

**S277893**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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ANOTHER PLANET ENTERTAINMENT, LLC,	)	
	)	
	)	No. S277893
	)	
<i>Petitioner,</i>	)	
	)	
v.	)	
	)	
VIGILANT INSURANCE COMPANY,	)	
	)	
<i>Respondent.</i>	)	

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On Certification from the United States Court of Appeals for the Ninth Circuit  
Ninth Circuit Court of Appeals No. 21-16093

BRIEF OF AMICUS CURIAE CALIFORNIA MEDICAL ASSOCIATION  
IN SUPPORT OF NO PARTY

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## CERTIFICATE OF INTERESTED ENTITY

Pursuant to Rule 8.208 of the California Rules of Court, *amicus curiae* California Medical Association states that it is a California nonprofit corporation, has no parent corporation, and does not issue shares of stock. The California Medical Association is a voluntary organization whose members include physicians, medical students, and related professionals.

Dated: August 2, 2023.

Respectfully submitted,

CENTER FOR LEGAL AFFAIRS  
CALIFORNIA MEDICAL ASS'N

By /s/ Shari P. Covington  
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*Attorney for Amicus Curiae  
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## INTRODUCTION

Louis Brandeis brilliantly put forward the phrase “sunlight is the best disinfectant” for effective metaphorical purpose more than a century ago, but no modern virologist or infectious disease physician would endorse it professionally, not literally at least. Yet Respondent’s brief before this Court repeatedly claims (against the great weight of scientific and medical understanding) that the COVID-19 virus<sup>1</sup> is “temporary” and can be “wiped away” by “the swipe of a cloth,” analogous to “brushing off a dusty tabletop.” Such unscientific beliefs form the foundation of Respondents’ legal arguments in this case that the COVID-19 virus does not impact “physical structures.”

The COVID-19 virus posed one of the most significant threats to public health in the last one hundred years. While we have made unprecedented progress in scientific and medical research, misinformation about the COVID-19 virus has been, and continues to be, a public health threat that can undermine physician-patient trust and the health of Californians. The specific meaning and impact of insurance coverage provisions are addressed by the parties and are beyond the scope of this

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<sup>1</sup> SARS-CoV-2 is the virus responsible for the resulting disease, COVID-19 or Coronavirus. For ease of reference, and consistent with the usage of prior court decisions, amicus refers to the virus and its resulting disease collectively herein as the COVID-19 virus except where context requires a distinction between the virus and its resulting disease.

amicus brief. However, the California Medical Association (“CMA”), speaking as the House of Medicine, cannot sit idly by in the face of dangerous misinformation that could be perpetuated through this case. CMA thus respectfully urges the Court to evaluate the issues before it through the lens of scientific and medical fact rather than through the misinformed views that permeate Respondent’s treatment of COVID-19.

## **ARGUMENT**

### **I. Scientific Studies Show that the COVID-19 Virus Cannot be Removed by Routine Surface Cleaning.**

According to Respondent, the COVID-19 virus is “temporary,” like a “water spill” or “wafting odor”; is “easily removable [and] self-dissipating”; and can be “wiped away,” much like “mopping up spilled water or brushing off a dusty tabletop.” Respondent’s brief at 27, 29, 33, 41. Respondent’s arguments are contrary to scientific fact.

The COVID-19 virus cannot be removed by routine surface cleaning. A number of studies have established that the COVID-19 virus is “much more resilient to cleaning than other respiratory viruses so tested.” Even extraordinary cleaning measures do not remove the COVID-19 virus from surfaces. In a 2021 study by the largest hospital network in New York State, the virus proved capable of surviving disinfection procedures used by trained hospital personnel in COVID-19 patient treatment areas. If trained hospital workers using hospital-grade disinfectants cannot remove all



COVID-19, neither can “routine” cleaning.

Moreover, surface cleaning does not prevent COVID-19 transmission. In fact, the Centers for Disease Control (“CDC”) has stated there is little evidence to suggest that routine use of disinfectants can prevent the transmission of Coronavirus from fomites (surfaces containing SARS-CoV-2) in community settings, such as theaters and other entertainment venues. In particular, the CDC concluded that, according to a quantitative microbial risk assessment study, “surface disinfection once-or twice-per-day had little impact on reducing estimated risks” of COVID-19 viral transmission.

Respondent’s claims to the contrary have no basis in science and should not guide this Court’s decision.

**II. Surface Cleaning Does Not Remove the Covid-19 Virus in Ambient Air or Prevent the Continuous Reintroduction of the Covid-19 Virus onto the Property.**

While surface transmission via fomites presents one means of viral transmission, the primary mode is airborne transmission.

The CDC has concluded that:

- “[t]he principal mode by which people are infected with SARS-CoV-2 ... is through exposure to respiratory droplets carrying infectious virus”; and
- “[w]hen a person with suspected or confirmed COVID-19 has been indoors,

virus can remain suspended in the air for minutes to hours.”<sup>2</sup>

The World Health Organization (“WHO”)<sup>3</sup> agrees, as does the scientific community. Numerous studies have made clear that the danger of COVID-19 transmission comes primarily from the presence of the COVID-19 virus in the indoor air of buildings and other enclosed premises. Indeed, an investigation of over 7,000 COVID-19 cases found that *all* outbreaks involving three or more people occurred indoors.<sup>4</sup>

Airborne SARS-CoV-2 viral RNA has also been detected inside hospitals at distances over 50 meters from COVID-19 patients’ rooms.<sup>5</sup> Another study examined a restaurant’s air conditioning system and found that it spread SARS-CoV-2 to people sitting at separate tables downstream

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<sup>2</sup> *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited July 23, 2023).

<sup>3</sup> Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may spread via the air*, USA TODAY NEWS (last updated Sept. 21, 2020), <https://www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/> (last visited July 23, 2023).

<sup>4</sup> Hua Qian et al., *Indoor transmission of SARS-CoV-2*, 31 INDOOR AIR 3, 639-45 (May 2021), <https://pubmed.ncbi.nlm.nih.gov/33131151/> (last visited July 23, 2023).

<sup>5</sup> Yuan Liu et al., *Aerodynamic analysis of SARS-CoV-2 in two Wuhan hospitals*, 582 NATURE 7813, 557-60 (June 2020), <https://pubmed.ncbi.nlm.nih.gov/32340022/> (last visited July 23, 2023).

of the restaurant's airflow.<sup>6</sup> Yet another study detected SARS-CoV-2 inside HVAC systems transmitted over 180 feet from its source.<sup>7</sup>

Moreover, on May 7, 2021, the CDC issued a warning of the risks of indoor airborne transmission of Coronavirus from aerosols at distances greater than six feet from the source, stating that “[t]ransmission of SARS-CoV-2 from inhalation of virus in the air farther than six feet from an infectious source can occur.” The CDC noted that these long-distance transmission events

“involved the presence of an infectious person exhaling virus indoors for an extended time (more than 15 minutes and in some cases hours) leading to virus concentrations in the air space sufficient to transmit infections to people more than 6 feet away, and in some cases to people who have passed through that space soon after the infectious person left.” The factors that increase the risk of SARS-CoV-2 infection under these circumstances include:

- **Enclosed spaces with inadequate ventilation or air handling** within which the concentration of exhaled respiratory fluids, especially very fine droplets and

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<sup>6</sup> Jianyun Lu et al., *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 7 (July 2020), [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article) (last visited July 23, 2023); *see also* Keun-Sang Kwon et al., *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 J. KOREAN MED. SCI. 46, e415 (Nov. 30, 2020), <https://jkms.org/DOIx.php?id=10.3346/jkms.2020.35.e415> (last visited July 23, 2023).

<sup>7</sup> Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, SCI. REPS. 10, 19589 (Nov. 11, 2020), <https://www.nature.com/articles/s41598-020-76442-2> (last visited July 23, 2023).

aerosol particles, can build-up in the air space.

- **Increased exhalation** of respiratory fluids if the infectious person is engaged in physical exertion or raises their voice (e.g., exercising, shouting, singing).
- **Prolonged exposure** to these conditions, typically more than 15 minutes.<sup>8</sup>

These published reports demonstrate that property that remained open to the public—with infectious persons entering and re-entering the premises—impaired the habitability of those premises and rendered them dangerous.

### **III. Cases Cited by Respondent Regarding Surface Cleaning Did Not Rely on Scientific Evidence.**

In hoping to bolster its untenable belief that COVID-19 can be removed by “the swipe of a cloth” (Respondent’s brief at 37), Respondent does not cite peer-reviewed scientific research. Instead, Respondent relies on claims found in court cases decided at the pleading stage, without the benefit of expert testimony and a scientific record. *E.g.*, *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 400 (6th Cir. 2022) (deciding motion to dismiss); *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1052 (Md. 2022) (answering certified question at the pleading stage); *United Talent*

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<sup>8</sup> *Scientific Brief: SARS-CoV-2 Transmission*, CDC (updated May 7, 2021), [https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fsciencebriefs%2Fscientific-brief-sars-cov-2.html](https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fsciencebriefs%2Fscientific-brief-sars-cov-2.html) (last visited July 23, 2023).

*Agency v. Vigilant Ins. Co.*, 77 Cal. App. 5th 821, 827 (2022) (deciding demurrer); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3D 1266, 1279 (Mass. 2022) (deciding motions to dismiss and for judgment on the pleadings). Had the courts been informed by science, they may have reached a different result.

Scientific evidence, as discussed above, shows that the COVID-19 virus is persistent rather than evanescent. No amount of cleaning, disinfection or even the dissipation of the COVID-19 virus with the passage of time, will protect an indoor space from reintroduction of the virus if the space is open to persons infected with COVID-19.

#### **IV. Scientific Evidence of COVID-19 Infection and Death Rates Among Essential Workers Shows that the COVID-19 Virus Rendered Property Uninhabitable or Less Functional in 2020.**

While COVID-19 vaccines and treatments for COVID-19 have helped individuals avoid infection and, for many, reduced the impact of the disease, scientific studies show that businesses deemed essential experienced a far higher degree of infection among their workers than that experienced in the general population. The data shows that employees of “essential businesses”<sup>9</sup> that were allowed to re-open or operate at reduced

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<sup>9</sup> The CDC defines essential workers as those conducting “operations and services in industries that are essential to ensure the continuity of critical functions in the United States.” *See Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CDC (updated

capacities during the pandemic experienced higher rates of infection as compared to the general public, thus demonstrating the presence of COVID-19 virus in their workplaces and that such workplaces were unfit and unsafe for normal use.<sup>10</sup> For example:

- One study found that 20% of essential grocery store workers tested positive for COVID-19, a much higher rate of infection than others in their surrounding communities.<sup>11</sup> Further, grocery store workers with interactions with the public tested positive for COVID-19 at a rate five times greater than the general population.<sup>12</sup>
- Essential workers accounted for 87% of excess deaths in California<sup>13</sup> and over 60% in New York City.<sup>14</sup>

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Mar. 29, 2021), <https://www.cdc.gov/vaccines/covid-19/categories-essentialworkers.html> (last visited July 23, 2023).

<sup>10</sup> Joanna Gaitens et al., *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH 4, 1446 (Feb. 4, 2021), <https://www.mdpi.com/1660-4601/18/4/1446> (last visited July 23, 2023).

<sup>11</sup> *Id.*

<sup>12</sup> Fan-Yun Lan et al., *Association between SARS-CoV-2 infection, exposure risk and mental health among a cohort of essential retail workers in the USA*, 78 OCCUPATIONAL ENV’T MED. 237-43 (Oct. 30, 2020), <https://oem.bmj.com/content/oemed/78/4/237.full.pdf> (last visited July 23, 2023).

<sup>13</sup> Yea-Hung Chen et al., *Excess mortality associated with the COVID-19 pandemic among Californians 18-65 years of age, by occupational sector and occupation: March through November 2020*, 16 PLOS ONE 6, e0252454 (June 4, 2021), <https://pubmed.ncbi.nlm.nih.gov/34086762/> (last visited July 23, 2023).

<sup>14</sup> *The plight of essential workers during the COVID-19 pandemic*, 395 LANCET 1587 (May 23, 2020),

- Nursing home residents accounted for at least 35% of all COVID-19 deaths in the United States as of March 2021 despite comprising less than 1% of the nation’s population.<sup>15</sup>

Similar findings have been reported among essential workers in other fields, including elevated rates of infection for first responders, correctional officers, and transportation and factory workers, among others.<sup>16</sup> These findings refute Respondent’s assertion that “even buildings with a confirmed presence of the virus remain inhabitable and usable for many purposes.” Respondent’s brief at 54. Such premises in fact may have been *inhabited* or occupied, but they were *not inhabitable*; that is, they were not suitable for occupancy and posed a danger to occupants.

## CONCLUSION

Respondent misstates the scientific facts surrounding transmission of the COVID-19 virus, contending without evidence that property was not damaged because the virus could be easily cleaned away. This is contrary to, and refuted by, the applicable science. This Court should not adopt Respondent’s claims concerning the COVID-19 virus in reaching its

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<https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2931200-9> (last visited July 23, 2023).

<sup>15</sup> Artis Curiskis et al., *Federal COVID Data 101: Working with CMS Nursing Home Data*, ATLANTIC (Mar. 4, 2021), <https://covidtracking.com/analysis-updates/federal-covid-data-101-working-with-cms-nursing-home-data> (last visited Oct. 7, 2022).

<sup>16</sup> *Id.*

decision, as doing so would undermine confidence in medicine and in the physicians who comprise the CMA's members. Such ultimately would endanger the public health of California.

Dated: August 2, 2023.

Respectfully submitted,

CENTER FOR LEGAL AFFAIRS  
CALIFORNIA MEDICAL ASS'N

By /s/ Shari P. Covington  
Shari Covington

*Attorney for Amicus Curiae  
California Medical Association*



## CERTIFICATE OF COMPLIANCE

(California Rule of Court 8.204(d))

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*Attorney for Amicus Curiae*  
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**PROOF OF SERVICE**

*Another Planet, LLC v. Factory Vigilant Insurance Company*, CA Supreme Court Case No. S277893

I am over 18 years of age and not a party to this action. I am employed in the County of Sacramento. My business address is 1201 K Street, Suite 800, Sacramento, California 95814.

On August 2, 2023, I served true copies of the following as follows:

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IN SUPPORT OF NO PARTY**

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/s/ Harmony Jantz  
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STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

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COMPANY**

Case Number: **S277893**

Lower Court Case Number:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/2/2023

Date

/s/Shari Covington

Signature

Covington, Shari (312078)

Last Name, First Name (PNum)

California Medical Association

Law Firm