No. B312241

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 1

SEE'S CANDIES, INC. AND SEE'S CANDY SHOPS, INC.,
Defendants-Petitioners,
v.
SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,
MATILDE EK, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ARTURO EK; KARLA EK-ELHADIDY; LUCILA DEL CARMEN EK; AND MARIA EK-EWELL,
Real Parties in Interest.

Appeal from the Superior Court of the
State of California for the County of Los Angeles
The Honorable Daniel Crowley | Case No. B312241

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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APPLICATION TO FILE AMICI CURIAE BRIEF

Pursuant to rule 8.487(e) of the California Rules of Court, the Chamber of Commerce of the United States of America, the California Chamber of Commerce, the California Workers' Compensation Institute, the Restaurant Law Center, the California Restaurant Association, the National Association of Manufacturers, the National Retail Federation, and the National Federation of Independent Business Small Business Legal Center respectfully seek permission to file the attached amici curiae brief in support of the petition for writ of mandate filed by petitioners See's Candies Inc. and See's Candy Shops, Inc. (Cal. Rules of Court, rule 8.487(e)(1).)[1] The brief explains that the issue presented in the petition is extremely important to employers in California, many of whom are amici's members.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 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 country—including throughout California. An important function of the Chamber is to represent

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[1] No party or counsel for a party in the pending case authored the attached 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 the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the attached brief.

the interests of its members in matters before Congress, the executive branch, and federal and state courts. To that end, the Chamber regularly files amicus curiae briefs in cases such as this one that raise issues of concern to the business community.

The California Chamber of Commerce ("CalChamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues.

The California Workers' Compensation Institute is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 80% of California's workers' compensation premium, and self-insured employers with $89B of annual payroll (33.7% of the state's total annual self-insured payroll). Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in numerous cases as amicus curiae before the California Supreme Court and Courts of Appeal.

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The

foodservice industry comprises over one million restaurants and other outlets that represent a broad and diverse group of owners and operators—from large national restaurant chains with hundreds of locations and billions of dollars in revenue, to small single-location, family-run neighborhood restaurants and bars, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Members of the California Restaurant Association are also automatically deemed members of the Law Center. The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases, such as this one, through amicus briefs speaking as one voice on behalf of its industry.

The California Restaurant Association ("CRA") is a nonprofit mutual benefit corporation organized under the laws of California with its principal office in the County of Sacramento, California. CRA is one of the largest and longest-serving nonprofit trade associations in the Nation. Representing the restaurant and hospitality industries since 1906, the CRA is made up of nearly 22,000 establishments in California. The restaurant industry is one of the largest private employers in California, representing approximately 1.4 million jobs. As an association of members in the restaurant industry, it has a substantial interest in laws relating to workplace injuries, as its members are directly affected by their interpretation.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.23 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 52 million American workers—and contributing $3.9 trillion to the annual GDP. The NRF regularly submits amicus curiae briefs in cases raising significant legal issues for the retail community.

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. 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. 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.

This Court granted amici's application to file a letter brief in support of the petition for writ of mandate filed by petitioners See's Candies Inc. and See's Candy Shops, Inc. before the Court issued its order to show cause. Amici respectfully request the Court accept for filing the attached brief in support of petitioners' petition for writ of mandate.

DATED: August 30, 2021 Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

/s/ Lucas C. Townsend
Lucas C. Townsend

Attorneys for Amici Curiae Chamber of Commerce of the United States of America, California Chamber of Commerce, California Workers' Compensation Institute, Restaurant Law Center, California Restaurant Association, National Association of Manufacturers, National Retail Federation, and National

Federation of Independent Business
Small Business Legal Center

AMICI CURIAE BRIEF

INTRODUCTION

All of the claims in this case derive from a single injury that plaintiff Matilde Ek allegedly sustained when she contracted COVID-19 in the course of her employment. Because plaintiffs' claims would not exist in the absence of the employee's workplace injury, they are barred from the courts and must proceed, if at all, under the workers' compensation system. The trial court nevertheless erroneously allowed plaintiffs to proceed with their negligence and premises liability claims against the employer on the theory that plaintiffs' alleged injuries were somehow "independent" of the employee's workplace injury. The trial court's ruling, if it is sustained, could subject employers across the state to potentially unlimited tort liability for alleged workplace injuries that the Legislature intended to be addressed in the workers' compensation system. Given that prospect, the potential impact of this Court's decision in this writ proceeding can hardly be overstated.

In enacting the Workers' Compensation Act (WCA), the Legislature struck a delicate balance: It allowed employees to recover for workplace injuries under a strict liability regime but protected employers from facing excessive liability in the civil litigation system by establishing workers' compensation as the exclusive remedy for all workplace injury claims. In the decision below, however, the trial court sharply departed from this balance, inventing a COVID-19 exception for injuries that derive from employees who allegedly contract the virus in the employer's

workplace and then infect their family members. Under the trial court's ruling, any person who contracts COVID-19 from an infected employee can bring a tort action against the employer for their "independent" injuries—even if those injuries necessarily derive from the employee's covered workplace injury and would not exist but for that covered injury.

That conclusion flies in the face of the derivative injury rule—a longstanding principle that establishes workers' compensation as the exclusive remedy for all claims that are derivative of an employee's covered workplace injury. The derivative injury rule is vitally important to the policies underlying the workers' compensation bargain enacted by the Legislature. The trial court's decision, if left to stand, will force employers across the state to face overwhelming uncertainty, bear massive additional costs, and engage in protracted legal battles. These consequences will disproportionally harm small businesses, which generally lack the financial resources necessary to sustain additional costs and protracted legal fights. The increased liability risk will harm many employers in California that are struggling to recover from the devastating effects of the COVID-19 pandemic, and it ultimately will harm their workforces. That is precisely what the Legislature sought to avoid when it enacted the WCA.

This Court should issue the writ of mandate, vacate the trial court's order overruling petitioners' demurrer, and order the court to enter an order sustaining the demurrer.

ARGUMENT

As California businesses recover from the COVID-19 pandemic and continuously adapt to changing public-health measures, employers and employees rely more than ever on the certainty of the legal rules governing the workers' compensation system. The WCA—and the derivative injury rule encompassed within it—subjects any injury that is derivative of a workplace injury suffered by an employee to the statutory exclusive remedy provision. The trial court's erroneous decision—an outlier among the decisions by other state and federal courts involving similar facts and claims—violates that well-established principle by judicially legislating a COVID-19 exception to the longstanding derivative injury rule. That exception, if allowed to stand, would undermine the WCA's underlying policies, resulting in deeply destabilizing consequences for businesses across the state.

A. The Derivative Injury Rule Is A Critical Feature Of The Workers' Compensation Bargain

The WCA "offers protection with one hand even as it removes access to civil recourse with the other." (*Gund v. County of Trinity* (2020) 10 Cal.5th 503, 527.) The Legislature enacted the statutory scheme to balance two competing goals: (1) offering employees "relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury" regardless of fault, and (2) limiting the amount of liability faced by employers by requiring employees to "give[] up the wider range of damages potentially available in tort." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 (*Vacanti*); see *South Coast Framing,*

Inc. v. Workers' Comp. Appeals Bd. (2015) 61 Cal.4th 291, 298 (*South Coast Framing*) [workers' compensation system provides certainty to employers, employees, and the public by "ensur[ing] that the cost of industrial injuries will be part of the cost of goods rather than a burden on society"].) To that end, where a "remedy is available as an element of the compensation bargain[,] it is exclusive of any other remedy to which the worker might otherwise be entitled from the employer." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1052 (*King*); see Lab. Code, § 3600, subd. (a) ["Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment"]; *id.*, § 3602, subd. (a) ["[T]he right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer."].)

The compensation bargain—and the bar on civil actions based on injuries to employees—encompasses injuries "collateral to or derivative of a compensable workplace injury." (*Vacanti*, *supra*, 24 Cal.4th at p. 814.) An employer's compensation obligation is "in lieu of any other liability whatsoever to *any person*" (Lab. Code, § 3600, italics added), including the employee's dependents (*id.*, § 3602), for work-related injuries to the employee. Consistent with this broad statutory language, the California Supreme Court has liberally construed the scope of the derivative injury rule: It precludes "third-party cause[s] of action" against the employer that "would not have existed in the absence of injury

to the employee." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 998 (*Snyder*).)

The derivative injury rule is critical to advancing the policies underlying the WCA. Courts must rigorously apply the derivative injury rule to ensure that "the work-connected injury engenders a single remedy against the employer"—no matter who that injury affects—that is "exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals." (*Williams v. State Comp. Ins. Fund* (1975) 50 Cal.App.3d 116, 122 (*Williams*).) The rule enforces the "compensation bargain" that is "[a]t the core of the WCA" by "limit[ing] an employee's remedies against an employer for work-related injuries to those remedies provided by the statute itself." (*King*, *supra*, 5 Cal.5th at pp. 1046, 1051.)

B. The Trial Court's Decision Was Wrong And Is An Outlier Among Decisions In Other Cases

The trial court in this case fundamentally misunderstood the derivative injury rule. Under its mistaken view, a large swath of COVID-related claims stemming from workplace conduct would be placed outside the scope of the workers' compensation system. That conclusion is not only contrary to decisions of the Court of Appeal and the Supreme Court but also conflicts with the decisions of every other state or federal court that has addressed claims arising from alleged COVID-related injuries in the workplace.

1. Claims That Derive From A Workplace Injury Are Barred By The Derivative Injury Rule

Plaintiffs' claims in this case are encompassed by the derivative injury rule and are therefore foreclosed by the exclusive

remedy provisions of the WCA. The complaint alleges that plaintiff Matilde Ek contracted COVID-19 in the course and scope of her employment with petitioners. (PA 126.) It was because of that alleged workplace injury that the employee was "unable to work" and later transmitted the virus to her husband while she "convalesced at her home." (*Ibid.*; see Opp. to Pet. for Writ of Mand. at p. 29.)

These allegations make clear that had plaintiff Matilde Ek not contracted COVID-19 on the job, the decedent's injury and the claims arising from it "simply would not have existed." (*Snyder*, *supra*, 16 Cal.4th at p. 998.) There is no allegation that the decedent was ever on petitioners' premises or was otherwise directly harmed by petitioners. Instead, the decedent's injury necessarily requires "alleg[ing] injury to another person—the employee." (*Ibid.*) That brings plaintiffs' claims squarely within the derivative injury rule and the WCA's exclusive remedy provisions.

The trial court, echoed by plaintiffs, analogized these facts to *Kesner v. Superior Court* (2016) 1 Cal.5th 1132—a case in which the injuries sustained were not dependent on or derivative of any injury sustained by the employee. But *Kesner* was a case about an employer's duty of care, *not* a case about workers' compensation exclusivity or the derivative injury rule. There the court allowed civil claims against an employer by an employee's spouse who had developed mesothelioma as a result of inhaling asbestos fibers brought home on the employee's clothing. (*Kesner*, *supra*, 1 Cal.5th at p. 1141.) There was no allegation in *Kesner* that the

spouse's injury derived from an injury to the employee. Nor was there any allegation or reason to infer that the employee in *Kesner* had been injured at all—unlike COVID-19, mesothelioma is not a contagious illness.

The claims in this case, in contrast, necessarily depend on the alleged illness suffered by plaintiff Matilde Ek in the workplace. That is because plaintiff Matilde Ek alleges she transmitted the virus to her husband at home after becoming infected in the course and scope of her work for petitioners. (PA 126.)

As Plaintiffs acknowledge, Matilde Ek suffered "[h]er own non-fatal case of [COVID-19]" and was the "causal link" between the workplace injury and the decedent. (Opp. to Pet. for Writ of Mand. at pp. 45, 11.) The decedent's injuries therefore derived from injuries suffered by his employee spouse; they were not "independent" of the employee's injury, as the trial court mistakenly supposed.

Plaintiffs repeatedly characterize their case as an "employee-vector" case, implying that this is a recognized exception to the normal operation of the derivative injury rule. (Opp. to Pet. for Writ of Mand. at pp. 45-47, 51-55.) But no decision by any California court has used the term "employee-vector" in the workers' compensation context. Moreover, the two cases that plaintiffs cite, *Kesner* and *Snyder*, do not support creating an exception to the derivative injury rule. *Kesner*, fundamentally, did not consider workers' compensation exclusivity and addressed only whether the employers owed a legal duty of

care to the employees' household members. (*Kesner*, *supra*, 1 Cal.5th at p. 1140.) The decision therefore says nothing at all about the derivative injury rule. Moreover, the case is factually distinguishable: The court in *Kesner* explained that the plaintiff "acted as a vector to carry the [asbestos] fibers into [the decedent's] home" because the decedent's illness occurred as a result of her "contact with asbestos fibers that [the employer] used on its property," not because of "[the decedent's] contact with [the employee]." (*Id.* at p. 1159, italics omitted.) Here, in contrast, the decedent's illness was caused by his contact with and exposure to plaintiff Matilde Ek—not because of a hazardous material used by petitioners in the workplace. (PA 126.) *Snyder* is similarly distinguishable from the facts here: That case did not involve a so-called vector because the plaintiff was injured directly on the employer's premises. (*Snyder*, *supra*, 16 Cal.4th at p. 1000.) Here, plaintiffs do not allege that the decedent was ever on petitioners' premises or was otherwise directly harmed by petitioners.

In reality, plaintiffs are asking for the judicial creation of a vast new category of cases not subject to the derivative injury rule. The Court should decline that invitation. In a global pandemic involving a highly transmissible virus, *every* employee could be a potential "vector" under plaintiffs' construct. Plaintiffs' proposed new exception to workers' compensation exclusivity would expose all employers, large and small alike, to an assortment of tort and premises claims from third parties whose only connection to the place of employment is that they came into contact with an infected employee. And it need not stop there:

Plaintiffs' proposed exception would encompass not only the infected employee's family and friends who contract COVID-19, but also the family and friends of each of those individuals who become infected with the virus, and anyone else who might claim some derivative injury. Such a never-ending chain of derivative injuries and unchecked liability is antithetical to the WCA. The Legislature enacted the WCA to provide predictability to employers and limited remedies to employees for workplace injuries.

The trial court's decision also would anomalously allow a plaintiff to impose liability on her employer in two proceedings—one in the workers' compensation system and one in civil court—for all derivative injuries flowing from a single workplace injury. The Legislature foreclosed such outcomes through the exclusivity provisions of the WCA. (See *King*, *supra*, 5 Cal.5th at p. 1052 ["where [a] remedy is available as an element of the compensation bargain it is exclusive of any other remedy to which the worker might otherwise be entitled from the employer"].) Enforcing the WCA's exclusivity provisions is critically important in cases such as this that involve injuries arising from COVID-19—"a dynamic and fact-intensive matter" that, more than 18 months after it emerged, continues to be "fraught with medical and scientific uncertainty." (*Palmer v. Amazon.com, Inc.* (E.D.N.Y. 2020) 498 F.Supp.3d 359, 370 (*Palmer*); see *Juarez v. Asher* (W.D. Wash. Mar. 11, 2021) No. C20-700 JLR-MLP, 2021 WL 949381, at *2 ["The COVID-19 pandemic continues to change and evolve"].)

In this uncertain and evolving environment, employers and employees rely more than ever on the workers' compensation system and the derivative injury rule in structuring their employment relationships. This is especially true for small employers, which consistently identify the workers' compensation system as among their top problems and sources of frustration. (See, e.g., NFIB Research Center, *Small Business Problems & Priorities* at pp. 10, 84 (2020), <https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf> [identifying the workers' compensation system as the 22nd most important issue facing small businesses nationally and the 10th most important issue facing small businesses in California].) The trial court's decision, if sustained, would only exacerbate these frustrations. It would mean that employers would continue to incur the costs of the workers' compensation system *and* would have to litigate a vast new array of third-party tort claims derived from covered workplace injuries. This double-liability regime would deprive employers of the promised benefits of workers' compensation exclusivity and frustrate the Legislature's carefully crafted balance between employers' and employees' rights and competing interests. A proper interpretation of the WCA and faithful application of the derivative injury rule, in contrast, would ensure expeditious and efficient resolution of all covered workplace injuries for employers and employees alike.

2. The Trial Court's Decision Is An Outlier

Given its flawed interpretation of the WCA and erroneous application of the derivative injury rule, it is unsurprising that the decision below conflicts with the decisions of every other court that has addressed claims arising from alleged COVID-related injuries in the workplace. (Cf. *Snyder*, *supra*, 16 Cal.4th at pp. 1001-1002 [surveying decisions of other jurisdictions construing the derivative injury rule].)

The trial court's refusal to apply the derivative injury rule to the decedent's injury stands in stark and direct contrast to recent decisions by the U.S. District Court for the Northern District of California. The federal district court twice correctly dismissed complaints by an employee's spouse asserting claims against his spouse's employer for the same type of injury as in this case because such claims "are barred by the exclusive remedy provisions of California's workers' compensation statutes." (Order Granting Motion to Dismiss, *Kuciemba v. Victory Woodworks, Inc.* (*Kuciemba*) (N.D. Cal. Feb. 22, 2021) No. 3:20-cv-09355-MMC; Order Granting Motion to Dismiss, *Kuciemba*, (N.D. Cal. May 10, 2021) No. 3:20-cv-09355-MMC.) Writ relief from this Court is necessary so that parties bringing identical claims in state and federal court are not met with divergent outcomes. Sustaining the trial court's decision would encourage forum shopping by plaintiffs within the state and generate even greater uncertainty for employers.

Other courts have also dismissed claims based on an employee's transmission of COVID-19 to a family member when

the employee allegedly contracted the virus in the workplace. In *Estate of Madden v. Southwest Airlines*, for example, the U.S. District Court for the District of Maryland dismissed a negligence claim brought on behalf of an employee's deceased husband who allegedly contracted COVID-19 from his spouse. ((D.Md. June 23, 2021) No. 1:21-cv-00672-SAG, 2021 WL 2580119, at *8.) The New York Supreme Court likewise dismissed claims by an employee brought after she allegedly contracted COVID-19 in the course of employment and transmitted it to her family members on the ground that the claims were "barred by the exclusive remedy provision" of New York's workers' compensation scheme. (*Lathourakis v. Raymours Furniture Co.* (N.Y.Sup.Ct. Mar. 8, 2021) No. 59130/2020.) State courts in Illinois and Maryland have dismissed similar claims. (Order of Dismissal, *Iniguez v. Aurora Packing Company, Inc.* (Ill.Cir.Ct., Kane County, March 31, 2021) No. 20L372; Order of Dismissal, *Kurtz v. Sibley Memorial Hospital* (Md.Cir.Ct., Montgomery County, Mar. 25, 2021) No. 483758V.)

The conclusion reached by the district court in *Kuciemba* and by courts in similar cases is unremarkable. It is well established under California law that the WCA and the derivative injury rule provide workers' compensation as the exclusive remedy for all claims that are derivative of an employee's workplace injury—including claims for injuries sustained by members of the employee's household. (See *King*, *supra*, 5 Cal.5th at p. 1052.) This Court should issue a writ of mandate directing the trial court to vacate its erroneous order, which created a new exception to that

bright-line rule for COVID-related injuries, and enter a new order sustaining petitioners' demurrer.

C. Creating A COVID-19 Exception To The Derivative Injury Rule Would Undermine The Policy Of The Workers' Compensation System

The trial court's decision was wrong not only as a matter of settled law but of sound policy, too. Allowing the decision below to stand would harm employers and employees alike by undermining clarity and predictability—qualities on which businesses across the state rely and which are especially vital as they endeavor to meet the essential services demanded by the public during the ongoing pandemic.

A predictable regulatory and legal regime allows businesses to rationally allocate resources in a manner that promotes their long-term success and survival. As this Court has observed, the long-settled rules under the WCA "ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society" and "spur increased industrial safety." (*South Coast Framing*, *supra*, 61 Cal.4th at p. 298.) In the face of uniform rules, guidance, and enforcement, businesses across the state know what to expect from the workers' compensation system and have planned accordingly.

The trial court's decision disrupts each of those settled norms and thereby casts overwhelming uncertainty upon California businesses. In overruling petitioners' demurrer, the court invented a novel exception to the derivative injury rule for injuries from COVID-19 that allegedly derive from employees who contract the virus in the employer's workplace and then infect

their family members. That decision, if left to stand, will inevitably result in conflicting decisions as some appellate courts abide by California courts' longstanding and broad interpretation of the derivative injury rule while others follow the trial court's decision, effectively abrogating that precedent. The resulting legal landscape will force businesses to bear additional demands, unexpected costs, and protracted legal battles, harming their workforces and jeopardizing California's fragile economic recovery. The smallest of businesses will be especially hard-hit by an outcome affirming the trial court and allowing increased civil liability in addition to workers' compensation costs.

Allowing COVID-workplace-injury claims to proceed in courts, with the prospect of uncapped liability, also would incentivize parties to engage in wasteful and time-consuming litigation, all while imposing significant burdens on a court system already backlogged with COVID-related delays. (Maria Dinzeo, *California Judicial Council Disburses Pandemic Funds for Court Backlogs* (Jan. 22, 2021) <https://www.courthousenews.com/california-judicial-council-disburses-pandemic-funds-for-court-backlogs/>.) Determining the source of an employee's COVID-19 infection, and whether the employee was the source of the family member's infection, are not simple enterprises—"the virus can be 'spread by individuals who are pre-symptomatic or asymptomatic,' i.e., difficult to identify." (*South Bay United Pentecostal Church v. Newsom* (9th Cir. 2021) 985 F.3d 1128, 1132.) It was concerns such as these that prompted the Legislature to adopt the exclusive remedy provisions of the

WCA, which imposes limited and determinate liability on employers in exchange for a strict liability regime. Yet the trial court's decision all but ensures that courts will have to confront an influx of immensely challenging third-party claims presenting novel issues of duty and causation.

A proper construction of the WCA—one that encompasses derivative injuries such as the decedent's illness that he allegedly contracted from his employee spouse—would promote certainty and predictability for employers and employees alike. Those virtues are especially important in an "evolving situation" such as the "[COVID-19] pandemic for which there is no immediate end in sight." (*Palmer*, *supra*, 498 F.Supp.3d at p. 370.)

Nor is the trial court's COVID-19 exception to the derivative injury rule necessary for employees affected by the pandemic to receive relief for their COVID-related workplace injuries. Data collected since the pandemic's inception demonstrates that the workers' compensation system is capable of addressing the proliferation of claims that employees have filed. During the 2020 accident year, employees in California reported 103,712 COVID-19 claims that arose from the scope of their employment. (Amy Puffer, *COVID-19 Workers' Comp Claims Surge in California* (Feb. 10, 2021) <https://woodruffsawyer.com/property-casualty/covid-19-workers-comp-claims-surge-california/>.) Each of these claims resulted in a thorough investigation that included "contact tracing, obtaining test results, and taking employer and employee statements, all of which are extremely time consuming." (*Ibid.*) The outcome for which plaintiffs advocate—and the decision

adopted by the trial court—gives injured employees a windfall by allowing them to pursue civil recourse for derivative injuries even as they receive remedies for their workplace injuries through the workers' compensation system.

Despite the unambiguous statutory language and long line of precedent against their position, plaintiffs urge the Court to rewrite the WCA to achieve a result the Legislature has declined to endorse. This Court should create a new exception to the derivative injury rule and to workers' compensation exclusivity, plaintiffs contend, because their deceased husband and father would otherwise not receive any compensation under the workers' compensation system. (Opp. to Pet. for Writ of Mand. at p. 16.) That argument is speculative, because plaintiffs do not contend that they have sought such compensation through the workers' compensation system. Even if they were correct, however, "a failure of the compensation law to include some element of damage recoverable at common law is a legislative and not a judicial problem." (*Williams*, *supra*, 50 Cal.App.3d at p. 122.) The Legislature has "plenary power" to "create, and enforce a complete system of workers' compensation" (Cal. Const. art. XIV, § 4), and any limits on remedies that the workers' compensation system provides for derivative third-party injuries are the product of legislative choice. Plaintiffs certainly may seek to persuade the Legislature to amend the WCA to provide greater remedies for derivative workplace injuries such as those alleged here. But in the meantime, the Court should decline to carve out an exception

to the statutory scheme that would violate its text, context, and purpose.

CONCLUSION

The Court should issue the writ of mandate, vacate the trial court's order overruling petitioners' demurrer, and order the court to enter an order sustaining the demurrer.

DATED: August 30, 2021

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Lucas C. Townsend
Lucas C. Townsend

Attorneys for Amici Curiae Chamber of Commerce of the United States of America, California Chamber of Commerce, California Workers' Compensation Institute, Restaurant Law Center, California Restaurant Association, National Association of Manufacturers, National Retail Federation, and National Federation of Independent Business Small Business Legal Center

CERTIFICATE OF WORD COUNT

I certify that the text of this brief consists of 5,010 words as counted by the program used to generate this brief.

DATED: August 30, 2021

/s/ Lucas C. Townsend
Lucas C. Townsend

[PROPOSED] ORDER

The application of the Chamber of Commerce of the United States of America, the California Chamber of Commerce, the California Workers' Compensation Institute, the Restaurant Law Center, the California Restaurant Association, the National Association of Manufacturers, National Retail Federation, and National Federation of Independent Business Small Business Legal Center to file a brief in support of the petition for writ of mandate filed by petitioners See's Candies Inc. and See's Candy Shops, Inc. is granted.

IT IS SO ORDERED.

Dated: _____ _____
Presiding Justice

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921.

On August 30, 2021, I served true copies of the following document(s) described as **APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

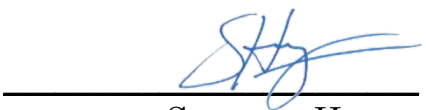
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Gibson Dunn & Crutcher LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

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

Executed on August 30, 2021, at San Francisco, California.



Susanne Hoang

SERVICE LIST

***See's Candies, Inc. and See's Candy Shops, Inc. v. Superior Court of California, for the County of Los Angeles (Matilde Ek, et al., Real Parties in Interest*)**
Case No. B312241

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