Case No. S250734

IN THE SUPREME COURT OF CALIFORNIA

B.B., a Minor, etc., et al.
Plaintiffs, Respondents and Petitioners,

v.

COUNTY OF LOS ANGELES, et al.
Defendants and Appellants.

T.E., a Minor, etc., et al.
Plaintiffs, Respondents and Petitioners,

v.

COUNTY OF LOS ANGELES, et al.
Defendants and Appellants.

D.B., a Minor, etc., et al.,
Plaintiffs, Respondents and Petitioners,

v.

COUNTY OF LOS ANGELES, et al.
Defendants and Appellants

After a Published Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B264946

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATIONS OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF DEFENDANTS; AMICUS BRIEF

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APPLICATION AND STATEMENT OF INTEREST

The Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada request leave to file the amicus brief accompanying this Application, based on the following grounds.

A. INTEREST OF PROPOSED AMICI CURIAE

1. The Association of Southern California Defense Counsel ("ASCDC") is the nation's largest regional organization of lawyers who specialize in defending civil actions. ASCDC counts as members over 1,000 attorneys in Southern and Central California, and is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal.[1]

2. The Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") is an association of over 800 attorneys primarily engaged in the defense of civil actions. As with the ASCDC, ADC-NCN members have a strong interest in the development of substantive and procedural law in California, and have extensive experience with personal injury matters such as this case. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADC-NCN has also

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1 *See e.g. Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Rashidi v. Moser* (2014) 60 Cal.4th 718; *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Ca1.4th 512; *Colony Bancorp of Malibu, Inc. v. Patel* (2012) 204 Cal. App. 4th 410; *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524.)

appeared as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal.[2]

3. The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on a number of matters of shared interest, such as this application and the accompanying brief.

B. WHY THIS APPLICATION SHOULD BE GRANTED

4. The Associations are vitally interested in the issue presented in this appeal. The right of defendants to allocate fault to others and reduce their liability for non-economic damages, which are often millions of dollars (as in this case), is absolutely critical in any tort case involving multiple defendants and/or multiple contributions to an injury. Due to the "inequity" and "injustice" of holding one defendant liable for all damages caused by the fault of others (*Civ. Code* §1431.1 (a)-(c)), Proposition 51 was passed into law by California voters over thirty years ago to ensure "that each defendant shall be liable only for the percentage of 'non-economic' damages which corresponds to that defendant's proportionate share of fault." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 596.)

5. The Associations represent many businesses and entities who are sued in numerous multi-defendant cases that are filed each year in California. These cases often include a variety of claims, including negligence, strict product liability, premises

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2 *See e.g. J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648; *Kesner,* 1 Cal. 5th at 1132; *Howell,* 52 Cal.4th at 541; *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308.)

liability, failure to warn and intentional torts. The Associations' interest to enforce the protections of Proposition 51, so that fault is shared by all tortfeasors and not shifted entirely onto one defendant, is illustrated by the fact that plaintiffs routinely sue many defendants in the same case for committing independent acts of wrongdoing that collectively contributed to cause an injury. (*See e.g. Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 959 [Claims for product liability, negligence and intentional infliction of emotional distress against nineteen manufacturers of asbestos products to which plaintiff was exposed over 40 years]; *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 77 [Claims for negligence, strict liability, failure to warn, concealment and battery against "at least 55 defendants" who manufactured over 200 products that contained toxic materials to which plaintiff was exposed over 20 years]; *Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 971 [Complaint against 50 defendants]; *Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1360 [Complaint against "dozens of defendants"]; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1281 [Complaint against "31 suppliers of asbestos-laden products"].)

6. In product liability and asbestos exposure cases, plaintiffs also typically assert claims for negligent and strict liability failure to warn—which they use as the springboard to also assert intentional tort claims for fraud and concealment based on the same evidence concerning a defendant's failure (decades or even generations ago) to provide information about a product. (*See e.g. Collin v. Calportland Company* (2014) 228 Cal.App.4th 582, 585; *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 505.) The claims are often blended together as one for "fraud/failure to warn." (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal. App.

4th 165, 173.) In medical malpractice actions, claims for negligence, strict product liability, concealment and battery are likewise asserted together against multiple defendants based on the same evidence relating to a plaintiff's treatment and what facts were represented or allegedly concealed. (*See e.g. Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 94-95, 98.) Many tort cases also involve multiple tortfeasors who contributed to cause an injury but cannot be joined because they are bankrupt (*Rutherford*, 16 Cal.4th at 960, 972, fn.3) or immune from civil liability under the workers compensation exclusivity rule. (*DaFonte,* 2 Cal.4th at 596, 601.)

7. If one defendant in a tort action is held liable for 100% of a plaintiff's non-economic damages and the fault of many others is shifted onto them, this will result in millions of dollars in additional liability—which is the "inequity" and "injustice" that Proposition 51 was intended to avoid. (*Civil Code* §1431.1 (a), (c).) This is magnified in mass tort litigation, where the Associations' clients are repeatedly sued in asbestos cases that are so numerous they are the subject of coordinated JCCP proceedings, and "scores of companies" who contributed to cause a plaintiff's injuries cannot be joined because they are bankrupt. (*Norfolk & Western Ry. v. Ayers* (2003) 538 U.S. 135, 169.) The Associations are therefore concerned about upholding the rule that "damages must be apportioned" among the "universe of tortfeasors" who contributed to cause a plaintiff's injuries. (*DaFonte,* 2 Cal.4th at 603.) This is consistent with the clear intent and purpose of applying Proposition 51 to "tort actions" (*Civil Code* §1431.1 (c))—which includes claims for intentional torts.

8. In many mass tort cases in which the Associations' clients have been sued, juries have allocated small percentages of fault to the sole defendant who remains at trial after others settle.

This can occur for many reasons, such as the jury determining that the defendant's conduct occurred over a relatively brief period of time or their product was not as harmful as others. (*See e.g. Rutherford,* 16 Cal.4th at 962 & fn. 3 [1.2% of fault allocated to the defendant remaining at trial, 2.5% to plaintiff and 96.3% to others, including bankrupt companies Johns-Manville, Unarco and Amatex]; *LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 868 [fault allocation of 3% and 5% to two defendants, and 92% to others]; *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 170 [4% fault to the defendant and 96% of fault to others].)

9. The Associations and their members' clients are very concerned about the issue and potential impact of this case, in which there is an attempt to have a jury's comparative fault allocations to others shifted back onto one defendant. Here, Plaintiffs seek to have a 20% tortfeasor (Deputy Aviles) shoulder 100% of the $8,000,000 non-economic damage award. In other cases, as illustrated by the fault allocations in *Rutherford* and *LAOSD Asbestos Cases*, defendants found to be just a fraction of fault such as 1%, 3% and 5% will be the targets of arguments that attempt to ramp up their liability to 100% for non-economic damages simply because counsel convinced the jury to find in their favor for an intentional tort. When non-economic damage awards are often multi-millions and many companies are serially sued in hundreds of mass tort cases filed each year, the "inequity," "injustice" and "financial crisis" that Californians denounced as unfair when voting in favor of Proposition 51 support the interest of the Associations in retaining the protection of this important law.

10. As discussed in the proposed amicus brief, the Associations submit that the Court of Appeal's decision in *B.B. v.*

County of Los Angeles (2018) 25 Cal.App.5th 115, 123-128, properly holds that Proposition 51 should be construed to limit a defendant's share of noneconomic damages to the comparative fault assigned by the jury—regardless of whether "tort actions" (*Civil Code* §1431.1 (c)) involve an intentional, negligent or strict liability tort claim.

11. The Associations respectfully believe that the accompanying amicus brief can assist this Court by providing a broader perspective than that offered by the parties, including a discussion of why it is especially important in multi-defendant mass tort cases to preserve several liability for noneconomic damages under Proposition 51. This amicus brief is therefore submitted due to the vital importance of upholding the protections set forth in Civil Code §§1431.1-1431.2, so that "'no defendant' shall have 'joint' liability for 'non-economic damages.'" (*DaFonte*, 2 Cal.4th at 601.)

C. NO OTHER PARTY INVOLVED

12. No other party or its counsel has authored this brief in whole or in part, or has made a monetary contribution to fund the preparation of this brief. (Cal. Rules of Court, rule 8.520(f) (4).)

For the foregoing reasons, this Court is respectfully requested to grant this application to file the accompanying amicus brief.

Dated: May 1, 2019

POLSINELLI, LLP

By: _____

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Dated: May 1, 2019

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BRIEF OF *AMICI CURIAE*

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Multiple people were involved in the "prolonged and violent struggle with several deputies of the Los Angeles County Sheriff's Department, who were called to arrest [Duane] Burley after he assaulted a woman while under the apparent influence of cocaine, marijuana, and PCP." (*B.B. v. County of Los Angeles* (2018) 25 Cal.App.5th 115, 120.) After considering all the evidence and arguments presented during the "several-weeks-long trial," the jury allocated 40% of fault to Mr. Burley, 20% to Deputy Aviles, 20% to Deputy Beserra and 20% to several other deputies. (*Id.* at 122.)

In attempting to re-allocate 100% of the fault and financial liability to Deputy Aviles because the jury found him liable for an intentional tort, Plaintiffs' briefs do not deny that Mr. Burley engaged in wrongful conduct by being under the influence of illegal drugs when he assaulted the woman who yelled "He tried to kill me," resisted arrest and fought with officers trying to restrain him. (*Id.* at 121.) Pages 10-11 of B.B.'s opening brief also tries to highlight the wrongful conduct of the other officers who physically injured Mr. Burley (in an apparent effort to downplay his role), as it states: (1) "Fernandez 'hockey-checked Burley off his feet, causing him to hit his head on a parked truck" and then "knelt on Burley's legs with all of his weight"; (2) "Celaya and Lee tased Burley multiple times"; (3) "a deputy hit Burley in the head several times with a flashlight"; and (4) Beserra was still "pressing his knee into the small of Burley's back" when paramedics arrived and "Burley had no pulse."

Pursuant to *Civil Code* section 1431.2 (a), the Court of Appeal properly held that, with respect to the jury's $8,000,000 non-

economic damage award: "Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." (*B.B.*, 25 Cal.App.4th at 123, 128; *Civ. Code* § 1431.2 (a).) Plaintiffs' attempt to disregard the jury's fault allocation and hold Deputy Aviles liable for the entire $8,000,000 non-economic damage award is precisely the inequitable result that Proposition 51 was intended to preclude when Californians voted it into law.

Plaintiffs' arguments, which focus on the clause "based on principles of comparative fault," were properly rejected by the Court of Appeal for being contrary to the plain terms and intent of Civil Code sections 1431.1-1431.2. (*B.B.*, 25 Cal.App.4th at 123-125.) They are also out of step with the fairness principles underlying the "pure comparative fault" system in California. In mass tort cases involving decades of exposure to harmful chemicals or many products, Plaintiffs' arguments would result in 100% of liability for all damages foisted onto one defendant who was allocated just 1% of fault because the plaintiff was only exposed to their product for just one week (or one day) out of a forty-year career over, if there was a finding of liability for intentional concealment along with negligent failure to warn. That is unfair and a wrong turn back to the "all or nothing" rules that were long ago rejected by this Court.

II. THE PLAIN TERMS OF PROPOSITION 51 ARE CLEAR: DEFENDANTS ONLY HAVE SEVERAL LIABILITY FOR NON-ECONOMIC DAMAGES, LIMITED TO THE PERCENTAGE OF FAULT ALLOCATED BY A JURY.

Both sides' briefs acknowledge that the terms of a statute govern its interpretation. However, Plaintiffs focus most of their

arguments on part of one sentence in Civil Code section 1431.2 (a)—the words "based upon principles of comparative fault." In light of all the provisions and the stated intent of the "Fair Responsibility Act of 1986," "popularly known as Proposition 51" (*Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 527), Plaintiffs' arguments are revealed as an improper attempt to rewrite the statutes to include an exception that does not exist and to subvert the will of the voters.

Plaintiffs also misconstrue the words "comparative fault" as being restricted to negligent and not intentional torts. To the contrary, as this Court explained in *Knight v. Jewett* (1992) 3 Cal.4th 296, 313–314: "Past California cases have made it clear that the 'comparative fault' doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.'" Thus, "California's system of 'comparative fault' seeks to distribute tort damages proportionately among all who caused the harm." (*DaFonte*, 2 Cal.4th at 595.)

This Court has previously considered the intent underlying Proposition 51, as well as arguments claiming it is ambiguous. The continued campaign here by Plaintiffs should again be rejected. As this Court held in *DaFonte,* "we find no such ambiguity" (2 Cal.4th at 602) and "the only reasonable construction of section 1431.2 is that a 'defendant['s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault as compared with all fault responsible for the plaintiff's injuries...." (*Id.* at 603.) Thus, as B.B.'s opening brief admits at page 19, this should end the inquiry

because: "All agree that where statutory 'language is clear, courts must generally follow its plain meaning" and "There is nothing to interpret or construe."

A. Proposition 51 Applies To "Each Defendant" In "Tort Actions" —Which Includes Defendants Sued For Intentional Torts.

"In 1986, the voters adopted Proposition 51, an initiative measure designed to modify the doctrine of joint and several liability in tort cases." (*DaFonte*, 2 Cal.4th at 596.) It was a "compromise" because "Proposition 51 retains the traditional joint and several liability doctrine with respect to a plaintiff's *economic* damages, but adopts a rule of several liability for *noneconomic* damages, providing that each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury." (*Buttram,* 16 Cal.4th at 528; emphasis in original.)

Civil Code section 1431.1, entitled "Findings and declaration of purpose," provides that the "injustice" and "inequity" which requires limiting liability for non-economic damages to the percentage of fault allocated to each defendant applies in "tort actions." (*Civ. Code* 1431.1 (c).) A "tort" means "wrongs for which society provides a remedy." (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1188; *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 853.) This includes intentional torts. As every law student is instructed, cases that involve intentional torts such as battery, assault and fraud are "tort actions."

The provisions in section 1431.1 that demonstrate it applies broadly to "tort actions" are set forth and bolded below:

"a) ***The legal doctrine of joint and several liability***, also known as 'the deep pocket rule', ***has resulted in a system of inequity and injustice*** that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People--taxpayers and consumers alike--ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that ***to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault***. To treat them differently is unfair and inequitable.

The People of the State of California further declare that ***reforms in the liability laws in tort actions are necessary and proper*** to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses." (*Civ. Code* § 1431.1 (emphasis added).)

Civil Code section 1431.2 (a) then provides that the several liability rule for non-economic damages applies to "each defendant," which is also bolded for the court's ease of reference: "(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. ***Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault***, and a separate judgment shall be rendered against that defendant for that amount."

In *DaFonte,* 2 Cal.4th at 603, when this Court previously analyzed the language and purpose of Civil Code sections 1431.1-1431.2, it repeatedly held that the rule of several liability for non-economic damages applies to every tort case and every defendant.

First, as *DaFonte* instructed: "The statute plainly attacks the issue of joint liability for noneconomic tort damages ***root and branch. In every case***, it limits the joint liability of every 'defendant' to economic damages, and it ***shields every 'defendant'*** from any share of noneconomic damages beyond that attributable to his or her own comparative fault." (2 Cal.4th at 602; emphasis added.) Intentional tort claims certainly fall within this rule that applies "in every case," to "shield every defendant" and limit liability for non-economic damages "root and branch."

Second, *DaFonte* stated: "Section 1431.2 declares plainly and clearly that ***in tort suits*** for personal harm or property damage, ***no 'defendant'*** shall have 'joint' liability for 'non-economic' damages, and '[e]ach defendant' shall be liable 'only' for those 'non-

economic' damages directly attributable to his or her own 'percentage of fault.' The statute neither states nor implies an exception for damages attributable to the fault of persons who are immune from liability or have no mutual joint obligation to pay missing shares. On the contrary, ***section 1431.2 expressly affords relief to every tortfeasor who is a liable 'defendant***,' and who formerly would have had full joint liability." (2 Cal.4th at 601; emphasis added.) A defendant sued for an intentional tort similarly falls within this rule that applies to "every tortfeasor."

Third, *DaFonte* stated: "The express purpose of Proposition 51 was to eliminate the perceived unfairness of imposing 'all the damage' on defendants who were 'found to share [only] a fraction of the fault.' (§ 1431.1, subd. (b).) In this context, the only reasonable construction of section 1431.2 is that a 'defendant['s] liability for noneconomic damages cannot exceed his or her proportionate share of fault ***as compared with all fault*** responsible for the plaintiff's injuries, not merely that of 'defendant[s]' present in the lawsuit." (2 Cal.4th at 603; emphasis added.) Leaving no doubt who is included within this rule, *DaFonte* cited to terms used in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 and stated "damages must be apportioned among [the] ***'universe' of tortfeasors***, including 'nonjoined defendants.'" (2 Cal.4th at 603; emphasis added.) Intentional tort claims again fall within this rule that applies to "all fault" and "the universe of tortfeasors."

Fourth, *DaFonte* explained that "the principal effect is precisely that intended by the initiative: ***defendants no longer have to pay an injured employee's noneconomic damages caused by the fault of another***, and the employee, like any

other tort victim, bears the resulting risk of loss." (2 Cal.4th at 603; emphasis added.) In other words, non-economic damage awards are "***limited by Proposition 51 to a rule of strict proportionate liability.*** With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained ***from each person responsible*** for the injury." (2 Cal.4th at 600; emphasis added.) The terms "fault of another" and "each person responsible" also include those sued for intentional torts.

Fifth, *DaFonte* concluded by holding: "In sum, section 1431.2 ***plainly limits a defendant's share of noneconomic damages to his or her own proportionate share of comparative fault."*** (2 Cal.4th at 604; emphasis added.) There is also nothing unclear about this holding—which is properly based on the plain and unambiguous terms of Proposition 51.

This Court and others have similarly held that a defendant's rights under Proposition 51 are absolute, based on the plain terms and intent of the statute. (*See e.g. Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, 997 ["Proposition 51 abolishes the system of joint and several liability among tortfeasors 'root and branch' by removing a 'defendant's' exposure to payment of damages in excess of his or her own 'fault' and by placing on the plaintiff, rather than the 'defendant[s]', the risk that any person at fault for the injury will fail to contribute his or her full proportionate share. The statutory protection is constant and absolute; it does not permit a 'defendant's' share of 'non-economic' damages to vary depending upon which other tortfeasors happen to be before the court, or upon the reason why a full proportionate contribution from each such tortfeasor may not be forthcoming."]; *Rashidi v. Moser* (2014) 60

Cal.4th 718, 722 ["Civil Code section 1431.2 imposes 'a rule of strict proportionate liability' on noneconomic damages [citing *DaFonte*]. Each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury.'"]; *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 24 ["Proposition 51 by its terms guarantees that no judgment will ever be entered against any defendant for the plaintiff's share of noneconomic damages."].)

Proposition 51 guarantees that even a minimally responsible defendant is jointly and severally liable for 100% of a plaintiff's economic damages. This "compromise" (*Buttram*, 16 Cal.4th at 528) underlies Proposition 51's limitation on non-economic damages, and compels affirmance.

B. The Ballot Materials For Proposition 51 Also Apply Broadly To "Tort Actions" and "All Defendants."

The ballot materials considered by Californians when voting in favor of Proposition 51 in 1986 are attached as Appendix A to this Court's opinion in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1243-1246. This includes the complete text of Civil Code sections 1431.1 to 1431.5, and "all relevant portions of the election pamphlet, including the Legislative Analyst's analysis and the arguments of the proponents and opponents." (*Id.* at 1192 fn. 1.)

Although "ballot materials can help resolve ambiguities in an initiative measure" (*DaFonte*, 2 Cal.4th at 602), here there is "no such ambiguity." (*Id.*) Nonetheless, they confirm that Proposition 51 broadly applies to all types of tort actions and there is no exception to exempt intentional tort claims from the several liability rule for non-economic damages.

The official title and summary prepared by the Attorney General of California broadly stated that the initiative applied to "Multiple Defendants Tort Damage Liability" and "tort damages." (*Evangelatos*, 44 Cal.3d at 1243.) As discussed above, "tort damages" involve those sought for intentional torts.

The Legislative Analyst materials explained that the measure "changes the rules governing who must pay for *non-economic damages*. It limits the liability of each responsible party in a lawsuit to that portion of non-economic damages that is equal to the responsible party's share of fault." (44 Cal.3d at 1243.) Again, "each responsible party" includes those responsible for intentional torts.

The "Rebuttal to Argument in Favor of Proposition 51" (44 Cal.3d at 1245)—which Californians rejected by voting to pass the law—acknowledged the widespread impact of the measure. It levied broad accusations against many defense groups sued in all types of tort cases about how Proposition 51 would reduce their liability. This included "the insurance industry," "toxic chemical" manufacturers, and "government" officials and entities.

Plaintiffs' arguments are effectively attempting to rewrite the statute to insert an exception for intentional tort claims. That is wrong because it is not the function of counsel or the courts to "insert what has been omitted" or "rewrite the law." (*People v. Leal* (2004) 33 Cal.4th 999, 1008.) The text of Proposition 51 and the ballot materials broadly apply to multiple-defendant "tort actions" and "tort damages." Plaintiffs' briefs do not, and cannot, deny that intentional torts are "tort actions" or involve "tort damages."

III. THE PHRASE "BASED ON PRINCIPLES OF COMPARATIVE FAULT" DOES NOT SUPPORT PLAINTIFFS' ATTEMPT TO TAKE AWAY DEFENDANTS' RIGHTS UNDER PROPOSITION 51.

Plaintiffs' arguments, which focus on the clause "based on principles of comparative fault," are similar to those made in an unsuccessful attempt to avoid having Proposition 51 applied to strict product liability actions. As before, these arguments should be rejected as contrary to the fairness principles upon which the doctrine of comparative fault rests—which are similarly at the heart of Proposition 51.

In *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 855, plaintiffs argued in an asbestos exposure case that "construing section 1431.2 to apply to strict products liability would deprive the phrase 'based upon principles of comparative fault' of any effect" because such actions involve liability without fault. As here, plaintiffs were attempting to shift all liability for a multi-million dollar non-economic damage award onto one defendant that the jury found to be 2.5% at fault in causing an injury. (*Id.* at 851.) In holding that Proposition 51 applied to reduce the defendant's liability for non-economic damages pursuant to the percentage of fault allocated by the jury (*Id.* at 859), *Wilson* explained that the clause "based on principles of comparative fault" means that fault should be equitably allocated among all who caused an injury. (*Id.* at 854.) That is because: "The doctrine allocates liability not simply on the relative blameworthiness of the parties' conduct, but on the proportion to which their conduct contributed to the plaintiffs' harm." (*Id.*) Thus, "a more accurate label" is "comparative responsibility." (*Id.*)

Wilson discussed that its decision was supported by this Court's decisions in *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725 and *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, in which comparative fault principles were extended to allow juries to allocate fault among tortfeasors found liable for negligence and strict liability. (*Wilson*, 81 Cal.App.4th at 854.) Comparative fault was adopted to abolish the harsh "all or nothing" rules of "contributory negligence" and "last clear chance," so that liability among multiple tortfeasors was instead allocated in proportion to their share of fault in causing an injury. (*Li v. Yellow Cab. Co.* (1975) 13 Cal.3d 804, 810 ["the 'all-or-nothing' rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault"]; *Daly*, 20 Cal.3d at 735 ["It is perhaps unfortunate that contributory negligence is called negligence at all. 'Contributory fault' would be a more descriptive term."].) The doctrine is based on the concept that "the extent of fault should govern the extent of liability," which is supported by "all intelligent notions of fairness." (*Li*, 13 Cal.3d at 811.) This is fair for plaintiffs too because the comparative fault doctrine adopted by this Court was a "pure form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant." (*Id.* at 804.)

In cases decided after Proposition 51 was enacted in 1986, this Court reaffirmed that fault is equitably shared and allocated to all tortfeasors who have contributed to cause an injury. (*See e.g. Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1011 ["Under comparative fault principles, damages are apportioned based upon the various causes contributing to a plaintiff's *harm*, as opposed to a particular defendant's *negligence*."]; *DaFonte*, 2 Cal.4th at 595

["California's system of 'comparative fault' seeks to distribute tort damages proportionately among all who caused the harm."]; *Knight*, 3 Cal.4th at 313-314 ["the 'comparative fault' doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury"].) Thus, cases decided before and after Proposition have a consistent theme, which support the Court of Appeal's holding here to uphold the jury's fault allocations to multiple tortfeasors sue under different theories for causing Mr. Burley's injuries: "[T]he 'comparative fault' doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.'" (*Knight*, 3 Cal.4th at 314.)

Plaintiffs' reliance on old contributory negligence cases that are cited on page 18 of T.E's and D.B.'s opening brief is misplaced. The unfairness of that doctrine is among the reason why this Court adopted the more flexible doctrine of "pure comparative fault." Plaintiffs' reliance on "Pre-Position 51 caselaw" cited on page 24 of B.B.'s opening brief also ignores that, when the voters passed the "Fair Responsibility Act of 1986" (*Buttram* , 16 Cal.4th at 527) into law, it "expressly affords relief to every tortfeasor who is a liable 'defendant,' and who formerly *would* have had full joint liability." (*DaFonte*, 2 Cal.4th at 601.)

Plaintiffs' arguments effectively seek a return to an "all or nothing" rule, which this Court has repeatedly denounced as harsh and unfair. (*American Motorcycle Assn. v. Superior Court* (1978)

20 Cal. 3d 578, 601; *Daly*, 20 Cal.3d at 734-735; *DaFonte,* 2 Cal.4th at 598.) They seek to impose 100% of liability for all damages if a jury found the defendant liable for an intentional tort—no matter if the defendant was found only 1% at fault or fifty other tortfeasors were also at fault or plaintiff was most at fault. In one fell swoop, they seek to eradicate comparative fault and defendants' rights under Proposition 51—which is contrary to the fairness principles underlying both. As Californians declared with their vote in passing Proposition 51, this would be an "injustice" and "inequity." (*Civ. Code* § 1431.1 (a), (c).)

IV. PROPOSITION 51 PROPERLY APPLIES TO ALL TYPES OF FAULT BECAUSE THE JURY CAN CONSIDER AND COMPARE SUCH TO REFLECT ANY ENHANCED BLAMEWORTHINESS WHEN ALLOCATING PERCENTAGES OF FAULT.

Courts have consistently applied comparative fault to tort cases involving different legal theories upon which multiple tortfeasors are claimed to be at "fault." In *Daly*, 20 Cal.3d at 734, this Court rejected arguments that comparative fault should not apply to strict product liability claims. There, plaintiffs argued that the two doctrines "cannot be compared," "oil and water" do not mix," and "strict liability, which is not founded on negligence or fault, is inhospitable to comparative principles." (*Id.*) Like those advanced by Plaintiffs here, these arguments ignore that, "in the evolving areas of both products liability and tort defenses," "there has developed much conceptual overlapping and interweaving in order to attain substantial justice." (*Id.* at 734-735.) "The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire." (*Id* at 736.) Thus, *Daly* emphasized that "our reason for extending a full system

of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness." (*Id.*)

The same reasoning and principles above apply here to support the jury's comparative fault allocations, despite the different legal theories involved and the intentional tort claim asserted against Deputy Aviles. This is consistent with the purpose of the comparative fault doctrine, which "our Supreme Court has repeatedly acknowledged," is "designed to permit the trier of fact to consider all relevant criteria in apportioning liability."(*Rosh v. Cave Imaging Sys., Inc.* (1994) 26 Cal.App.4th 1225, 1233.) This allows a jury to properly "consider and evaluate the relative responsibility of various parties for an injury"—regardless of whether "responsibility for the injury rests on negligence, strict liability, or other theories of responsibility." (*Id.*, citing *Knight*, 3 Cal.4th at 314; s*ee also Pfeifer v. John Crane* (2013) 220 Cal.App.4th 1270, 1285.)

Juries are able to "equitably apportion liability between or among negligent and strictly liable tortfeasors, or negligent and intentional actors." (*Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1145 fn. 41.) In doing so, a jury is permitted to consider the relative culpability or blameworthiness of all involved tortfeasors in order to determine what percentage of fault should be given to each for causing the plaintiff's injury. (*Pfeifer,* 220 Cal.App.4th at 1289; *Rosh*, 26 Cal.App.4th at 1233-1234; *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 148.)

In *Pfeifer*, 220 Cal.App.4th at 1289-1290, the jury increased defendant JCI's share of liability because it determined JCI's misconduct was more egregious than another tortfeasor (the Navy). As the Court of Appeal discussed, "the evidence supported the inference that JCI was consciously indifferent to the dangers that its products posed to consumers," "while the Navy was merely negligent regarding those dangers during Pfeifer's period of service." (*Id.* at 1289.) "The evidence was thus sufficient to support the jury's allocation of comparative fault, in view of the differences in the ***length and gravity*** of JCI's and the Navy's misconduct." (*Id.* at 1289-1290; emphasis added.) *Pfeifer* cited *Daly*, 20 Cal.3d at 742, for the proposition that "the principles of comparative fault 'elevate justice and equity above the exact contours of a mathematical equation."

In *Scott*, 27 Cal.App.4th at 136, the Court of Appeal held "a defendant may be found liable for noneconomic damages only in proportion to the total fault of all persons whose acts were a legal cause of the plaintiff's injuries, whether or not all such persons have appeared in the action, and ***whether their acts were intentional or negligent***." (Emphasis added.) This was supported by *DaFonte*, which "construed section 1431.2 to mean a defendant is liable only for a proportionate share of noneconomic damages as compared with *all fault*, and not merely as compared with the fault of the defendants present in the lawsuit." *(Scott*, 27 Cal.App.4th at 150, citing *DaFonte*, 2 Cal.4th at 603-604.) Applying the reasoning of *Safeway*, *Scott* agreed with other courts that have held "an action in which one tortfeasor acted negligently and another acted intentionally is 'an action based upon principles of comparative fault, and therefore Civil Code section 1431.2 applies to

such an action." (*Scott*, 27 Cal.App.4th at 150, citing *Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 6-7.)

Applying the principles set forth by this Court in *DaFonte* and *Safeway*, the Court of Appeal in *Scott*, 27 Cal.App.4th at 151, held: "It follows that in *all* cases in which a negligent actor and one or more others jointly caused the plaintiff's injury, the jury should be instructed that, assuming 100 percent represents *the total causes* of the plaintiff's injury, ***liability must be apportioned to each actor who caused the harm in direct proportion to such actor's respective fault, whether each acted intentionally or negligently or was strictly liable*** [Cites omitted], and whether or not each actor is a defendant in the lawsuit." Ultimately, however, the case was remanded for reallocation of fault because the jury assigned just 1% of fault to a foster parent who intentionally scalded the seven year old child causing damage all the way to the bone, determining that the jury was likely under a misapprehension that it could only allocate fault for the parent's negligence (in failing to seek timely medical care) and not for intentionally burning the child. (*Id.* at 150.)

In *Rosh*, 26 Cal.App.4th at 1225, the Court of Appeal held a jury properly weighed the evidence in a case to allocate 75% of fault to the defendant who was found liable under a negligence theory and 25% at fault to a person who committed an intentional tort. The defendant (Cave Imaging) provided security services for plaintiff's employer. Plaintiff fired a temporary employee named Tong Hua, who later returned to work and shot plaintiff with a gun. (*Id.* at 1230-1231.) The defendant was sued for its negligence in allowing Mr. Hua back on the premises and failing to stop him from shooting plaintiff. (*Id.* at 1231-1233.) After plaintiffs were awarded millions in

non-economic damages, the defendant appealed, arguing "the jury improperly apportioned liability by finding [it] was more responsible for plaintiffs' injuries than the intentional tortfeasor." (*Id.* at 1229.) The Court of Appeal affirmed, finding there was substantial evidence supporting the jury's allocation of greater fault for the defendant's negligence because it was aware terminated employees posed a security risk and should not be allowed on the premises. (*Id.* at 1234.) After discussing this Court's decisions in *Daly*, *Safeway*, *American Motorcycle* and *Knight*, the Court of Appeal also held the "flexible" nature of the comparative fault doctrine allowed the jury to evaluate "the relative responsibility" of the involved torteasors, regardless of the different theories of liability. (*Id.* at 1233.) *Rosh* also cited *Daly* for support of its holding that a jury is able to "apportion fault where different classes of tortfeasors are involved." (*Id.*)

In *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1195–96, the Court of Appeal similarly observed: "*DaFonte* is important to the instant case because it indicates the Supreme Court's unwillingness to base the application of Proposition 51 on either the status of the defendant ***or the theory of the defendant's liability.***" (Emphasis added.) *Arena* also discussed that arguments which assert a "case did not come within the provisions of Proposition 51 because an intentional tortfeasor's acts are not based on comparative fault" are "contrary to the purposes of Proposition 51." (*Id.* at 1196, fn. 11.)

As the cases above demonstrate, plaintiffs are free to argue and a jury or reviewing court may conclude that, under the facts of a particular case, a larger fault percentage should be allocated to a defendant who committed an intentional tort or whose wrongful

conduct (under any theory) was committed over a longer period of time. (*Scott*, 27 Cal.App.4th at 150; *Pfeifer*, 220 Cal.App.4th at 1289-1290.) In other cases, the facts will support allocating a majority of the fault to someone found liable for negligence. (*Rosh,* 26 Cal.App.4th at 1233-1234.) However, it would be contrary to the purposes underlying Proposition 51, and a retreat back to the "all or nothing" rules that this Court has consistently denounced as unfair, to *mandate* that in *every case*—despite the jury's finding that other tortfeasors were at fault and contributed to cause an injury—a defendant *must* be liable for *all* of a plaintiff's non-economic damages if it is found liable for an intentional tort.

In many cases, a jury may conclude that the fair and appropriate allocation of fault should primarily be based "not simply on the relative blameworthiness of the parties' conduct, but on the proportion to which their conduct contributed to the plaintiffs' harm." (*Wilson,* 81 Cal.App.4th at 854.) For instance, in asbestos cases, plaintiffs often file bankruptcy trust claims that admit decades of exposure to other entities' products (*In re Garlock Sealing Techs, LLC* (Bankr. W.D.N.C. 2014), 504 B.R. 71, 83-86, which can dwarf the exposure claim asserted against a defendant who is sued for only months or weeks of claimed work by the plaintiff. This is among the many reasons why smaller shares of fault are allocated in asbestos cases to the defendant who remains at trial, after a plaintiff settles with other defendants or files bankruptcy trust claims against companies who manufactured many other products that contributed to cause an injury. (*See e.g. Rutherford,* 16 Cal.4th at 962 & fn. 3 [1.2% of fault allocated to the defendant remaining at trial in comparison to 96.3% of fault to 18 other defendants and three bankrupt companies, Aamatex, Unarco

and Johns-Manville]; *LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 868 [fault allocation of 3% and 5% to two defendants in comparison to 92% of fault allocated to others]; *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 170 [4% fault to the defendant and 96% of fault to others].)

Applying comparative fault principles is fair to all involved. This includes plaintiffs, who can still obtain substantial damages despite being "more at fault than the defendant" (*Li*, 13 Cal.3d. at 804)—which is what the jury decided was supported by the evidence here when it allocated the largest share of fault (40%) to Mr. Burley. However, it is unfair to do as sought by Plaintiffs here, which is to disregard a jury's fault allocations and hold one defendant liable for all damages if one claim of liability involves an intentional tort.

The cornerstone of our system of justice is the wisdom and integrity of juries. "Trial by jury is an inviolate right and shall be secured to all." (Cal. Const. art. I, § 16.) Thus, juries must be allowed to weigh the evidence in a case and exercise their reasoned judgment to equitably and fairly allocate fault among multiple tortfeasors whose conduct contributed to cause an injury. That is fair, just and equitable —which is the purpose and goal of Proposition 51 and the doctrine of comparative fault.

V. LIMITING A DEFENDANT'S LIABILITY TO THEIR PROPORTIONATE SHARE OF FAULT IS CRITICALLY IMPORTANT IN MULTI-DEFENDANT MASS TORT CASES SUCH AS ASBESTOS LITIGATION.

The issue before this Court is broad and will impact many types of tort cases. A defendant's rights under Proposition 51 and the doctrine of comparative fault are essential in mass tort cases, where many companies are sued in many cases.

For instance, hundreds of cases are filed each year in California against companies who (a) manufactured products that contained asbestos as an ingredient; (b) performed work with asbestos products; and (c) owned, maintained or controlled premises where asbestos products were used.[3] In such cases, it is common for plaintiffs to sue dozens of defendants in each case for independent acts of wrongdoing under various theories that include negligence, strict liability and intentional torts. (*See e.g. Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 959 [Claims for product liability, negligence and intentional infliction of emotional distress against nineteen manufacturers of asbestos products to which plaintiff was exposed over 40 years]; *Pfeifer,* 220 Cal.App.4th at 1281 [Complaint against "31 suppliers" of products]; *Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 971 [Complaint against 50 defendants]; *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753, 759 [Complaint against 200 defendants].)[4]

The "Rebuttal to Argument in Favor of Proposition 51" highlighted that it was intended to apply to defendants sued in mass tort cases such as asbestos litigation. The rebuttal was drafted by James Vermeulen, the "Founder and Executive Director" of the "Asbestos Victims of America." (*Evangelatos*, 44 Cal.3d at 1245.) Mr. Vermeulen was also petitioner in *Vermeulen v. Superior Court*

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3 Due to the high volume of asbestos cases filed in Los Angeles, San Diego and Orange Counties, they are coordinated in JCCP 4674.

4 Over the last few years alone, this Court granted review to decide several recurring legal issues in asbestos cases. *See e.g. Kesner v. Superior Court* (2016) 1 Cal.5th 1132 [Duty to household members for take-home asbestos exposures]; *Webb v. Special Elec. Co.* (2016) 63 Cal.4th 167 [Sophisticated intermediary defense]; *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 [No duty for products manufactured and distributed by other companies].

(1988) 204 Cal.App.3d 1192, which involved several thousand asbestos cases then pending in the Alameda County Superior Court. (*Id.* at 1195-96.)

In *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, which is the seminal case governing a plaintiff's burden to prove causation in asbestos exposure cases, this Court reaffirmed that a defendant's right to allocate fault is critical. In *Rutherford*, plaintiff sued more than a dozen defendants for asbestos exposures from many products during a forty year work career, asserting that each contributed to cause his lung cancer. (*Id.* at 959-960, 963 fn. 3.) Plaintiff's complaint alleged causes of action for products liability, negligence and intentional infliction of emotional distress. (*Id.* at 959.) The jury allocated 2.5% of fault to defendant Owens-Illinois and 96.3% to the many other manufactures of products to which plaintiff was exposed. (*Id.* at 962.) When considering the causation standard that should be applied in asbestos cases, this Court noted that alternative burden-shifting theories were inapplicable for several reasons, including "it is often the case that the culpable party or parties will not be before the court." (*Id.* at 971) That is because many companies have filed for bankruptcy and can no longer be joined as defendants. This includes the "largest producer of asbestos products, Johns Manville" (*Id.* at 972), who was among the entities allocated virtually all the fault in *Rutherford* (*Id.* at 962 fn. 3) and was assigned 49% of fault in another case decided by this Court. (*Webb*, 63 Cal.4th at 178.)[5]

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5 *In Webb*, 63 Cal.4th at 177-178, this Court again noted that "Johns–Manville was the oldest and largest manufacturer of asbestos-containing products in the country, maintaining plants across the United States and overseas."

In *Rutherford*, 16 Cal.4th 953, 976, this Court recognized that plaintiffs "cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber." Rather than having to prove their illness was actually caused by asbestos from a particular defendant's product, plaintiffs may satisfy their burden of proving causation by "demonstrating that exposure to the defendant's asbestos products was, in reasonable medical probability, a substantial factor in causing ***or contributing to his risk*** of developing cancer." (*Id.* at 957-958; emphasis added.) Having lowered the plaintiffs' burden of proving causation, this Court next held that, "although a defendant cannot escape *liability* simply because it cannot be determined with medical exactitude the precise contribution that exposure to fibers from defendant's products made to plaintiff's ultimate contraction of asbestos-related disease, ***all joint tortfeasors found liable as named defendants will remain entitled to limit damages ultimately assessed against them in accordance with established comparative fault and apportionment principles***." (16 Cal.4th at 958; emphasis added.)

Following *Rutherford*, plaintiffs have successfully argued that defendants (along with any other entities who contributed to the total asbestos exposures) are at fault because every exposure from their products and work activities contribute to increase the risk of developing an illness. (*See e.g. Davis v. Honeywell International Inc.* (2016) 245 Cal.App.4th 477, 485, 494.) The fair flip-side is that defendants in asbestos litigation are entitled to reduce their liability pursuant to Proposition 51 and comparative fault principles by allocating percentages of fault to others who contributed to cause a

plaintiff's cumulative exposures. (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205.)

In *Soto*, 239 Cal.App.4th at 173, plaintiffs filed suit "against numerous defendants," alleging their various asbestos-containing products contributed to cause Secundino Medina's death. The complaint included causes of action for strict product liability, negligence and intentional torts such as "fraud/failure to warn" and "conspiracy/failure to warn." (*Id.*) By the time of trial, only Borg-Warner remained as a defendant. (*Id.* at 172.) Plaintiffs' experts testified that "all of Medina's lifetime exposures to asbestos, 'each of them in and of themselves,' were a substantial factor in causing his mesothelioma." (*Id.* at 175.) The jury awarded $6 million of non-economic damages to Mr. Medina's three daughters, and allocated 35% of fault to Borg-Warner. (*Id.* at 172.) Borg Warner appealed the judgment and plaintiffs cross-appealed to challenge the jury's 25% fault allocation to non-party American Smelting Refinery Company (ASARCO). (*Id.)* The Court of Appeal affirmed both. (*Id.*)

In upholding the jury's allocation of fault, which reduced Borg-Warner's liability for the multi-million dollar non-economic damage award pursuant to Proposition 51, *Soto* initially followed this Court's decision in *DaFonte* to state: "A defendant accordingly may reduce its own comparative fault by pointing the finger at other tortfeasors, including those who are not party to the case." (239 Cal.App.4th at 202.) The Court of Appeal in *Soto* again reaffirmed that the doctrine of comparative fault is "a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable

apportionment or allocation of loss.'" (*Id.*) Rejecting plaintiff's argument that there was no substantial evidence to demonstrate ASARCO was "at fault" (*Id.* at 205), the Court of Appeal held the same evidence from plaintiffs' expert that "all of Medina's lifetime exposures" contributed to cause his illness "supports the jury's allocation of liability to ASARCO." (*Id.*)

Plaintiffs must not be allowed to hold all defendants liable for contributing to a lifetime of exposures to asbestos, but then avoid an allocation of fault to the many other defendants and non-parties who also contributed to cause the injury. When considered in the context of the hundreds of asbestos cases filed each year in California, the important concerns that Proposition 51 was enacted to remedy—which include the "injustice" and "inequity" of holding defendants liable for millions of noneconomic damages caused by the fault of others and the threat of "financial bankruptcy" to businesses and other entities (*Civ. Code* §1431.1 (a), (c)—are heightened. Similar to this Court's observation in *Rutherford*, 16 Cal.4th at 971-972, the United States Supreme Court discussed over a decade ago that "Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy." (*Norfolk & W. Ry. Co. v. Ayers* (2003) 538 U.S. 135, 169.) The list has swelled today to over 100 bankrupt companies, [6] which has and will continue to cause dire financial circumstances for those

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6 See Utah Code Ann. § 78B-6-2002, which acknowledged in 2016 that "(a) approximately 100 employers have declared bankruptcy at least partially due to asbestos-related liability; (b) these bankruptcies have resulted in a search for more solvent companies by claimants, resulting in over 10,000 companies being named as asbestos defendants, including many small-and medium-sized companies, in industries that cover 85% of the United States economy...."

remaining in what has been described as the "elephantine mass" of asbestos litigation. (*Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 821.) These continuing "flood of claims" "advance like a perpetually unrolling carpet" (*In Re Joint Eastern and Southern Dist. Asbestos Lit.* (E&S.D. N.Y. 2002) 237 F.Supp.2d 297, 302), which "threaten the economic viability of the defendants" due to the "continuing filings of bankruptcy." (*In Re Collins* (3rdCir. 2000) 233 F.3d 809, 812.) This includes California, as it has been noted for years that "California courts are already overburdened with asbestos litigation." (*Hansen,* 51 Cal.App.4th at 760.)

The reason why scores of defendants continue to be sued in asbestos litigation is because asbestos was widely used in many different products and applications due to its "commercial utility," "tensile strength, durability, flexibility, and resistance to heat, wear, and corrosion." (*Mullen v. Armstrong World Indus., Inc.* (1988) 200 Cal.App.3d 250, 255.) Asbestos figured prominently "in commercial production for more than a century," in which "[o]ver 3,000 separate uses of asbestos have been identified." (*Id*; *Borel v. Fibreboard Paper Products Corp.* (5th Cir.1973) 493 F.2d 1076, 1083, fn. 3.) However, as this Court observed in *Rutherford*, 16 Cal.4th at 972, which is among the many reasons why juries properly allocate more or less fault among the many companies who manufactured and worked with such, "[a]sbestos products have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others."[7] These varied products

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7 As this Court explained, the "divergence is caused by a combination of factors, including: the specific type of asbestos fiber incorporated into the product; the physical properties of the product itself; the percentage of asbestos used in the product. There are six different asbestos silicates used in industrial applications and each

and services have "a rainbow-like diversity" due to the vast "array of potential uses." (*Mullen*, 200 Cal.App.3d at 256.)

A host of other factors can also support the particular percentage of fault that a jury may allocate among many defendants sued for different exposure periods, products, premises and work activities that are typically involved in an asbestos case for exposures that a plaintiff had during a thirty or forty year career. For instance, the length of claimed exposure will vary greatly among the dozens of defendants. Regardless of the theory of liability asserted, a jury should be allowed to (and likely will) allocate a smaller share of fault against a defendant sued for a brief period of exposure that lasted just weeks or months, as compared to defendants who exposed plaintiff to asbestos for decades. This is supported by the comparative fault principles discussed in *Rutherford*, *Soto* and *Pfeifer*, as well as the "dose-response" nature of asbestos disease, in which "the longer or the more intense the asbestos exposure, the greater the injury." (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1134.) During the lengthy work career at issue in a case, some claims against a defendant can also involve years of take-home exposures when plaintiff was not a "member of

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presents a distinct degree of toxicity in accordance with the shape and the aerodynamics of the individual fibers. Further, it has been established that the geographical origin of the mineral can affect the substance's harmful effects. A product's toxicity is also related to whether the product is in the form of a solid block or a loosely packed insulating blanket and to the amount of dust a product generates. The product's form determines the ability of the asbestos fibers to become airborne and, hence, to be inhaled or ingested. The greater the product's susceptibility to produce airborne fibers, the greater the product's potential to produce disease. Finally, those products with high concentrations of asbestos fibers have corresponding high potentials for inducing asbestos-related injuries.'" (*Rutherford*, 16 Cal.4th at 972-973.)

the employee's household"—which would support a lower fault allocation because that aspect of the claim could not even be asserted against them. (*Kesner*, 1 Cal.5th at 1140, 1157; *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 276 ["Because Marline was not a member of Joseph's household when Joseph worked at the Enco station in Pomona, Exxon did not have a duty to Marline with respect to secondary asbestos exposure."].) A lower fault allocation can also be warranted against a defendant who discharged their duty to warn by providing adequate warnings to a sophisticated intermediary (*Webb*, 63 Cal.4th at 176-177) and did not sell products to consumers. A jury may similarly find that the warnings provided by some defendants were more robust and adequate, which can support their individual defenses to failure to wan and design defect claims, and thus is an additional factor that warrants a lower share of fault. (*See e.g. Hansen,* 55 Cal.App.4th at 1517 ["the presence of a warning is an appropriate consideration in determining a product is *non*defective"]; *Oakes v. E.I. Dupont* (1969) 272 Cal.App.2d 645, 649 ["a product bearing a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."].) These are just a few examples of the varying reasons that can support a jury's decision to fairly allocate a smaller or larger share of fault in a multiple-defendant asbestos case. Their decision should not be trumped or foreclosed because counsel persuaded them to find one defendant liable for an intentional tort, such as the intentional infliction of emotional distress claim asserted in *Rutherford* and/or concealment for purportedly not disclosing some fact.

In mass-tort cases such as asbestos litigation—where scores of defendants continue to be sued in each case for their independent

acts of wrongdoing or "fault" and many companies have already been forced into bankruptcy—it is absolutely critical for defendants to retain the right to limit liability for non-economic damages by the fault allocated to others. This right was conferred by the citizens of California when voting to pass Proposition 51 into law and was properly upheld by the Court of Appeal in *B.B.* For the many reasons discussed in this brief and Defendants' Answer Brief on the Merits, amici respectfully urge this Court to do the same.

Amici recognize that other courts such as *Thomas v. Duggins Construction Co., Inc.* (2006) 139 Cal.App.4th 1105 have reached a different conclusion.[8] However, the decision in *B.B.* is the better reasoned approach, which is consistent with the flexible doctrine of comparative fault and the purposes underlying Proposition 51. As the Second Appellate District reasoned, *Thomas* and other cases that have not applied Proposition 51 to "tort actions" –which include intentional torts and apply to "each defendant" (*Civ. Code* § 1431.1 (c), 1431.2 (a))—are wrongly decided for many reasons. This includes that their conclusion: (1) "conflicts with the plain text of section 1431.2" (*B.B.*, 25 Cal.App.5th at 124); (2) "conflicts with our Supreme Court's interpretation of section 1431.2" (*Id. at* 126); (3) improperly resorts to "extrinsic constructional aids, even though "Section 1431.2 itself contains no ambiguity" (*Id.* at 125); and (4) "read[s] a limitation into section 1431.2 that is not present in the

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8 Acknowledging that the issue was pending review before this Court, which "will soon resolve this split of authority," the First Appellate District recently agreed with *Thomas* in *Burch v. CertainTeed Corp.,* 2019 WL 1594460, at *9 (Cal. Ct. App. Apr. 15, 2019). Amici understand that a petition for review may likely be filed in *Burch*, although there is still several more weeks before any petition is due to be filed. Thus, this amicus brief only addresses *B.B.* because it is the only case currently pending before this Court.

statutory text" because "the statute neither states nor implies an exception for damages attributable to the fault of a person who acted intentionally rather than negligently." (*Id.* at 127)

VI. CONCLUSION

The jury's fault allocations in this case should be respected, and the Court of Appeal's decision should be affirmed. Juries are well-equipped to consider each claim and weigh the evidence in a case to fairly allocate fault among the many entities involved in causing an injury. This Court is therefore respectfully requested to confirm that, in "tort actions," "the unambiguous reference to '[e]ach defendant' in section 1431.2, subdivision (a) mandates allocation of noneconomic damages in direct proportion to a defendant's percentage of fault, regardless of whether the defendant's misconduct is found to be intentional." (*B.B.*, 25 Cal.App.5th at 128.) Lower courts should again be instructed that a "jury properly may consider and evaluate the relative responsibility of various parties for an injury," regardless of whether a claim "rests on negligence, strict liability, or other theories of responsibility" in order "to arrive at an 'equitable apportionment or allocation of loss.'" (*Knight*, 3 Cal.4th at 314.)

Dated: May 1, 2019

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Dated: May 1, 2019

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CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies that the proposed amicus brief complies with the typeface and word limitations prescribed under *California Rules of Court*, Rule 8.204.

Exclusive of the exempted portions, the proposed amicus brief contains 8,509 words, which is less than the total words permitted by Rule 8.204 (c). Counsel relies on the word count of the computer program used to prepare this brief. This brief is also formatted in compliance with Rule 8.204(b), as it uses type that is 13-point with lines of text that are one-and-a-half-spaced.

Dated: May 1, 2019

Respectfully submitted,

POLSINELLI, LLP

By: _____
David K. Schultz

Attorneys for Attorneys for Amicus Curiae; Association of Southern California Defense Counsel

PROOF OF SERVICE

B.B., a Minor, etc., et al. v. County of Los Angeles, et al.
Case No.: S250734

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and not a party to the within action; my business address is 2049 Century Park East, Suite 2900, Los Angeles, CA 90067.

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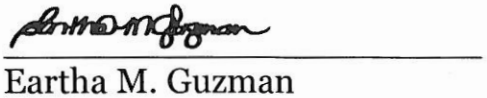

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SERVICE LIST

B.B., a Minor, etc., et al. v. County of Los Angeles, et al.
Case No.: S250734

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Case No.: S250734

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The following Appellate Document has been submitted.

Case Type: Civil

Case Number: S250734

Case Name: B.B., a Minor, etc., et al. v. County of Los Angeles, et al.

Name of Party: Associations of Southern CA Defense Counsel and Defense Counsel of Northern CA and Nevada

Type of Document(s):
Amicus Curiae Brief

Name of Attorney or Self-Represented Party Who Prepared Document: David K. Schultz

Bar Number of Attorney: 150120

List of Attachment(s):

S250734_S250734_ACB_ASCDC_ADCNCN.pdf