No. S274191

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CORBY KUCIEMBA and ROBERT KUCIEMBA,

Plaintiffs-Appellants,

vs.

VICTORY WOODWORKS, INC., a Nevada Corporation,

Defendant-Respondent,

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 FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF SEE'S CANDIES, INC. AND SEE'S CANDY SHOPS, INC. IN SUPPORT OF DEFENDANT-RESPONDENT

MUNGER, TOLLES & OLSON LLP
Malcolm A. Heinicke (SB No. 194174)
Malcolm.Heinicke@mto.com
560 Mission Street, 27th Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

MUNGER, TOLLES & OLSON LLP
Joseph Lee (SB No. 110840)
Joseph.Lee@mto.com
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MUNGER, TOLLES & OLSON LLP
Donald B. Verrilli (SB No. 420434)
Donald.Verrilli@mto.com
601 Massachusetts Ave., NW, Ste. 500 E
Washington, D.C. 20001-5369
Telephone: (202) 220-1100
Facsimile: (202) 220-2300

MUNGER, TOLLES & OLSON LLP
Benjamin J. Horwich (SB No. 249090)
Ben.Horwich@mto.com
560 Mission Street, 27th Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Attorneys for Amicus Curiae
SEE'S CANDIES, INC. and SEE'S CANDY SHOPS, INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT

Under California Rules of Court, rule 8.520(f), See's Candies, Inc. and See's Candy Shops, Inc. (collectively, "See's Candies") respectfully request permission to file the attached *amici curiae* brief in support of defendant-respondent Victory Woodworks, Inc.[1]

[1] No party or counsel for a party in the pending case authored the attached 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 submissions of the attached brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

See's Candies has a clear and significant interest in this case and the important issues it presents. This is a "take home" COVID-19 case, in which plaintiff Corby Kuciemba sues her husband's employer on the theory that her husband was exposed to COVID-19 at work, and in turn infected his wife in the family home. See's Candies has been sued in two cases in Los Angeles Superior Court that arise from this same fact pattern and so present the same threshold legal issues.[2] One of those cases resulted in a published Court of Appeal decision that addressed the Workers Compensation Act ("WCA") exclusivity issue that the Ninth Circuit has certified to this Court. (*See's Candies, Inc. v. Superior Court* (2021) 73 Cal.App.5th 66) (*See's Candies*). In that decision, the Court of Appeal expressly noted that it was not addressing the other issue – duty of care – certified by the Ninth Circuit, adding that this issue "would appear worthy of exploration." (*Id.* at p. 94). See's Candies has since filed a demurrer on that very issue in the second of the two lawsuits filed against it.[3]

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[2] *Matilde Ek, Individually and as successor in Interest to Arturo Ek et al. v. See's Candies, Inc.; See's Candy Shops, Incorporated; and Does 1-20*, Los Angeles Superior Court Case No. 20STCV49673 (filed Dec. 30, 2020).

Maria Saucillo, Individually and as Successor in Interest of Decedent, Gilbert Saucillo, Jr. et al. v. See's Candy Shops, Incorporated; and Does 1-50, Los Angeles Superior Court Case No. 21STCV35250 (filed Sept. 23, 2021).

[3] The demurrer has been stayed, pending this Court's decision in the present case.

As set forth below, Amici contend that (a) employers do not owe a duty to non-employees to prevent take-home viral illnesses, precluding the claims here as a matter of law; and even if there were such a duty, (b) the Court of Appeal in *See's Candies* misinterpreted this Court's precedent in holding – contrary to the ruling of the U.S. District Court in the present case – that such "take home" virus cases escape the exclusive remedy provisions of the WCA and the associated derivative injury rule.

Accordingly, *amici* respectfully requests that this Court accept and file the attached *amicus* brief, which seeks to provide the Court useful information, argument, and authority to inform its analysis of the issues certified by the Ninth Circuit.

DATED: October 12, 2022

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ *Malcolm A. Heinicke*
Malcolm A. Heinicke

Attorney for Amicus Curiae SEE'S CANDIES, INC. and SEE'S CANDY SHOPS, INC.

AMICUS CURIAE BRIEF

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In the wake of the COVID-19 pandemic, plaintiffs in California and other states have sought to impose unprecedented "take home" virus liability on employers. In these cases, an employee's spouse or other family member sues their spouse's employer, alleging that the employee was exposed to COVID-19 at work and then infected family members outside the workplace, typically in the employee's home. The allegedly infected employees do not sue for their own alleged illness, as such claims would clearly be barred by Workers Compensation Act (WCA) exclusivity. Instead, in an effort circumvent this exclusivity doctrine, family members bring the actions even though they cannot allege that they contracted COVID-19 on the employer's premises or that they (non-employees) had any legal relationship with the employer. While the effects of COVID-19 and other viral infections are significant, and these lawsuits involve unquestionably tragic facts, California law does not impose liability on employers in such situations, and the creation of an unprecedented exception to the contrary would create sweeping exposure to employers for third-party infections suffered by those who happen to have contact with their employees.

These "take home" virus lawsuits include two filed in Los Angeles Superior Court against See's Candies – one of which resulted in a published

Court of Appeal decision addressing (and wrongly deciding) one of the two questions, relating to WCA preemption, that has now been certified to this Court by the Ninth Circuit in the present case. (*See's Candies, Inc. v. Superior Court* (2021) 73 Cal.App.5th 66) (*See's Candies*). As for the other issue certified by the Ninth Circuit here – duty of care – the Court of Appeal in *See's Candies* observed: "We express no opinion on the question of duty apart from that it would appear worthy of exploration." (*Id.* at p. 94.) Amici have since filed a demurrer on the duty of care issue in the second lawsuit filed against them, and the court has stayed resolution of that demurrer pending this Court's decision in the present case.

If allowed to proceed, such "take home" virus cases would impose potentially enormous costs on employers throughout the state – many of which are still attempting to recover from losses sustained during the pandemic – and also threaten to further burden our judicial system. Such litigation – recently noted to be "on the rise"[4] – would necessarily be complex and challenging, consuming significant party and judicial resources. As the Plaintiffs in this case acknowledge, such take home COVID-19 cases "may well require expert testimony about complex

[4] *Employers Beware: Take-Home COVID Cases are on the Rise* (US), National Law Review (Vol. XII, Number 282, May 25 2022) <https://www.natlawreview.com/article/employers-beware-take-home-covid-cases-are-rise-us> [as of Oct. 11, 2022].

scientific issues." (Plaintiffs' Reply Br. at p. 4.) This is so because, as scientific research has shown, the COVID-19 virus is both rapidly evolving and highly contagious, with variations in lethality and transmissibility among different variants. Indeed, See's Candies believes that for these reasons, plaintiffs in "take home" virus cases will ultimately be unable to prove by a preponderance of evidence either (1) where the employee in fact contracted the virus (i.e., whether at work or elsewhere), and (2) whether the employee's family members in fact contracted the virus from the employee or from another of the potentially numerous persons they encountered in their own workplaces, on public transit, or in any number of other locations. And of course, even if such facts could be shown, plaintiffs also would have to prove some culpable conduct on the part of the employer in failing to contain the spread of an illness that has defied organized and concerted containment efforts by leading scientific and medical experts throughout the world.

This presents a specter of litigation in which employers are forced to incur very significant legal fees – possibly through trial – as well as disruption to their business, defending litigation that ultimately is likely to fail on the merits due to the inherent uncertainties in method and mode of transmission of an unpredictable, untraceable, and highly contagious diseases like COVID-19 and other communicable viruses. Such litigation would consume significant and valuable judicial resources, while not

redounding to the benefit of plaintiffs who ultimately cannot prove their case. But in the end, it is not the policy downsides associated with such cases that precludes them: it is the statutory law and the precedent of this Court, which were crafted with these and other policy considerations in mind.

The legal questions certified by the Ninth Circuit implicate judicial policies that are designed to avoid such an untoward result.

Duty of Care: As this Court has noted, "[d]uty is not universal," and instead "exists only if 'the plaintiff's interests are entitled to legal protection against the defendant's conduct.'" (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213, rehg. den. May 12, 2021, quotation marks omitted (*Brown*) [quoting *Dillon v. Legg* (1968) 68 Cal.2d 728, 734].) In *Brown*, this Court – "[d]istilling the principles articulated in prior cases" – clarified "that whether to recognize a duty to protect is governed by a two-step inquiry." (*Ibid.* at p. 209.) "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." (*Ibid.*) Second, if the first step is satisfied– and only if it is – "the court must consult the factors described in *Rowland* to determine whether relevant policy considerations counsel limiting that duty." (*Ibid.* [referring to *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*)].)

"Take home" COVID-19 cases demonstrate precisely why the duty of care is not unlimited: they do not present either "a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect." (*Brown, supra,*11 Cal.5th at 209.) An employee's family members are not in any relationship with the employer, much less a "special relationship." Nor do such cases – which arise from events occurring away from the worksite and outside the employer's control – present "some other set of circumstances giving rise to an affirmative duty to protect." (*Ibid*.) And so both California courts and courts from sister states have rejected efforts to created unprecedented liability for offsite contact with an employer's employee.

This Court in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 (*Kesner*), found there was a limited duty in the unique situation in which an employee, working for a manufacturer making commercial use of asbestos, carries home asbestos fibers on the employee's person or clothing, and then a non-employee family member is injured as a result of ingesting those fibers. (*Id.* at p. 1141.) In so holding, *Kesner* emphasized that the risks of asbestos had long been known and that remedial measures were readily available to prevent employees from taking the fibers home on their person or clothing. (*Id*. at pp. 1146-1147.) Such facts, critical to the decision in *Kesner*, are absent in cases alleging "take home" COVID-19 infections. And so the Second District Court of Appeal has recently and correctly held

that California law, and *Kesner* in particular, do not impose a duty of care on an employer to prevent the spread of communicable illnesses to family members of an employee. (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129 (*City of Los Angeles*).) *City of Los Angeles* found support for this holding in a key aspect of this Court's ruling in *Kesner*, emphasizing that a duty arose there because plaintiffs had contact not with the employee but instead with dangerous materials that the employer used on its property: "[i]t is not Lynne's [wife's] contact with Mike [asbestos worker] that allegedly caused her mesothelioma, but rather Lynne's contact with *asbestos fibers that BNSF used on its property*." (*Id.* at p. 142 [quoting *Kesner*, *supra*, 1 Cal.5th at p. 1159 (emphasis in original)].)

Courts in sister states have reached the same conclusion in "take home" COVID-19 cases – at least one of which specifically distinguishes asbestosis cases. (*Iniguez v. Aurora Packing Co.* (Ill. Cir. Ct., Kane County, Mar. 31, 2021, No. 20 L 372) 2021 WL 7185157 at p. *3 (*Iniguez*) [noting that the asbestos cases "differ from the [COVID-19] matter at bar in one critical respect . . . [i]t is the injury through contact with a byproduct of the Defendant's very business" at issue, whereas in the case of a "take home" COVID-19 claim, "it is the special relationship between . . . employer/employee which is of critical concern."]; see also *Estate of William Madden v. Southwest Airlines Co*. (D. Md. June 24, 2021, No.1:21-CV-00672-SAG) 2021 WL 2580119 at p. *4, fn. 1 (*Estate of*

William Madden) [applying Maryland law to reject a take-home COVID-19 case because "[t]he employment relationship here between [Defendant] and [employee] is not a 'special relationship' that would give rise to a duty to [the employee's spouse]"].)

This Court has made clear that if this first step in the duty analysis is not met, then the *Rowland* factors (*Rowland*, *supra*, 69 Cal.2d 108) do not come into play. As this Court has explained: "the *Rowland* factors do not serve as an alternative basis for imposing duties to protect." (*Brown*, *supra*, 11 Cal.5th at p. 221.) In other words, *Rowland* does not provide a second or independent basis for imposing a duty of care; instead, only if the plaintiff can satisfy the first step and establish a special relationship does the court then "consult the factors described in *Rowland* to determine whether relevant policy considerations counsel limiting that duty." (*Id*. at p. 209.) Because cases alleging "take home" COVID-19 infections do not meet the first step of the *Brown* analysis, the *Rowland* factors need not be consulted. But even if the first step were satisfied, then the *Rowland* factors would powerfully militate against imposing near-limitless liability on employers for take-home infections allegedly suffered by an employee's family members – infections that occur off the employer's premises and completely outside the employer's control.

Worker's Compensation Preemption: If this Court were to impose a duty of care on employers to prevent "take home" virus illnesses,

any such duty must necessarily relate to conditions occurring at the workplace, because employers have no control over what happens in their employees' homes. And likewise an employee's family members, in order to bring a credible "take home" virus claim, must allege that the employee (due to the employer's negligence) contracted the virus at work, and in turn, infected family members at home. Such claims therefore necessarily require pleading and proof of an antecedent workplace injury to an employee, bringing the claims squarely within the exclusive remedy provisions of the Worker's Compensation Act (WCA) and the associated derivative injury rule. As this Court has emphasized, "the derivative injury rule governs cases in which 'the third party cause of action [is] derivative of the employee injury in the purest sense: It simply would not have existed in the absence of injury to the employee.' [Citation.]" (*Snyder v. Michael's Stores, Inc*. (1997) 16 Cal.4th 991, 998 (*Snyder*).) That is precisely the situation presented by "take home" COVID-19 cases alleging that an employee contracted the virus at work and in turn infected family members at home. In *Snyder*, this Court found the derivative injury rule did not bar claims for the fetus Mikayla's injuries only "[b]ecause Mikayla's injuries were not derivative of [her mother] Naomi's, but the result of *her own* exposure to toxic levels of carbon monoxide." (*Id.* at p. 995, italics added.) This demonstrates that if Mikayla's injuries *had* been caused by an antecedent workplace injury to her mother – as is true in "take home" virus

cases – then the derivative injury rule *would* have applied to bar such claims as a matter of law.

II. ARGUMENT

A. Employers Do Not Owe A Duty Of Care To Prevent "Take Home" Viral Infections By Non-Employees.

California law imposes a threshold duty requirement to prevent litigation of claims where the connection between injury and the defendant's conduct is so tenuous that, absent a limitation on duty, courts would be required to handle unwieldy cases and defendants would be forced to endure the costs and disruption of litigation – and face undue settlement pressure as a result. For this reason, California law "does not . . . impose a presumptive duty of care to guard against any conceivable harm that a negligent act might cause." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 399.) "Courts [] have invoked the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act. . . .'" (*Elsheref v. Applied Materials, Inc*. (2014) 223 Cal.App.4th 451, 459 (*Elsheref*) [quoting *Bily v. Arthur Young & Co*. (1992) 3 Cal.4th 370, 397].)

As a starting point, it is well-settled that "the existence of a legal duty is generally a question of law for the court to determine," and "[i]f the plaintiff does not and cannot show a duty owed directly to him, the action is subject to dismissal." (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 605,

612 [affirming the sustaining of a demurrer without leave to amend because the plaintiffs could not establish a duty of care]; see also *Cabral v. Ralphs Grocery Co*. (2011) 51 Cal.4th 764, 770 (*Cabral*) ["Duty is a question of law for the court, to be reviewed de novo on appeal"].)

As this Court has noted: "Duty is not universal; not every defendant owes every plaintiff a duty of care." (*Brown*, supra, 11 Cal.5th at p. 213.) Instead, "[a] duty exists only if 'the plaintiff's interests are entitled to legal protection against the defendant's conduct.'" (*Ibid.* [quoting *Dillon v. Legg* (1968) 68 Cal.2d 728, 734].)

In *Brown*, this Court – "[d]istilling the principles articulated in prior cases" – clarified "that whether 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, supra,* 11 Cal.5th at p. 209.) In so holding, this Court made clear that the *Rowland* factors come into play only if the plaintiff satisfies the first step. As *Brown* stated: "the *Rowland* factors do not serve as an alternative basis for imposing duties to protect. The purpose of the *Rowland* factors is to determine whether the relevant circumstances warrant limiting

a duty already established, not to recognize legal duties in new contexts." (*Id.* at p. 221.)

1. Employers Are Not In A "Special Relationship" With Non-Employee Family Members

Plaintiffs in "take home" COVID-19 cases cannot satisfy the first step of the *Brown* analysis, and so cannot establish a duty of care. An employer is not in *any* legal relation with an employee's family members (away from the employer's premises), much less the "special relationship" that can trigger a duty of care. An employee's family members have no "'right to expect' protection" from an employer for whom they did not work, and whose premises they did not occupy. (*Brown*, supra, 11 Cal.5th at p. 216 [quoting *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619 (*Regents*)].) And while the employer has a special relationship with the employee, the employer has no "ability to control [the employee's] conduct" outside the workplace, where the "take home" infection necessarily occurs. (*Ibid.* [quoting *Regents*, *supra*, 4 Cal.5th at p. 619].) Thus, no "special relationship" can be shown vis-à-vis the employer and family members of an employee who seek to sue the employer for a "take home" viral illness.

And so multiple courts, applying the laws of sister states, have declined to impose a duty of care on employers in such situations.[5] For instance, in *Iniguez*, *supra*, 2021 WL 7185157 at p. *2, the Illinois Circuit Court declined to impose a duty of care on an employer for the COVID-19 death of the employee's spouse, holding that "Decedent stands in no special relationship to Defendant. Decedent was not an invitee of Defendant and was not caused injury as a consumer." (*Id*. at pp. *2, *4; see also *id.* at p. *3 [noting that courts have "routinely declined to extend the duty owed between . . . employer to employee to plaintiffs having no relationship to the defendant"].) Likewise, in *Estate of William Madden*, the District Court, applying Maryland law, held in another take-home COVID-19 case that "[t]he employment relationship here between [Defendant] and [employee] is not a 'special relationship' that would give rise to a duty to [the employee's spouse], because [the employee] was operating outside the scope of her employment when she returned home post-training and had

[5] In the absence of California precedent on point, California courts "consider decisions from other states for their persuasive value." (*Bianchi v. Westfield Ins. Co.* (1987) 191 Cal.App.3d 287, 291.) Thus when few California cases have addressed the specific issue at hand, California courts consult decisions from other states addressing the same issue. (*Shell Oil Co. v. City and County of San Francisco* (1983) 139 Cal.App.3d 917, 920 [when California cases addressing a specific issue "are few in number," it is appropriate to "consult the relevant decisions of other states"].)

close contact with [Plaintiff]." (*Estate of William Madden*, *supra*, 2021 WL 2580119 at p. *4, fn. 1.)

2. No Other Set of Circumstances Gives Rise to An Affirmative Duty Here

Nor do take-home COVID-19 cases present "other circumstances that give rise to a comparable affirmative duty to protect." (*Brown*, *supra*, 11 Cal.5th at p. 221.) Plaintiffs here seek to manufacture such a duty based on *Kesner*, which involved a commercial user of asbestos that failed to utilize available and well-known measures to prevent employees from carrying asbestos fibers home on their person or clothing, thereby indirectly injuring family members. This effort to expand the limited holding in *Kesner* to create liability for take-home virus cases fails.

In *Kesner*, this Court addressed the specific instance in which an employee working at a facility using asbestos did not himself become ill from asbestos fibers, but instead, brought those fibers home on his clothing and non-employee family members allegedly developed mesothelioma from repeated contact with those fibers over time. (*Kesner*, *supra*, 1 Cal.5th at p. 1141.) Addressing this specific situation, the Court held that employers that make commercial use of asbestos have a duty to protect employees' household members from secondary asbestos exposure, where "contact with asbestos fibers that BNSF used on its property" were carried home on the employee's person or clothing. (*Id.* at pp. 1145-1146, 1159

[emphasis in original].) In creating this focused duty, the Court relied on factors that are wholly absent in the case of COVID-19, including (a) the manufacturer's deliberate decision to make commercial use of asbestos despite its known hazards, and (b) the fact that government and industry groups had both (i) warned manufacturers of the risks created by "take-home exposure" to asbestos and (ii) recommended specific preventative measures to mitigate this risk. (See *id.* at p. 1146 [noting that 44 years earlier, "the federal Occupational Safety and Health Administration (OSHA) published its first permanent regulations for employers using asbestos"].)

Confirming the limited nature of the special duty created by *Kesner*, the Second District Court of Appeal has recently and correctly held that California law, and *Kesner* in particular, do not impose a duty of care on an employer to prevent the spread of communicable illnesses from employees to non-employee family members. In *City of Los Angeles*, the Second District declined to extend the duty for take-home asbestos exposure established in *Kesner* to a situation in which a plaintiff contracts a disease in the workplace and then communicates that disease to a family member at home. (*City of Los* Angeles, *supra*, 62 Cal.App.5th at pp. 143-144.) In that case, the plaintiff (Wong) was the spouse of a city employee (Chen). The plaintiff spouse alleged that she caught typhus from the employee after he contracted typhus in the workplace as the result of unsanitary worksite

conditions that the employer had failed to abate, despite direction to do so from Cal-OSHA. (*Id.* at p. 134.) Plaintiff Wong argued that under both Government Code section 835 and more generally under *Kesner*, "the City owed her a duty of care for 'take-home' exposure to typhus." (*Id*. at pp. 141-142.)

The Court of Appeal rejected both contentions. First, the court held that the city employer had no duty of care under section 835, and that it was entitled to statutory immunity for that claim. (*City of Los* Angeles, *supra*, 62 Cal.App.5th at pp. 141, 149.) Second, and relevant here, the court rejected the plaintiff's claim that the employer owed her a common law "duty of care for 'take home' exposure to typhus" under *Kesner*. (*Id.* at pp. 141-144.) The court reached this conclusion not only because the employer was a public entity but also and independently because Wong had not alleged she was exposed to conditions of the property brought home by Chen, but rather contracted the illness *from him*:

> In addition, the Supreme Court in *Kesner* pointed out that the plaintiffs' liability allegations were not premised on the wife's contact with the husband, but instead on the wife's contact with the hazardous condition from the defendant's premises that had been carried home on the husband's clothing. Here, by contrast, Wong has not alleged that Chen brought home infected fleas or rodents, thus exposing Wong to the conditions of the property. Instead, Wong alleges that she contracted typhus from Chen, months after Chen first became ill. Thus, the basis for premises liability the Supreme Court relied upon in *Kesner*—that a private premises owner may be held liable for hazardous substances that have escaped the property and caused harm offsite—is not applicable here.

(*Id.* at pp. 143-144.) As the Court of Appeal recognized, *Kesner* emphasized this same distinction when it held that "[i]t is not Lynne's [wife's] contact with *Mike* [asbestos worker] that allegedly caused her mesothelioma, but rather Lynne's contact with *asbestos fibers that BNSF used on its property*." (*Id.* at p. 142 [quoting *Kesner*, *supra*, 1 Cal.5th at p. 1159 (noting that the inherently dangerous condition at issue was "created and maintained" on the defendant's property)].)

This precedent dictates the same result here, precisely because it is consistent with and in fact derived from this Court's ruling in *Kesner*. Employers do not, of course, make commercial use of the COVID-19 virus, nor gain any financial benefit from employee illnesses. Quite the opposite is true – employers want nothing less than for their workforce to become ill. Nor can plaintiffs in "take home" COVID-19 cases credibly allege that they contracted COVID-19 as a result of hazardous fibers brought home from the workplace, much less that there are known and effective measures to prevent such transmission (as there are in the cases of asbestos fibers). Instead, "take home" COVID-19 claims are necessarily premised on the allegation that an employee contracted the virus in the workplace and then, once so injured, transmitted the virus to family members in the home – where the employer has no dominion or control.

For the above reasons, "take home" COVID-19 claims are precisely the type of allegation that *Kesner* distinguished and that *City of Los Angeles*

rejected as a matter of law. And here also, sister states are in accord. For example, the court in *Iniguez* reached the same conclusion under Illinois law. Specifically addressing "take home asbestos" cases, the court noted that such cases "differ from the [COVID-19] matter at bar in one critical respect. . . . [I]t is the injury through contact with a byproduct of the Defendant's very business" at issue, whereas in the case of a "take home" COVID-19 claim, "it is the special relationship between . . . employer/employee which is of critical concern." (*Iniguez*, *supra*, 2021 WL 7185157 at p. *3.)

If employers were saddled with a duty to prevent "take home" COVID-19 illnesses, any of the 96 million persons infected with COVID-19 in the U.S.[6] could potentially sue a family member's employer, alleging that an employee brought the virus home. And such a result could easily extend to other illnesses – such as the flu (which kills some 52,000 Americans per year[7]), typhus (as in *City of Los Angeles*), and viral hepatitis

[6] See Centers for Disease Control and Prevention, COVID Data Tracker (Oct. 7, 2022) <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [as of Oct. 11, 2022].

[7] See Centers for Disease Control and Prevention, *Disease Burden of Flu* <https://www.cdc.gov/flu/about/burden/index.html> [as of Oct. 11, 2022] ("CDC estimates that flu has resulted in 9 million – 41 million illnesses, 140,000 – 710,000 hospitalizations and 12,000 – 52,000 deaths annually between 2010 and 2020.").

(which killed nearly 4,000 Americans in 2020[8]). The potential liability would also extend to the next viral pandemic the planet suffers. And in each scenario, just as with COVID-19, imposing a duty on employers to prevent "take home" illnesses by non-employees would improperly depart not only from this Court's precedent, but from reasoned decisions by sister states.

3. Even if the First Step of the *Brown* Analysis were Met, the *Rowland* Factors Would Foreclose an Employer's Duty to Prevent Take Home Infections

Because plaintiffs in "take home" COVID-19 cases cannot show either a special relationship or other circumstances giving rise to an affirmative duty to protect, there is no need to proceed to the second step of the *Brown* analysis (the *Rowland* factors). As *Brown* held, "the *Rowland* factors do not serve as an alternative basis for imposing duties to protect," and so the purpose of the *Rowland* factors is "to determine whether the relevant circumstances warrant *limiting* a duty *already established*, not to recognize legal duties in new contexts." (*Brown*, *supra*, 11 Cal.5th at p. 221) (emphasis added).)

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[8] Centers for Disease Control and Prevention, National Center for Health Statistics. National Vital Statistics System, Mortality 1999-2020 on CDC WONDER Online Database (2021) <https://wonder.cdc.gov/controller/saved/D76/D266F497> [as of Oct. 11, 2022] (Data are from the Multiple Cause of Death Files, 1999-2020, as compiled from data provided by the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program).

Even if this Court were to consider the second step, the *Rowland* factors would also preclude imposing a duty upon employers to prevent "take home" COVID-19 infections.[9] We address each factor below.

Foreseeability: Plaintiffs argue that such "take home" infections are foreseeable, but the analysis is significantly more nuanced. Particularly in the first months of the pandemic – a timeframe relevant to many of the cases filed to date[10] – little was known as to the means of transmission and contagiousness of COVID-19. And significantly, it is well-settled that "duty analysis looks to the time when the duty was assertedly owed." (*Kesner*, *supra*, 1 Cal.5th at p. 1150). Furthermore, at no time during the pandemic have employers had information as to what steps employees were taking in the home to guard against transmission to family members – nor any ability to regulate or control such conditions.

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[9] In *Brown*, the Court reiterated the pertinent factors as follows:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

(*Brown*, *supra*, 11 Cal.5th at p. 217 [quoting *Rowland*, *supra*, 69 Cal.2d at p. 113].)

[10] For example, both of the pending cases against See's Candies allege infections in March 2020 – the very outset of the pandemic.

In any event, "[f]oreseeability alone is not sufficient to create an independent tort duty." (*Vasilenko v. Grace Fam. Church* (2017) 3 Cal.5th 1077, 1086 (citations omitted) (*Vasilenko*).) Instead, "policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk . . . 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 [fn. and citations omitted].) And each of the other *Rowland* factors counsels against imposing a duty on employers to prevent "take home" infections. As for "the degree of certainty that the plaintiff suffered injury," once again there will inevitably be uncertainty both as to whether the employee in fact contracted COVID-19 in the workplace, and also as to whether it was the employee from whom family members contracted the virus. This is indeed the nature of a highly communicable disease: its spread depends on our inability to identify and isolate potential vectors of transmission. Similarly, "the closeness of the connection between the defendant's conduct and the injury suffered" weighs against a finding of duty here: an employer's conduct at the workplace is far removed from the employee's home (where the secondary infection allegedly occurred). Indeed, the employer is powerless to control conditions in the employee's home, a factor that powerfully militates against imposing a duty of care for the simple reason that one should not be held accountable for events over which one lacks

control. (See, e.g., *Colonial Van & Storage, Inc. v. Superior Court* (2022) 76 Cal.App.5th 487, 497 ["absent any control of the property, a defendant cannot be held liable for a dangerous condition on that property."]; *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1241 ["[t]he law does not impose responsibility where there is no duty because of the absence of a right to control" [citation omitted].)

Moral blame: Nor is there any "moral blame attached to the defendant's conduct" in cases of "take home" viral illness. What steps businesses, schools, and other institutions should take during a global pandemic to prevent secondary infections involves a host of policy considerations and requires a difficult balance between competing social, medical, and economic concerns. This is a far cry from situations in which courts have assigned moral blame – something done, for instance, when defendants "benefitted financially" from the use of a dangerous product, and failed to take sufficient steps to mitigate its risks. (*Kesner*, *supra*, 1 Cal.5th at p. 1151 ["commercial users of asbestos benefitted financially from their use of asbestos"].) Such a consideration has no application to "take home" COVID-19 cases, where the employer is not making commercial use of the virus and indeed wants nothing *less* than for COVID-19 to be present in the workplace. Moral blame has also been found where a defendant has greater knowledge or specialized expertise as to the risks in question, and knows that the plaintiffs are relying on such

expertise – but this factor also is absent in the typical "take home" COVID-19 case. (See, e.g., *Beacon Residential Cmty. Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 586 ["[b]ecause of defendants' . . . awareness that future homeowners would rely on their specialized expertise . . . significant moral blame attaches to defendants' conduct"].) And likewise, if "there are few 'reasonable ameliorative steps' available" to prevent the harm, defendants will not be "'particularly blameworthy' for failing to take them." (*Issakhani v. Shadow Glen Homeowners Assn., Inc*. (2021) 63 Cal.App.5th 917, 929, mod. May 27, 2021, rev. den Aug. 18, 2021 [quoting *Vasilenko*, *supra*, 3 Cal.5th at p. 1091].) This rule applies with particular force here: if the pandemic has demonstrated anything, it is that this virus is highly effective at circumventing measures taken to contain it.

The policy of preventing future harm: This policy "is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible," because the costs will motivate changes in the defendants' behavior. (*Cabral*, *supra*, 51 Cal.4th at p. 781.) But imposing liability on employers for take-home infections would not serve to prevent future harm, because COVID-19 has proven so effective at evading precautions and can spread in a workplace notwithstanding concerted efforts at containment. Likewise, it is entirely unclear whether workplace measures are an effective way of controlling viral illnesses, considering that employees spend most of

their time away from the workplace, and so come into contact with any number of other potential sources of illness. If imposing a duty to make available changes to behavior "would not be especially effective in preventing future harm," as here, this factor weighs against a finding of duty. (*Issakhani*, *supra*, 63 Cal.App.5th at p. 928; see also *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1217-1218, rehg. den. & opn. mod. Oct. 17, 2007 [no duty to adopt proposed measures that are only "dubiously effective" in preventing harm].)

Burden to defendant and community consequences: Likewise, "the burden to the defendant and consequences to the community" weigh against imposing a duty of care here. "[I]mposing a duty [on employers] toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope." (*Elsheref*, *supra*, 223 Cal.App.4th at p. 460 [bracketed language added by *Elsheref* panel; quoting *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 822].) Likewise, this Court has noted that "the undesirable consequences of allowing potential liability" may outweigh any benefit from imposing costs of negligent conduct upon those responsible. (*Cabral*, *supra*, 51 Cal.4th at p. 782.) That is clearly the case here because imposing a duty on employers to prevent take home viral illnesses, with resulting liability for breach, would expand liability to a virtually limitless pool of potential claimants. To pick just one of myriad examples, if there were another measles

outbreak at a Disney theme park,[11] non-employees who never visited the theme park could sue Disney, claiming they contracted the disease from a Disney employee – even though the disease could in fact have been transmitted by a non-employee, and would have necessarily been transmitted away from the theme park that the employer controls. The same would be true on an even more widespread basis with a flu outbreak: non-employees could allege they got the flu from a relative and sue the deepest-pocketed employer in their households. Where the range of potential defendants and plaintiffs is so vast and the harm especially difficult to avoid, the consequences to the community outweigh the benefit of imposing a duty on those defendants to avoid it. (See *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 474-475 [finding that imposing a duty on operators of large machinery to refrain from scaring horses when they see or should have seen them would have "obvious and detrimental consequences stifling to the community"].)

The Maryland court explained this reality in apt terms. (*Estate of William Madden*, *supra*, 2021 WL 2580119 at p. *6 ["finding a duty here would leave employers litigating countless COVID-19 third-party exposures simply by virtue of contact with their employees during the

[11] See Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report* (Feb. 20, 2015 / 64(06); 153-154) <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm> [as of Oct. 11, 2022].

pandemic. All that would functionally be required . . . would be potential exposure at work and subsequent contact with a foreseeable third party . . . a relatively common set of circumstances."].)

Insurance: The final *Rowland* factor – "the availability, cost, and prevalence of insurance" – likewise counsels against a finding of duty here. Insurance costs are implicated in the duty analysis to assess whether the "cost of insurance [w]ould significantly rise if there were a dramatic increase in the number of suits brought by" plaintiffs against defendants for this category of conduct. (*Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1152, rehg. den. & opn. mod. Oct. 23, 1991, review den. Jan. 16, 1992.) If the cost of insurance would likely "rise appreciably" were the court to recognize a duty to prevent a certain type of harm, that factor would weigh against finding a duty. (*Id*. at p. 1153.) Such a result is virtually certain here – even assuming that insurance against "take home" infection claims is available at all. While the District of Maryland concluded some 15 months ago that it is too early to make an assessment as to the cost and availability of insurance against the risk of take-home COVID-19 claims (*Estate of William Madden*, *supra*, 2021 WL 2580119, at p. *7), if one properly considers the potential scope of such claims – including that they would not be limited to COVID-19, but could include other viruses such as the flu or measles – then the vast and virtually limitless variety of "take home" infection claims makes clear that the cost

of insuring against such claims would be prohibitive, if the insurance is available at all. It would be unwieldy and unjust to make employers across the state the effective insurers for viral illnesses contracted by persons with whom their employees come in contact.

B. "Take Home" COVID-19 Claims Based on an Antecedent Workplace Illness Suffered by An Employee Are Preempted by the Workers' Compensation Scheme.

A finding that employers do not owe a duty to prevent "take home" viral illness claims would effectively moot the second question certified by the Ninth Circuit, relating to WCA preemption. If, however, this Court were to impose a duty of care on employers to prevent "take home" virus illnesses, then such a rule would dictate a finding that family member claims fall within the scope of WCA exclusivity and the derivative injury rule. Employers have no ability to control conditions in the homes of their employees, and so any duty of care visited upon employers must relate – and relate only – to conditions in the workplace. Likewise, in order to bring a credible "take home" virus claim, an employee's family members must allege that the employee (due to the employer's negligence) contracted the virus at work, and in turn, infected the family members at home. The fact that such claims relate exclusively to alleged negligence in the workplace, and turn necessarily on an antecedent workplace injury, bring "take home" virus cases squarely within the scope of WCA exclusivity and the associated derivative injury rule. Thus, should the

Court address the second certified issue, it should hold – contrary to the Court of Appeal's erroneous decision in *See's Candies* – that non-employee plaintiffs cannot circumvent WCA preemption and bring "take home" COVID-19 or other infection claims for workplace negligence against employers for whom they never worked.

The Workers Compensation Act ("WCA") comprises "a comprehensive statutory scheme governing compensation given to California employees for injuries incurred in the course and scope of their employment." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1046 (*King*) [quoting *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810 (*Vacanti*)].) Under the Act, an injured employee's "sole and exclusive remedy" against her employer or her employer's workers' compensation insurance carrier or claims administrator, is the right to recover workers' compensation benefits. (Lab. Code, § 3602, subd. (a); *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1, 5-6 & fn. 2.) The Act instructs that its provisions are to be "liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code, § 3202.) "This rule of liberal construction applies even though a particular plaintiff might prefer to forgo a workers' compensation remedy in favor of a remedy at law." (*King*, *supra*, 5 Cal.5th at p. 1051.)

As this Court has observed, the WCA embodies a "compensation bargain": it benefits employees by creating strict liability for workplace injury, while giving employers the benefit of an absolute defense to civil litigation based on the workplace injury. (*Vacanti*, *supra*, 24 Cal.4th at p. 811.)

> The underlying premise behind this statutorily created system of workers' compensation is the 'compensation bargain.' [Citation.] Pursuant to this presumed bargain, 'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' [Citation.]

(*Ibid.* [quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16].)

"To effectuate this theoretical bargain, the Legislature enacted several provisions limiting the remedies available for injuries covered by the WCA (the exclusive remedy provisions)." (*Vacanti*, *supra*, 24 Cal.4th at p. 811.) These provisions include Labor Code section 3600, which sets the liability standard for, and exclusive nature of, WCA claims. That section provides: "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 . . . ." (Lab. Code, § 3600, subd. (a), italics added; see also *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 286 (*Horwich*).)

As the italicized language makes clear, the WCA's exclusive remedy provisions apply not only to the workplace injury itself, but also to collateral or derivative injuries suffered by third parties. "It is by now well established that the WCA's exclusivity provisions preempt not only those causes of action premised on a compensable workplace injury, but also those causes of action premised on injuries 'collateral to or derivative of' such an injury." (*King*, *supra*, 5 Cal.5th at p. 1051 [quoting *Vacanti*, *supra*, 24 Cal.4th at p. 811, in turn quoting *Snyder*, *supra*, 16 Cal.4th at p. 997].)

Such collateral or derivative injuries include a spouse's claims for loss of consortium and infliction of emotional distress, arising from a worker's on-the-job injury – even though such claims allege an independent injury *to the spouse* that is not suffered in the workplace. (See, e.g., *Santiago v. Employee Benefits Services* (1985) 168 Cal.App.3d 898, 906-907 ["In exchange for [the WCA's] comprehensive system of assured compensation, the employee foregoes most separate tort actions he or she may have against his or her employer, including a spouse's action for loss of consortium."]; *Gillespie v. Northridge Hosp. Foundation* (1971) 20 Cal.App.3d 867. 870-871 ["It would be anomalous to hold that the employer is under no liability in tort to a married employee but is liable in tort to her [non-employee] husband for the consequences *to him* of the

tortious injury to his wife." (Italics added, quoting *Danek v. Hommer* (N.J. 1952) 87 A.2d 5, 7)]; see also *Cole v. Fair Oaks Fire Protection Dist*. (1987) 43 Cal.3d 148, 162-163 [holding that the derivative injury rule bars claims by a non-employee spouse for her own loss of consortium and intentional infliction of emotional distress, based on alleged harassment of employee husband which led to his suffering a disabling stroke].)

The Court of Appeal's opinion in *See's Candies* sought to distinguish these authorities on the ground that the plaintiffs in that case sued for the injury of a non-employee (Mr. Ek), distinct from the antecedent workplace injury to his wife. (*See's Candies*, *supra*, 73 Cal.App.5th at p. 87 [declining to "extend[] the derivative injury doctrine to a nonemployee's injury"].) The panel erred in so holding. First, its ruling conflicts with the Third District Court of Appeal's decision in *Williams v. Schwartz* (1976) 61 Cal.App.3d 628 (*Williams*). There, the plaintiff "construe[d] the preemptive provisions of the Labor Code as affecting only those 'derivative' actions by an employee's dependents *based on injuries incurred solely by the employee himself*." (*Id.* at p. 632, italics added.) The Court of Appeal rejected this argument, holding it "rests on a fallacious premise." (*Ibid*.) The Third District explained that the derivative injury rule has been held to bar a non-employee spouse's claims for loss of consortium, even though "loss of consortium is a form of mental suffering

and involves a deprivation of interests *which are personal to the spouse who brings suit*." (*Ibid*. italics added.)

Second, the *See's Candies* panel justified its ruling by noting that in *Snyder*, "the Supreme Court called into question the holding of *Salin v. Pacific Gas & Electric Co.* (1982) 136 Cal.App.3d 185" "a case extending the derivative injury doctrine to a nonemployee's injury." (*See's Candies*, *supra*, 73 Cal.App.5th at pp. 81, 87.) Likely because the import of *Salin* was not briefed, however, the Court of Appeal overlooked the fact that this Court – just two years after *Snyder* – cited *Salin* with approval with respect to the very statutory language at issue here: "[T]he exclusivity of workers' compensation prevails as to heirs in light of Labor Code section 3600, which provides that liability under the Workers' Compensation Act [citation] is 'in lieu of any other liability whatsoever to any person . . . .'" (*Horwich*, *supra*, 21 Cal.4th at p. 286, citing *Salin*, *supra*, 136 Cal.App.3d at p. 190.)

And third, *Snyder* itself makes clear the flaw in the Court of Appeal's reasoning in *See's Candies*. In *Snyder*, suit was brought for an injury to the fetus, separate from her mother's injury – but *Snyder* nowhere suggests that this fact took the case outside the scope of the derivative injury rule. To the contrary, this Court found that the derivative injury rule did not apply in that case only because the fetus' injury did not depend on an antecedent workplace injury to her mother, the employee. As the

Supreme Court explained: "Plaintiffs alleged simply that both Naomi [mother] and Mikayla [fetus] were exposed to toxic levels of carbon monoxide, injuring both. Mikayla sought recompense for her own injuries." (*Snyder*, *supra*, 16 Cal.4th at p. 1000; see also *id.* at p. 995 [derivative injury rule did not apply "[b]ecause Mikayla's injuries were not derivative of Naomi's, but the result of *her own* exposure to toxic levels of carbon monoxide" (italics added)].) The clear import of this holding is that, if Mikayla's injuries – however separate from her mother's – *had* been caused by an antecedent workplace injury to her mother, then the derivative injury rule would have applied to bar such claims.

In the same way, the Court of Appeal's opinion in *See's Candies* misreads this Court's favorable citation, in *Snyder*, of an earlier Louisiana case, *Cushing For and on Behalf of Brewer v. Time Saver Stores, Inc.* (La.Ct.App. 1989) 552 So.2d 730 (*Cushing*) (*See's Candies*, *supra*, 73 Cal.App.5th at p. 88) – a case that neither side had addressed in their briefs to the Court of Appeal. *Cushing* was "a child's suit for *in utero* brain injuries, allegedly caused by his mother's accidental workplace fall." (*Snyder*, *supra*, 16 Cal.4th at p. 1001.) But as *Snyder* explained, the Louisiana court held that the state's derivative injury rule did not apply precisely because "the fetal injuries at issue in *Cushing* were not logically derivative of the mother's injury." (*Id.* at p. 1002.) Just as in *Snyder*, the fetus and the mother suffered injuries simultaneously, but the injuries were

independent of one another – and so to state a claim for fetal injury, it was not necessary to allege an antecedent workplace injury to an employee.[12]

By contrast, precisely such an allegation of an antecedent workplace injury is necessary for family members to state a credible "take home" virus claim. And indeed, the Plaintiffs-Petitioners in the present case appear to agree. They argue: "The *Snyder* opinion did not turn on where the plaintiff is injured (a factual question), *but whether the non-employee plaintiff must allege an injury to the employee* in order to prove the non-employee's separate personal injury claim (a legal question)." (Petitioner-Plaintiffs' Reply Br. at p. 10 [emphasis added].) "Take home" virus cases by definition require an allegation that the employee was injured in the workplace, and then came home and transmitted the virus to the non-employee, away from the employer's premises and outside the employer's control. As such, whenever a "take home" virus case is based on the theory that the family members were infected at home by an employee who first contracted the virus at work, the derivative injury rule applies.

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[12] In fact, the *Cushing* court did not find that third-party injuries that are distinct from (but still dependent on) an earlier workplace injury somehow escape the derivative injury rule. To the contrary, it found that even though subsequent non-employee injuries or losses are "rightfully termed 'separate and distinct' and 'independent' from those injuries sustained by the employee," workplace negligence claims based on those injuries are nevertheless barred under the derivative injury rule if they are "hinged upon the injuries of the employee." (*Cushing*, *supra*, 552 So.2d at pp. 731-732.)

The *See's Candies* court reasoned that "persons need not themselves suffer adverse health impacts in order to transmit a virus," and so Mr. Ek's illness there did not necessarily turn on an antecedent workplace injury to his wife, the employee. (*See's Candies*, *supra*, 73 Cal.App.5th at p. 85.) This also was an error. For one, a bodily infection with the COVID-19 virus – in which the virus releases its genetic material into the inside of healthy cells throughout the body[13] – is an "illness" within the meaning of the WCA, whether it produces symptoms or not.[14] And so someone who actually contracts COVID-19 in the workplace has suffered a workplace injury, regardless of the short-term extent of their symptoms and the (still unknown) long-term effects of such an infection.[15] Likewise, the Court of

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[13] See Scripts Research, *How the Novel Coronavirus Infects a Cell* <https://www.scripps.edu/covid-19/science-simplified/how-the-novel-coronavirus-infects-a-cell/> [as of Oct. 11, 2022].

[14] An "injury" under the WCA expressly includes the contraction of a disease such as COVID-19, without any exclusion for asymptomatic cases. (See Lab. Code, § 3208 ["'Injury' includes any injury or disease arising out of the employment . . . ."].) And so it is established that the WCA applies to "industrially caused disease." (*Arndt v. Workers' Comp. Appeals Bd.* (1976) 56 Cal.App.3d 139, 148.) Indeed, the California Legislature, in emergency legislation enacted at the outset of the COVID-19 pandemic, expressly recognized that COVID-19 is a "disease" within the meaning of the WCA. (See Lab. Code, § 3212.86, subd. (i)(1) ["'COVID-19' means the 2019 novel coronavirus disease."].)

[15] See, e.g., Henry Ford Health Institute, *Why Are Asymptomatic COVID-19 Patients Experiencing Long-Haul Symptoms?* (May 17, 2021) <https://www.henryford.com/blog/2021/05/asymptomatic-long-haulers#:~:text=It's%20not%20entirely%20known%20why,causing%20damage%20throughout%20your%20body> [as of Oct. 11, 2022] ("It's not entirely known why asymptomatic people can have long-haul symptoms. But even if you

Appeal improperly disregarded the express allegations of the plaintiffs' complaint that Ms. Ek first became ill, convalesced at home, and then there (at home) transmitted the virus to her husband. These allegations are "adverse health impacts" by any definition.

The Court of Appeal, taking what it characterized as "an extreme example," posited a situation in which "a researcher in a laboratory studying dangerous pathogens inadvertently becomes infected due to the employer's lax safety protocols," and in turn "boards a bus home and infects all the passengers." (*See's Candies*, *supra*, 73 Cal.App.5th at p. 89.) The Court of Appeal suggested it would be too sweeping a result to apply the derivative injury rule in this context, even though the passengers' illnesses "would not have existed in the absence of injury to the employee." (*Ibid.* [quoting *Snyder*, *supra*, 16 Cal.4th at p. 998].) But such a situation is far removed from the typical "take home" virus case such as this. First, the hypothetical involves a laboratory, presumably with expertise in

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don't experience noticeable side effects, it doesn't mean COVID-19 isn't taxing on your body: your immune system could still be going into overdrive and the virus could still be causing damage throughout your body."); Shabir, *What Does COVID-19 Do to the Lungs?* (Feb. 22, 2021) <https://www.news-medical.net/health/What-Does-COVID-19-do-to-the-Lungs.aspx> [as of Oct. 11, 2022] ("Whilst asymptomatic individuals who test positive for COVID-19 may not overtly show any signs of lung damage, new evidence suggests that there may be some subtle changes that occur in such patients, potentially predisposing asymptomatic patients for future health issues and complications in later life.").

containment, that has made a conscious decision to allow pathogens into the workplace – a far cry from the typical "take home" case, in which (as noted above) the employer wants nothing *less* than for a virus to invade the workplace. Second, the Court of Appeal's hypothetical involves infections by members of the general public rather than by an employee's immediate family members, the context in which "take home" viral cases typically arise. This Court is called upon here only to consider whether the derivative injury rule applies to "take home" viral injury claims by an employee's family – a circle that the derivative injury rule has long been found to include, including in loss of consortium cases such as *Williams*, *supra*, 61 Cal.App.3d 628. Further, the Court of Appeal's hypothetical example overlooks the fact that U.S. laboratories handling pathogens are subject to extensive oversight, including by the CDC's Division of Laboratory Systems[16] – and likewise by extensive regulations[17] that are likely to displace state common law claims.

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[16] See Centers for Disease Control and Prevention, Division of Laboratory Systems <https://www.cdc.gov/csels/dls/> [as of Oct. 11, 2022].

[17] See generally 29 C.F.R. § 1910.1030 et seq.; 29 C.F.R. § 1910.1030(e) (setting required practices for "HIV [human immunodeficiency virus] and HBV [hepatitis B virus] Research Laboratories"); see also 42 U.S.C. § 262a(b)(1) [directing Secretary of Health & Human Services to promulgate regulations providing for "proper laboratory facilities to contain and dispose of" dangerous biological agents and toxins, which regulations have been published at 42 C.F.R. Part 73 - (HHS) Quarantine, Inspection, Licensing - Select Agents and Toxins].

Finally, even assuming that a state law exception to the derivative injury rule should be created to impose "take home" liability on laboratories that handle deadly pathogens (making commercial use of them), it would be more suitable for the Legislature, rather than this Court, to craft such an exception to the WCA statute. (E.g., *Estate of Griswold* (2001) 25 Cal.4th 904, 917 ["We may not, under the guise of interpretation, insert qualifying provisions not included in the statute."].) If the Legislature views application of WCA preemption in such a circumstance to be too broad, it is free to change the language of the Act. That the Legislature, to date, has not adopted such an exception may be because the Court of Appeal's example is truly hypothetical – or alternatively because no change in the law is appropriate, in deference to the extensive federal regulation in the area, not to mention the cascade of adverse effects on employers and courts from allowing "take home" virus cases.

III. CONCLUSION

Employers in this State should not be saddled with liability for "take home" virus claims – illnesses suffered by family members of an employee, which arise in the family home beyond the employer's control, and which do not stem from any commercial use of a harmful substance by the employer. To hold otherwise would depart from this Court's own precedent and from multiple decisions of other states in the specific context of the COVID-19 pandemic. Because that issue is dispositive here, the

Court need not reach the second question of WCA preemption. Should the Court address that question, it should hold that "take home" virus claims by an employee's family members, based on an antecedent workplace injury or illness of the employee, fall within the scope of WCA preemption and the associated derivative injury rule.

Dated: October 12, 2022 MUNGER, TOLLES & OLSON LLP

By: /s/ *Malcolm A. Heinicke*
Malcolm A. Heinicke

Attorney for Amicus Curiae SEE'S CANDIES, INC. and SEE'S CANDY SHOPS, INC.

CERTIFICATE OF WORD COUNT

I certify pursuant to Rule 8.204, subd. (c)(1) of the California Rules of Court that this brief consists of approximately 9,687 words as counted by the software program used to generate it, exclusive of materials not required to be counted under Cal. R. Ct. rule 8.520, subd. (c)(3).

Dated: October 12, 2022 MUNGER, TOLLES & OLSON LLP

By: /s/ *Joseph D. Lee*
Joseph D. Lee

Attorney for Amicus Curiae SEE'S CANDIES, INC. and SEE'S CANDY SHOPS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2022, I electronically filed the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF SEE'S CANDIES, INC. AND SEE'S CANDY SHOPS, INC. IN SUPPORT OF DEFENDANT-RESPONDENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mark Thomas Freeman Mark Lain Venardi VENARDI ZURADA LLP 101 Ygnacio Valley Rd., Suite 100 Walnut Creek, CA 94596	Attorneys for Plaintiffs and Appellants Corby Kuciemba and Robert Kuciemba *Via TrueFiling*
William A. Bogdan HINSHAW & CULBERTSON LP One California St., 18th Fl. San Francisco, CA 94111	Attorney for Defendant and Respondent Victory Woodworks, Inc. *Via TrueFiling*
Alan Charles Dell'Ario ATTORNEY AT LAW P.O. Box 359 Napa, CA 94559	Attorney for Amicus Curiae Consumer Attorneys of California *Via TrueFiling*
John W. Klotsche O'CONNOR THOMPSON MCDONOUGH KLOTSCHE LLP 2500 Venture Oaks Way, Suite 320 Sacramento, CA 95833	Attorneys for Amicus Curiae Construction Employers' Association *Via TrueFiling*

Robert E. Dunn
EIMER STAHL LLP
99 S. Almaden Blvd., Suie 642
San Jose, CA 95113

Attorneys for Amicus 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

Via TrueFiling

/s/ Seana Flanagin
Seana Flanagin

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S274191**
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Date

/s/Joseph Lee

Signature

Lee, Joseph (110840)

Last Name, First Name (PNum)

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