Case No. **S207313**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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ROSEMARY VERDUGO, mother, successor and heir of MARY ANN VERDUGO, Decedent and MICHAEL VERDUGO, brother of Decedent,

Plaintiffs and Appellants,

vs.

TARGET STORES, a division of TARGET CORPORATION, a Minnesota corporation,

Defendant and Respondent.

FOLLOWING CERTIFICATION OF A QUESTION OF CALIFORNIA LAW FROM THE U.S. COURT OF APPEALS, NINTH CIRCUIT, IN APPEAL NO. 10-57008.

AMICI CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

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INTRODUCTION: INTEREST OF AMICI AND IMPORTANCE OF ISSUE

The California Chamber of Commerce (CalChamber) and the Civil Justice Association of California (CJAC) welcome the opportunity to address the important issue this case presents:[1]

> **Under what circumstances, if ever, does the common law duty of a retail store owner to provide emergency first aid to invitees require the owner to have an Automatic External Defibrillator on the premises for cases of sudden cardiac arrest?**

CalChamber is a non-profit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For more than a century, the Chamber has been the voice of California business. While the Chamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees.

[1] CalChamber and CJAC ask, by separate application lodged with this brief, the Court's permission to accept the amici curiae brief for filing.

Accordingly, CalChamber acts on behalf of the entire business community to improve our state's economic and job climate in representing business on a broad range of legislative, regulatory and legal issues.

CJAC is a 35-year-old non-profit organization representing hundreds of business, professional associations and local government groups. The principal purpose of CJAC is to educate the public about ways to make our civil liability laws more fair, certain and economical. Toward this end CJAC has participated in the legislative, initiative and judicial processes to enact and shape laws determining who gets paid, how much, and from whom when the conduct of some is alleged to occasion harm to others.

Amici are vitally interested in the Court's determination of whether a retail store has a common law duty to keep and maintain an automatic external defibrillator (AED) for emergency treatment of those who may suffer sudden cardiac arrest (SAC) while on store premises. Indeed, the issue here "implicates strong state interests and could have wide-reaching effects in the state of California." *Verdugo v. Target Corp.* (9th Cir. 2012) 704 F.3d 1044, 1046 (*Verdugo*). Issues of *duty* are key to determining negligence liability, the theory animating the bulk of personal injury cases crowding our courts. While "duty" is but one element of four in the negligence formula,[2] it is not co-equal to the others, but recognized as the "most . . . important feature,"[3] the "central element

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[2] The elements of every negligence action are (1) a defendant's legal duty to the plaintiff as a result of a standard of care, (2) breach of that duty (negligence), and (3) damages (4) caused by that breach. *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.

[3] Jules L. Coleman, *Mistakes, Misunderstandings, and Misalignments* (2012) 121 YALE L.J. ONLINE 541, 551.

in all negligence actions,"[4] "the overarching concept . . . central to the law of torts,"[5] and "an important conceptual tool [judges] may use to keep inappropriate cases from ever reaching juries."[6]

The flip-side to this last listed function of the *duty* element is that if a court decides there is a "duty" defendant owes plaintiff (and the plaintiff has suffered compensable injury), that often effectively ends matters with defendant paying something to the plaintiff. This is due to the loosey-goosey, too easy to satisfy "substantial factor" test for ascertaining *causation* or *foreseeability*. *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239.[7] It often occurs when courts adopt *foreseeability*, the touchstone for

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[4] Sydney Knell Leavitt, *Death by Chicken: The Changing Face of Allergy Awareness in Restaurants and What to Do When Food Bites Back* (2011) 42 *U. TOL. L. REV.* 963, 974.

[5] Dean J. Haas, *"Doctor, I'm Pregnant and Fifteen–I Can't Tell My Parents–Please Help Me": Minor Consent, Reproductive Rights, and Ethical Principles for Physicians* (2010) 86 *N.D. L. REV.* 63, 80.

[6] David G. Owen, *Figuring Foreseeability* (2009) 44 *Wake Forest L. Rev.* 1277, 1305. See also Rory Bahadur, *Almost a Century and Three Restatements after Green It's Time to Admit and Remedy the Nonsense of Negligence* (2011) 38 *N. KY. L. REV.* 61, 70-71 (footnotes omitted): "An important aspect of duty is that its existence is typically a question of law for the court. Therefore, judges in negligence cases act as gatekeepers or screeners of negligence actions. If the court determines that no duty of care is owed to the plaintiff or that no duty of care exists, then the court may dismiss the action as a matter of law. This gatekeeper function is an important role of judges in negligence actions."

[7] While substituting the "substantial factor" test for causation in place of traditional "proximate cause" was undoubtedly well-intentioned with respect to the goals of clarity and certainty, its use has had unfortunate, unintended consequences. See, e.g., Steven D. Wasserman, *et al.*, *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 *PEPP. L. REV.* 883, 894 ("This [substantial factor] test has been much quoted, interpreted, and misapplied to the point that any exposure to asbestos, however insubstantial, seems to be sufficient for a plaintiff to defeat summary judgment."); and Jonathan C. Mosher, *A Pound of Cause for a Penny of Proof: the Failed Economy of an Eroded Causation Standard in Toxic Tort Cases* (2003) 11 *N.Y.U. ENVTL. L.J.* 531, 568 ("[I]t is apparent that [the substantial factor (continued...)

causation, as the "most important factor" in establishing *duty*. See e.g., *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434. "While duty [historically] evolved as a way of expanding negligence liability and proximate cause evolved as a means to limit negligence liability, both are based on the same analytical fulcrum of *foreseeability*. And therein lies the rub." Bahadur, *supra* at 72. A leading scholar has, in urging courts to eschew "forseeability" for also determining "duty," explained long-ago the consequence of this "rub":

> If the foreseeability formula were the only basis of determining both duty and its violation, such activities as some types of athletics, medical services, construction enterprises, manufacture and use of chemicals and explosives, serving of intoxicating liquors, operation of automobiles and airplanes, and many others would be greatly restricted. Duties would be so extended that many cases now disposed of on the duty issue would reach a jury on the fact issue of negligence.

Leon Green, *Foreseeability in Negligence Law* (1961) 61 *COLUMB. L. REV.* 1401, 1417-18.

As Professor Green and numerous other legal scholars understand, once *duty* is established in a case – or a court declines to make a "no duty" ruling in response to a pretrial motion – the plaintiff has a good chance of getting to trial, which enhances plaintiffs' leverage for settlement with defendants unwilling to risk the wager of jury

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[7](...continued)
instruction] was not intended to lower the standard for causation in California toxic tort cases. Yet, . . . th[at instruction] . . . set the stage for the critics of cause to argue that, in California, plaintiffs must prove only possibilities, rather than probabilities, in order to demonstrate cause.").

trial. Consequently, the scope and application of defendant's duty in the circumstances of this case is of critical importance to amici.

SUMMARY OF SALIENT FACTS AND PROCEDURE

The issue certified by the Ninth Circuit for decision by the Court is so broadly phrased that it seems an invitation for an "advisory" opinion: "Under what circumstances, if ever, does the common law duty of a retail store owner to provide emergency first aid to invitees require the owner to have an AED on the premises"? Fortunately, however, this issue arises from a concrete dispute that tethers and frames it more narrowly for consideration.[8]

Plaintiffs are the mother and brother of Mary Ann Verdugo, who died of SCA[9] in 2008 while shopping at defendant Target Store in Pico Rivera, California. They filed this "wrongful death" action against defendant in 2010[10] not because of anything Target is alleged to have done to induce or cause decedent's SCA, but because of what it did *not* do – *viz.*, keep and maintain an AED on its premises so that someone could promptly use it to possibly revive Mary Ann and save her life. Though a 911 call was

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[8] "The weight of authority holds that a high court's answer to a certified question is *not* an improper advisory opinion so long as (i) a court addresses only issues that are truly contested by the parties and are presented on a factual record; and (ii) the court's opinion on the certified question will be dispositive of the issue, and res judicata between the parties." *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 362.

[9] Sudden cardiac arrest is caused by a problem with the heart's electrical impulses, causing it to stop pumping blood. Unlike a myocardial infarction (a heart attack), sudden cardiac arrest often strikes with no prior symptoms and can strike a heart that is otherwise healthy.

[10] Plaintiffs initially filed in state court, but defendant successfully removed the action to federal district court where the court dismissed it on the ground defendant owed no common law tort duty to provide an AED on its premises.

promptly made on behalf of decedent, it took paramedics from a nearby Los Angeles County Fire Department station several minutes to reach her. By the time the paramedics arrived, Mary Ann was dead. Target did not have an AED in its store.

In asserting a common law duty in tort for defendant to have an AED on its premises, plaintiffs allege facts in their pleadings and submissions about the frequency of SCAs (700 daily on a national basis) and the importance of AEDs in resuscitating victims experiencing it if done promptly (within the first 5 minutes of the attack). Plaintiffs also cite and rely upon findings pertinent to AEDs and SCAs found in statutes and legislative hearings. These findings are that "nearly 300,000 Americans suffer from sudden cardiac arrest every year, and only eight percent survive. The chance of surviving sudden cardiac arrest decreases by 10 percent for every minute that passes before the heart's rhythm is restored." Cardiac Arrest Survival Act of 2000, Pub. L. No. 106–505, § 402(5), 114 Stat. 2314. It is estimated that 30 percent of those who experience cardiac arrest could be saved if an AED were used immediately. *Id.* § 402(4).

Ironically, while some statutes do and others did require specific enterprises (e.g., health studios and courses for dental sedation assistants) to have AEDs on their premises, none have ever required defendant or other similarly situated businesses to do so. In fact, the most recent statute governing AEDs and their use, provides that "[n]othing in this section or Section 1714.21 may be construed to *require a building owner or a building manager to acquire and have installed an AED in any building*." Cal. Health & Safety Code § 1797.196(f); emphasis added.

Despite this plain statutory language absolving defendant from *any duty* to have an AED on its properties, plaintiffs persist in seeking a court "announcement of a common-law rule that would require many retail establishments across the state to acquire AEDs." *Verdugo*, *supra*, 704 F.3d at 1046. The Ninth Circuit felt the California Supreme Court better positioned to address the major questions of California tort law presented by this case and certified it to the Court for a decision.

SUMMARY OF ARGUMENT

Defendant, a commercial retail store, owes no common law duty to acquire and place on its property defibrillators for emergency medical assistance to customers and guests who experience sudden cardiac arrest. A comprehensive and detailed set of statutes governing who is and who is not required to have defibrillators on their premises evinces an intent by the Legislature to "occupy the field" governing the use and requirements of AEDs, clearly exempting defendant from any such requirement. Specific and express language supersedes any common law duty in this regard by stating "[n]othing in [this or other pertinent code sections] may be construed to *require* a building owner or a building manager to *acquire and have installed* an AED in *any* building."

Even assuming *arguendo* the absence of specific legislative language dictating this result, the common law duties of landowners, who have a "special relationship" with their invitees, does not extend so far as to require them to provide AEDs on their premises. The extent of a property owner's common law duty to come to the aid of a sick or injured invitee, is limited to promptly summoning emergency services, not providing them directly.

ARGUMENT

I. THE LEGISLATURE HAS DETERMINED THAT RETAIL STORES OWE "NO DUTY" TO THEIR GUESTS TO KEEP AND MAINTAIN A DEFIBRILLATOR ON THEIR PREMISES FOR THE RESCUE OF GUESTS WHO MAY SUFFER CARDIAC ARREST.

"The common law is only one of the forms of law and is no more sacred than any other . . .. [I]t may be changed at the will of the [L]egislature, unless prevented by constitutional limitations." *People v. Hickman* (1928) 204 Cal. 470, 479. Thus, "we may consider common law practices . . . only if they are not superseded by or in conflict with . . . statutory provisions. [Citation.]" *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157.

The authority and ability of our Legislature, as a coordinate and coequal branch of state government, to change the common law applies to torts and any or all of their constituent elements, including *duty*. "Within constitutional limits, the Legislature may, if it chooses, modify the common law by statute. *E.g.*, *Strang v. Cabrol* (1984) 37 Cal.3d 720, 724 (legislation abrogating prior tort decisions of this court); *Cory v. Shierloh* (1981) 29 Cal.3d 430, 439 ('It is well settled that the Legislature possesses a broad authority both to establish and to abolish tort causes of action.')." *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1069.

When, as here, the Legislature has enacted numerous statutes governing the placement and attendant responsibilities of certain types of facilities for maintenance, testing, and training of employees respecting the use of defibrillators – and, most importantly, exempted retail stores such as defendant from any duty to have AEDs on their premises – that ends the inquiry as to whether defendant is under a common law

tort duty to place a defibrillator on its property. Indeed, absent "a statutory provision establishing an exception to the general rule of Civil Code section 1714,[11] courts should create [a duty] only where 'clearly supported by public policy.' " *Rowland v. Christian* (1968) 69 Cal.2d 108, 112. As amici shall show, the Legislature has unmistakably "established an exception" to the general duty rule of section 1714 by specific language in the context of numerous statutes "occupying the field" respecting the use and placement of AEDs in a variety of buildings.

A. The Legislature Has "Occupied the Field" Governing the Use and Placement of Defibrillators for a Variety of Property Owners and Supplanted the Use of Common Law Torts to Regulate their Duty to Have AEDs on their Properties.

Statutes supplant the common law when their number and scope appear to evince a legislative intent to cover the entire subject or, in the parlance of case law, to "occupy the field." "[G]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should . . . supersede and replace the common law dealing with the subject matter. [Citation.]" *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285. That has occurred here with respect to who is and who is not required to have defibrillators on their property, and the responsibilities of those who do place them on their premises, whether by legal mandate or pursuant to their own volition.

Civil Code section 1714.21 and Health and Safety Code section 1797.196 were both first enacted in 1999, but have since undergone several amendments. As initially

[11] "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 or person . . .."

enacted, Civil Code section 1714.21 provided a qualified immunity for any person who in good faith rendered emergency care by the use of an AED at the scene of an emergency, so long as the person had completed a certified basic CPR and AED use course. Health and Safety Code section 1797.196 provided immunity from liability for persons or entities that acquired AEDs, where emergency care was rendered with the AED in accordance with Civil Code section 1714.21, and where "expected AED users" had completed a certified CPR and AED training course. Former Health & Saf. Code § 1797.196, subd. (b)(3)(A). In the preamble to Health and Safety Code section 1797.196, the Legislature stated: "It is the intent of the Legislature that an automated external defibrillator may be used for the purpose of saving the life of another person in cardiac arrest when used in accordance with Section 1714.21 of the Civil Code." Stats.1999, ch. 163, § 1.

In 2002, the Legislature amended both statutes because of public response indicating that conditioning the immunity on "expected AED users" having completed a training course actually discouraged the acquisition and use of AEDs. The synopsis of Assembly Bill No. 2041, which amended the statutes, explained that the amendment would

> [e]ncourage greater availability of these apparently 'fail safe' life-saving devices in public and private buildings across the state by broadening the scope of the immunity provided. The bill would grant immunity, regardless of prior training, to all 'Good Samaritans' who voluntarily use AEDs at the scene of an emergency to try to save someone's life, and it would also grant immunity to building owners or others who voluntarily acquire such safety devices to potentially save the lives of building

> tenants and members of the public, provided specified safety standards are met.

Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2041, 2001–2002 Reg. Sess., as amended April 16, 2002.

Thus, the amended version of Civil Code section 1714.21 grants immunity to anyone using an AED in an attempt to save a life, regardless of any prior training. It provides: "Any person who, in good faith and not for compensation, renders emergency care or treatment by the use of an AED at the scene of an emergency is not liable for any civil damages resulting from any acts or omissions in rendering the emergency care." Civ. Code § 1714.21, subd. (b). As to a person acquiring an AED, the amended statute further provides: "A person or entity that acquires an AED for emergency use pursuant to this section is not liable for any civil damages resulting from any acts or omissions in the rendering of the emergency care by use of an AED, if that person or entity has complied subdivision (b) of Section 1797.196 of the Health and Safety Code." Civ. Code § 1714.21, subd. (d).

Health and Safety Code section 1797.196, as amended in 2002, similarly provides that building owners and those who acquire and install AEDs are not liable for damages resulting from the rendering of emergency care with AEDs, without regard to whether the individual using the device has undergone specified training. Health & Saf. Code § 1797.196, subd. (b). Persons or entities acquiring AEDs benefit from the statutory immunity only if certain requirements are met, including complying with regulations governing the placement of the AED (*id.* at subd. (b)(1)); ensuring that the AED is regularly maintained, tested, and checked for readiness (*id.* at subd. (b)(2)(A) & (B)); ensuring that anyone using AEDs reports its use and activates

emergency medical services (*id.* at subd. (b)(2)C); ensuring that at least one employee per AED completes a training course (*id.* at subd. (b)(2)(D)); ensuring that there is a written plan describing procedures to be followed in the event of an emergency that may involve use of AED (*id.* at subd. (b)(2)(E)); and ensuring that tenants of a building where an AED is placed are notified of its location and receive a brochure describing its use, and that similar information is posted next to an AED (*id.* at subd. (b)(3) & (4)). This code section, set to expire in 2013, was extended indefinitely in 2012. Sen. Bill 1436, 2010-2012 Reg. Sess.

In 2004, Gov. Code § 8455 was enacted to require the Department of General Services to "apply for federal funds . . . for the purchase of [AEDs] to be located in state buildings," and imposed through Health & Safety Code § 1797.196(b)(5) specific AED requirements on "K-12 schools."

In 2006, the Legislature required all health clubs to have AEDs available, along with staff trained in their use by July 1, 2007, in view of the "significantly higher" risk of SCAs occurring during exercise. Health & Saf. Code § 104113. Two years later, Bus. & Prof. Code § 1756.2(c)(1) was enacted to require dental sedation assistant permit courses to have a defibrillator. That statute expired by virtue of a "sunset" clause in 2011, but regulations impose the same requirement on similar medical service providers. See, e.g., 16 Cal. Code Regs. § 1070.8 & 22 Cal. Code Regs. §§ 10005-06, 100020-21, 100027, 100031-100043, 100063.1.

B. Express Statutory Language and Applicable Canons of Construction Make Clear that Defendant Has No Duty to Have AEDs on its Premises.

Although the aforementioned statutes provide immunity to those who acquire and install an AED in their buildings in the event the device is used in an emergency situation, the Legislature made it abundantly clear that (except for health studios) it did not intend to impose any duty on building owners and managers to acquire AEDs in the first place. Subdivision (f) of Health and Safety Code section 1797.196, extended indefinitely in this immediate past legislative session, provides: "[n]othing in this section or Section 1714.21 may be construed to *require* a building owner or a building manager to *acquire and have installed* an AED in *any* building." Emphasis added.

1. The "Plain Language Rule" Establishes that Defendant Has No Duty to Place an AED on its Property.

The rules governing statutory construction are uncomplicated and settled. When construing a statute, the Court's goal "is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." *Estate of Griswold* (2001) 25 Cal.4th 904, 910. The judiciary looks first to the language of the statute, mindful that the words "should be given the meaning they bear in ordinary use. [Citations.]" *DiCampli–Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992. Judicial construction, and judicially crafted exceptions, are appropriate only when literal interpretation of a statute would yield absurd results or implicate due process. *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 124; *In re C.H.* (2011) 53 Cal.4th 94, 107. Otherwise, a statute "must be applied in strict accordance with [its] plain terms." *Cassel* at 124. "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." [Citation.]" *In re Ethan C.*

(2012) 54 Cal.4th 610, 627. Under no circumstance, however, may the court " 'under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.]" *DiCampli–Mintz* at 992. In this regard, the court "must assume that the Legislature knew how to create an exception if it wished to do so. . .. [Citation.]" *Ibid.*

The plain language and meaning of the words "[n]othing in this section or Section 1714.21 may be construed to *require* a building owner or a building manager to *acquire and have installed* an AED in *any* building" (emphasis added) are free from doubt. The Legislature does not want its enactments about AEDs to be construed by courts as *requiring* defendant or other retail stores to acquire and place defibrillators on their properties. This explicit language is a pristine example of the Legislature meaning what it says and saying what it means.[12] "There is enough confusion in the law. We should say what we mean and mean what we say." *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 57.

[12] Plaintiffs' tortured "spin" of this provision is reminiscent of *Alice in Wonderland*:

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all." Lewis Carroll, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* (Gardner edit.1960) 269.

2. To Read the Immunity Statute for those Voluntarily Choosing to Place AEDs on their Premises as Permitting Courts to Impose a Common Law Duty Requiring them to do so, Defeats its Purpose and Leads to an Absurd Result.

If the plain language rule does not convince the Court that it should not read the immunity statute as permitting imposition of a common law duty upon retail stores to equip its premises with AEDs, two canons of statutory interpretation conjoin to compel that conclusion.

First, "if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the *purpose of the statute*, the evils to be remedied, the legislative history, public policy, and the . . . scheme encompassing the statute." *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977; emphasis added. After all, "if a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense."[13]

Second, "[r]ules of statutory construction require courts to construe a statute to promote its purpose, render it reasonable, and *avoid absurd consequences*." *Ford v. Gouin* (1992) 3 Cal.4th 339, 348 (rules of construction require courts to avoid absurd results); emphasis added. "Our canons of statutory construction guide us to reject an interpretation that would produce . . . an absurd result." *Quintano v. Mercury Casualty Company* (1995) 11 Cal.4th 1049, 1064.

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[13] Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VAND. L. REV.* 395, 400 (italics added), reprinted in Singer, *STATUTES AND STATUTORY CONSTRUCTION* §48A:08, p. 639 (2000 ed.).

The statutes pertinent to this dispute – Civ. Code § 1714.21; Health & Saf. Code § 1797.196; and Gov. Code § 8455 – reflect legislative policy to encourage the availability of AEDs by providing immunity from liability for those who acquire the devices when they are used in an attempt to save a life. But this legislative objective of inducing businesses to voluntarily acquire AEDs for their premises would be defeated by an opinion from this court imposing a common law duty on these same businesses to have AEDs on their premises. What was meant by the Legislature to be a voluntary act encouraged by the incentive of immunity would instead become a mandatory act promoted by the fear of liability. Such a reading would pervert the purpose of the statutes and produce an "absurd" result.

3. When the Statutes Governing the Placement of AEDs are Read Together and Harmonized, it is Manifest that Defendant Owes no Duty to Acquire and Place AEDs on its Properties.

Plaintiffs ask this Court to read Health & Saf. Code § 1797.196 in isolation and either ignore or excise subsection f's "no duty" language therefrom, finding instead a common law tort duty for defendant to acquire and place defibrillators on its premises. A significant obstacle to such statutory slaughter exists, however, in the form of the *pari materia* ("of the same matter") canon of statutory interpretation.

"It is a basic canon of statutory construction that statutes in *pari materia* should be construed together so that all parts of the statutory scheme are given effect." *LEXIN v. Superior Court* (2010) 47 Cal.4th 1050, 1090. Two "[s]tatutes are considered to be in *pari materia* when they relate to the same person or thing, to the same class of

person[s or] things, or have the same purpose or object." *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4.

Here, the statutes that should be read and considered in *pari materia* are those encouraging *voluntary* conduct by businesses with invitees to place AEDs on their properties and statutes that *require* certain kinds of businesses – i.e., health studios and dental sedation assistant permit courses – to do so. Both groups of statutes concern the placement of AEDs by different types of establishments but, most importantly, show that the Legislature knows the difference between encouraging voluntary behavior and requiring that behavior through the imposition of common law tort liability.

Health & Saf. Code § 104113 states unequivocally that "[e]very health studio . . . shall acquire, maintain, and train personnel in the use of an automatic external defibrillator . . .." This, of course, contrasts sharply with Health and Safety Code section 1797.196 (f)'s provision that "[n]othing in this section or Section 1714.21 may be construed to *require* a building owner or a building manager to *acquire and have installed* an AED in *any* building." Emphasis added. The contrast is significant because it shows the Legislature knows how to require behavior when it wants and how to voluntarily encourage that behavior. Reading these two groups of statutes in *pari materia*, then, leads to an inescapable conclusion: unless one is a "health studio" or was, from 2008 through 2011, a provider of courses for dental sedation assistants, "[n]othing in [any other statute governing AEDs] . . . may be construed to *require* a building owner or a building manager to *acquire and have installed* an AED in *any* building." Health & Saf. Code § 1797.196 (f).

4. The Statutory Construction Canon of *Ejusdem Generis* Favors Exemption for Defendant from Any Duty to Acquire and Place AEDs on its Properties.

Another principle of statutory construction, *ejusdem generis*, provides additional help in reaching the conclusion that defendant has no duty to acquire and place defibrillators on its premises. *Ejusdem generis* instructs that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope." *Bernard v. Foley* (2006) 39 Cal.4th 794, 806–807. This canon "applies whether the specific words follow general words in a statute or vice versa. In either event, the general term or category is "restricted to those things that are similar to those which are enumerated specifically. [Citation.]" *International Federation of Professional and Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 342.

Here Health & Saf. Code § 1797.196(b) references its application to the general category of "any person or entity that acquires an AED," followed by more specific references in later subsections to "public or private K-12 school[s]" and "buildings" and "building managers." Certainly defendant Target is encompassed by the category of "any person or entity," as well as the phrase referring to those who own or lease "a building" and employ "a building manager." But defendant is not, of course, by virtue of subsection (f), required as "a building owner or a building manager to *acquire and have installed* an AED in *any* [of its] building[s]." This operative statutory language simply cannot be squared with its opposite, which is urged upon the Court by plaintiffs and their amicus: a common law duty in tort to acquire and place an AED on its premises.

II. EVEN ABSENT THE STATUTORY EXEMPTION FROM A DUTY TO ACQUIRE AND PLACE DEFIBRILLATORS ON ITS PREMISES, THERE IS NO COMMON LAW TORT DUTY FOR DEFENDANT TO DO SO.

Courts recognize a "special relationship" between business proprietors like defendants and their invitees (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 244–247) or between property owners or managers and those using the property. *Frances T. v. Village Green Owners Association* (1986) 42 Cal.3d 490 (*Frances T.*). Such a relationship gives rise to a duty to maintain the premises in a "reasonably safe condition" (*Sharon P. v. Arman Ltd.* (1999) 21 Cal.4th 1181, 1189, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 865, fn. 19), and may include a duty to take affirmative measures, either to prevent foreseeable harm from occurring to those using the premises, or to come to the aid of a patron or invitee in the face of ongoing or imminent harm or danger. *Delgado, supra,* 36 Cal.4th at 235–238.

For example, in *Frances T., supra,* 42 Cal.3d 490, plaintiff was attacked at night in her condominium unit. She sued the owners' association for negligence based on the theory that the association had a duty, similar to a landlord, to take action to maintain the common areas under its control in a safe condition for the residents. Plaintiff pleaded particularized facts, alleging that the association was aware of reports and complaints about various nighttime crimes on the premises, was aware of the link between crime on the premises and the lack of lighting in the common areas, and had failed to respond in a timely manner to requests for more exterior lights. The court concluded that these alleged facts were sufficient to show the existence of a duty on the part of the association and a breach of that duty. *Id.* at 499.

Similarly in *Ann M., supra,* 6 Cal.4th 666, the court found that the proprietors of a shopping center had a "general duty of maintenance, which is owed to tenants and patrons, . . . [and which] include[s] the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." *Id.* at 674. The scope of the duty, the court wrote, "is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed." *Id.* at 678. "In cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." *Id.* at 678–679. *Ann M.* concluded that in the circumstances of that case there was not a sufficiently high degree of foreseeability to impose a duty on the landlord to provide security guards to patrol the shopping center premises.

In *Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th 1181 (*Sharon P.*), the court again applied this balancing test in a case where plaintiff was attacked in a parking garage underneath a commercial office building. As in *Ann M.,* the court in *Sharon P.* concluded that the circumstances did not demonstrate a sufficiently high degree of foreseeability of crimes of the kind suffered by plaintiff in order to justify imposing the burdensome duty on defendant to undertake security measures such as installing lighting, monitoring security cameras and providing security guards on the premises. See also *Delgado*, *supra*, 36 Cal.4th at 236–240, where the Supreme Court reviewed the development of the law regarding premises liability based on a "special relationship,"

and adopted the balancing test set forth in *Ann M.*, *supra*, 6 Cal.4th at 678–679.

Plaintiffs contend the duty they seek to impose on defendant—to acquire and place AEDs on its premises—amounts to a "minimal burden" that could prevent the foreseeable harm that occurred here. *Delgado*, *supra*, 36 Cal.4th at 243. Thus they argue that the balancing test set forth in the premises liability cases weighs in favor of imposing a duty in this case.

But under the common law of this state, the "special relationship" duty a landlord owes to tenants and invitees has never been extended to impose an affirmative duty such as plaintiffs seek to impose here, requiring placement of a medical device in defendant's buildings. A landlord may have a duty to maintain the premises in a reasonably safe condition. He may also have a duty to prevent foreseeable harm, such as a criminal attack by a third party, from occurring to those using the premises, or to take certain steps to come to the aid of an invitee in the face of imminent or ongoing danger. These circumstances, however, differ from those present here.

As the court found in *Frances T.,* a defendant's failure to provide lighting in common areas, knowing that the lack of lighting was linked to criminal activity, could constitute a breach of duty. Here, however, although cardiac arrest among retail shoppers and browsers may be foreseeable, the occurrence of such an injury cannot be prevented or protected against by any precautionary measures taken by the operators of the premises. Rather, an injury of this nature is a risk inherent in everyday life. Unlike *Frances T.,* and the other premises liability cases mentioned, nothing

defendant did or did not do in this case invited or led to the cardiac arrest suffered by decedent.

In regard to the extent of the duty of a landlord or business proprietor to come to the aid of a sick or injured invitee, courts have found that sound policy limits the extent of this duty to promptly summoning emergency services. In *Breaux v. Gino's, Inc.* (1984) 153 Cal.App.3d 379 (*Breaux*), for instance, plaintiff's wife choked while eating at a restaurant owned and operated by Gino's, Inc., and later died. The restaurant's assistant manager called an ambulance as soon as he was aware that the decedent was in distress. No one attempted to provide first aid to the decedent, who was alive when the ambulance arrived. Gino's complied with California statutory law by posting state-approved instructions on first aid for choking victims. The statute provided immunity from liability to anyone who followed those instructions in assisting a choking victim. *Breaux*, *supra*, 153 Cal.App.3d at 381. *Breaux* discussed the extent of the restaurant's duty for nonfeasance, that is, the physical acts restaurants are required to perform to assist customers who need medical attention. *Id.* at 382. The court determined that given Gino's compliance with the statute, the restaurant met its legal duty to the decedent when it summoned medical assistance within a reasonable time.

Similarly, *Rotolo v. San Jose Sports and Entertainment, LLC* (2007) 151 Cal.App.4th 307, review den. Aug. 15, 2007 (*Rotolo*) considered the duty owed by the operator of a sports facility to an invitee who suffered cardiac arrest on the premises. Parents sued the operators of the facility for wrongful death after their teenage son died of cardiac arrest while participating in an ice hockey game. They alleged defendants had a duty to notify facility users of the existence and location of an AED on the premises. The

parents also claimed, as do plaintiffs herein, that the timely use of the AED would have greatly increased the chances of their son's survival. *Rotolo, supra,* 151 Cal.App.4th at 313.

The trial court sustained defendants' demurrer, finding no common law duty "beyond a duty to timely summon emergency services, which defendants fulfilled." *Ibid.* The appellate court affirmed, reasoning that the Legislature occupied the field by enacting statutes that governed the acquisition and use of AEDs, but did not impose an affirmative duty on building owners and managers to acquire AEDs in the first instance. *Id.* at 314. Most important for the purposes of this case, the court declined "to create a legal duty that [was] nowhere defined in the statutes or in common law . . .." *Ibid.*

Rotolo also addressed the well-established *Rowland* factors that inform the policy decision to impose a duty of care:

> 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.

Id. at 336-337, citing and quoting *Rowland v. Christian*, *supra*, 69 Cal.2d 108.

Rotolo's "balancing" of the *Rowland* factors is instructive for this case. Echoing the allegations of plaintiffs here, the *Rotolo* plaintiffs claimed that sudden cardiac arrest

is the leading cause of death among athletes. They also asserted, as do plaintiffs here, that statistics show there is a virtual certainty a person who experiences cardiac arrest will die unless defibrillation occurs within minutes. They contended, therefore, that there is a high degree of *foreseeability* death will occur in the absence of the timely use of an AED. Crucial to providing this aid, they claimed, is an emergency plan by the operators of a sports facility that informs those supervising the sporting event of the existence and location of the AEDs in the facility. Plaintiffs in *Rotolo* further contended, similar to what plaintiffs claim in this case, that the connection between defendants' conduct and the injury suffered by Nicholas Rotolo was "close," because if league officials and coaches had been informed that there was an AED installed near where Nicholas collapsed, and the device had been used by those administering aid to him, he would have had a greatly increased probability of survival. Here plaintiffs make the analogous claim that if only defendant had a defibrillator available on its premises, decedent may have been saved.

Acknowledging that it may well be "advisable and helpful for operators of sports facilities to develop an emergency plan that includes notice to users of the facility of the availability of lifesaving devices on the premises," the court nonetheless concluded the plaintiffs' *foreseeability* factor failed to account for the limitations on the duty of a business proprietor to provide assistance to a patron experiencing a medical emergency as discussed in *Breaux*, *supra,* 153 Cal.App.3d at 382; and rejected plaintiffs' attempt to expand the duty imposed on operators of sports facilities. *Rotolo* at 337.

Rotolo also rejected application of *Rowland*'s "close connection" factor, explaining that though "statistically the chances of surviving an incident of cardiac arrest are

increased by the timely use of a defibrillator, [this] does not give rise to a duty on [defendants'] part to take affirmative steps to ensure the device will be used in appropriate circumstances, particularly considering that the Legislature expressly has found no duty to acquire or install an AED in the first place." *Id.*

Nor was *Rotolo* convinced that the "moral blame" factor of *Rowland* favored plaintiffs' claim. "To avoid redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of . . . factors in favor of liability." *Rotolo* at 337.

Finally, *Rotolo* rejected, for reasons fully applicable to this case, plaintiffs' argument that what it was asking by way of "notice" from defendants to their invitees about the location of AEDs was "minimally burdensome" and should therefore be granted:

> [D]ecisions as to what losses are compensable are policy determinations . . . best left to the Legislature, which in this case has established detailed standards for the use and regulation of AEDs. The Legislature has seen fit to not impose any duties of notice on building owners who acquire AEDs, other than those specifically delineated in the statute. Although the duty [plaintiffs] seek to impose may appear, in retrospect, to be minimally burdensome, it is not our role to second guess the Legislature on matters of policy by expanding the express limitations set forth in the statute.

Rotolo, *supra*, 151 Cal.App.4th at 337-338.

CONCLUSION

For all the reasons aforementioned, the Court should answer the certified question in the negative by holding that defendant has no common law duty in tort to acquire and provide an AED on its premises for invitees who experience cardiac arrest.

Dated: November 1, 2013

Respectfully submitted,

/s/

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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 7,600 words.

Date: November 1, 2013

/s/
Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On November 1, 2013, I served the foregoing document(s) described as: *Amici Curiae* Brief of the California Chamber of Commerce and the Civil Justice Association of California in *Verdugo v. Target Corporation*, S207313 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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[X](BY MAIL) I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

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

Executed this 1st day of November 2013 at Sacramento, California.

/s/
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