Case No. A126822 (Civil)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOYCE A. CRULL, individually and as successor to DENTON E. CRULL,

Plaintiff and Appellant,

v.

3M COMPANY, et al.,

Defendants and Respondents.

Alameda County Superior Court Case No. RG 08 404667
Hon. Patrick Zika, Judge

APPLICATION OF COALITION FOR LITIGATION JUSTICE, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT 3M COMPANY

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TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200 of the California Rules of Court, *amici curiae* request permission to file the accompanying brief in support of Defendant-Respondent 3M Company.

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* are well-suited to provide a broad perspective to this Court as to the context in which this case should be considered. The proposed brief does not seek to simply repeat Defendant-Respondent's arguments.

Amici agree with the trial court's decision to grant nonsuit to 3M in this action based on Plaintiff's failure to present evidence that "but for" 3M's conduct, Plaintiff would not have developed asbestos-related cancer. Plaintiffs in cases such as this one, which do not involve asbestos-containing products, should be decided under California's traditional "but for" causation standard (*see Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239 and Judicial Council of California Civil Jury Instruction (CACI) No. 430), rather than the special asbestos-specific causation standard (*see Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953 and CACI 435).

This result is not only compelled by a common-sense reading of California law, but also is critical as a matter of sound public policy. Now in its fourth decade, the asbestos litigation has been sustained by a relentless search for new defendants and new theories of liability. (*See* Mark Behrens, *What's New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501; Peter Geier, *Asbestos Litigation Moves On With World War II Shipyard Cases 'Dying Off', Plaintiff Attorneys Dig Deeper to Find New Strategies* (Jan. 9, 2006) 130:5 Recorder (San Francisco) 12, *available at* 2006 WLNR 25577320.) One former plaintiffs' attorney described the litigation as an "endless search for a solvent bystander." (*'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz* (Mar. 1, 2002) 17:3 Mealey's Litig. Rep.: Asbestos 5 [quoting Mr. Scruggs].) Defendant-Respondent 3M is an example.

Amici believe that the application of flimsy causation standards is always objectionable. Here, as we will demonstrate, it could have disastrous consequences for public health and safety.

No party or any counsel for a party in the pending appeal authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or

entity other than the *amici curiae* made a monetary contribution intended to fund the preparation or submission of the brief.

* * *

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers to address the asbestos and toxic tort litigation environment.[1] The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos and toxic tort litigation environment.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community.

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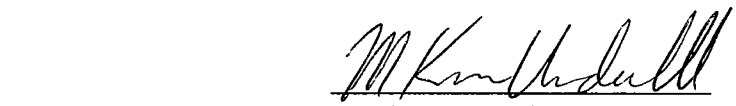
[1] The Coalition includes Century Indemnity Company, Chubb & Son, a division of Federal Insurance Company, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

* * *

For these reasons, *amici* respectfully request that the Court grant this Application.

Respectfully submitted,



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Dated: March 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2011, I caused an original and four copies of the foregoing Application to be manually filed with the clerk of the Court of Appeal for the First Appellate District, Division Two. Pursuant to Rule 8.44(b), I further caused four copies to be filed with the clerk of the Supreme Court of California. A copy was mailed via First Class Mail to the following and hand delivered to the clerk of the Superior Court in compliance with Rule 8.212(c) of the Rules of Court:

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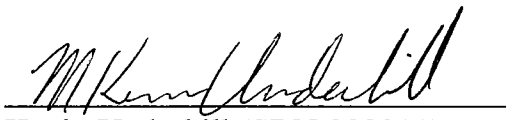

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INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* are well-suited to provide a broad perspective to this Court as to the context in which this case should be considered and the reasons why the trial court's decision to grant nonsuit to 3M should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with the trial court's decision to grant nonsuit to 3M in this action based on Plaintiff's failure to present evidence that "but for" 3M's conduct, Plaintiff would not have developed asbestos-related cancer. Plaintiffs in cases such as this one, which do not involve asbestos-containing products, should be decided under California's traditional "but for" causation standard (*see Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239; Judicial Council of California Civil Jury Instruction (CACI) No. 430), rather than the special asbestos-specific causation standard (*see Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953; CACI 435).

This result is not only compelled by a common sense reading of California law, but also is critical as a matter of sound public policy. Now in its fourth decade, the asbestos litigation has been sustained by a relentless search for new defendants and new theories of liability. (*See*

Mark Behrens, *What's New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501 (2009); Peter Geier, *Asbestos Litigation Moves On With World War II Shipyard Cases 'Dying Off', Plaintiff Attorneys Dig Deeper to Find New Strategies*, 130:5 Recorder (San Francisco) 12 (Jan. 9, 2006), *available at* 2006 WLNR 25577320.) The litigation has been described as an "endless search for a solvent bystander." Defendant-Respondent 3M is an example.

Amici believe that the application of flimsy causation standards is always objectionable. (*See, e.g.*, Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony* (2008) 37 Sw.U. L.Rev. 479.) Here, as we will demonstrate, it could have disastrous consequences for public health and safety.

ARGUMENT

I. BACKGROUND IN WHICH THE SUBJECT LITIGATION SHOULD BE CONSIDERED

A. National Overview

Asbestos litigation is the "longest-running mass tort" in U.S. history. (Helen Freedman, *Selected Ethical Issues in Asbestos Litigation* (2008) 37 Sw.U. L.Rev. 511, 511.) "For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." (*In re Combustion Eng'g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200.) As far back as 1997, the United States Supreme Court described the litigation as a "crisis."

(*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597.)[1] Through 2002, approximately 730,000 asbestos claims had been filed. (*See* Stephen J. Carroll et al., *Asbestos Litigation xxiv* (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.)[2]

In 2005, the RAND Institute for Civil Justice found that following the first bankruptcy attributed to asbestos litigation in 1976, there were nineteen asbestos-related bankruptcies in the 1980s, seventeen in the 1990s, and thirty-six more between 2000 and 2004 alone. (*See* Carroll et al., *supra*, at xxvii.) By 2006, asbestos-related liabilities had forced over eighty-five companies into bankruptcy. (*See* Martha Neil, *Backing Away from the Abyss*, A.B.A. J. (Sept. 2006) at 26, 29, *available at* http://www.abajournal.com/magazine/article/backing_away_from_the_abyss/.) As of 2010, the litigation had forced at least ninety-six companies into bankruptcy (*see* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Inst. for Civil Justice 2010), *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf), with

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1 *See also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation* (2002) 54 Baylor L.Rev. 331; Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis* (2001) 71 Miss. L.J. 1.

2 RAND has estimated that $70 billion was spent in the litigation through 2002, with future costs greatly exceeding that figure. (*See* Carroll et al., *supra,* at 92, 106.)

devastating effects on defendants' companies' employees, retirees, shareholders, and surrounding communities. (*See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (2003) 12 J. Bankr. L. & Prac. 51.)

These consequences for today's companies and communities are likely to have lingering economic and financial effects as well, with harm continuing into the foreseeable future:

> The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

(George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States* (2003) 44 S.Tex. L.Rev. 981, 998.)

As a result of the large number of bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." (Editorial, *Lawyers Torch the Economy*, Wall St. J. (Apr. 6, 2001) at A14, *abstract available* at 2001 WLNR 1993314; *see also* Steven B. Hantler et al., *Is the Crisis in the Civil Justice System Real or Imagined?* (2005) 38 Loy.L.A. L.Rev. 1121, 1151-52 [discussing spread of asbestos litigation to "peripheral defendants"].) One former plaintiffs' attorney described the litigation as an "endless search for a solvent

bystander." (*'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) [quoting Mr. Scruggs].)

The dockets reflect that the litigation has moved far beyond the era in which manufacturers, producers, suppliers and distributors of friable asbestos-containing products or raw asbestos were the defendants. The range of defendants has expanded beyond those responsible for asbestos-containing products, producing exponential growth in the dimensions of asbestos litigation and compounding the burden on the courts. (*See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J. (Apr. 12, 2000) at B1, *abstract available at* 2000 WLNR 2042486; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J. (Jan. 27, 2003) at B1, *abstract available at* 2003 WLNR 3099209; Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) [noting that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities."], *available at* http://www.cbo.gov/doc.cfm?index=4641.)

The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. (*See* Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks* -

Insights, Apr. 2010, at 1, *available at* http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf.) At least one company in nearly every U.S. industry is involved in the litigation. (*See* American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007), *available at* www.actuary.org/pdf/casualty/asbestos_aug07.pdf.) Nontraditional defendants now account for more than half of asbestos expenditures. (*See* Carroll et al., *supra*, at 94.)

B. California's Experience

California has not escaped these problems. (*See* Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis* (2004) 45 Santa Clara L.Rev. 1, 2 ["The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket."]; Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann.Surv.Am.L. 525, 599 ["[P]laintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases."]; Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L.Rev. 883, 885 ["With plaintiff firms from Texas and elsewhere opening

offices in California, there is no doubt that even more asbestos cases are on their way to the state."]; Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), *at* 2006 WLNR 4514441.)

Judges in California have acknowledged the ever-increasing burden placed on the judicial system by the state's asbestos docket. For example, San Francisco Superior Court Judge James McBride has said that the length of asbestos trials causes hardship for jurors, leaving many citizens unable to serve and forcing the courts to "use jurors at an absolutely abominable rate." (*Judicial Forum on Asbestos*, HB Litigation Conferences, New York City, June 3, 2009 [quoting Judge McBride], *available at* http://litigation conferences.com/?p=6669.)[3] Judge McBride said that the rate at which asbestos litigation depletes potential jurors from the overall pool could lead the jury system to "collapse" if the economy worsens significantly; these impacts would be most likely to occur in areas which tend to have lower response rates on summonses. (*See also Judges Roundtable: Where Is California Asbestos Litigation Heading?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, July 2004, at 3 [San Francisco Superior Court Judge Ernest Goldsmith stating that asbestos cases take up twenty-five percent of the court's docket].)

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[3] *See generally* Mark A. Behrens & M. Kevin Underhill, *A Call for Jury Patriotism: Why the Jury System Must Be Improved for Californians Called to Serve* (2003) 40 Cal.W. L.Rev. 135.

C. Respirator Manufacturers Are Ensnarled in the "Endless Search for the Solvent Bystander"

Included in the ever-expanding net of potential defendants are respirator manufacturers. Unlike most other attenuated defendants who have been pulled into these cases, however, respirator manufacturers designed protective equipment to guard against the harmful effects of prolonged exposure to such airborne contaminants.

Yet, in spite of this distinction, which is significant from both a legal and public policy standpoint, respirator manufacturers are increasingly being targeted in litigation. According to the International Safety Equipment Association, more than 325,000 individual asbestos and silica lawsuits have included claims against respirator manufacturers alleging design and warning defects between 2000 and mid-2008. (*See* Letter from Daniel K. Shipp, President, Int'l Safety Equip. Ass'n to Edwin G. Foulke, Jr., Asst. Sec. of Labor for Occupational Safety & Health and Leon R. Sequeira, Asst. Sec. of Labor for Policy, U.S. Dep't of Labor (May 19, 2008), *available at* http://www.safetyequipment.org/viewDocumentFile.cfm?MimeType=application%2Fpdf&key=C%3A%5CInetpub%5Cvhosts%5Csafetyequipment%2Eorg%5Chttpdocs%5Cuserfiles%5CFile%5CDOLpreemption08may%2Epdf.)

That this increase in claims against respirator manufacturers occurred in the absence of a reported mass failure of a product is astonishing. In fact, there are few reported verdicts against respirator

manufacturers. One such rare case led the Mississippi Supreme Court to grant judgment notwithstanding the verdict due to the lack of evidence that the plaintiffs wore masks while exposed to asbestos, let alone the defendant's masks, or that the plaintiff relied on any representations, labeling, or warnings provided by the company. (*See 3M Co. v. Johnson* (Miss. 2005) 895 So. 2d 151, 154-57, 164-65.)

Even where settled for small amounts that are no greater than litigation costs, the cumulative effect of these lawsuits can damage the viability of respirator manufacturers. In fact, as concerns regarding the flu pandemic rose in 2006, United States respirator manufacturers warned that they had spent ninety percent of net income from respirator sales on litigation costs in one recent year. (*See* Press Release, Coalition for Breathing Safety, *Can the U.S. Afford a Shortage of Respirator Masks to Fight Flu Pandemic?*, *available at* http://www.breathingsafety.interactive.biz/press/release/2006/09_19.htm.)

II. IMPOSING UNDUE LIABILITY AND DEFENSE COSTS ON RESPIRATOR MANUFACTURERS MAY ADVERSELY IMPACT PUBLIC HEALTH AND SAFETY

Claims against respirator manufacturers that are brought largely for their nominal settlement value are not only damaging to the companies, but threaten to have a broader adverse effect on the public health and safety.

The financial impact of such suits, even if ultimately dropped or settled for small amounts, provides a strong disincentive for respirator

manufacturers to continue producing these safety devices for sale in the United States or for new companies to enter the respirator market. If the evolution of asbestos and silica mass tort litigation provides any guide, mounting liabilities could force respirator manufacturers to shut down. These results, at the very least, would reduce the availability and affordability of respirators. Should their supply fail to keep pace with demand, industrial workers and the public would be exposed to considerable, and entirely unnecessary, risk.

Such negative effects are heightened in times of emergency or crisis. An integral part of the United States emergency planners and first responders strategy in the case of a flu pandemic is the use of respirators to prevent its spread; a strategy which, depending on the severity of the outbreak, may fail due to litigation costs depleting the capital resources among the major domestic respirator manufacturers. The United States government purchased and stockpiled over 155 million masks, including 104 million N95 respirators and 52 million surgical masks, in response to the avian flu threat in 2006. (*See* Dep't of Health & Human Servs., Report to Congress, Pandemic Influenza Preparedness Spending 4 (2006), *available at* http://www.upmc-biosecurity.org/bin/e/b/hhs_pan_flu_spending_2006-12.pdf.) In 2008, the Department of Labor proposed guidance recommending that employers purchase and stockpile respirators in preparation for an influenza epidemic. (*See* Request for Comments on

Proposed Guidance on Workplace Stockpiling of Respirators and Facemasks for Pandemic Influenza (May 9, 2008) 73 Fed.Reg. 26,431.) The following year, the Centers for Disease Control recommended use of respirators to reduce the risk of contracting swine flu. (*See* Centers for Disease Control & Prevention, Interim Recommendations for Facemask and Respirator Use in Certain Community Settings Where Swine Influenza A (H1N1) Virus Transmission Has Been Detected, Apr. 27, 2009, *available at* http://www.cdc.gov/h1n1flu/masks.htm.)

Yet the United States is far behind the emergency-preparedness curve with respect to other countries. (*See* Bevan Schneck, *A New Pandemic Fear: A Shortage of Surgical Masks*, Time (May 19, 2009), *available at* http://www.time.com/time/health/article/0,8599,1899526, 00.html [reporting that the CDC Strategic National Stockpile contains only 119 million masks—39 million surgical and 80 million respirator—which is less than one percent of the goal health officials set in 2007 following the devastation of Hurricane Katrina, and that the United States has one mask for every three Americans compared with 2.5 and 6 per resident in Australia and Great Britain, respectively]; Kelly M. Pyrek, *U.S. Pandemic Could Severely Strain Face Mask, Other PPE Supply Pipeline*, Infection Control Today, Oct. 4, 2008, *available at* http://www.infectioncontrol today.com/articles/pandemic-and-face-mask-shortage.html [reporting that France has purchased hundreds of millions of masks for its citizens].) Most

respirator production has moved outside the United States with nine out of ten masks (respirators and the less sturdy surgical masks) manufactured in China and Mexico (*see* Schneck, *supra*), where they are not subject to American tort litigation. This reliance on foreign manufacturers has led some to question whether sufficient respirators would be available to Americans in an emergency situation because foreign manufacturers are likely to divert their supplies to the countries in which they are located. (*See id.*; *see also* Pyrek, *supra.*) Even if stockpiling is not the answer, some suggest that "stepping up domestic manufacturing of [personal protective equipment] items is the single best way to be prepared for a pandemic or other emergency event." (Pyrek, *supra.*)

The continued risk from similar threats such as natural disasters, terrorism, or other diseases represents an important issue that the tort system does not address, and one that is particularly disturbing given the lack of evidence supporting liability in many cases and the level or regulation already dedicated to approving the design, labeling, and use of respirators.

III. GIVEN THIS HISTORY AND POTENTIAL IMPACT OF UNWARRANTED LIABILITY, IT IS IMPERATIVE THAT THIS COURT REQUIRE PLAINTIFFS TO PROVE "BUT FOR" CAUSATION

Given that asbestos litigation has evolved into a search for the solvent bystander and the potentially adverse health and safety implications of imposing unwarranted liability and litigation defense costs on already

highly-regulated respirator manufacturers, it is essential that this Court properly require Plaintiffs to show a defect in the design of the protective equipment or its accompanying warnings, and that such a flaw caused the plaintiff to develop the injury at issue.

An area where this Court should make the critical distinction between defendant companies that produced or supplied asbestos-containing products and those that provided protective gear to safeguard workers from exposure is with respect to the proper causation standard.

The trial court correctly applied the causation standard set forth by Judicial Council of California Civil Jury Instruction (CACI) No. 430, which provides the general tort standard applicable to products that do not contain asbestos. CACI 430 states:

> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [*Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.*]

(CACI 430 [emphasis added].) The commentary to the instruction makes clear that CACI 430 "subsumes the 'but for' test of causation—e.g., plaintiff must prove that but for defendant's conduct, the same harm would not have occurred" and that "[c]onduct does not 'contribute' to harm if the same harm would have occurred without such conduct." (*Id.* [citing *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239-1240].)

Here, under CACI 430, a plaintiff must show that but for a defect in the defendant's respirator with respect to its design or instructions, the plaintiff would not have developed mesothelioma. If the evidence shows that the plaintiff's employer (the Navy) did not provide him with proper respiratory safety gear, that he only intermittently wore a respirator while working and therefore could have developed cancer regardless of the defendant's product, or that he did not routinely use the defendant's respirator but some other product, then causation is lacking.

Plaintiffs' contention that the traditional "but for" standard does not apply whenever "concurrent causes" are alleged (*e.g.*, Pls.' Reply Br. at 34-36) is wrong. The California Supreme Court has "not abandon[ed] or repudiate[d] the requirement that the plaintiff must prove that, *but for* the alleged negligence, the harm would not have happened." (*Viner*, 30 Cal.4th at 1239 [emphasis in original].) The limited exception to the "but for" standard applies *only* to "concurrent *independent* causes," which "are multiple forces operating at the same time and independently, *each of which would have been sufficient by itself to bring about the harm.*" (*Id.* at 1240 [emphasis added].) By contrast, "forces [that] operate[] in combination, with none being sufficient in the absence of the others to bring about the harm, ... are not concurrent *independent* causes," they are ordinary "concurrent causes." (*Id.* [emphasis in original].) A plaintiff *must* show that such causes were a "but for" cause of injury. (*See id.*; *see also*

Huitt v. S. Cal. Gas Co. (2010) 188 Cal.App.4th 1586, 1596, 116 Cal. Rptr. 3d 453, 461 [explaining that plaintiff must prove that the defendant's conduct was "a necessary antecedent" of harm].) Here, 3M's respirators cannot be a concurrent *independent* cause of the decedent's harm because the products contain no asbestos—"by itself," each is harmless. (*Viner*, 30 Cal. 4th at 1240.)

Nor is it proper to apply the more relaxed causation standard articulated by CACI 435, as Plaintiffs request. This alternative standard was developed to apply specifically to claims against manufacturers and suppliers of *asbestos-containing* products where exposure to several such products during the plaintiffs' career each may have contributed to his developing cancer.

Under this standard, "the plaintiff must first establish some threshold exposure to the defendant's asbestos-containing products." (*Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953.) Once such exposure is shown, "the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth." (*Id.*) Instead, the plaintiff need only prove "that exposure to defendant's product . . . was a substantial factor contributing to the plaintiff's . . . risk of developing cancer." (*Id.*)

Protective safety equipment does not contribute to a worker's injury in this manner. Such products, when used as instructed, reduce a worker's

exposure to asbestos fibers, not contribute to it. CACI 430, the traditional causation standard, is appropriate in product liability cases targeting respirator manufacturers.

IV. PLAINTIFF HAS SUBSTANTIAL ALTERNATIVE SOURCES FOR RECOVERY

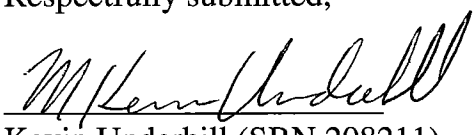
Finally, it is important to note that while Plaintiffs no doubt seek to impose liability on a solvent manufacturer as a substitute for proper entities that are now bankrupt, trusts have been established to pay claims involving those companies' products. (*See* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts* (2008) 17 Norton J. Bankr. L. & Prac. 257.) In fact, one study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." (Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006), *available at* http://www.bateswhite.com/media/pnc/7/media.287.pdf.) For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average of $1.2 million from active and emerging asbestos bankruptcy trusts (*see* Charles E. Bates et al., *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), *available at* http://www.bateswhite.com/media/pnc/9/media.229.pdf), and could receive as much as $1.6 million. (*See* Charles E. Bates et al, *The Claiming Game*, 25:1 Mealey's Litig. Rep.: Asbestos 27 (Feb. 3, 2010), *available at* http://www.bateswhite.com/media/pnc/2/media.2.pdf.)

A recent study by the RAND Institute for Civil Justice identified sixty-three trusts from a group of ninety-six asbestos-related bankruptcies that have been established or proposed, then closely examined twenty-six of the largest trusts. (*See* Dixon et al., *supra.*) These trusts paid approximately 575,000 claims, for a total value of $3.3 billion, in 2008. (*Id.* at 31.) To put these numbers in perspective, a 2005 RAND report estimated that $7.1 billion was paid by asbestos defendants in the tort system in 2002. (*Id.* [citing Carroll et al., *supra*, at 92].) Assets under trust control indicate that significant payments will continue. The twenty-six selected trusts had assets totaling $18.2 billion at the conclusion of 2008. (*Id.* at 36.) This total does not include the assets of four recently formed trusts that had not filed financial statements as of 2009. The total also does not include the estimated assets of currently proposed trusts. Estimates of the initial assets of eight of the nine proposed trusts for which information is available total $14.5 billion. (*Id.* at 30.)

CONCLUSION

For these reasons, *amici* respectfully request that this Court affirm the trial court's decision to grant nonsuit to 3M in this case.

Respectfully submitted,



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Dated: March 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2011, I caused an original and four copies of the foregoing Brief to be manually filed with the clerk of the Court of Appeal for the First Appellate District, Division Two. Pursuant to Rule 8.44(b), I further caused four copies to be filed with the clerk of the Supreme Court of California. A copy was mailed via First Class Mail to the following and hand delivered to the clerk of the Superior Court in compliance with Rule 8.212(c) of the Rules of Court:

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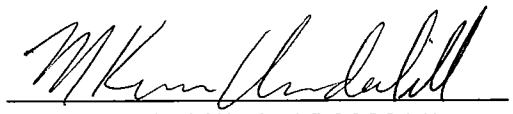

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