No. S207313

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs/Appellants,

v.

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

Defendant/Respondent.

Following Certification of a Question of California Law from the United States Court of Appeals for the Ninth Circuit, in Appeal No. 10-57008

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION SUPPORTING RESPONDENT TARGET STORES

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INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. The ATRA regularly files *amicus curiae* briefs in cases before federal and state courts

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4)(A).)

that address important liability issues, such as the one presented in this case.

Both the Chamber and the ATRA have a strong interest in maintaining the well-settled and clear duties on the part of businesses to assist customers in the event of a medical emergency and to avoid unprecedented and unreasonable extensions of that duty.

INTRODUCTION

The California Legislature has already considered and rejected any tort duty on the part of businesses to maintain an Automated External Defibrillator ("AED") on their premises. In an effort to avoid that clear legislative judgment, Plaintiffs urge this Court to adopt a general, common law requirement that commercial property owners have and administer AED aid to guard against a health risk that customers themselves bring to the premises and that is untethered to the business property or operations. Even if this avenue were open to the Court—and it is not (Appellee's Answer Brief ("AAB") 17-23)—both foundational tort principles and sound policy weigh against it.

Every business in this state has a strong incentive to provide its customers with a safe environment when they visit the premises. Businesses understand that in order to keep the customers they have, and attract new ones, the businesses must ensure that their premises do not create unreasonable risks for their customers and that their employees are

attentive to customer safety. Many businesses are also subject to property- and industry-specific safety regulations, from fire safety requirements to food-inspection ratings for restaurants.

Businesses, of course, are open to all customers, and some of those customers will have a variety of unknown medical conditions that have the potential to create an emergency. Despite a business's efforts to maintain a safe premises and comply with applicable safety requirements, by random chance, some customers will experience a medical emergency while visiting the business. Settled common law principles provide that, in these situations, a business owes its customers the duty to promptly contact first responders, who are trained to assess the customer's condition and provide appropriate medical care. That limited common law duty is straightforward and reasonable. It can be applied in a uniform way to different medical emergencies for businesses of all types and sizes. And it is consistent with both the legislature's judgment about AEDs and the standard of reasonable care that has long applied to commercial property owners.

Plaintiffs' effort to create a new duty for California businesses to provide emergency medical treatment themselves in the form of AEDs would be a drastic and potentially dangerous departure from the settled law. If adopted, this proposed rule would work a sea change in premises liability, for it would portend a duty to prepare for, recognize, and treat a health risk that the property owner did not create. Property owners and

their employees are not trained to assess medical emergencies or make a judgment regarding what emergency treatment is necessary.

Such an expansion of tort law would also invite plaintiffs to press for additional duties on the part of commercial property owners to anticipate other medical conditions that might cause emergencies on their premises. If a business must prepare to diagnose and then treat a customer's cardiac arrest, why not diabetic shock, epileptic seizure, or choking? A duty to maintain an AED could also lead businesses to feel compelled to administer other forms of heart attack aid, such as CPR and intubation.

These potential extensions of Plaintiffs' reasoning highlight the uncertainty and mischief that would result from creating a duty for businesses to provide AED treatment. Courts have long rejected the notion that businesses are "the insurer[s] of the visitor's personal safety." (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 476.) The cost of shifting the responsibility to California businesses to treat their customers' medical emergencies would be significant at the outset and certain to expand. Businesses would need to incur the expense of identifying which medical risks—risks that inhere in their customers' own health—could result in emergencies during routine business visits. Businesses would also bear the expense and burden of purchasing medical equipment and training employees in various emergency medical treatment skills. Effectively, this new field of tort litigation would require that every California business to

maintain its own emergency aid clinic, run by its employees and prepared to treat a range of medical conditions that could cause an emergency. And because California would stand alone in deploying tort law to establish a new medical insurance system, the State's businesses would suffer a competitive disadvantage.

For all of these reasons, this Court should answer the Ninth Circuit's certified question by validating the Legislature's judgment and holding clearly that there is no duty on the part of commercial property owners to maintain an AED to treat customers.

LEGAL ARGUMENT

I. BOTH SETTLED LAW AND SOUND TORT POLICY DICTATE THAT BUSINESSES FULFILL THEIR DUTY TO CUSTOMERS BY PROMPTLY SUMMONING PROFESSIONAL MEDICAL ASSISTANCE

As this Court observed nearly a decade ago, "it long has been recognized" that the special relationship between businesses and their customers obligates businesses only to "undertake relatively simple measures" to provide "assistance [to] their customers who become ill or need medical attention." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 241 [citing and quoting *Breaux v. Gino's, Inc.* (1984) 153 Cal.App.3d 379, 382].) California law on this issue has been settled for nearly three decades, since *Breaux* recognized that, in the absence of additional statutory requirements, a business "meets its legal duty to a patron in

distress when it summons medical assistance within a reasonable time." (*Breaux*, *supra*, 153 Cal.App.3d at p. 382 [holding that restaurant had no duty to physically assist patron that was choking].) In the decades following *Breaux*, no California court has held otherwise.

The rule first recognized in *Breaux* and echoed by this Court in *Delgado* applies in straightforward fashion to all types of emergency situations and all types of businesses. Businesses have the same responsibility in the event of any medical emergency: to promptly contact trained medical professionals to assist the person in need. This clearly defined rule spares everyone from post-hoc attempts to determine, in the wake of a tragedy, what more a business could have done to treat an unexpected medical emergency.

A. California and States Nationwide Have Held That Businesses Are Not Required to Maintain and Use AEDs to Provide Direct Medical Treatment

The California courts have already directly addressed the question posed by the Ninth Circuit in this case: whether a business has "a duty under California law to purchase [and, presumably, use in the event of an emergency] AEDs." (*Verdugo v. Target Corp.* (9th Cir. 2012) 704 F.3d 1044, 1049.) The answer is no.

Rotolo v. San Jose Sports and Entertainment, LLC (2007) 151 Cal.App.4th 307, specifically considered a business's duty regarding AEDs and unequivocally held that "*there is no duty to acquire an AED or have it*

available." (*Id.* at p. 332 [italics added].) As *Rotolo* properly recognized, the California "Legislature made clear that it did not intend to impose any duty on building owners and managers to acquire AEDs." (*Id.* at p. 320.) Therefore, "the sole duty based on the special relationship of the premises owner towards invitees to provide assistance in the face of a medical emergency [is] to summon emergency services." (*Id.* at p. 332.)

Every appellate court in the country that has considered this issue has reached the same conclusion as *Rotolo*: a business does not owe a common law duty to obtain or use an AED. (See *Rotolo*, *supra*, 151 Cal.App.4th at 332 ["We have found no precedent for extending the special relationship doctrine in this fashion."]; see also *Miglino v. Bally Total Fitness of Greater New York, Inc.* (N.Y. 2013) 985 N.E.2d 128, 132 ["[A] health club had no duty at common law to use an AED, and could not be held liable for failing to do so."]; *L.A. Fitness Int'l, LLC v. Mayer* (Fla. Dist. Ct. App. 2008) 980 So.2d 550, 561-62 [same]; *Salte v. YMCA of Metro. Chicago Found.* (Ill. App. 2004) 814 N.E.2d 610, 614-15 [same]; *Atcovitz v. Gulph Mills Tennis Club, Inc.* (Pa. 2002) 812 A.2d 1218 [same].)

B. Both Common Law Tort Principles and Sound Policy Support the Appellate Courts' Unanimous Rejection of Any Duty to Maintain and Use AEDs

The California Legislature's pronouncement that businesses are not required to maintain and use AEDs should be treated as dispositive for the

reasons that Defendant/Respondent Target Stores has explained. (AAB 17-23.) But even setting the Legislature's controlling views aside, that rule should be followed because it flows directly from foundational tort principles. Under settled tort law, both within and outside California, commercial property owners are not charged with a duty to foresee and guard against every risk of injury their customers might face while on the premises. Instead, businesses owe their customers only a duty of *reasonable* care in responding to emergencies. That duty manifestly does not extend to treating medical conditions, carried by the customers themselves, that create emergencies through no fault of the business owner.

"The existence and the scope of a duty owed is a question of law to be decided by the court." (*Delgado*, *supra*, 36 Cal. 4th at p. 253.) "[T]he basic policy of this state set forth by the Legislature in Section 1714 ... is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 118-119.) The duty that a business owner owes its customers *qua* proprietor is thus one of reasonable care; the business must "maintain land in [its] possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Ctr.* (1993) 6 Cal.4th 666, 674, *disapproved on another point in Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527 fn. 5.) The focus of these tort duties is thus on the risks

flowing from the proprietor's control of its *property* and on the dangers that arise *because of* a customer's visit there.

These principles do not require a business to anticipate and treat emergencies that result from a customer's personal health condition, rather than from the business's property or operations. The California courts have properly determined that the scope of a business's duty to customers "in the face of a medical emergency [is] to summon emergency medical services." (*Rotolo*, *supra*, 151 Cal.App.4th at p. 332.) The scope of that duty is commensurate with the generic nature of medical risks. It would make no sense to allocate fault to a business owner merely because a customer happened to experience, on the premises, a health problem that the business owner did not cause and could not treat without taking on the responsibilities of a health care provider. "In the absence of duty, there can be no tort liability, and no fault can be allocated to a party that is not a tortfeasor." (*Munoz v. City of Union City* (2007) 148 Cal.App.4th 173, 179-182.)

The limited duty of commercial property owners to provide reactive assistance to medical emergencies is grounded not only in traditional tort principles, but also in sound policy. The rule provides business owners with clear guidance regarding their obligations in the event that their customer suffers a heart attack or any other medical emergency. Regardless of the nature of a customer's health condition or emergency, the

duty is the same: to contact promptly first responders, who are trained to provide professional medical assistance. That rule is clear and can be effectively carried out by commercial property owners regardless of the size or nature of the business. It requires no special training or equipment. And it appropriately balances the interests of delivering care to customers in need and the limited ability of a business to anticipate and treat the medical conditions of any given customer.

II. REQUIRING BUSINESSES TO OBTAIN AND USE AEDS WOULD CREATE A NEW FIELD OF TORT LITIGATION

Reversing California's law and departing from the national consensus that businesses do not owe a duty to own and use AEDs to treat customers who suffer a cardiac arrest would have far-reaching consequences. As the New York Court of Appeals recognized earlier this year, requiring businesses to use AEDs to provide direct medical treatment to customers would "engender a whole new field of tort litigation, saddling [businesses] with new costs and generating uncertainty." (*Miglino*, *supra*, 985 N.E.2d at p. 133.)

Plaintiffs' proposed rule would portend a new class of tort claims against business owners, because it seeks to impose duties to anticipate—and to take specific measures to treat—customer medical conditions that have nothing to do with the business's property or operations. The risk of cardiac arrest, and the concomitant AED duty urged by Plaintiffs, could be

compared to many other medical risks and related treatments. Nor could businesses find comfort in statutory provisions disclaiming specific precautions, since AEDs are covered by such a provision. For the first time in the decades since *Breaux*, businesses and their employees would potentially be placed in the role of first responders charged with recognizing and determining the nature of a customer's medical emergency and making a judgment on the proper medical response.

1. Duty to Treat Diabetic Emergencies

Heart conditions are not the only health risk that could potentially cause a business customer to experience an emergency on the premises—through no fault of the business. Diabetes is another. Were this Court to hold that the general risk of cardiac arrest invokes a duty on the part of commercial property owners to maintain AEDs, its reasoning could potentially be extended to require businesses to keep insulin kits, or other diabetic supplies, on hand to guard against the possibility of a diabetic emergency.

Diabetes is a metabolic disorder in which the body produces no, or not enough, insulin, a hormone that controls blood sugar levels. (See generally <http//www.nlm.nih.gov/medlineplus/diabetes.html>.) Diabetes can be genetic (Type 1) or develop as a result of lifestyle and dietary factors (Type 2), and serious cases (of both types) are often treated with insulin injections. (*Ibid.*) Some insulin-dependent diabetics suffering from acutely

low insulin levels can experience a "diabetic emergency" such as diabetic ketoacidosis, which can cause rapid breathing, nausea, vomiting, abdominal pain, and unusual behavior. (<http://www.nlm.nih.gov/medlineplus/ency/article/000320.htm> [describing symptoms]; see generally Eledrisi, "Overview of the Diagnosis and Management of Diabetic Ketoacidosis, 331 American J. of Med. Sciences 243-251 (2006).) Other diabetics may experience severe cases of hypoglycemia, where the blood sugar level falls to dangerously low levels and causes the person to suffer from impaired judgment, lethargy, or loss of consciousness. (See generally <http//www.nlm.nih.gov/medlineplus/hypoglycemia.html>.)

We are not aware of any court recognizing a duty on the part of commercial land owners to provide specific training for diabetic emergencies. But if this Court were to establish a requirement for businesses to provide AED treatment, it could open the door to arguments that businesses also owe a duty to provide insulin treatment or other diabetic emergency aid. Plaintiffs suffering from diabetes have previously asserted negligence claims for failure to treat diabetic episodes in a variety of contexts. For example, they have brought actions against employers for failing to stop a diabetic person suffering from hypoglycemia from driving (see *Stockberger v. United States* (7th Cir. 2003) 332 F.3d 479, 480-81); against police officers for mistaking a diabetic hypoglycemia attack for drunkenness (and then using excessive force) (see *Burns v. City of*

Redwood City (N.D. Cal. 2010) 737 F. Supp. 2d 1047, 1052; cf. *Coleman v. City of Port Allen Chief of Police* (W.D. La. July 17, 2013) 2013 WL 3777152, at *4 [claim that officers failed to ensure safety of motorist suffering from diabetic ketoacidosis during traffic stop]); and against jail officials for failing to administer care to an inmate suffering diabetic ketoacidosis (e.g., *Howard v. City of Columbus* (Ga. Ct. App. 1995) 466 S.E.2d 51, 53).

A duty to provide emergency AED treatment could also lead to claims asserting a similar duty to administer aid to customers suffering from a diabetic emergency or episode. Like the risk of cardiac arrest, a diabetic emergency or incident could happen at any time. As with the risk of cardiac arrest, there would be no reasonable way for a business owner to know that a given customer might be diabetic. And in the same way that AEDs, when used quickly and properly, can sometimes save the lives of certain heart attack victims, insulin kits and other emergency protocols, if administered quickly and properly, can sometimes save those suffering a diabetic emergency. The upshot is that the same flawed duty analysis urged by Plaintiffs in this case could, if adopted by this Court, lead to arguments that businesses owe a similar duty to treat diabetic emergencies. This despite the fact that the risks flow from the customer's own health condition and not from anything specific to the business's activities or property.

2. Duty to Treat Epileptic Seizures

A common law tort duty to administer AED aid to customers suffering a random cardiac arrest could also be invoked by plaintiffs in future cases to argue that businesses owe a duty to aid victims of epileptic seizures. Epilepsy is a disorder caused by abnormal or synchronous brain activity and, in severe cases, can lead to abrupt seizures. (See generally <http//www.ninds.nih.gov/disorders/epilepsy/epilepsy.htm>.) The risk that a customer may suffer an epileptic seizure while visiting a business bears many similarities to the risk of heart attacks. A business owner has no way to predict whether a particular customer may have epilepsy. To provide treatment in the event of such an emergency, the business's employees would have to make a medical judgment on the cause of the emergency and the proper response—a responsibility that requires specialized training and expertise. (<http://www.epilepsyfoundation.org/resources/upload/603_EMS-EMS_Training_Participants_Guide_LowRes.pdf>.)

We are aware of no decision holding that property owners have a general tort duty to train their employees to treat customers suffering from epileptic seizures. But plaintiffs have asserted negligence claims based upon the alleged negligence of a lifeguard in failing to notice a swimmer who had drowned after suffering a seizure (see e.g., *Onufer v. Seven Springs Farm, Inc.*, (3d Cir. 1980) 636 F.2d 46, 47); the alleged insufficient response of a jail's medical staff to an inmate's seizures (see e.g., *City of*

Birmingham v. Moore (1994) 631 So. 2d 972, 973); and against employers for alleged failure to administer aid during an epileptic seizure (see, e.g., *Newman v. Redstone* (Mass. 1968) 237 N.E.2d 666, 669 [rejecting negligence claim brought by employee where employer called for ambulance in response to the employee's epileptic seizure]).

If adopted, the common law tort duty urged by Plaintiffs could potentially be extended to seizures suffered by customers while on a business's premises. If businesses have a duty to use AEDs, plaintiffs could argue that businesses owe a comparable duty to train employees to identify and stabilize a customer having an epileptic seizure.

3. Duty To Perform CPR

If commercial property owners must be prepared to administer AED aid to customers suffering cardiac arrest, a requirement that businesses be prepared to administer CPR could also potentially follow. Like the administration of AED, CPR is aimed at reviving a person undergoing cardiac arrest. (*Mayer*, *supra*, 980 So.2d at p. 559.) While CPR does not require equipment, it, like AED aid, demands specific training. (See, e.g., *Limones v. School Dist. of Lee County* (Fl. Dist. Ct. App. 2013) 111 So.3d 901, 905.)

Courts have repeatedly held that businesses do not have a duty to perform CPR on customers in distress, but these holdings could be called into question if this Court recognizes a new duty to provide AED

assistance. In *Mayer*, for example, the Florida Court of Appeal held that a business's duty to assist customers in a medical emergency "does not encompass the duty to perform skilled treatment, such as CPR." (*Id.* at p. 559.) The court explained that although "the procedure for CPR is relatively simple and widely known as a major technique for saving lives, it nonetheless requires training and re-certification." (*Ibid.*) The court also noted that there "is no common law or statutory duty that a business have an AED on its premises." (*Id.* at p. 561.) Accordingly, the court held as a matter of law that the health club did not have a duty to perform CPR and that it "fulfilled its duty of reasonable care in rendering aid to the deceased by summoning paramedics within a reasonable time." (*Id.* at p. 562.)

For many of the same reasons that *Mayer* rejected a general tort duty on the part of businesses to administer CPR (or have an AED on the premises), this Court should reject a duty to maintain AED equipment and administer AED assistance. If this Court were instead to hold that a business is required to train employees to use an AED, it would invite lawsuits claiming that businesses also have a duty to train employees to perform CPR or deliver other medical care.

Indeed, *Mayer* illustrates why a standard that would require a business's employees to make medical judgments and deliver emergency care is not only unprecedented but also potentially dangerous. *Mayer* involved a health club patron who suffered an emergency heart ailment

while exercising. (980 So.2d at p. 552.) An employee of the health club promptly called the paramedics, but they were unable to revive the man. (*Id.* at p. 553.) Although one of the health club employees was trained in CPR, he did not administer it because he believed the customer may have been suffering from a seizure, a stroke, or a concussion and did not want to make matters worse by attempting CPR. (*Ibid.*) If businesses are faced with a duty to provide direct emergency medical care, however, they may well feel compelled to attempt emergency aid that may not only be ineffective but also cause additional harm. Instead of forcing employees to make decisions in high stress situations and perform aid that is far outside their ordinary business responsibilities, the law should leave those judgments to the medical professionals and first responders who are trained to handle them.

4. Duty to Perform Heimlich Maneuver

Another common medical emergency that businesses, especially restaurants and bars, face is customers who are choking. (See "Choking and the Heimlich Maneuver," The Ohio State University: Wexner Medical Center, *available at* <http://medicalcenter.osu.edu/patientcare/healthcare_services/emergency_services/non_traumatic_emergencies/choking_heimlich/Pages/index.aspx>; 2 A.L.R. 5th 966 (1992).) The most effective method for treating a person who is choking is the Heimlich maneuver, a process of performing abdominal thrusts to clear the blocked

airway. This procedure does not require medical equipment, but does require training. Though effective, the Heimlich maneuver can be painful and cause injuries, such as bruised or broken ribs, even when performed properly.

For decades, businesses— most commonly restaurants— nationwide have faced claims that they had a duty to perform the Heimlich maneuver and take other risk-specific measures to save customers who were choking. In California, it has been settled since the 1980s that a restaurant does not have a common-law duty to provide direct medical treatment such as the Heimlich maneuver. (See *Breaux*, *supra*, 153 Cal.App.3d at p. 382.) In *Breaux*, the Court of Appeal held that a restaurant has the same duty in responding to a choking customer as it has in any other medical emergency: to promptly contact trained medical professionals. (*Ibid.*) In arriving at this holding, the court cited a California statute that required restaurants to post instructions on providing first aid for choking victims, but that expressly stated that the statute did *not* create an "obligation on any person to remove, assist in removing, or attempt to remove food which has become stuck in another person's throat." (*Ibid.* [quoting former Health & Saf. Code, § 28689].)

Although the statute discussed in *Breaux*, requiring restaurants to post instructions for assisting someone choking, was repealed effective July 2007, 2006 Cal. Legis. Serv. Ch. 23 § 1 (S.B. 144) (effective July 1, 2007),

this Court and courts nationwide have cited *Breaux* (both before and after the statute was repealed) in support of the proposition that businesses do not have a common law duty to perform the Heimlich maneuver to aid a choking customer.[2] The California Legislature's eventual repeal of the statute discussed in *Breaux* casts no doubt on the decades of cases citing *Breaux* in support of the national consensus that businesses do not owe a common law duty to provide direct emergency aid such as the Heimlich maneuver. The repeal eliminated the narrow duty of restaurants to post first aid instructions, which is consistent with the Legislature's earlier recognition that there is no "obligation on any person to remove, assist in removing, or attempt to remove food which has become stuck in another person's throat" (*Breaux*, *supra*, 153 Cal.App.3d at p. 381 fn. 2 [quoting

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[2] (See, e.g., *Delgado, supra,* 36 Cal.4th at p. 241 [citing *Breaux* to support that "it long has been recognized" that the special relationship between businesses and their customers obligates businesses only to "undertake relatively simple measures" to provide "assistance [to] their customers who become ill or need medical attention."]; *Mayer*, *supra*, 980 So. 2d at pp. 559-60 [citing *Breaux* and other cases in recognizing that "Courts have similarly found that the Heimlich maneuver is a rescue technique that is not included in a business owner's duty to render aid to patrons facing medical emergencies"); *Lee v. GNLV Corp.* (Nev. 2001) 22 P.3d 209, 213 [business met duty to customer by summoning professional medical assistance]; *Drew v. LeJay's Sportsmen's Café, Inc.* (Wyo. 1991) 806 P.2d 301, 304 ["[A] restaurant does not have a duty to provide medical training to its food service personnel, or medical rescue services to its customers who become ill or injured through no act or omission of the restaurant or its employees. A restaurant in these circumstances meets its legal duty to a customer in distress when it summons medical assistance within a reasonable time."]; *Parra v. Tarasco, Inc.* (Ill. App. 1992) 595 N.E.2d 1186, 1188 [same].)

former Health & Safety Code, § 28689]), and the well-settled law, confirmed in the decades since *Breaux*, that businesses do not owe a common law duty to provide direct medical aid to customers.

If this Court were to hold that a business is required train employees to use an AED, there is every reason to expect that California businesses would face renewed claims that they are required to train employees to perform the Heimlich maneuver. A requirement that businesses maintain AEDs, and that their employees administer it to heart attack victims, could be analogized to a duty to train employees to perform the Heimlich maneuver. At a minimum, the Plaintiffs' proposed rule would create uncertainty where there is now clarity regarding the scope of restaurants' duty to respond to choking emergencies. Given that the Legislature has directly addressed AEDs, restaurants could find no comfort in the fact that the Legislature *eliminated* the narrow, and expressly qualified, notice duty previously imposed on restaurants.

B. Duty to Provide Intubation

Even where businesses voluntarily offer medical care, they face lawsuits for not providing enough. (See *Lundy v. Adamar of New Jersey, Inc.* (3d Cir. 1994) 34 F.3d 1173.) In *Lundy*, a woman suffered a heart attack while playing blackjack at the defendant casino. (*Id.* at pp. 1174-75.) The casino had an on-site nurse and contacted her immediately. She arrived within minutes and, with the assistance of other patrons, began

performing CPR and contacted an ambulance, which arrived a few minutes later. The nurse brought with her an oxygen tank and other equipment to assist with performing CPR, but did not have an intubation kit. (See *ibid.*) The EMTs who arrived on the scene shortly thereafter did bring an intubation kit, which was effective in restoring the patron's pulse. (See *ibid.*)

The plaintiffs alleged that the casino owed a duty to have on-site equipment and trained personnel to perform intubations. The court rejected that argument, noting that it effectively "would require casinos to provide a full-time on-site staff physician." (*Lundy*, *supra*, 34 F.3d at p. 1179). The court noted that the duty owed to patrons did "not extend to providing all medical care that the carrier or innkeeper could reasonably foresee might be needed by a patron." (*Ibid.*) Recognizing that it was indisputable that the casino provided the care that it was reasonably capable of providing and contacted emergency medical assistance promptly, the court held that the casino had fulfilled its duty to render assistance to its customer. (See *id.* at pp. 1178-1179.)

If this Court were to hold that some or all businesses are required to obtain and train employees to use AEDs, it would potentially open the door to arguments, such as those advanced in *Lundy*, that a business must also be prepared to perform additional medical services. An employee's proper administration of AED aid would not prevent heart attack victims from

arguing that other efforts, like intubation, should have been made to help them.

III. EXPANDING TORT LAW TO REQUIRE BUSINESSES TO PROVIDE DIRECT MEDICAL CARE WOULD CREATE UNCERTAINTY AND IMPOSE SUBSTANTIAL NEW COSTS ON CALIFORNIA BUSINESSES AND THE COURTS

A. Businesses Cannot Reasonably Predict the Extent to Which They Must Be Prepared to Provide Medical Services to Their Customers

Establishing a common law duty for certain businesses to obtain and train employees to use AEDs would radically depart from traditional tort policy, while substantially increasing the burdens and risks faced by California businesses. As Target Stores notes in its brief (AAB 53-54), the practical effect of ruling that certain stores have a duty to use an AED will be that all businesses will anticipate such a duty. If not, those businesses risk facing a lawsuit, where hindsight and the wake of a tragedy may distort any benefit/burden analysis. Although the costs related to obtaining and maintaining AEDs and training employees in their use are significant in their own right (*ibid.*), that is only the beginning.

The practical effect of creating a duty to provide specific emergency care (i.e., an AED) will be pressure on businesses to provide other forms of medical care. Such pressure would place two substantial burdens on businesses: (1) assessing and identifying the range of medical emergencies to which they should be prepared to respond; and (2) preparing their

employees to respond to those emergencies. These burdens would be enormous and undercut the competitiveness of California's businesses. And they would contravene, rather than advance, the tort system's goal of allocating risk as between a wrongdoer and a victim, effectively making business proprietors insurers of their customers' health.

1. Forcing Businesses to Predict and Understand the Possible Range of Medical Emergencies Customers May Face Poses a Substantial Burden

A threshold, and easily overlooked, burden of expecting businesses to provide direct medical aid to their customers is that businesses must first know what medical emergencies they might face. If businesses were to have a tort duty to purchase and properly use AEDs to treat cardiac arrests, they would feel compelled to assess what other possible medical emergencies their customers may suffer, including how to recognize and treat those emergencies.

As the above examples illustrate, there are many other health conditions and health risks that could potentially befall a customer while he or she is visiting a business. The risk that a customer will suffer an epileptic seizure, a diabetic episode, or choke represent just a handful of possible health emergencies. Were this Court to create a duty to maintain and operate AEDs, businesses would need to assess whether these and other health emergencies fall within the scope of that duty and, if so, what measures businesses should be expected to take to full their duties. In the

face of a ruling that requires stores like Target to provide AED treatment, businesses could not expect that a CPR training requirement would be limited to health clubs or athletic facilities or even that a Heimlich training requirement would be limited to restaurants or bars. They would, in equal measure, need to assess the kinds of health conditions and risks that could arise while a customer visits their property.

The vast majority of businesses would have no mechanism in place for obtaining such information. Because the duty to provide emergency aid could attach regardless of the size or type of business, all commercial property owners would need to bear the expense and burden of determining the health risks that their patrons may face. For most businesses, this would be an area wholly outside their expertise, and beyond the insurance, human relations, and regulatory issues that they must typically manage. Some businesses may choose to send employees to seminars or medical training. Other businesses may feel compelled to incur additional expenses, such as hiring a consultant. These expenses would necessarily be ongoing, both to keep up with any changes in medical conditions and treatment and to account for employee turnover.

The result would be to force each and every business proprietor to monitor the general health conditions and risks affecting the population. At a time when California businesses are already under tremendous economic pressure—pressure so great that many businesses are leaving the state—it

makes no policy sense to saddle them with such a burdensome and expensive obligation. That is especially so because there is nothing in Section 1714 and the cases applying it, or in the common law of premises liability, that supports such a broad and sweeping duty.

As the facts of this case make clear, the duty to administer aid for heart attacks and similar conditions would be untethered to the proprietor's actual business and any health risks specific to that business. All businesses inviting customers onto their property would need to evaluate the medical conditions affecting customers *in general* to identify and prioritize the health risks that could potentially befall them on the business premises. The effect would be to expand the duties of business proprietors, bringing them, through the customers that visit their premises, into the health care system.

The common law baseline of tort duties bears emphasis here. As noted above, commercial property owners owe their customers a duty of reasonable care. (See *Moore*, *supra*, 111 Cal.App.4th at p. 476.) That means they are "obligated to exercise due care in [their] actions so as not to create an unreasonable risk of injury to others." (E.g., *Lugtu v. California Hwy. Patrol* (2001) 26 Cal.4th 703, 716.) These principles do not require a business owner to anticipate health risks that customers generally have and that are connected to the business's property by nothing more than arbitrary coincidence or tragedy: that the customer's medical condition (such as a

heart ailment, epilepsy, or diabetes) or a generalized health risk (such as choking) happens to manifest itself while the customer is on the premises.

Because such health emergencies do not flow from the business itself, they are not the sorts of risks that property owners should be responsible for managing in the first instance. By nature, the emergencies could just as easily arise anywhere else at any other time. Although businesses certainly have an interest in ensuring that their premises is a safe environment, it would take a manifestly unreasonable amount of effort for a business to determine, as to an anonymous customer, which medical conditions or health risks are likely to affect that person during a customer's visit. These are properly the concerns of health care providers, not of business owners.

2. Businesses Will Face the Additional Burden of Preparing to Treat Medical Emergencies

Plaintiffs' proposed new tort duty would also impose on businesses the additional expense of preparing to provide the medical aid necessary to treat those medical emergencies. In the context of a lawsuit, that burden analysis is retrospective. But in the context of business operations, it is *prospective*.

Businesses would need to undertake the expense of preparing for the conditions that could potentially fall within the medical emergency duties urged by Plaintiffs. A common law duty to guard against cardiac arrest

with AEDs could lead to comparable duties for businesses to train employees to administer CPR; to make intubation equipment available; and to take other medical precautions for emergencies that may generally befall customers. If businesses are required to have a functioning AED and to train employees to operate it, then they would need to expect that plaintiffs could assert duties to provide additional emergency medical care, such as CPR, intubation or insulin equipment, or the Heimlich maneuver. Such duties would entail a corollary obligation to identify the cause of the customer's distress and the proper medical response. To make those judgments properly and safely, businesses would either have to train their employees or hire on-site medical staff. These expenses would be in addition to any threshold risk-assessment costs undertaken by those businesses.

The potential costs of these measures to California businesses are staggering. Training employees in medical response techniques and outfitting them with the necessary equipment would be expensive for any business and prohibitively so for the many small businesses that would feel equally subject to these requirements. These costs could be further compounded by the follow-on burdens, financial and otherwise, that would result from forcing employees into the role of first responders. Even with training, employees who were called upon to provide medical aid in an unexpected emergency may suffer mental trauma or even face personal

liability. Because no other state has taken the step of adopting a novel AED duty, these additional burdens would fall solely on the shoulders of California businesses. That would hurt their competitiveness, without furthering any cognizable tort policy or principle.

A duty to provide emergency medical equipment and treatment for generalized health risks cannot be squared with the tort system and the traditional duty of reasonable care borne by commercial property owners. It is settled that a property owner "is not the insurer of the visitor's personal safety." (*Moore*, *supra*, 111 Cal.App.4th at p. 476.) Yet, the novel duty proposed by Plaintiffs, if adopted, would threaten to make business proprietors insurers of their customers' health. They would be required, under the guise of tort duties, to address health risks that they did not create, that do not arise from their property in any specific way, and that inhere in the unknown medical conditions of customers. This despite the fact that tort duties have never "extend[ed] to providing all medical care that the carrier or innkeeper could reasonably foresee might be needed by a patron." (*Lundy*, *supra*, 34 F.3d at p. 1179.)

Additionally, businesses would always face the risk and uncertainty of whether they have done enough. Any time a customer fell ill or suffered a medical emergency, businesses would face the risk of a lawsuit arguing that they should have been aware of that particular medical condition and prepared to treat it. The inherent uncertainty of this environment would

encourage lawsuits, carrying the cost of litigation and the pressure to settle. Cases like *Lundy* show that there is always more that a business could have done to prepare for or address an unexpected medical emergency, and the only way to have every base covered is for a business "to provide a full-time on-site staff physician." (*Ibid.*)

Ultimately, it is simply not possible to draw a line with any certainty regarding the level of medical treatment that a business should be prepared to provide, when the other side of the scale is potentially saving a customer's life. Establishing a duty for businesses to provide certain medical services would open the door to endless arguments that businesses should have provided more, introducing uncertainty that would lead to significant costs and burdens onto both businesses and the courts.

IV. THE LEGISLATURE IS THE PROPER BODY TO DETERMINE WHETHER TO EXPAND THE SCOPE OF A BUSINESS'S DUTY TO PROVIDE MEDICAL CARE TO ITS CUSTOMERS

The inherent uncertainty and related burdens discussed above illustrate why the California Legislature, and not the courts, is the proper arm of government to consider expanding the scope of medical services that businesses must provide to customers. The extent to which some, or all, businesses should be prepared to provide certain medical services to customers is an important political judgment. As this Court has aptly observed for decades, "the Legislature stands in the best position to identify

and weigh the competing consumer, business, and public safety considerations" that accompany such a judgment. (*Philadelphia Indem. Ins. Co. v. Montes-Harris* (2006) 40 Cal.4th 151, 163 [declining to extend the duties owed by rental car companies beyond what the Legislature had established]; see also *Cal. Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 210 ["[s]uch line-drawing is the province of legislative bodies."]; (*Marks v. Whitney* (1971) 6 Cal.3d 251, 260 [political judgments are "within the wisdom and power of the Legislature"].) Accordingly, "decisions as to what losses are compensable are policy determinations ... are best left to the Legislature." (*Rotolo*, *supra*, 151 Cal.App.4th at p. 338.)

The California Legislature already has directly and thoroughly addressed the issue of a business's use of AEDs. To its credit, the Legislature has enacted legislation designed to encourage companies to *voluntarily* acquire AEDs, by passing laws that provide immunity to any business that—provided it follows the statute's requirements—uses an AED to treat a customer in distress. The California Legislature did not, however, decide that businesses are *required* to obtain an AED or to use one. To the contrary, the California Legislature unambiguously established that "[n]othing in [the statute] 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).) Courts "do no sit as 'super-legislatures' to determine the wisdom, desirability, or propriety of a

statute enacted by the legislature." (*Estate of Horman* (1971) 5 Cal.3d 62, 77.) Here, the submission of a certified question to this Court provides a means for this Court to clarify for the federal courts the *current* state of California law (see Cal. Rule of Court 8.548), not to create new duties in direct conflict with legislative pronouncements.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court answer the Ninth Circuit's certified question by confirming that California law does not require businesses to obtain or use an AED to treat customers that have suffered a cardiac arrest.

Dated: October 31, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
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According to the word count function in Microsoft Word 2010, this brief, including footnotes but excluding portions excludable pursuant to Rule 8.520(c)(3), contains 7,289 words.

October 31, 2013

Fred A. Rowley, Jr.

PROOF OF SERVICE VIA OVERNIGHT MAIL

I, Cynthia S. Soden, declare:

1. I am over the age of 18 and not a party to the within cause. I am employed by Munger, Tolles & Olson LLP in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, Thirty-Fifth Floor, Los Angeles, California 90071-1560.

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/s/ Cynthia S Soden

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