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May 18, 2017

VIA COURIER

Hon. Tani Cantil-Sakauye, Chief Justice,
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Phillips v. Honeywell International, Inc.*, No. S241544
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this letter, pursuant to rule 8.500(g) of the Rules of Court, in support of defendant Honeywell International Inc.'s petition for review in this case. Honeywell's petition raises important legal issues of statewide, and indeed national, importance warranting this Court's review.

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, in every industry sector and geographic region of the country. In particular, the Chamber has many members in California and many more who conduct substantial business in this state. For that reason, the Chamber and its members have a significant interest in the sound and equitable resolution of asbestos-related and other claims in California courts.

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The Chamber routinely advocates the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of vital concern. In fulfilling that role, the Chamber has appeared many times before this Court and the California Courts of Appeal.

WHY REVIEW SHOULD BE GRANTED

Nearly twenty years ago, this Court decided *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 (*Rutherford*), a landmark case that formulated and applied a new, two-part causation standard specific to toxic tort cases involving asbestos-related injuries. But in the twenty years since this Court's decision, several California courts have moved further and further away from the rule this Court announced, relaxing the causation standard for asbestos-related claims to what has effectively become an "any exposure" theory of liability. This series of lower-court decisions, including the decision here, run directly contrary to *Rutherford*, and conflict with decisions from numerous other jurisdictions—including the Ninth Circuit. California law is becoming increasingly outside the mainstream and has turned the California court system into a magnet jurisdiction for asbestos cases.

The Chamber recognizes that this Court has denied previous petitions for review on the causation standard for asbestos-related claims. But this issue has not gone away, and will continue to plague California trial and appellate courts until this Court grants review and decides the issue. This Court should therefore grant review in this case, not only to correct the legal error made in the lower-court decision, but also to put to rest nearly two decades of litigation over this issue and ensure that the centuries-old causation requirement in tort claims is not eliminated, and businesses are not exposed to crippling liability for injuries to which they only trivially or remotely contributed, merely because a claim involves asbestos-related injuries.

I. *Rutherford*'s Two-Part "Substantial Factor" Test

In *Rutherford*, this Court considered the standard for proving causation in product liability cases involving asbestos-related injuries. (*Rutherford*, *supra*, 16 Cal.4th at p. 957.) *Rutherford* squarely rebuffed the argument that the burden of proof for causation should shift to defendants in such cases, rejecting such a "fundamental departure" from "basic tort principles." (*Id.* at pp. 968-969.) But *Rutherford* also noted that holding plaintiffs to a "but-for" standard of causation would not be appropriate for asbestos litigation because it would require plaintiffs to prove that fibers from a defendant's products were the specific fibers that eventually initiated the process of malignant cellular growth, which was scientifically difficult, if not impossible, to do. (*Id.* at p. 982.) In light of this difficulty, *Rutherford* held that the appropriate standard of causation was an adapted, two-part, asbestos-specific version of the "substantial factor" test. (*Ibid.*)

The two-part, asbestos-specific "substantial factor" test set forth in *Rutherford* requires a plaintiff to (1) "establish some threshold *exposure* to the defendant's defective asbestos-containing products" and (2) "further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford*, *supra*, 16 Cal.4th at p. 982, original italics.) *Rutherford* clarified that exposure to a defendant's product was a substantial factor "if in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer." (*Id.* at p. 977, original italics.)

In short, the discussion in *Rutherford* made plain that this Court did not intend to relieve plaintiffs of their traditional burden to prove defendants' conduct caused their injuries. Indeed, this Court adapted the substantial factor test in order to *maintain* plaintiff's burden of proving causation, while also acknowledging the scientific difficulties inherent in asbestos litigation.

II. Lower Courts Continue to Improperly Depart from *Rutherford*

Over the past several years, trial courts and the courts of appeal have repeatedly misconstrued the standard this Court articulated in *Rutherford*, unduly broadening and fundamentally reworking it in the mistaken belief that every exposure to asbestos could properly be deemed to have increased the risk of developing cancer. Under this "any exposure" theory, courts have stretched and refashioned the entire notion of "substantial factor" to such an extent that the once two-part standard now has only one part: a threshold showing of exposure to the defendant's asbestos-containing products. In re-crafting the causation standard, these decisions run directly counter to this Court's holding in *Rutherford* by effectively relieving plaintiffs of any burden of proving causation and shifting it entirely onto defendants.

For example, in *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, Division Three of the Second Appellate District affirmed a jury's substantial factor finding based on expert medical testimony that "all exposures constitute a substantial factor contributing to the risk of developing mesothelioma." (*Id.* at pp. 976-977.) The court found that this testimony was "sufficient to establish in reasonable medical probability that exposure to . . . asbestos was a substantial factor contributing to [the plaintiff]'s risk of contracting mesothelioma." (*Id.* at p. 978) Yet such a conclusion goes directly against the notion of requiring plaintiffs to prove causation in addition to some threshold exposure. To rule that "all exposures" to asbestos can be a substantial factor simply because they contribute to the risk of plaintiff's injury is to entirely remove the concept of "substantial" from the "substantial factor" test. In reaching this conclusion, the Court of Appeal failed to adhere to *Rutherford*'s central holding, and effectively gutted the second part of this Court's asbestos "substantial factor" test.

The decision of Division Two of the Second Appellate District in *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, similarly held that a medical doctor was not needed to testify that there was a "reasonable medical probability that the exposure . . . was a 'legal cause' of [the plaintiff]'s

injury." (*Id.* at pp. 673-674.) The court reversed the trial court's nonsuit, which was based on the rationale that the plaintiff failed to show, to a reasonable degree of medical probability, that the product caused the complained-of injury. (*Id.* at p. 675.) The Court of Appeal held that the generic testimony of plaintiff's epidemiologist qualified as medical evidence, even though the epidemiologist was not a medical doctor, did not diagnose the plaintiff, and could not testify as to the cause of the plaintiff's condition. (*Id.* at p. 666.) This conclusion effectively altered the second part of the *Rutherford* test, morphing the requirement to demonstrate a *substantial* contribution into a requirement to demonstrate *any* contribution.

Last year, in *Davis v. Honeywell International Inc.* (2016) 245 Cal.App.4th 477 (*Davis*), Division Four of the Second Appellate District continued the regrettable trend of effectively reworking and transforming the *Rutherford* standard into the very burden-shifting this Court rejected. In *Davis*, the plaintiff's medical expert testified that any exposure to asbestos from working on brake linings, as the plaintiff did, was a substantial factor in causing mesothelioma. (*Id.* at p. 483) The expert admitted that he did not perform any calculations designed to estimate the dose of asbestos the plaintiff may have received from his work on brake linings. (*Id.*) Taking a breathtakingly broad view of *Rutherford*, the Court of Appeal determined that *Rutherford* "does not require a 'dose level estimation,'" and the expert's "any exposure" testimony was sufficient to satisfy *Rutherford*'s requirement that a plaintiff establish to a reasonable medical probability that his or her exposure to the defendant's asbestos-containing product was a substantial factor in contributing to the risk of developing cancer. (*Id.* at p. 492.) Under this reasoning, *any* exposure is essentially equivalent to a *substantial* factor. This conclusion all but eliminates *Rutherford*'s requirement that plaintiffs prove the asbestos "substantial factor" causation and exposes any business that has ever produced asbestos-containing products to massive, potentially business-ending, liability, no matter the remoteness of the connection between its products and the plaintiff's injuries.

The Court of Appeal in this case followed this disturbing trend of departure from *Rutherford*, and affirmed a nearly $6 million jury verdict that was based on a differently named but similarly misguided "every identified exposure" theory of causation. Indeed, at trial, plaintiffs' expert testified that each "identified exposure" to asbestos fibers of any type had substantially contributed to James Phillips's mesothelioma, including his exposure to asbestos while working on brake linings manufactured by defendant's corporate predecessor. (Opn. at pp. 39-41.)

Plaintiffs' expert in this case admitted that he did not even attempt to separate out any of Phillips's particular exposures to asbestos; he merely excluded from his causation analysis instances in which Phillips used a product that did not contain asbestos and instances in which he did not breathe in asbestos fibers. (*Id.* at 39-40.) As to identified exposures to asbestos, the expert concluded that "*all* of those exposures . . . result in disease risk." (*Id.* at 39, italics added.) In short, plaintiffs were permitted to tell the jury through their expert that a particular exposure was a "substantial factor" in causing cancer simply by establishing that an exposure occurred.

III. Numerous Other Jurisdictions Have Rejected the "Any Exposure" Causation Theory

The Court of Appeal's decision places California well outside the mainstream of state and federal courts with respect to the governing standard for proving exposure to a defendant's asbestos.

Courts across the country have rejected the "any exposure" theory. (See, e.g., *McIndoe v. Huntington Ingalls Inc.* (9th Cir. 2016) 817 F.3d 1170 (*McIndoe*); *Cornell v. 360 W. 51st St. Realty, LLC* (2014) 22 N.Y.3d 762; *Anderson v. Ford Motor Co.* (2013) 950 F.Supp.2d 1217 (D. Utah 2013); *Ford Motor Co. v. Boomer* (Va. 2013) 736 S.E.2d 724; *Gregg v. V-J Auto Parts Co.* (Pa. 2007) 943 A.2d 216; *In re W.R. Grace & Co.* (Bankr. D. Del. 2006) 355 B.R. 462; *Brooks v. Stone Architecture, P.A.* (Miss.Ct.App. 2006) 934 So.2d 350; *Bartel v. John Crane, Inc.* (N.D. Ohio 2004) 316 F.Supp.2d 603, affd. sub nom. *Lindstrom v. A-C Prod. Liab. Trust* (6th Cir. 2005) 424 F.3d 488;

Free v. Ametek (Wash.Super.Ct. Feb. 28, 2008) 2008 WL 728387; *Daly v. Arvinmeritor, Inc.* (Fla.Ct.App. Nov. 30, 2009) 2009 WL 4662280.)

For example, the Pennsylvania Supreme Court in *Betz v. Pneumo Abex LLC* (Pa. 2012) 44 A.3d 27, affirmed a lower court's decision precluding the plaintiffs from using their expert's "any exposure" opinion. (*Id.* at pp. 39, 58) The court explained that the "any-exposure opinion ... obviates the necessity for plaintiffs to purs[u]e the more conventional route of establishing specific causation (for example, by presenting a reasonably complete occupational history and providing some reasonable address of potential sources of exposure other than a particular defendant's product)." (*Id.* at p. 54.) The court found the "any exposure" theory to be in conflict with itself because, "[s]imply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive." (*Id.* at p. 56.)

Similarly, the Texas Supreme Court rejected the "any exposure" theory in an asbestos case involving a plaintiff suffering from mesothelioma, holding that the substantial factor causation test is the proper test to be used in determining liability in such cases. (*Bostic v. Georgia-Pacific Corp.* (Tex. 2014) 439 S.W.3d 332, 352-353 (*Bostic*).) *Bostic* reaffirmed that under the substantial factor test, "proof of 'any exposure' to a defendant's product will not suffice and instead the plaintiff must establish the dose of asbestos fibers to which he was exposed by his exposure to the defendant's product." (*Id.* at p. 353; see also *Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765, 770-771 [applying the same principles in asbestos cases involving plaintiffs suffering from asbestosis]; *Smith v. Kelly-Moore Paint Co.* (Tex.Ct.App. 2010) 307 S.W.3d 829, 835, 839 [holding that asbestos plaintiffs must prove the amount of exposure and the minimum dose of the product above which an increased risk of developing cancer occurs].)

The Ninth Circuit has also rejected the "any exposure" theory as a matter of federal maritime law. The court in *McIndoe* concluded that the district court properly rejected the plaintiffs' argument "that evidence of prolonged exposure" to asbestos is unnecessary to satisfy the substantial factor test

where the plaintiff presents medical expert testimony that "*every* exposure to asbestos above a threshold level is necessarily a substantial factor in the contraction of asbestos-related diseases." (*McIndoe*, *supra*, 817 F.3d at 1177.) *McIndoe* reasoned that permitting plaintiffs to establish causation through such "every exposure" testimony would result in "the sort of unbounded liability that the substantial factor test was developed to limit." (*Id.*)

IV. Further Extending Liability for Asbestos Will Harm California Businesses That Are Not Culpable and Have Caused No Harm

Since the 1980s, asbestos litigation has proved fatal to manufacturers and distributors of asbestos-containing products. To date, over a hundred companies have filed for bankruptcy protection as a result of an onslaught of asbestos claims. (Crowell Moring, *CHART 3: COMPANY NAME, CASE NO., COURT, PLAN STATUS & PUBLISHED DECISIONS* (Apr. 1, 2016), https://www.crowell.com/files/Asbestos-Bankruptcy-Debtors-plan-status-citations-published-decisions.pdf.)

The initial wave of bankruptcies involved traditional asbestos defendants that mined and processed raw asbestos. But since that initial wave, the number of new defendants and lawsuits has increased dramatically. (See Scarcella et al., The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010 (Oct. 10, 2012) Mealey's Litigation Report: Asbestos at p. 1.) Plaintiffs' attorneys have shifted their focus to peripheral defendants, who manufactured and distributed far less harmful asbestos products, such as pumps, valves, and gaskets. (*Id.* at p. 4).

If the asbestos liability standards continue to move towards absolute liability, more companies in a wide variety of industries will be exposed to crushing liability and potential bankruptcy. The industries facing this potential exposure include construction, automotive trades, residential home repair, and remodeling. Under an "any exposure" standard, plaintiffs' attorneys will enmire and extinguish these peripheral companies, even

though they are a significant step removed from the mining and processing of asbestos fibers.

As an example, in 2015, Oakfabco Inc. declared bankruptcy after it was crippled by asbestos-related claims. (See Karmasek, *Defunct boiler maker, crippled by asbestos claims, files for bankruptcy again* (Aug. 18, 2015), http://legalnewsline.com/stories/510633724-defunct-boiler-maker-crippled-by-asbestos-claims-files-for-bankruptcy-again.) The asbestos claims arose from the company's manufacturing of boilers prior to 1988 that, according to the company's 1956 catalog, had at that time been made with an "asbestos rope gasket." (*Ibid.*) The company estimated as of August 2015 that there were approximately 3,400 active asbestos claims, and more than 30,000 inactive asbestos claims outstanding, against it. (*Ibid.*)

The legal standard at issue in this thus has real consequences for real companies and their employees. This Court's review is warranted to ensure that more companies are not pushed into bankruptcy due in part to an incorrect legal standard that improperly imposes liability on California companies.

CONCLUSION

The Chamber respectfully requests that this Court grant review to disapprove of the lower-court departures from the important standard for determining liability in asbestos-related cases this Court set forth in *Rutherford*, and reverse or vacate the judgment of the Court of Appeal in this case.

Sincerely,

Blaine H. Evanson

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

cc: See attached Proof of Service

PROOF OF SERVICE

I, Teresa Motichka, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, California 94105-0921, in said county and state. On May 18, 2017, I served the within:

***AMICUS CURIAE* LETTER TO THE SUPREME COURT OF CALIFORNIA**

to each of the persons named below at the address(es) shown, in the manner described below:

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Fifth District Court of Appeal
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☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated above for collection and mailing at my business location, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper.

Teresa Motichka

Teresa Motichka

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