*Id.* § 3212.88(m) [outbreak exists for employer with 100 employees or fewer if four employees test positive for COVID-19 within 14 days; outbreak exists

employer's negligence and the employee's infection thus distinguishes COVID-19 take-home cases from the asbestos-related situation in *Kesner*.

Moreover, while the only relevant intervening act in *Kesner* was that the contaminated employee would return home—which this Court deemed to be reasonably foreseeable—there are many intervening acts employees can take that will affect both their risk of infection and the risk that they will transmit it to others. For example, some employees will choose to be vaccinated, while others will remain unvaccinated; some employees will wear their masks properly while at work, while others will drop them below their nose or mouth; some employees will keep themselves physically healthy, while others will not; some employees will congregate with their co-workers on lunch breaks, while others will isolate; some employees will quarantine from their families if they become sick, while others will continue to interact; and some employees will seek medical attention immediately, while others will tough it out at home. These many variations make it impossible to foresee whether any negligence on the part of the employer will result in the disease being contracted by an employee and transmitted to a third party.

Thus, while it may be foreseeable that an infected employee will return home, the foreseeability factors are much more ambiguous in take-home COVID-19 cases than this Court found them to be in *Kesner*.

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for employer with more than 100 employees if 4 percent of employees test positive for COVID-19 within 14 days].)

B. Public-policy considerations militate decisively against imposing a duty of care on employers to prevent take-home cases of COVID-19.

Even if the Court concludes that "take-home" COVID-19 infections are the foreseeable result of an employer's negligence, "foreseeability alone is not sufficient to create an independent tort duty." (*Kesner*, *supra*, 1 Cal.5th at p. 1149–50 [citation omitted].) Courts also weigh the "policy considerations for and against the imposition of liability" (*ibid.*) "for the sound reason that the consequences of a negligent act must be limited in order to avoid an intolerable burden on society," (*Elden v. Sheldon*, (1988) 46 Cal.3d 267, 274 (*Elden*); see also *Erlich*, 21 Cal.4th at p. 552.) And as this Court explained in *Kesner*, "the duty analysis is forward-looking," meaning that "the most relevant burden is the cost to the defendants of upholding, not violating the duty of ordinary care." (1 Cal.5th at p. 1152.)

In *Kesner*, this Court concluded that it would not be "unreasonably expensive" for an employer to prevent its employees from bringing home asbestos fibers. (*Ibid.*) Nor did the Court believe that such precautions would "impede[] defendants' ability to carry out an activity with significant social utility" because, "[i]n general, preventing injuries to workers' household members due to asbestos exposure does not impose a greater burden than preventing exposure and injury to the workers themselves." (*Id.* at pp. 1152–53.) Indeed, there was a "strong public policy limiting or forbidding the use of asbestos." (*Id.* at 1151.)

Here, by contrast, preventing employees from contracting the virus at work would be prohibitively expensive, and imposing liability for the

downstream consequences of those infections would likely force many California employers to cease operations altogether. Although it is certainly in the public interest to ensure safe working conditions, there is a countervailing interest in preventing California employers from being buried by litigation they cannot avoid regardless of how safely they operate their businesses. California courts have often carved out exemptions to the duty of care based on such public policy considerations. It should do so here as well.

1. Employers have no control over whether the virus is present at their workplaces.

In *Kesner*, this Court recognized that it would not be unjust to impose a duty of care on manufacturers who used asbestos because they "benefitted financially from their use of asbestos and had greater information and control over the hazard than employees' households." (*Id.* at p. 1151; *see also Ruiz*, *supra*, 2022 WL 2093052, at *5 [explaining that in asbestos cases the employer "in effect, create[s] the danger" because "presumably a profitable component of the employer's business" requires exposure to asbestos].) COVID-19 is completely different. Businesses do not use the virus in their products—much less financially benefit from any such use—and employers have no control over whether COVID-19 is present in the workplace because employees *bring the virus to work*. As noted above, this highly infectious airborne virus is everywhere, and a workplace free of contamination one day may have contagious levels of viral particles the next if an infected employee is present. And though employers can regulate their employees' conduct while on-site, they cannot prevent their employees

from engaging in conduct outside the workplace that may lead to infection.

Furthermore, whereas effective safety protocols existed to prevent the spread of asbestos fibers, there are no such effective countermeasures to completely prevent the spread of COVID-19 in the workplace. (See *Ruiz*, *supra*, 2022 WL 2093052, at *5 [noting that employers have had decades to conform their health and safety practices to address the risks posed by asbestos].) Indeed, employers are often unaware that an employee is infected and transmitting the virus because, according to some studies, up to 59% of all COVID-19 transmission comes from *asymptomatic* carriers.[9] The prevalence of asymptomatic transmission means that even a blanket rule prohibiting sick employees from coming to work would not ensure a COVID-19-free workplace.[10] A single asymptomatic individual can trigger a significant outbreak.[11] Although rapid testing is readily available today, it was not

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[9] See Michael A. Johannsson et al., *SARS-CoV-2 Transmission from People Without COVID-19 Symptoms* (Jan. 7, 2021) JAMA Network at 4 https://tinyurl.com/3sux9w3e.

[10] Nor is it practical to require asymptomatic individuals exposed to the virus to quarantine. As California health have authorities have recognized, such a policy is unsustainable. (See Rong-Gong Lin II and Luke Money, *California Says Asymptomatic People Exposed to Coronavirus Don't Need to Quarantine* (Apr. 13, 2022), L.A. Times, https://tinyurl.com/yktz35sj.)

[11] For example, in 2020, 44 members of a San Jose hospital emergency department were infected with COVID-19 on Christmas Day—despite the widespread use of masks and other protective gear—when an asymptomatic employee entered the ER in an inflatable costume. (Mandela Linder and Marianne Favro, *44 San Jose Kaiser Staff Members Test Positive in COVID-19 Outbreak, 1 Dies* (Jan. 4, 2021) NBC Bay Area, https://tinyurl.com/daksec6u.)

in July 2020 when Plaintiff was injured, and the "relevant question . . . is whether imposing tort liability in [July-2020] would have prevented future harm from that point." (*Kesner*, 1 Cal.5th at 1150.) Even today, testing every employee daily to prevent infected individuals from entering the workplace would be prohibitively expensive for many small employers.[12]

Once an infected employee enters the workplace, it is impossible for an employer to completely prevent transmission to other employees. As experts now agree, the primary pathway for infection is exposure to aerosolized viral particles.[13] According to the Centers for Disease Control and Prevention ("CDC"), if a person infected with COVID-19 is indoors for as little as 15 minutes it can lead to a concentration of the virus in the air that is sufficient to transmit infectious particles to someone standing over 6 feet away—and those particles can linger for hours after the infected person leaves the room.[14] Under these conditions, "the longer a space is occupied and the more people that are

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[12] The FDA approved AbbottBinaxNow COVID-19 Antigen Self Test typically retails for $20–$25 and comes with two tests. Ellen Lee, *At-Home COVID-19 Antigen Test Kits: Where to Buy and What You Should Know* (Aug. 30, 2022), N.Y. Times Wirecutter, https://tinyurl.com/55zs36a3. At this price point, the cost of daily preventative tests for an employer with 100 employees would quickly exceed $1,000 per day, even assuming enough tests were available.

[13] See *COVID-19 Scientific Brief: SARS-CoV-2 Transmission* (May 7, 2021) Centers for Disease Control and Prevention, https://tinyurl.com/4wucr7sc.

[14] See *COVID-19 Scientific Brief: SARS-CoV-2 Transmission* (May 7, 2021) Centers for Disease Control and Prevention, https://tinyurl.com/53mmdhy3; *Coronavirus: Indoor Air and Coronavirus (COVID-19)* (Dec. 15, 2021) U.S. EPA, https://tinyurl.com/yckuasew.

present, the greater the potential for airborne transmission of the virus."[15]

To be sure, employers can take certain actions to mitigate transmission—such as investing in upgrades to their building's heating, ventilation, and air conditioning ("HVAC") systems—but many small businesses cannot afford such investments. Moreover, as the CDC has acknowledged, even the most efficient air filtration systems cannot completely eradicate COVID-19 particles from circulation.[16] Confronted with such an infectious airborne virus, nearly every jurisdiction in the country decided in early 2020 that the only way to prevent transmission of COVID-19 in the workplace was to shut down businesses. (See *Inns-by-the-Sea v. Cal. Mutual Insurance Co.* (2021) 71 Cal.App.5th 688, 703–04 [discussing government shutdown orders issued "in direct response to the continued and increasing presence of the coronavirus" in the community].)[17] But total shutdowns impose enormous costs on society and thus were mostly abandoned even while the pandemic continued.[18]

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[15] *Coronavirus: Science and Technical Resources Related to Indoor Air and Coronavirus (COVID-19)* (July 7, 2022) U.S. EPA, https://tinyurl.com/yp48kdf4.

[16] *COVID-19: Ventilation in Buildings* (June 2, 2021) Centers for Disease Control and Prevention, https://tinyurl.com/45smzhbk.

[17] Even the vaccines, which did not exist in July 2020, cannot prevent transmission. (See *COVID-19 After Vaccination: Possible Breakthrough Infection* (June 23, 2022) Centers for Disease Control and Prevention, https://tinyurl.com/5n6vr5pe.

[18] See Tim Arango and Thomas Fuller, *The Price of a Virus Lockdown: Economic 'Free Fall' in California* (May 28, 3030), N.Y. Times https://tinyurl.com/4nxtyp7r ("Across California there is a growing

Another factor distinguishing this case from *Kesner* is that the potential liability to third parties from take-home COVID-19 massively exceeds any potential liability from take-home asbestos. Only a "narrow class of people who are in frequent contact with [affected] employees and their clothing" are likely to be injured by asbestos fibers on an employee's clothes. (*Ruiz*, *supra*, 2022 WL 2093052, at *6.) By contrast, "the pool of potential plaintiffs [in COVID-19 cases] isn't a pool at all—it is an ocean," because "an employee could single-handedly cause dozens or hundreds of infections through relatively minimal contact." (*Ibid.*; see also *Madden*, *supra*, 2021 WL 2580119, at *6 [declining to impose a duty on employers to protect third parties from take-home COVID-19 exposure because of the "broader societal consequences," including the prospect of "opening the floodgates" to expansive new classes of third-party plaintiffs].) There is thus no "reasonable or principled stopping point" for cabining liability should the Court authorize take-home COVID-19 cases to proceed. (*Ruiz*, *supra*, 2022 WL 2093052, at *7; *see also Madden*, *supra*, 2021 WL 2580119, at *7 [rejecting the imposition of a duty of care in take-home COVID-19 cases because there would be "few clear limiting principles" to cabin liability].)

Petitioners attempt to distinguish *Ruiz* and *Madden* on the ground that neither case involved a "strict, binding, and extremely detailed Health Order" like the one San Francisco issued to employers at the outset of the pandemic. (Pet'r Reply Br. at 29.) But when deciding whether to impose a duty, the Court "looks to the entire category of

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sense that the pandemic will reshape the state's economy, with long-lasting pain.").

negligent conduct, not to particular parties in a narrowly defined set of circumstances." (*Cabral*, *supra*, 51 Cal.4th at p. 774 [citation omitted].) Petitioners do not suggest that negligence should be limited *exclusively* to situations where an employer violates a health order, and there is no reason to think juries will take such a view if take-home cases proceed to trial.

Petitioners also contend that *Ruiz* and *Madden* are inapposite because Petitioners propose to limit potential liability to members of an employee's household. (Pet'r Reply Br. at 31.) But even that proposed limitation is cold comfort to employers given that many employees live in dorms, group homes, multi-generation living situations, and crowded apartments. And if it is foreseeable that an employee infected with COVID-19 will transmit the disease to members of his or her household, it is likely foreseeable that they will spread the disease to other people with whom they come into regular contact as well. Imposing a duty to protect third parties from infection and disease would thus "leave employers litigating countless COVID-19 third-party exposures simply by virtue of contact with their employees during the pandemic." (*Madden*, *supra*, 2021 WL 2580119, at *6.)

2. The public's interest in promoting business activity weighs against holding employers liable for third-party COVID-19 infections they have little power to prevent.

This Court has often limited the duty of care in the face of countervailing public-policy interests. It should take the same approach here.

For example, in *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, the Court determined that landlords do not have a duty to deny housing to

suspected gang members—even though imposing such a duty would arguably lead to safer living situations—because of the countervailing interest in prohibiting housing discrimination based on "race, ethnicity, family composition, dress and appearance or reputation." (*Id.* at p. 1216.) And in *Elden* the Court declined to extend the duty of care owed by automobile drivers to unmarried cohabitants of those injured in car crashes, citing the state's policy interests in promoting the marriage relationship and avoiding over-burdening the courts with complex inquiries into litigants' personal affairs. (46 Cal.3d at p. 274–76.) And in *Knight v. Jewett* (1992) 3 Cal.4th 296, this Court declined to hold that athletes have a legal duty to protect other competitors from injury based on the state's public-policy interest in preserving "vigorous" engagement in sporting events and the Court's conclusion that imposing liability would chill active participation in sports leagues. (*Id.* at p. 318–19.)

Here, there is a substantial public-policy interest that cuts against the imposition of a duty to prevent take-home COVID-19 infections. Employers must be able to operate their businesses without facing devastating personal-injury suits whenever they allow more than one person to enter the workplace at a time. Businesses are already fleeing California due to its hostile business climate,[19] and if employers can be dragged into litigation every time their employees' family members—or

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[19] See Adam A. Millsap, *Businesses are fleeing California along with its residents, and President Biden should pay attention* (Aug. 27, 2021) Forbes, https://tinyurl.com/2z4jauhk; Lee Ohanian, Joseph Vranich, *Why Company Headquarters are Leaving California in Unprecedented Numbers* (Sep. 14, 2022) Hoover Institution, https://tinyurl.com/2p8ste3x.

any of their employees' other close contacts—are sickened with COVID-19, many more will likely leave the state. Small businesses will be especially vulnerable if this Court grants open season on employers.

Petitioners' amicus notes that, unlike in other states, the California Legislature declined to enact a "COVID-shield" statute that would have immunized employers from liability in "take home" COVID-19 cases. (Amicus Br. of Consumer Attorneys of California at 10.) But this Court has long held that "unpassed bills, as evidence of legislative intent, have little value." (*Dyna-Med, Inc. v. Fair Employment & Housing Comm'n* (1987) 43 Cal.3d 1379, 1396; see also *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 572 fn.5 [same].) The Court should thus decline to read any significance into the Legislature's inaction.

In sum, given the strong public policy in protecting small businesses from insolvency and keeping them in the state, the Court should hold that employers do not have a legal duty to protect third parties from contracting COVID-19 from employees who allegedly contracted the disease in the workplace.

C. Imposing an absolute duty of care on California employers would significantly burden the judicial system.

Not only will California employers shoulder an outsize burden if the Court declines to limit the duty of employers in take-home COVID-19 cases, but the court system will also be swamped by a wave of litigation. In California alone, there have been over 11 million reported

cases of COVID-19, resulting in 96,176 deaths.[20] If every person in California injured by COVID-19 can sue their roommate's or spouse's employer, the court system will be utterly overwhelmed. (See *Madden*, *supra*, 2021 WL 2580118, at *6 [explaining that due to the ubiquity of COVID-19 and the difficulty in tracing a point of exposure, "finding a duty . . . would leave employers litigating countless COVID-19 third-party exposures simply by virtue of contact with their employees during the pandemic"].) Even if claims against a single employer could be litigated on a class-wide basis (which is doubtful given the individualized issues involved in proving causation), there are hundreds of thousands of businesses in California that could be dragged into court.

The burden on the judicial system will be exacerbated by the thorny issues of proof involved in take-home COVID-19 cases. In addition to demonstrating injury from COVID-19, a third-party plaintiff asserting a take-home claim would have to prove that he contracted the disease from an employee, that the employee contracted the disease at work, and that the employer's negligence caused the employee's infection. But given the prevalence of COVID-19, the myriad ways in which a person can be infected, the latency period in which the virus incubates, the fact that asymptomatic people can spread the virus without knowing they are infected, and that even the best precautions will not eliminate COVID-19 from the workplace, it will be extremely difficult to provide any conclusive proof on these questions. These cases are thus unlikely to be resolved in the early stages of litigation and will instead likely

[20] *Tracking Coronavirus in California: Latest Map and Case Count*, (updated Sept. 19, 2022) N.Y. Times, https://tinyurl.com/46pan3sb.

devolve into battles of experts speculating about the probability that an infection was contracted from one source versus another. (See *Ruiz*, *supra*, 2022 WL 2093052, at *7 [noting the "practical difficulty in demonstrating causation" in take-home COVID-19 cases].) This will increase litigation costs to the parties, drag the courts into fights over expert qualifications and methodology, and force juries to reach verdicts based on little more than expert speculation.[21]

CONCLUSION

For these reasons, this Court should hold that employers cannot be held liable for injuries to non-employees resulting from COVID-19, even assuming the plaintiff contracted the disease from an employee who was exposed at work. Whether the Court holds that the derivative-injury rule bars liability or that employers simply do not owe a duty of care to protect third parties from take-home COVID-19, the result is the same and this Court should advise the Ninth Circuit that proper application of California law requires affirming the dismissal of Petitioners' complaint.

Dated: October 12, 2022

Respectfully submitted,

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[21] As noted above, the California Legislature tacitly recognized the challenge inherent in establishing a causal link between an exposure to COVID-19 and the employer's conduct when it temporarily created a "disputable" presumption that certain employees who test positive for COVID-19 contracted the virus at work. (Lab. Code § 3212.86, subd. (e).)

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Dated: October 12, 2022

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STATE OF CALIFORNIA
Supreme Court of California

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