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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S207313

MICHAEL VERDUGO,
ROSEMARY VERDUGO, and MARY ANN VERDUGO,

Plaintiffs and Appellants,

v.

TARGET CORPORATION,

Defendant and Respondent.

SUPREME COURT
FILED

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After the United States Court of Appeals for the Ninth Circuit
certified the question to the California Supreme Court
(Case No. 10-57008)

On Appeal from the United States District Court,
Central District of California, Los Angeles
(Case No. 2:10-cv-06930-ODW-AJW, Honorable Otis D. Wright II, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT AND RESPONDENT

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APPLICATION

Pursuant to California Rule of Court 8.520(f), Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Defendant/Respondent Target Corporation. Amicus is familiar with the issues and scope of their presentation, and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the free enterprise system from abusive regulation, a civil justice system that grants excessive or inappropriate awards, and barriers to the freedom of contract. To that end, PLF has participated in several cases before this Court and others on matters affecting the public interest, including the scope and application of tort duties. *See, e.g.*, *Castaneda v. Olsher*, 41 Cal. 4th 1205 (2007) (mobile home park owner has no duty to prevent tenant's injury from stray gunfire between hostile street gangs); *Wiener v. Southcoast Childcare Centers, Inc.*, 32 Cal. 4th 1138 (2004) (homicidal driver's attack on preschool was not foreseeable); *Bass v. Gopal, Inc.*, 395 S.C. 129 (2011) (motel not liable for trespassing criminal's attack on a guest); *Giggers v. Memphis Housing Authority*, 277 S.W.3d 359 (Tenn. 2009) (addressing landlord responsibility for tenant-on-tenant crime); *Trammel*

Crow Central Texas, Ltd. v. Gutierrez, 267 S.W.3d 9 (Tex. 2008) (shopping mall owner not liable for fatal shooting of patron on the premises). PLF attorneys also have published articles about public policies underlying tort liability. *See, .e.g.*, Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports

gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. NFIB Legal Center has filed in numerous cases voicing concerns over expansive new theories of negligence. *See Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679 (2013) (declining to abrogate common law principle of contributory negligence in favor of comparative negligence); *Ford Motor Co. v. Boomer*, 285 Va. 141 (2012) (addressing a new theory of causation); *Cullum v. McCool*, Sup. Ct. TN Case No. E2012-00991-SC-R11-CV (2013) (concerning a novel theory of negligence that would create new legal duties of care for businesses). In this case, NFIB Legal Center seeks to file in order to draw attention to the real impacts that Plaintiff's proposed rule will have on California's small business community.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT AND RESPONDENT

INTRODUCTION AND SUMMARY OF ARGUMENT

Mary Ann Verdugo died from sudden cardiac arrest at a Target store. Verdugo's family argued that she might have lived if the Target had an

Automatic External Defibrillator (AED) available. Because there is no statutory requirement that retail stores purchase, maintain, and train their employees to use an AED, Verdugo's family seeks an expansion of California common law that would impose a duty on businesses to have AEDs on their commercial properties.[1] This Court should reject this proposal.

A commercial property owner owes no common law duty to keep on hand any specific device in the event of a medical emergency. Instead, a business owner is required to take reasonable steps to prevent or address foreseeable harms. Courts should not use the common law to dictate each specific kind of equipment that each specific kind of business must purchase, maintain, and train employees to use. Under existing law, those decisions are made first by the businesses themselves, which use their own judgment to determine what risks are likely and what preventative steps are most appropriate; and second, by the Legislature, which may choose to standardize a particular duty of care.

In this case, all parties agree that the Legislature, to the extent that it has codified public policy related to AEDs, imposes no statutory duty on

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[1] Verdugo claims to "seek[] no blanket rules or judicial legislation," Reply Brf. on the Merits at 2, but the certified question accepted by this Court plainly asks when "does the common law duty of a commercial property owner to provide emergency first aid to invitees require the availability of an Automatic External Defibrillator ('AED') for cases of sudden cardiac arrest?" which would, if answered in the affirmative, create a blanket rule imposing a specific, inflexible duty on commercial property owners.

businesses to purchase and maintain the devices. Health and Safety Code § 1797.196(f) ("Nothing 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."). Common law tort duties, which must remain flexible to remain relevant across advances and changes in biotechnology, should not be held to require a commercial property owner to respond to a patron's medical emergency with a specific medical device.

ARGUMENT

I

PUBLIC POLICY SUPPORTS A LIMITED DUTY FOR BUSINESSES CONFRONTED WITH A PATRON'S MEDICAL EMERGENCY

A. Premises Liability Is Based on Dangers Inherent in the Property, Not Dangers Inherent in the Invitee

Property owners are held responsible for the condition of their premises because the landowner is in a superior position both to know of and to remedy dangerous instrumentalities or conditions on their property. *Girvetz v. Boys' Market*, 91 Cal. App. 2d 827, 829 (1949) ("To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier 'must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition' "); *Florez v. Groom Dev. Co.*, 53 Cal. 2d 347, 357 (1959). The limitations are necessary because the principle that a business

should pay for the harms it causes is not, by itself, a sufficient principle for the creation of tort liability. In addition to identifying the party that caused the harm, tort law looks to public policy considerations to determine who should bear the cost of the harm. Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. "At some point," therefore, "it is generally agreed that the defendant's act cannot fairly be singled out from the multitude of other events that combine to cause loss." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982).

Generally, no one has a "duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act." *Seo v. All-Makes Overhead Doors*, 97 Cal. App. 4th 1193, 1202-03 (2002) (citation omitted). A special relationship may give rise to a legal duty to protect the plaintiff from third parties, even in the absence of misfeasance by the defendant. However, California law plainly holds that in no way is a business proprietor the insurer of an invitee's safety. *Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 1205 (2001); *Kentucky Fried Chicken of Cal., Inc. v. Sup. Ct.*, 14 Cal. 4th 814, 819 (1997).

Instead, the business owes "a duty to exercise reasonable care in keeping the premises reasonably safe." *Ortega*, 26 Cal. 4th at 1205.

The "special relationship" argument that exists between a store and customer is very different than that between, for example, a hospital and a patient, or a cruise ship and a passenger. In the latter instances, "the special relationship situations generally involve some kind of dependency or reliance." *Melton v. Boustred*, 183 Cal. App. 4th 521, 535 (2010) (quoting *Olson v. Children's Home Society*, 204 Cal. App. 3d 1362, 1366 (1988)). A hospital patient's health is in the hands of the hospital doctors and nurses. A cruise ship passenger has no means of disembarking and seeking other care if the ship is at sea. If the hospital patient or cruise ship passenger suffers a medical emergency, he or she depends on the hospital or ship's personnel to provide care beyond simply calling for assistance. This enhanced duty makes sense in these limited circumstances, because medical personnel are standing by for the specific purpose of assisting those who require it and who have no other options for obtaining it. In contrast, a Target shopper does not have any kind of unique dependency or reliance on the store to provide medical care beyond the usual duty of a business owner to summon help.

This is true even where the Target store is "huge." Opening Brief on the Merits, 2013 WL 2367417 at *6 (filed Apr. 18, 2013). Verdugo's apparent disdain for big box stores notwithstanding, lots of commercial businesses

encompass substantial square footage: multistory office buildings, sporting and entertainment venues, and so on. Large is not equivalent to isolated. Building codes ensure that large, enclosed spaces contain sufficient doors to permit prompt entry of emergency personnel, who are not restricted to using the front door used by the general public. Moreover, if the duty to maintain specific medical devices on the premises depends on the response time of emergency medical personnel, then rural businesses, of every size, will be found to have a duty solely due to their distance from an emergency dispatch station.[2] There is no principled way to constrain such a duty only to big box retail establishments; ultimately, all businesses, large and small, urban and rural, would be required to purchase, maintain, and train their employees in the use of AEDs, and potentially other medical devices. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

Second, under the general rules governing a special relationship between a land or business owner and a guest or patron, a defendant has no duty to protect the victim from potential harm where the defendant has no

[2] Emergency response time in rural areas is significantly greater than in urban areas. *See* Humboldt County, *Emergency Response Time and Coverage Appendix D*, http://co.humboldt.ca.us/board/agenda/questys/mg93555/as93602/as93603/ai97857/do97918/1.pdf (last visited Oct. 15, 2013) (average emergency response time in a rural community is eleven minutes, compared to seven minutes in an urban area).

knowledge of circumstances that could lead to harm. *Romero v. Sup. Ct.*, 89 Cal. App. 4th 1068, 1083 (2001). California tort law does not require people to be good Samaritans, and ordinarily does not impose liability for mere nonfeasance. *Romero*, 89 Cal. App. 4th at 1079. "[I]t is not enough to assert that it is *conceivable*" that harm could befall a guest on the landowner's premises, *id.* at 1089, and courts will not require premises owners to engage in "continuous supervision" of those invited onto their property. *Id.* at 1094. It would be absurd to suggest that a retail shopping outlet has knowledge, or even any right to inquire, about its patrons' medical histories.[3]

Where premises liability is invoked not because of any dangerous condition created by the property, but solely because of the presence of a person who brings the potential for harm with her, the landowner's duty must be narrowly construed. The existing duty of property owners to summon aid sufficiently balances the policy favoring assistance to the stricken with the policy that property owners cannot be made uniquely responsible for insuring the safety of every person who enters the premises. *Delgado v. Trax Bar &*

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[3] There is nothing unique to Target that draws patrons with medical problems; shoppers fall all along the spectrum of health and well-being and Target, like all businesses, must make their premises not only available, but accessible, to potential patrons with a wide range of medical and other disabilities. *See Californians v. Disability Rights v. Mervyn's LLC*, 165 Cal. App. 4th 571 (2008) (discussing requirements of Unruh Civil Rights Act and California's Disabled Persons Act); *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661 (2009) (discussing access requirements of federal American with Disabilities Act and Unruh Civil Rights Act).

Grill, 36 Cal. 4th 224, 241 (2005) ("[I]t long has been recognized that restaurant proprietors have a special-relationship-based duty to undertake relatively simple measures such as providing 'assistance [to] their customers who become ill or need medical attention and that they are liable if they fail to act.' [Citations.] . . . Such measures may include telephoning the police or 911 for assistance.").

Courts in other jurisdictions that have examined the issue of a business owner's duty to injured patrons generally hold that a business owner satisfies its legal duty to come to the aid of a patron experiencing a medical emergency by summoning medical assistance within a reasonable time. They have declined to extend the duty of reasonable care to include providing medical care or medical rescue services. For example, a Kansas court held that a company is not obligated to use an AED as part of rendering emergency care to an employee when a company nurse or emergency medical technician was not available. *Adee v. Russell Stover Candies, Inc.*, 186 P.3d 840, 847 (Kan. Ct. App. 2008). Ohio's intermediate appellate court held that the managers of a swimming pool did not have a duty to have an AED nearby, despite expert testimony that having an AED on site would make the swimming pool area safer. *Bae v. Dragoo & Assocs., Inc.*, 804 N.E.2d 1007, 1015 (Ohio Ct. App. 2004). *See also Lundy v. Adamar of N.J., Inc.*, 34 F.3d 1173, 1179 (3d Cir. 1994) (affirming summary judgment for casino owner sued by patron who

suffered a cardiac arrest and alleged that the casino breached its duty to provide medical care because it did not have an intubation kit on the premises or the personnel necessary to perform an intubation).

In *Abramson v. Ritz Carlton Hotel Co., LLC*, 480 Fed. Appx. 158 (3d Cir. 2012), a hotel guest's widow sued the hotel when her husband suffered a fatal heart attack while dining in the hotel restaurant. She alleged that the hotel breached its duty of care by failing to properly maintain the medical equipment provided during the emergency. The court held that "a common understanding of 'first aid' does not encompass the use of an oxygen tank or AED any more than it encompasses an intubation kit. Rather, 'first aid' involves simple procedures that can be performed with minimal equipment and training, such as bandaging and repositioning." *Id.* at 162. Because the hotel "fulfilled its limited common law duty to summon help and, until help arrived, provide basic first aid," it was not liable for the guest's death. *See also L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550, 559 (Fla. App. 2008) (holding that "first aid" does not include CPR or any other skilled treatment that requires training); *Salte v. YMCA of Metro. Chi. Found.*, 351 Ill. App. 3d 524, 529 (2004) (Business was required to provide "whatever first aid that, under the circumstances, they were reasonably capable of providing," but it was not required to be "prepared to provide[] all medical care that it could reasonably foresee might be needed by a patron.") (citations omitted).

In *Boller v. Robert W. Woodruff Arts Center, Inc.*, 311 Ga. App. 693, 695 (2012), the court rejected a widow's lawsuit against an arts center for the death of her husband, allegedly because of the center's failure to have onsite either an ambulance or someone certified to use an AED, as well as failure to have a plan to deal with medical emergencies. It held that no statutory or common law duty existed that would require the center "to provide emergency medical services to the patrons of its concerts." *Id.* at 696. *See also* Kevin M. Rodkey, *Medical Technology Meets the Maryland General Assembly: A Case Study in Handling Advances in Automated External Defibrillator Technology*, 12 J. Health Care L. & Pol'y 81, 87 (2009) (comprehensive listing of jurisdictions).

B. Businesses Should Not Be Held to a Greater Duty Because They Care About Their Customers' Well-being

The trial lawyers argue that Target held itself out as particularly protective of and concerned with its patrons' health, such that it should be responsible for providing emergency medical care.[4] Case law developed in the context of health and fitness clubs, however, suggest an alternative. Health and fitness clubs, much more so than department stores such as Target,

[4] Amicus Curiae Brief of the Consumer Attorneys of California, 2013 WL 4497996 at 6-7 (July 24, 2013).

promote themselves as caring for the health and well-being of their customers.[5] This is their primary draw to customers. Yet health clubs and other sports and fitness facilities are not held to a legal duty to provide medical services beyond calling 911 when someone on the premises suffers a medical emergency. *Rotolo v. San Jose Sports and Entertainment, LLC*, 151 Cal. App. 4th 307, 314-15 (2007).

In *Digiulio v. Gran, Inc.*, 74 A.D.3d 450, 903 N.Y.S.2d 359 (App. Div. 2010), *aff'd* 11 N.Y.3d 765, 929 N.Y.S.2d 71 (2011), a health club member suffered a cardiac arrest while on a treadmill. One club employee immediately called 911 and began administering CPR and another employee, in a panicked state, tried but failed to bring an AED to the member's aid. A state statute required that both an AED and a certified employee be on the health club premises, and it was. The actions of the panicked employee, however, meant that it was not used. The member and his wife sued, arguing that the health club had a common law legal duty to maintain a defibrillator on the premises and train its employees in the proper use of the equipment. The New York

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[5] *See, e.g.*, 24 Hour Fitness, *Resources* (*available at* http://www.24hourfitness.com /resources/) (last visited Oct. 15, 2013) (offering exercise guidelines, nutritional information, and other tools to promote "living the fitness lifestyle."); The Los Angeles Athletic Club (*available at* http://www.laac.com/Default.aspx?p=Dynamic Module&pageid=243721&ssid=116343&vnf=1) (last visited Oct. 15, 2013) (offering to fulfill customer goals from "athletic performance to holistic wellness").

appellate court disagreed, holding that "[a]fter the heart attack, the club's employees more than fulfilled their duty of care by immediately calling 911 and performing CPR, had no common-law duty to use the AED, and could not be held liable for not using it." *Id.* at 452

Subsequently, in *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364 (2013), a fitness club member collapsed and the club called 911 and brought an AED to the stricken member's side. A certified employee sought to assist Miglino, but neither used the AED nor administered CPR, finding both to be inappropriate given Miglino's condition (breathing, with a pulse). Two other members, medical professionals, administered CPR. Miglino died and his son sued, based on Bally's failure to use the AED. The court rejected the plaintiff's statutory claims and while it deferred ruling on the common law claim, the court's tone in addressing it suggested skepticism, because "New York courts have viewed health clubs as owing a limited duty of care to patrons struck down by a heart attack or cardiac arrest while engaged in athletic activities on premises." *Id.* at 350. The complaint asserted that Bally did not "'employ or properly employ life-saving measures regarding [Miglino]' after he collapsed." *Id.* at 343. In response, Bally submitted affidavits that contradicted this claim, by showing that "the minimal steps adequate to fulfill a health club's limited duty to a patron apparently suffering a coronary incident—i.e., calling 911,

administering CPR and/or relying on medical professionals who are voluntarily furnishing emergency care—were, in fact, undertaken." *Id.* at 351. *See also Salte v. YMCA of Metro. Chicago Found.*, 351 Ill. App. 3d 524, 529 (2004) (affirming dismissal of action brought against health club owner by wife of health club member who suffered cardiac arrest while using treadmill and holding that owner did not have a duty to have a cardiac defibrillator on its premises and its staff did not have a duty to use a defibrillator on the health club member); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 589 (2002) (holding that tennis club owed no duty to tennis club member who suffered heart attack to acquire and maintain a defibrillator on its premises for emergency use); *Rutnik v. Colonie Ctr. Court Club, Inc.*, 249 A.D.2d 873, 875, *cert. denied*, 92 N.Y.2d 808 (1998) (holding that racquetball club was not negligent in failing to have a defibrillator present on premises for immediate emergency use; also noting that there was no defect in the premises themselves).

C. Other Medical Conditions That Require Immediate Assistance Do Not Impose Duties on Property Owners

Any person may carry with her the risk of a heart attack as she moves through her days, in and out of a variety of businesses, homes, government buildings and streets. Likewise, many people bear other significant risks, as a result of their genetic dispositions and or lifestyle choices, which might lead to a medical emergency wherever they might go. For example, many

individuals have nut allergies and require an immediate injection of epinephrine (Epipens) upon contact with nuts. Asthmatics depend on immediate use of inhalers to restore their ability to breath. And diabetics may need an immediate injection of insulin or sugar with sudden changes in blood sugar. In none of these situations, however, do courts place a duty on premises owners to provide these medical devices.

For example, in *Chiney v. American Drug Stores, Inc.*, 21 S.W.3d 14, 15-16 (Mo. App. 2000), a drug store pharmacist refused to provide an albuterol inhaler to a patron who was suffering an acute asthma attack because she had no current prescription; she therefore had to travel by ambulance to a medical center for treatment. The court defined the relationship between the pharmacist and the plaintiff as one of a pharmacist to a potential customer. *Id.* at 17. The pharmacist's job was to fill and dispense prescriptions according to the directions of health care providers who are authorized to prescribe medication. *Id.* The court held that the pharmacist was under no legal duty to provide prescription medication (the inhaler), call a doctor, or consult with the plaintiff because the plaintiff had never filled a prescription at his pharmacy before and he never received a prescription drug order. *Id.* at 18. *Cf. Burns v. City of Redwood City*, 737 F. Supp. 2d 1047, 1052-54 (N.D. Cal. 2010) (not only did movie theater in which diabetic patron suffered disorientation and odd behavior not provide any medical assistance, but it called the police, who

forcibly subdued and arrested him for intoxication); *American Nurses Ass'n v. Torlakson*, 57 Cal. 4th 570, 577 (2013) ("The need for insulin can arise anytime and anywhere"); *Pace v. State*, 425 Md. 145, 169-70 (2012) (state had no duty of care under the National School Lunch Act to prevent cafeteria workers from giving peanut butter sandwich to a student with a severe allergy; no common law tort duty alleged in the complaint).

In these analogous situations, a relatively inexpensive medical device or drug could be administered (or, in the case of low blood sugar, a candy bar or juice box). Yet courts do not impose common law duties on landowners, schools, or employers to provide these specific types of medical care.

II

A RIGID RULE REQUIRING AEDS VIOLATES TORT JURISPRUDENCE THAT FAVORS FLEXIBLE CONCEPTS OF DUTY

This Court should not adopt an inflexible rule concerning the prophylactic measures a business owner must take in a particular case. The common law of torts, including the concept of duty, evolves in light of the changing conditions and circumstances of society. *Washington v. Resolution Trust Corp.*, 68 F.3d 935, 938 (5th Cir. 1995). "No rigid rule can be stated defining when a duty of care owed by a specific defendant to plaintiff does or does not exist." *McGarvey v. Pacific Gas & Elec. Co.*, 18 Cal. App. 3d 555, 561 (1971). *See also Weaver v. Bishop*, 206 Cal. App. 3d 1351, 1358 (1988)

(Comparing "the rigidities of property law" with "the more flexible, conduct-oriented principles of tort.").

Changes in biotechnology eventually will render a device-specific duty obsolete. People suffering from cardiac arrest, for example, may be treated with drugs rather than a defibrillator. Oregon Health and Science University is currently conducting a study that compares the effectiveness of two drugs frequently administered by first responders to a person suffering cardiac arrest. Dylan Fitzwater, *OHSU Gets New NIH Science Research Funding for Cardiac Arrest Study*, Science Market Update (July 31, 2012).[6] Following another path of research, scientists at the Hohenstein Institute developed an entirely different type of therapy for sudden cardiac arrest victims based on extremely rapid cooling down of the patient's body. Innovative cooling pads, which require no power source, induce "therapeutic hypothermia," thus slowing circulation and allowing more time for the patient to receive critical care before suffering irreparable neurological damage. Hohenstein Institute, *Help for Cardiac Arrest Patients – Fast and Without Electricity*, ScienceDaily (June 29, 2012).[7] Even traditional cardiopulmonary resuscitation (CPR) has undergone changes due to biotechnological advances: handheld mechanical

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[6] *Available at* http://info.biotech-calendar.com/?Tag=Cardiac%20Arrest (last visited Oct. 15, 2013).

[7] *Available at* http://www.sciencedaily.com/releases/2012/06/120629120326.htm (last visited Oct. 15, 2013).

devices now exist to provide more consistent and possibly more effective pumping action than a human being. S.C. Brooks, et al., *Mechanical chest compression machines for cardiac arrest*, Cochrane Summaries (Jan. 19, 2011).[8]

By the same token, given the rapid changes in biotechnology, if the court opens the door to establishing duties on commercial property owners to maintain particular medical devices on the premises, at what point does such a duty arise? How accessible and inexpensive must the device be? Who determines when a cheap, easy-to-use device has achieved a level of ubiquity that could justify a requirement that every commercial establishment keep on the premises? Construing the common law to demand the presence of one particular type of medical device opens the door for future plaintiffs to argue that business owners should have other types of medical devices on hand. As businesses struggle to discern what potential medical devices might be retroactively demanded by the common law, their uncertainty translates into fear of lawsuits and higher prices and the cost of the anticipated litigation is factored into the price of goods and services. *See* Testimony of Elizabeth Milito, *Litigation Abuses*, House of Representatives Comm. on the Judiciary Subcomm. on the Constitution at 5 (Mar. 13, 2013) (The fear of litigation can

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[8] *Available at* http://summaries.cochrane.org/CD007260/mechanical-chest-compression-machines-for-cardiac-arrest (last visited Oct. 15, 2013).

be extremely effective in corralling employers into settling even the most frivolous of claims.). The retroactivity of the declared new duty is a further reason why the imposition of any new affirmative duties belongs in the legislative realm, where the public has input, and legislators are better suited to weighing the social costs of new regulations and potential benefits to the public welfare. The common law duty of landowners to provide reasonable aid to a stricken guest on the property cannot be tied to specific devices or treatments, which will likely become obsolete with biotechnological advances.

CONCLUSION

Premises liability rules should apply only when the landowner should have been aware of a particular likelihood of injury or the necessary preventative measures. There is nothing inherent about Target—or any retail establishment—that makes its customers more likely to suffer a heart attack. Thus, the proposed duty to purchase, maintain, and train employees in the use of AEDs is nothing more than a tax on businesses to respond to a general social problem rather than remediation of an increased risk of harm caused by the business. Businesses are not meant to be insurers. As the New Jersey Supreme Court recently wrote:

> [T]he function of the law, and in particular the common law governing tort recoveries, cannot be driven by sympathy or overshadowed by the effects of tragedy. Rather, the function of tort law is deterrence and compensation, and absent circumstances in which the definition of the duty can be applied both generally and justly, this Court should stay its hand. In the

> end, although creating a cause of action to suit these facts might serve the ends of these particular plaintiffs, we cannot say that it would advance the public interest or lead to a rule that would sensibly, predictably, and fairly govern future conduct.

Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 329-30 (2013).

This Court should answer the certified question in the negative: there is no common law duty for commercial businesses to maintain AEDs on the premises.

DATED: October 24, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT AND RESPONDENT is proportionately spaced, has a typeface of 13 points or more, and contains 5,007 words.

DATED: October 24, 2013.

DEBORAH J. LA FETRA

DECLARATION OF SERVICE BY MAIL

I, Suzanne M. MacDonald, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On October 24, 2013, true copies of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT AND RESPONDENT were placed in envelopes addressed to:

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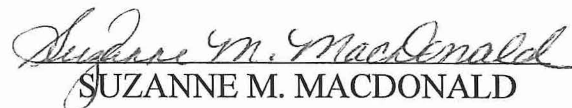
which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 24th day of October, 2013, at Sacramento, California.



SUZANNE M. MACDONALD