No. 22–55219

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF POMONA,

Plaintiff–Appellee,

v.

SQM NORTH AMERICA CORPORATION, A DELAWARE CORPORATION,

Defendant–Appellant.

On Appeal from the United States District Court for the Central District of California, Case No. 2:11–cv–0167–RGK The Honorable R. Gary Klausner, United States District Judge

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN COATINGS ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* states that the Chamber of Commerce of the United States of America (Chamber) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber states that it has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber. The American Coatings Association, Coalition for Litigation Justice, Inc., and International Association of Defense Counsel have no parent corporations and have issued no stock.

Pursuant to Rule 29(a)(4)(E), counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 29(a)(2), counsel for *amici curiae* states that all parties consented to the filing of this brief.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States of America (Chamber), American Coatings Association (ACA), Coalition for Litigation Justice, Inc. (CLJ), and International Association of Defense Counsel (IADC). *Amici's* members include manufacturers, designers, and sellers of products in California, their insurers and their counsel. *Amici*, therefore, have an interest in ensuring that courts interpreting California law adhere to settled California Supreme Court precedent requiring a product liability plaintiff to prove—with competent evidence—both the existence of an actual design defect, and that the defective design was the proximate cause of the plaintiff's injuries.

The 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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch,

[1] *Amici* file this brief in support of Defendant-Appellant pursuant to Rule 29.

and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community. In fact, the Chamber has filed *amicus* briefs in previous stages of this lawsuit.

ACA is a voluntary, nonprofit trade association representing more than 170 manufacturers of paints and coatings, raw materials suppliers, distributors, and technical professionals. As the leading organization representing the coatings industry in the United States, a principal role of ACA is to serve as an advocate for its membership on legislative, regulatory, and judicial issues at all levels. In addition, ACA undertakes programs and services that support the paint and coatings industries' commitment to environmental protection, sustainability, product stewardship, health and safety, corporate responsibility, and the advancement of science and technology. Collectively, ACA represents companies with over 90% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

CLJ is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for toxic tort claims and related tort

litigation.[2] CLJ files *amicus curiae* briefs in important cases that may have a significant impact on the tort litigation environment.

IADC is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. IADC is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

California's strict products-liability doctrine does not transform manufacturers into insurers against all injuries that may result from the use of their products into perpetuity. Yet, that is exactly what the City of Pomona is seeking to do here. In 2010, the City filed this lawsuit to subject SQM North America to liability because the company allegedly sold fertilizer to orchards in the Pomona area in the 1930s and 1940s that contained perchlorate at

[2] CLJ includes Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

levels not deemed potentially hazardous for another 60 to 70 years. The City previously asked the Court to allow it to apply today's perchlorate standards to the fertilizer's design decades ago, and the Court did so.[3] But the district court went further and allowed the case to be tried without *any* burden on the City to prove design defect. The City was able to recover by showing only that the fertilizer—not the fertilizer's design—caused its injuries.

The California Supreme Court has repeatedly held that strict products liability is not absolute; a plaintiff must show that a *defect* in the product caused the alleged injuries. Here, although the City alleges the fertilizer was defectively designed, it never identified the design aspect that allegedly made the product defective, provided expert testimony establishing the alleged defect, or demonstrated how this purported defect caused the City's alleged injuries. Instead, the City asserted that there was an injury so the amount of perchlorate in the fertilizer must have been too high. This is the precise type of *ipse dixit* design defect allegations that the California Supreme Court has continually rejected. A defect does not speak for itself.

[3] *See City of Pomona v. SQM N. Am. Corp.*, 801 F. App'x 488 (9th Cir. 2022) (unpublished).

Additionally, the City is not alleging harm from its own purchase or use of the fertilizer. California law does not completely bar bystanders from recovering in products liability, but it does require them to prove that their injuries were reasonably foreseeable. Thus, the City had to show that it was reasonably foreseeable in the 1930s and 1940s that the amount of perchlorate in the fertilizer would cause the City to have to spend money filtrating its water supply in 2006 and 2007. As discussed in previous briefings, the City's experts and this Court have all acknowledged that it was undisputed that harmful effects of perchlorate were unknown in the early to mid-twentieth century. Yet, the district court ruled otherwise and allowed the claim.

Amici request that this Court overturn the ruling below and enforce longstanding California design-defect and products-liability law—including the need to show defect, causation, and foreseeable risk of harm to a bystander. The City must be held to the same burdens on these key questions of product liability law as any other party bringing such a claim. It has not met this burden.

ARGUMENT

I. THE COURT SHOULD OVERTURN THE RULING BELOW BECAUSE THE CITY OF POMONA NEVER PRESENTED A *PRIMA FACIE* DESIGN-DEFECT CLAIM

A. Plaintiff's Burden in a Design Defect Case is to Identify the Defect and Prove the Defect Caused the Alleged Injury

In allowing the City to pursue its claim against SQM, the district court disregarded longstanding California law requiring that a plaintiff seeking to recover for a product-based harm must establish that the product was defective and that the defect caused the alleged harm. In *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 64 (Cal. 1962), the California Supreme Court became the first court in the country to adopt products liability, concluding that liability can attach when a plaintiff proves injury "as a result of a defect. . . that made the [product] unsafe." Like most states, California recognizes three distinct types of product defect: manufacturing, design, and failure to warn. A plaintiff, regardless of whether a private person or public entity, must present a *prima facie* case under one of these defect theories to have a viable claim.

Here, the City alleges that the fertilizer SQM sold in the 1930s and 1940s was defectively designed. California has two tests for design defect; each is unique and appropriate to its own circumstances. *See Soule v. General*

Motors Corp., 8 Cal. 4th 548, 566 (Cal. 1994). The first test—the risk utility test—is met if a product design's risks outweigh its utility. The second test—the consumer-expectations test—is met if the product design violated minimum safety assumptions that consumers may reasonably have about the product. The consumer-expectations test "is reserved for cases in which the everyday experience of the product's users permits a conclusion" that the product is defective "regardless of expert opinion about the merits of the design." *Id.* at 567 (emphases omitted). For questions of science or engineering, as in this case, only the risk-utility test is appropriate.

Indeed, when this case was previously before this Court, a panel explained that the City could not resort to the consumer-expectations test because (i) "the impact of commercial use of fertilizer more than fifty years ago [is] not part of the everyday experience of ordinary consumers"; (ii) "the contamination at issue" was of a "technical and scientific nature"; and (iii) the product involves "obscure components under complex circumstances." *City of Pomona v. SQM N. Am. Corp.*, 694 F. App'x 477, 478 (9th Cir. 2017). To prevail, the City had to present a risk-benefit design-defect claim, which has specific elements and requirements. The claim "involves an evaluation of the design itself," *Campbell v. General Motors Corp.*, 32 Cal. 3d

112, 118 (Cal. 1982)—that is, whether "the benefits of the design outweigh the risk of danger inherent in such design." *Soule*, 8 Cal. 4th at 567.

For these cases, the California Supreme Court has established a burden-shifting framework. The initial burden is on the plaintiff to "adduce[]" evidence "which would permit a jury to find that a design feature of the product was a proximate cause of plaintiff's injury." *Campbell*, 32 Cal. 3d at 119. Only "once the plaintiff makes a *prima facie* showing that the injury was proximately caused by the product's design," does the burden "shift to the defendant to prove, in light of the relevant [risk-benefit] factors, that the product is not defective." *Id.* at 119. If the plaintiff does not show its injuries would not have occurred with a non-defective design, the plaintiff's claim fails and the burden never shifts to the defendant. That is what occurred here. The City only presented evidence that the product, not the product's design, caused the alleged injury. Thus, the district court should have granted SQM's motion seeking judgment as a matter of law.

B. By Not Identifying the Defect or How the Defect Caused Its Injury, the City Did Not Present a *Prima Facie* Design Defect Case

The City did not satisfy its *prima facie* burden simply by arguing that it was injured by perchlorate in SQM's fertilizer. "A product liability case must

be based on substantial evidence establishing both the defect and causation." *Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1373 (Cal. Ct. App. 2005). Thus, given the complexity of the scientific issues here, the City had to show through expert testimony what the defect was and that this defect caused the City's injury. The City never presented such a case.

At trial, the City never identified how much perchlorate was *designed* to be in the fertilizer. Instead, the City argued only that SQM "had the *ability* to produce fertilizer with less than 0.1 percent perchlorate" but "elected not to utilize that ability." Pl. Opp. to MJAL at 7 (emphasis added). This statement says nothing about how the fertilizer was *designed*. A car manufacturer may have the *ability* to make a tank, but that is not how most cars are *designed*. As a result, this Court found it was not determinative that a pickup-truck manufacturer had the *ability* to put "protective seats, seatbelts, and occupant packaging" in the cargo bed; the design-defect claim still failed on summary judgment. *Maneely v. General Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997) (applying California law) (affirming summary judgment). To be clear, the City's design defect theory—that "[t]he disparity between what SQMNA had the ability to do, and what SQMNA actually did,

was . . . the 'design' at issue in the case," Pl. Opp. to MJAL at 7—does not speak to the design of the fertilizer at all.

Next, the City used testimony from a former SQM executive who stated his "belief" that the "typical or average percentage of perchlorate" in the fertilizer was ".2, .3, .4." ER-1692 at 5. Again, this testimony does not address how the product was *designed*. At best, it states a person's belief of how some fertilizer was produced. The only suggestion about how the fertilizer was *designed* was the patent, which stated that the fertilizer was intended to have "less than . . . 0.1% perchlorate." 7-ER-1353, 1362.

If the amount of perchlorate in the fertilizer was designed to be less than 0.1 percent, as the patent suggests, but batches of fertilizer in this executive's view had varying higher amounts, that would be consistent with evidence that one would expect in a *manufacturing-defect* case. A manufacturing defect occurs where a product "differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 429 (Cal. 1978). Manufacturing and design defects are mutually exclusive theories of products liability, and here, the City abandoned any manufacturing-defect claim. Thus, the City never met its burden to show how the fertilizer was

designed with respect to perchlorate and how that design—not just the product—caused its injuries.

In design-defect cases based on the type of complex risk-utility analysis needed here, a hallmark of satisfying this burden of proof is presenting expert testimony on each of these elements. As California courts have explained, when a design defect claim is based on the consumer-expectations test, "expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect." *Stephen*, 134 Cal. App. 4th at 1373. But when the design-defect claim invokes complex risk-utility balancing, the subject matter is "beyond common experience," and in those circumstances, competent "expert testimony is required." *Id.* California courts, as well as this Court, have affirmed this point on several occasions.

For example, *Stephen* concerned a woman injured in a car accident where a tire tread separated from the tire itself. *See id*. at 1365–66. The court excluded the testimony of the plaintiff's tire expert and nonsuited the case. *See id.* at 1365. The California Court of Appeal affirmed the exclusion of the plaintiff's expert on various grounds, including his lack of qualifications and the speculative nature of his conclusions, and affirmed the trial court's decision to nonsuit the action. The appellate court explained that the

plaintiff's "theory about the tire failure [was] based on the tire's chemical characteristics and the supposedly defective 'recipe' used by [the tire manufacturer] in the manufacturing process." *Id.* at 1373. Given that these issues are beyond common knowledge, "[i]t follows that Stephen's inability to present expert testimony was fatal to her product liability and negligence claims, and that nonsuit was proper." *Id.*

In *Howard v. Omni Hotels Management Corp.*, 203 Cal. App. 4th 403 (Cal. Ct. App. 2012), a hotel guest sustained injuries from slipping in a bathtub. The plaintiff proffered an engineering expert who testified that the bathtub was "dangerously slippery, and should have been made safer." *Id.* at 415. The California Court of Appeal concluded the testimony was "not supported by anything other than [the expert's] own opinion." *Id.* at 427. Without competent expert testimony identifying an actual design defect, the court affirmed summary judgment for the manufacturer. *See id.* at 428, 435; *see also Braverman v. BMW of N. Am., LLC*, 2021 WL 1020408, at *3 (C.D. Cal. Mar. 17, 2021) (rejecting argument that expert testimony on defective design "is not required to establish a *prima facie* case" because "[w]hether a car is defectively designed is beyond the common knowledge of the average layman"), *appeal filed*, No. 21–55427 (9th Cir. Apr. 29, 2021).

And in *Shalaby v. Newell Rubbermaid, Inc.*, 379 F. App'x 620 (9th Cir. 2010), the plaintiffs brought suit after a handheld torch exploded. Because "the cause of the explosion . . . presented questions of physics, metallurgy, and engineering related to the construction, composition, design and operation of a handheld torch attached to a gas cylinder," the plaintiffs "were required to present expert testimony on these issues to establish a prima facie case." *Id.* at 622. Because the trial court excluded the plaintiffs' experts, this Court explained, "[t]he district court correctly applied California law in concluding that the plaintiffs had not established a *prima facie* [design-defect] case." *Id.* at 623. *See also, e.g.*, *Rovid v. Graco Children's Prods., Inc.*, 2018 WL 5906075, at *16 (N.D. Cal. Nov. 9, 2018) ("[W]ithout [expert] testimony plaintiffs lack evidence showing a <u>design</u> feature of the subject mattress proximately caused Leanne's death.").

This case suffers from the same flaw as these other cases. The City, just like the plaintiffs in the other cases, alleges only that the subject product caused harm. Alleging that there was too much perchlorate in fertilizer is no different from alleging that a bathtub was too slippery, that tire treads should not have separated, or that a torch should not have exploded. Merely arguing that the product should have been made differently is not sufficient

for meeting the standards for a *prima facie* case of design defect under California law.[4] The City's claim should have been dismissed.

II. THE CITY, AS NEITHER A PURCHASER NOR A USER OF THE FERTILIZER, CANNOT RECOVER IN STRICT LIABILITY FOR HARM THAT WAS NOT REASONABLY FORESEEABLE

In addition, the City did not argue that it bought or used the fertilizer at issue; it is bringing this claim as a third-party bystander. Under longstanding California law, in order to recover for a product-defect claim, the City had to show that the "injury to bystanders from the defect is reasonably foreseeable." *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 586 (Cal. 1969). Thus, the City was required to show that SQM could have reasonably foreseen in the 1930s or 1940s that the design of its fertilizer would cause the harm the City alleges 60 to 70 years later. It failed to do so.

First, it is undisputed that harmful effects of perchlorate were not reasonably foreseeable in the 1930s and 1940s when SQM sold the fertilizer, and it was not reasonably foreseeable that the City would claim injury from

[4] "Such a minimal standard would nullify plaintiffs' burden to identify the purported design feature that proximately caused the injury." *Rovid*, 2018 WL 5906075, at *14 (emphasis omitted); *see also Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1108 (N.D. Cal. 2002) (rejecting plaintiffs' argument that they "need only demonstrate that the underlying injury was caused by the product itself") (emphasis omitted).

the orchards' use of fertilizer containing perchlorate. Ironically, it was the City that initially argued in this case that it was not known that perchlorate would cause such harm, which is why it had not removed perchlorate from the town's drinking water sooner than it did. As this Court noted, the City "provided evidence that its failure to act was *reasonable at the time*, given the scientific uncertainty regarding the safety of perchlorate in drinking water and the fact that Pomona relied on [state regulations] as 'guideposts' for determining what levels of [perchlorate] were safe." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1052 (9th Cir. 2014) (emphasis added). Thus, the district court erred in concluding that the evidence "supports [a] finding that the type of harm was foreseeable." Ord. at 5. The party and this Court have already acknowledged that no such evidence exists.

Second, it was improper for the district court to suggest that the evidence somehow "justified a finding that Pomona was the user or consumer of Defendant's fertilizer" such that foreseeability would not need to be proved under California law. *Id.* It is undisputed that the City did not purchase or use the fertilizer itself, and any notion that the City can be considered a user or consumer of the fertilizer based on its residents' use of the product would represent a radical departure of California law. The

California Supreme Court's bystander distinction would become meaningless with respect to local governments, thereby improperly giving the City greater rights to sue than other types of bystanders. Such a result would improperly allow products liability to usurp environmental tort law for when governments can seek abatement or other remedies for ground or water pollution. There is no basis in California law for such a ruling.

These basic limitations on third-party claims are common in states that allow product liability claims by bystanders. "Most courts that have extended strict products liability to injuries suffered by bystanders have done so, in part, on the basis that the bystanders' injuries were the foreseeable results of the alleged defects." *Straub v. Fisher & Paykel Health Care*, 990 P.2d 384, 390 (Utah 1999).[5] Courts analyzing such claims "will scrutinize the interrelationship between the use of the defendant's product and the activities of the bystander to determine whether the harm caused was foreseeable." Patrick R. Buckler, *State of the Art Evidence in Products*

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[5] *See, e.g.*, *Winnett v. Winnett*, 310 N.E.2d 1 (Ill. 1974) (holding manufacturer of farm equipment could not reasonably foresee that four-year-old would be allowed to approach equipment when in operation); *see also* P.G. Reiter, *Products Liability: Extension of Strict Liability in Tort to Permit Recovery by a Third Person Who was Neither a Purchaser Nor User of Product*, 33 A.L.R.3d 415 (1970) (discussing cases).

Liability Suits in Maryland, 28 U. Balt. L. Rev. 117, 184 (1998); *see also* Ronald G. Franklin, *Persons Entitled to Recover Under Strict Product Liability—Bystanders*, 1 Tex. Prac. Guide Torts § 4:165 (updated 2021) ("In bystander strict liability actions, liability rests on foreseeability . . . ."). These restrictions apply to public and private plaintiffs alike.

Finally, several courts, including the U.S. Supreme Court, have expressed concern that allowing unforeseeable liability conflicts with due process. The Supreme Court has observed that constitutional limits are stretched by imposing "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Eastern Enters. v. Apfel*, 524 U.S. 498, 528-29 (1998) (plurality opinion of O'Connor, J.); *see id.* at 538 (declining to address due process claim, having found that statute violated Takings Clause); *id.* at 549 (separate opinion of Kennedy, J.) (concluding that "in creating liability for events which occurred 35 years ago," statute had "a retroactive effect of unprecedented scope" and violated due process); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness . . . dictate that a person receive fair notice

not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

This Court should not permit such liability here. The proper course is for the Court to adhere to California law for bystander product defect claims. The City did not show that it was a user or consumer of the fertilizer, or that its injuries were reasonably foreseeable in the 1930s and 1940s. This Court should reverse.

III. FAILURE TO REQUIRE A PROPER DESIGN DEFECT CLAIM WOULD LEAD TO ABSOLUTE LIABILITY, WHICH CALIFORNIA COURTS HAVE REJECTED

Adding to the importance of this case is that the City's effort to circumvent traditional design-defect standards is part of a trend of plaintiffs trying to impose liability on manufacturers when a product is used or misused in ways that create downstream risks or costs. In these cases, manufacturers are targeted to pay such costs even when selling a non-defective product. Justice Traynor, who authored *Greenman*, expressed early concern that products liability doctrines should not impose absolute liability, where a manufacturer is liable simply because its product caused an injury. "A knife manufacturer," he wrote, is not automatically liable "when the user cuts himself with one of its knives." Roger J. Traynor, *The*

Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 367 (1965).

The California Supreme Court has repeatedly reaffirmed that product liability "has never been, and is not now, *absolute* liability." *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 733 (Cal. 1978); *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 994 (Cal. 1991) ("Strict liability. . . was never intended to make the manufacturer or distributor of a product its insurer."). Absolute liability is found only in narrow areas of the law, namely, abnormally dangerous activities. *See* Restatement (Second) of Torts §§ 519–520 (1977).

The Rhode Island Supreme Court stated the rule clearly: "Absolute liability attaches only to ultrahazardous or abnormally dangerous *activities* and not to ultrahazardous or abnormally dangerous *materials*." *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 465 (R.I. 1996) (emphasis in original).

As leading scholars have explained, subjecting manufacturers to liability merely for "producing and marketing certain categories of risky products," would create category liability that has no foundation in the law. James A. Henderson & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1329

(1991). Imposing such liability would create a predicament for manufacturers of chemicals and other products with inherent risks, who often act in reliance on government standards. These manufacturers generally can change product designs prospectively to respond to the discovery of new or greater risks or to changes in risk tolerance. But to hold manufacturers liable for legacy products designed at a time when risks were unforeseeable or deemed to be acceptable at the time under prevailing governments standards constitute a radical departure from well-established law and will lead to increased restrictions, including market withdrawal.

There is no sound rationale for turning manufacturers into insurers-of-last-resort for risks associated with their products. *See Kim v. Toyota Motor Corp.*, 6 Cal. 5th 21, 30 (Cal. 2018) (manufacturer is not "an insurer for all injuries which may result from the use of its product"). Yet, that is what happens when a plaintiff "only need[s] to prove that the product was a factual cause in producing his injury." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973). These are the reasons why California and other courts have broadly rejected such liability expansions under products liability and other tort theories. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a*

New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits, 44 Wake Forest L. Rev. 923, 935-51 (2009) (citing cases).

The Court should "not use its diversity jurisdiction to expand state law beyond its presently existing boundaries." *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 742 (5th Cir. 2005). The City's theory of liability would require the Court to do just that.

CONCLUSION

For these reasons, *amici* ask the Court to reverse the ruling below.

Respectfully submitted,

/s/ Philip S. Goldberg
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-55219

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/s/ Philip S. Goldberg