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Honorable Ronald M. George, Chief Justice
and the Associate Justices
CALIFORNIA SUPREME COURT
300 S. Spring Street
2nd Floor, Atrium Room 2752
Los Angeles, California 90013

Re: *Terry Marsolino v. Sharmila Patel, et al.*, No. S173976, on Petition For Review from the Fourth Appellate District Court of Appeal No. E041922, Letter of Amici Curiae Lockheed Martin Corporation, Aerojet-General Corporation, National Association of Manufacturers, Wyle Laboratories, Inc., and American Chemistry Council

Dear Chief Justice George and Associate Justices:

The Amici appearing through their counsel respectfully submit this letter pursuant to Rule 28(g) of the California Rules of Court in support of the Petition for Review filed by Sharmila Patel, et al. ("Petition") to bring to this Court's attention a conflict between the district courts of appeal on the key issue presented in this case, which is of crucial importance to Amici, some of whom are defendants in cases presenting this same issue and some of whom represent companies that will be subject to this issue in pending and future cases. Three pressing concerns merit review by this Court. First, review is necessary to finish the work this Court began in *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 ("*Mitchell*"), *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 ("*Soule*"), and *Viner v. Sweet* (2003) 30 Cal.4th 1232 ("*Viner*") on the issue of "but for" causation and the proper jury instructions explaining that legal issue. Second, review is needed to restore confidence in the decision of the Judicial Council of California ("Judicial

Council")[1] to include an "explicit" "but for" instruction in California Civil Instruction Number 430 ("CACI 430"). That instruction has been undermined by the Court of Appeal's opinion in this case ("Decision"), and a similar one in *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1096 ("*Mayes*"), which tell trial courts that a "but for" instruction is properly rejected as "redundant" because the "but for" test is "subsumed" in the more ambiguous term "substantial factor." Finally, review is needed to resolve a conflict between the Decision below and *Mayes*, on the one hand, and the decision of the Court of Appeal on remand in *Viner v. Sweet* (2004) 117 Cal.App.4th 1218 ("*Viner II*"), on the other hand, over whether it is error to refuse a proper "but for" instruction. This conflict is compounded by the fact that this Court held in *Soule* that it was error to give only a "substantial factor" instruction where the defendant presented evidence that the plaintiff's injury would have occurred even if the defendant had not engaged in the conduct alleged and requested an explicit "but for" instruction. *Soule*, 8 Cal.4th at p. 573.

I.
INTEREST OF AMICI CURIAE

The Decision below affirms the trial court's refusal to instruct the jury that California law requires a plaintiff to prove "that without defendants' negligence, plaintiff's injuries would not have occurred," which is commonly referred to as "but for" causation. The Court of Appeal conceded that the evidence presented a "but for" issue and that the proposed instruction is an accurate statement of the law, but it agreed with the trial court that the "but for" instruction need not be given because the proposed instruction was "redundant" given that the jury had been instructed on "substantial factor," which "subsumes" the "but for" test. Although lawyers and judges may know what "substantial factor" subsumes and what it does not, it cannot be assumed that such knowledge is possessed by lay jurors, who are not trained in the law.

Amici, which collectively represent companies that engage in business in California and employ its citizens, have an immediate interest in having "but for" causation communicated clearly and precisely to lay jurors because they and the companies they represent have repeatedly been named as defendants in chemical exposure lawsuits where a jury's understanding of "but for" causation can be crucial to the outcome. In such suits plaintiffs allege that low-dose exposure to industrial chemicals has caused them illness. The scientific evidence supporting the allegations that the substance can cause the diseases alleged in people generally, or that it did so

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[1] In 1997 the Judicial Council appointed the Task Force on Jury Instructions, which drafted approximately 800 new civil instructions that the Judicial Council approved in September 2003. Report of Advisory Committee on Civil Jury Instructions (Aug. 2, 2004), at pp. 1-2 <http://www.courtinfo.ca.gov/jc/documents/reports/1004ItemD7.pdf> (as of June 24, 2009). The Judicial Council formed the Advisory Committee on Civil Jury Instructions to maintain and update these instructions. *Id.* The Advisory Committee recommends revisions to the Judicial Council, *id.*, which then approves and publishes the revised instructions. CACI (Oct. 2008 Ed), at p. 2.

in the plaintiffs specifically, is often lacking. The illnesses alleged in such cases commonly occur whether or not a person has been exposed to the substance at issue, and there is little or no scientific evidence linking the substance to the diseases plaintiffs claim it causes. Further, because these suits are usually populated by plaintiffs identified through recruiting campaigns, not independent medical evaluations, it is often the case that plaintiff-specific facts show that the plaintiff likely would have developed the same disease regardless of the exposure. As has been observed by the draft Third Restatement of Torts, plaintiffs and their experts compensate by arguing that "although they cannot show the defendant's tortious conduct was a but-for cause of harm by a preponderance of the evidence, [they] may still prevail by showing that the tortious conduct was a 'substantial factor' in causing the harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 (Proposed Final Draft No. 1, 2005). In other words, plaintiffs' counsel rely upon the ambiguity of the term "substantial factor" to make up for the shortcomings in their own proof of causation. But jury verdicts should not be won on the basis of confusion, and Amici ask this Court to grant review to ensure that clarity, not confusion, will prevail on the issue of "but for" cause.

Amici have an interest in having review of the Decision below granted for two reasons. First, the Decision, and a similar one in *Mayes*, give the trial court carte blanche to refuse a requested special instruction informing the jury that California law requires "but for" causation even where the facts require that the jury have a clear understanding of the "but for" standard in order that defendants have a fair opportunity to present their defense. In doing so they conflict with *Viner II*, which found the refusal to give a virtually identical "but for" instruction in similar circumstances to be "fundamental error." Amici worry that *Mayes* and the Decision below will be invoked to violate their right "to correct, nonargumentative instructions on every theory of the case advanced by [them] which is supported by substantial evidence." *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.

Second, the Decision below and the similar one in *Mayes* undercut Amici's ability to request and receive even the official Judicial Council approved "but for" instruction. Those cases tell trial courts that any instruction on "but for" causation is "redundant" because it is subsumed in the term "substantial factor," apparently obviating the need for a trial court *ever* to give the bracketed instruction adopted by the Judicial Council in CACI 430. They so hold although the Judicial Council Directions for Use cite this Court's decision in *Soule* to advise that in a proper case it may be error not to include the bracketed language in the instruction given. Relying on *Mayes*, the Decision below overrules the Judicial Council by holding that "CACI No. 430 without its bracketed sentence adequately instructed the jury on cause-in-fact or but for causation." Decision, *55. Together with *Mayes* and one other unpublished decision, [2] it is the third opinion to so hold.

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[2] Amici respectfully inform the Court that in *Pollak v. Goldman,* (Feb. 29, 2008, No. B192054) [nonpub.opn.] review den. May 21, 2008, No. S162565, the Second Appellate District, Division One, found that it was not error for the trial court to refuse to give

[Footnote continued on next page]

II.
"BUT FOR" CAUSATION IN CALIFORNIA

It has always been and remains the law in California that, except in the case of concurrent independent causes and in certain circumstances in asbestos cases,[3] a plaintiff seeking to hold a defendant liable for causing a plaintiff's harm must prove "but for" causation—that the same harm would not have occurred without defendant's conduct. Prior to 1991 California juries were so instructed under BAJI 3.75. *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052. In *Mitchell,* this Court struck down BAJI 3.75 because one of the terms appearing in that instruction, "proximate cause," was too confusing for the jury. Agreeing with Dean Prosser that "'proximate cause' . . . is a complex term of highly uncertain meaning under which other rules, doctrines and reasons lie buried," this Court disapproved BAJI 3.75 because it was "'conceptually and grammatically deficient.' The deficiencies could mislead jurors, if they can glean the instruction's meaning despite the grammatical flaws, to focus improperly on the cause that is spatially or temporally closest to the harm." *Mitchell*, 54 Cal.3d 1049, 1052.

In *Mitchell* the Court also found that it would not be error to use the "substantial factor" instruction contained in BAJI 3.76 where "but for" cause is at issue because "the 'substantial factor' test subsumes the 'but for' test. If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries." *Mitchell, supra,* 54 Cal.3d at p. 1052, *quoting Doupnik v. General Motors Corp.* (1990) 225 Cal.App.3d 849, 861. Importantly, the Court did not hold in *Mitchell* that the existing instructions could not be improved upon: "nothing in this opinion should be read to discourage the Committee on Standard Jury Instructions from drafting a new and proper 'but for' instruction." *Id.* at p. 1054, n. 10. Until the recent CACI instructions were published, however, no official authority had taken up this Court's invitation to adopt a new instruction on "but for" causation. During this hiatus, this Court twice addressed the issue of "but for" cause in ways that should have guided the Court of Appeal below to a different result than it reached.

[Footnote continued from previous page]

defendant's instruction that "Plaintiff must show that defendants were a cause of plaintiff's injuries. This requires that plaintiffs provide through expert testimony that but for the defendants' alleged negligence, it is more likely than not the plaintiff would not have sustained her claimed injuries.'" While acknowledging that the "proposed instruction was correct in substance," the Court found that "the substantial factor instruction given to the jury was also correct . . . ." Amici cite this unpublished decision only to illustrate this to be a "recurring issue." *Mangini v. J.G. Durand Int'l* (1994) 31 Cal.App.4th 214, 219.

3 In referring to the requirement of but for causation this letter excludes asbestos and concurrent independent causation cases.

The first "but for" case decided by this Court after *Mitchell* is *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548. There the defendant automobile manufacturer argued for a special "but for" instruction to make it clear to the jury that the alleged design defect in its vehicle was not the cause of plaintiff's ankle injury if the jury determined that "this particular accident would have broken plaintiff's ankles in any event." *Id.* at p. 573 *quoting Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1. This Court held that it was error for the trial court to instruct only on "substantial factor" causation and not to give the requested "but for" instruction, but the error was harmless in the particular circumstances of that case because the "but for" issue had been clearly elucidated during the trial. *Id.* at pp. 573, 582.

Despite the clear holding in *Soule* on the need for a "but for" instruction when the issue is presented by the evidence and an explicit instruction is requested, some plaintiffs began to argue, and some courts to accept, that *Mitchell* marked California's substantive abandonment of "but for" causation.[4] But that misperception was corrected by this Court in *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240. In that attorney malpractice case defendant argued "that the trial court erred in not instructing the jury that the Viners needed to prove they would have received a better deal 'but for' defendant attorney Sweet's negligence." *Id.* at p. 1238. Plaintiffs countered that in *Mitchell* "this court repudiated the 'but for' test of causation in tort cases alleging negligence," *id.* at p. 1239. "Not so," said the Court, "*Mitchell* did not abandon or repudiate the requirement that the plaintiff must prove that, but for the alleged negligence, the harm would not have happened." *Ibid.* Because the Court of Appeal had erroneously concluded that the "but for" standard did not apply at all in attorney malpractice cases, this Court remanded to the Court of Appeal for further proceedings.

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[4] *Gilligan by Tasker v. United States* (9th Cir. Mar. 25, 1998) Case No. 96-56723,1998 U.S. App. LEXIS 6058, *4 [citing *Mitchell* for the proposition that "[i]n California, the law of causation turns on the 'substantial factor' test, not the 'but for' test."); *Selby v. AMTRAK* (9th Cir. Cal. Sept. 14, 1999], Case No. 97-17022, 1999 U.S. App. LEXIS 22495, **22-23 [finding no error under *Mitchell* in district court's instruction because "[a]lthough the district court's instruction in this case included references to proximate cause, the court's instruction did not introduce the criticized concept of 'but for' causation."]; *Great Am. Ins. Co. v. Wexler Ins. Agency, Inc.* (C.D. Cal. Feb. 17, 2000), Case No. CV 97-9397, 2000 U.S. Dist. LEXIS 6592, *48, n. 12]"At least one court has stated that it is unclear whether the Supreme Court's endorsement [in *Mitchell*] of the 'substantial factor' definition displaces any definition encompassing a 'but for' concept of causation."]; *Westside Ctr. Assocs. v. Safeway Stores 23* (1996) 42 Cal.App.4th 507, 530, n. 22 ["WCA contends *Mitchell* displaces the requirement for 'but for' causation in intentional interference cases in favor of a lesser 'substantial factor' standard. Safeway disagrees . . . we need not decide what effect, if any, *Mitchell* has in the present situation."]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 839 [faulting proffered instruction that did not refer to "proximate cause" for "utilizing the 'but for' language rejected in *Mitchell v. Gonzales* . . . ."].

On remand the Court of Appeal found in *Viner II* that "the trial court's omission of an appropriate ['but for'] causation instruction was ***fundamental error*** that in all probability affected the jury's verdict in favor of the Viners." *Viner II, supra,* 117 Cal.App.4th at p. 1224 (initial capitalization omitted) (emphasis added).

At about the same time as *Viner II* was decided, the Judicial Council released its "Plain English" Civil Jury Instructions, which were part of an extensive project to rewrite instructions in "plain, straightforward language, to provide an alternative to often confusing legal terminology that has been used in the California trial courts for the past 70 years." *New Plain-English Jury Instructions Adopted to Assist Jurors in California Courts* (Jul. 16, 2003) Judicial Council of California <http://www.courtinfo.ca.gov/jury/civiljuryinstructions/press_release7-16-03.pdf> (as of June 24, 2009). In the Judicial Council's civil jury instructions, known as CACI, one of the elements of proving negligence and other torts is: "That [*name of defendant*]s failure to perform its duty was a substantial factor in causing [*name of plaintiff*]'s harm." *E.g.*, CACI 423. CACI 430 then defines "substantial factor" as follows: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." CACI 430 (2003 Ed.). The original draft of CACI 430 provided no explicit instruction on "but for" causation to clarify the above "substantial factor" instruction. After *Viner* clarified that California law still requires a finding of "but for" cause, the Judicial Council began to address the issue in its October 2004 revisions to the draft CACI instructions. According to the Report of the Advisory Committee on Civil Jury Instructions, of all the revisions made at that time, the one "that generated the most discussion within the advisory committee involved CACI 430, *Causation—Substantial Factor*," namely "whether to modify the instruction by adding the 'but for' causation test in response to the holding of the recent California Supreme Court opinion in *Viner*[.]" Report of Advisory Committee on Civil Jury Instructions (Aug. 2, 2004), p.3 <http://www.courtinfo.ca.gov/jc/documents/reports/1004ItemD7.pdf> (as of June 24, 2009). For the time being, the "committee decided to add a use note regarding the interplay between 'but for' and 'substantial factor' causation." *Id.*

The next year the Judicial Council incorporated the "but for" requirement into the text of CACI 430 by adding a bracketed sentence to instruct the jury "explicitly" that "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." Report of Advisory Committee on Civil Jury Instruction (Nov. 3, 2005), at pp. 1-2; CACI 430 (2005 Summer Draft) <http://www.courtinfo.ca.gov/jc/documents/reports/1202item4.pdf> (as of June 24, 2009). In its "Directions for Use," the Judicial Council commented that "[t]he optional last sentence [of CACI 430] makes . . . explicit" that the term "'substantial factor' subsumes the 'but for' test of causation, that is, 'but for' the defendant's conduct, the plaintiff's harm would not have occurred." *Id.* Indeed, citing *Soule,* the Judicial Council noted that "***in some cases it may be error not to give this sentence.***" *Ibid.* (emphasis added). Further, the Judicial Council made it clear that while there are circumstances in which the bracketed instruction should be given, there is only one circumstance in which the "but for" language would be improper: "do not include the last sentence in a case involving concurrent independent causes." *Ibid.*

Four months later, the Court of Appeal in *Mayes v. Bryan*, 139 Cal.App.4th 1075, 1095 (2006), ignored *Soule, Viner II,* and the CACI Directions for Use, holding, in effect, that it is *never* necessary to give a "but for" instruction. Although *Mayes* did not involve concurrent independent causes, the court of appeal nevertheless held that it was proper for the trial court to refuse defendant's proffered instruction on "but for" cause, reasoning that "because the jury was instructed on 'substantial factor' and 'but for' is subsumed under the substantial factor test[,] . . . a 'but for' instruction would have been redundant." While BAJI 3.76, not CACI 430, was requested and given, the Court went on in dicta to state, "[t]here is no requirement in either recent revision of CACI 430 that the bracketed language be used in addition to the first sentence of the instruction . . . the trial court is not required to instruct from both tests of cause in fact unless the state of the evidence suggests otherwise." *Id.* at p. 1095-96. No party petitioned this Court for review in *Mayes.*

In holding that an express "but for" instruction would be "redundant," the *Mayes* opinion relied on a sentence in the 2005 edition of CACI 430 Directions for Use, which stated that "[t]he first sentence of the instruction [, which refers to "substantial factor,"] accounts for the 'but for' concept." *Id.* at p. 1095. The December 2007 revisions deleted that sentence from the Directions for Use and added a statement citing *Soule* that "[t]he optional last sentence makes [the 'but for' requirement] explicit, and in some cases it may be error not to give this sentence." Report of Advisory Committee on Civil Jury Instruction (October 12, 2007); CACI 430 (December 2007 Draft) <http://www.courtinfo.ca.gov/jc/documents/reports/120707item4.pdf> (as of June 24, 2009).

Like *Mayes*, the Court of Appeal in the instant case ignored this Court's decision in *Soule,* the Court of Appeal's decision in *Viner II,* and the Judicial Council's Direction for Use.[5] It also failed to take notice of the change in the Directions for Use following the erroneous interpretation in *Mayes.* Plaintiff in this case[6] argued that the defendant physicians had committed malpractice by failing to diagnose his colon cancer sooner than they did. Defendants argued, among other things, that plaintiff's colon cancer was already terminal when they first saw him, so any failure to diagnose the cancer was not a "but for" cause of plaintiff's death. Decision, *5. Defendants also argued that because of the location of plaintiff's tumor, common colon cancer screening devices would not have detected it. *Id.*, **16-18. So if the jury were to find that defendants were negligent only for not ordering those tests, rather than for not ordering the specialized ones that would have detected plaintiff's unusually-located cancer, that negligence would not be a "but for" cause of plaintiff's death since plaintiff would have died

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[5] Like *Mayes,* plaintiff in this case did not contend that he was injured by concurrent independent causes, so nothing in the Judicial Council's Directions for Use suggest that it would have been improper to give the explicit "but for" instruction. Decision, *61, n. 7.

[6] Plaintiff died during the pendency of the appeal and was replaced by his personal representative, Terry Marsolino. Decision, *2, n. 1.

even if defendants had acted non-negligently. At the close of evidence, defendants proposed multiple special "but for" instructions to cover these theories. *Id.*, *54, fn. 6. The trial court refused them all and instructed the jury on causation as "substantial factor" as defined by CACI 430 without the bracketed sentence. *Id.*, *52.

While judges and lawyers have been educated in the law and are therefore in a position to know that the phrase "substantial factor" subsumes the "but for" test of causation, and that the jury must in fact find that defendant's conduct was a "but for" cause of plaintiff's death in order to enter a verdict against defendants, there is no reason why the jury would know that unless the trial court tells them. So there can be no doubt that in the circumstances of this case, it was less clear, and therefore more confusing, for the jury to be told only that defendants' malpractice had to be a "substantial factor" in causing the harm, than if defendants' proffered "but for" instructions had also been given. And the record reveals that such additional clarity almost certainly would have made a difference, for it is apparent that the jury accepted either that plaintiff was already terminally ill or that defendant doctors were only negligent for not ordering the common screening tests. During deliberations, the jury three times asked questions about whether it could find negligence that caused no harm. Petition, 7. In response to these questions, the trial court did not instruct on "but for" cause. *Id.* The jury's verdict reflects its unease about whether defendants' conduct had actually contributed to the harm: it found liability but assigned hardly any of the causal fault to defendants. Decision, *1 (86% comparative fault to plaintiff and 4% and 10% to the two doctors, respectively).

Having refused to make explicit the requirement of "but for" causation to the jury, the trial court proceeded to reverse the bulk of the jury's verdict (its overwhelming allocation of causal fault to plaintiff) as incompatible with its assumed conclusion that defendants' conduct had been a "but for" cause of the death. On plaintiff's motion for Judgment Notwithstanding the Verdict, the trial court allocated 100% fault to defendants because "looking at all the acts defendants raise that could be the basis for [plaintiff] Mr. Didion's negligence . . . there was no showing by any experts that had Mr. Didion done these acts it would have led to a diagnosis of colon cancer at a time [when] he was [likely] curable." *Id.*, *36.

The Court of Appeal affirmed this ruling and found no error in the trial court's refusal to give any of defendants' proffered "but for" instructions. In so holding, it did not dispute that defendants' proffered "but for" instructions are an accurate statement of the law. *Id.*, **55, 64. Nevertheless, the Court of Appeal found that the "but for" instructions had been properly rejected because "CACI No. 430 without its bracketed sentence adequately instructed the jury on cause-in-fact or but for causation." *Id.*, *54. "The fourth, bracketed sentence of CACI No. 430 would have clarified or made explicit what the first three sentences implied, namely, that conduct, or an act or omission, cannot be a substantial factor in causing harm unless but for that act or omission the harm would not have occurred." *Id.* at ** 54-55. In other words, like *Mayes,* the Court of Appeal in this case held in effect that it is *never* necessary to give the bracketed "but for" instruction—to "clarif[y] or ma[k]e explicit" the "but for" standard--because the more ambiguous term "substantial factor" adequately communicated the "but for" test to the jury by implication. Neither the trial court nor the Court of Appeal explained why it was not important

to clarify and make explicit such an important legal principle when they found no legal shortcoming in the proffered instructions. As discussed below, not only is the Decision below wrong and unjust, but it is flatly contrary to this Court's decisions in *Soule* and *Viner,* conflicts with *Viner II,* and renders the Judicial Council's Directions for Use a nullity. Review should be granted to clarify this issue of vital importance to California tort law.

III.
REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A CLEAR CONFLICT BETWEEN THE COURTS OF APPEAL AND TO INSURE THAT JURIES ARE PROPERLY INSTRUCTED ON "BUT FOR" CAUSATION

In 1314 a medieval lay jury was asked in an English property case, *Abbot of Tewkesbury v. Calewe,* to decide whether certain land was "free alms" or "lay fee" without being told what those legal terms meant. The jurors protested "we are not men of law," to which the judge responded "say what you feel." Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081, 1082 (2001). This problem of randomized justice resulting from instructing juries in a legal lexicon foreign to them is one that the Judicial Council has been a national leader in addressing head on. It has done so through CACI: instructions worded in "plain, straightforward language," not the "often confusing legal terminology." *New Plain-English Jury Instructions Adopted to Assist Jurors in California Courts* (Jul. 16, 2003) Judicial Council of California, *supra.*

Today, nearly 700 years after *Abbot of Tewksbury*, the courts of appeal in the Decision below and *Mayes* are still leaving juries to speculate about the meaning of technical legal terms instead of explaining what those terms mean. They believe that just because jurors have been instructed on "substantial factor" alone, they have no need for an explicit instruction on "but for" cause because "but for" cause is "subsumed" by the term "substantial factor." Respondent urges this Court to deny review for the same reason. Answer, at pp. 7-12. This is pure fiction. The fact that judges and lawyers might know what "substantial factor" means—and, as seen below, many do not—does not justify the assumption that lay jurors, who are not trained in the law, will also understand it. So even though the courts of appeal in this case and in *Mayes* were asked to give explicit instructions on "but for" cause that were admittedly accurate statements of the law, they, like the medieval court in *Abbot of Tewksbury,* would prefer to have the jurors "say what [they] feel" rather than give the requested instruction. This is antithetical to the modern view advocated by the Judicial Council that the law should be explained to jurors in plain, easy to understand, English.

Review by this Court is necessary to end this practice and should be granted for three separate and independent reasons. First, the theory of instruction by implication relied on by the Court of Appeal below is contrary to *Soule*, is unreasonable, and will only result in more unnecessary error. Second, the Decision below and *Mayes* are a direct attack on the Judicial Council's efforts to provide juries with "plain, straightforward language." If an instruction proffered to provide an accurate explanation of a loaded legal term like "substantial factor" can be rejected on the sole ground that such explanation is "redundant," *Mayes*, *supra,* 139

Cal.App.4th at p. 1096, then "confusing legal terminology" will always trump plain English. Finally, review is necessary to resolve an actual conflict between the Decision below and *Mayes,* on the one hand, and *Viner II,* on the other.

A. Instructing on "But For" Causation Only By Implication When The Evidence Places "But For" Causation At Issue Contravenes This Court's Ruling In *Soule* and Will Result in More Error And Injustice

Civil jurors take an oath to reach "a true verdict rendered according only to the evidence presented to you and to ***the instructions of the court***." Cal. Code Civ. Proc. § 604 (emphasis added). They are then told by the trial court that "[a]t the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law." CACI 100. After the trial, they are told "[y]ou must follow the law exactly as I give it to you," and forbidden from doing their own research thereon. CACI 5000.

Jurors promising to follow the law deserve to be told what the law is, plainly and explicitly in terms they can understand. And there is no dispute that the "but for" instructions proposed by defendants in this case are an accurate statement of the law and would have instructed the jury more explicitly on its obligation to find "but for" causation than the instructions that were actually given. But at the heart of the rulings in the Decision below and *Mayes* is the notion that because, as a matter of legal principle, the substantial factor test "subsumes" the "but for" test, exposing the jury to the substantial factor test never requires further explanation because it informs them of the "but for" requirement by "necessary implication." Decision, *59; *Mayes*, *supra,* 139 Cal.App.4th at p. 1098; Answer, at p. 7 ("Contrary to the petitioners' assertion, a 'but for' instruction was given. The substantial factor language/test in CACI No. 430 subsumes the 'but for' test."). This approach is both unrealistic and contrary to the principles set out in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548.

Soule was a design defect case in which plaintiff alleged that a defect in her GM Camaro caused the front wheel to break free during a high impact collision and smash the floorboard into her feet, causing injury to both ankles. *Id.* at p. 577. GM denied the defect and argued that "the wheel would have collapsed regardless of any defect, and, in any event, that the wheel's collapse played no part in the ankle injuries plaintiff received." *Id.* at p. 572. In support of its theory that the defect did not cause the injury because the injury would have occurred without it, GM proposed that the jury be given the following special instruction: "'[i]f you find that the subject Camaro . . . was improperly designed, but you also find that [plaintiff] would have received enhanced injuries even if the design had been proper, then you must find that the design was not a substantial factor in bringing about her injuries and therefore was not a contributing cause thereto.'" *Id.* at p. 559. The trial court refused this special instruction; instead, on causation the jury was instructed only pursuant to BAJI 3.76 that a "legal cause of injury is a cause which is a substantial factor in bringing about the injury." *Ibid.*

Plaintiff prevailed at trial, and GM unsuccessfully appealed. On review this Court found that the trial court had erred when it refused the "but for" instruction proposed by GM. The Court reasoned that GM was "entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by [it] which is supported by substantial evidence," *id.* at p. 572, and because GM had offered admissible evidence that plaintiff's injury would have occurred even if there had been no defect, it was error to refuse the proferred instruction. The Court expressly rejected the premise of the Decision below and *Mayes* that giving a substantial factor instruction made the proffered "but for" instruction superfluous:

> The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a "substantial factor" in producing plaintiff's "enhanced" injuries. However, ***this instruction dealt only by "negative implication" with GM's theory*** that any such defect was not a "substantial factor" in this case because this particular accident would have broken plaintiff's ankles in any event. As we have seen, GM presented substantial evidence to that effect. ***GM was therefore entitled to its special instruction, and the trial court's refusal to give it was error.***

Id. at p. 573 (emphasis added). While the Court ultimately concluded that the error was harmless on the facts before it, the refusal to give the instruction was error nonetheless.

Both the Decision below and *Mayes* incorrectly disregarded this Court's holding in *Soule* that it was error not to give the proffered "but for" instruction. In each of those cases, like *Soule*, the evidence presented placed "but for" causation at issue; defendant requested a correct "but for" instruction; and the trial court rejected the request on the grounds that the "but for" concept was adequately communicated by negative implication through the substantial factor instruction.[7] But unlike *Soule*, each of the courts of appeal here and in *Mayes*, on similar facts, accepted the "negative implication" rationale that

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[7] In the Decision below, the Court of Appeal misinterpreted *Soule*, and the same error is repeated by Respondent in the Answer. According to the Court below, *Soule* only applies to hyper-specific "pinpoint" instructions and therefore had no application in this case "because none of them [the proposed instructions] pinpointed a particular defense theory of the case to any particular facts." Decision, *64; Answer, at p. 11. But in *Soule* the Court discussed "pinpoint" instructions only after it had determined that it was error not to give the proposed "but for" instruction. The discussion of "pinpoint instructions" took place as part of this Court's determination that the trial court's legal error had been harmless. Thus, the fact that "the omitted language was similar in function and purpose to 'pinpoint' instructions," was one consideration militating in favor of the error being harmless. *Soule*, 8 Cal.4th at p. 581. It had nothing to do with whether the defendant was entitled to the instruction in the first place.

Respondent makes here and upheld the trial court's refusal to give the requested "but for" instruction.

As this Court in *Soule* realized, instructing juries on "but for" causation only by negative implication does not work. "Obviously, jurors can only follow the law if someone explains it to them in a comprehensible fashion," Tiersma, *supra*, at p. 1081, and the relationship between "but for" causation and substantial factor is no exception. "Substantial factor" is a turn-of-the-century legal term first coined by Jeremiah Smith in a 1911 Harvard Law Review article. Smith, *Legal Cause in Actions of Tort*, 25 Harv.L.Rev. 102, 233 (1911). The term has vexed both juries and "men of law" for decades. One published decision reported an incident in which it was learned post-verdict that "all the jurors were confused by the meaning of the term 'substantial factor,'" resulting in an errant verdict. 697 N.Y.S.2d 100, 105, *Moisakis v. Allied Bldg. Prods. Corp.* (1999) (J. Friedman dissenting). Having examined the issue, the Law Review Commission concluded in its draft Third Restatement of Torts that "[t]he substantial-factor test has not [ ] withstood the test of time, proving confusing and being misused . . . arguments have been made and some courts have accepted the proposition that, although the plaintiff cannot show the defendant's tortious conduct was a but-for cause of harm by a preponderance of the evidence, the plaintiff may still prevail by showing that the tortious conduct was a substantial factor in causing the harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 (Proposed Final Draft No. 1, 2005). As this Court made clear in *Viner,* however, a jury instructed on "substantial factor" is supposed to reach the same result as a jury that is given the explicit instruction on "but for" causation since "negligent conduct cannot be a substantial factor in bringing about harm if the harm would have been sustained even if the actor had not been negligent." *Viner, supra,* 30 Cal.4th at p. 1240. The Law Review Commission's concern that judges and juries often do not reach the same result depending on which instruction is given is undoubtedly one of the reasons that the Judicial Council adopted the bracketed language, which clarifies for the jury what "substantial factor" means.[8]

The assumption by the Court of Appeal below and the *Mayes* Court that juries will fully understand, without explanation, the relationship between "substantial factor" and "but for" cause is also belied by the fact that even some courts and legal scholars are confused on this issue, asserting that "substantial factor" is a "weaker" or "more lenient" standard than "but for"

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[8] The bracketed language is made optional because there are occasions when a "but for" instruction is not appropriate. For example, in cases involving concurrent independent causes, the "substantial factor" instruction appearing in the first three sentences of CACI 430 is an accurate statement of the law, but the bracketed "but for" language is not. CACI 430 Directions for Use (2008 Ed.). And in some cases there is no genuine issue of "but for" causation presented by the evidence. But where, as here, the evidence would support a finding that something other than defendant's conduct was the "but for" cause of plaintiff's harm, a properly craft "but for" instruction should be given upon request.

cause.[9] *See In re Bendectin Litigation* (6th Cir. 1988) 857 F.2d 290, 311 ["We conclude therefore that even if the cited Ohio cases were applied to the present case, plaintiffs would still have to prove 'but for' causation rather than some *weaker* 'substantial factor' standard."] (emphasis added); *Kennedy v. S. Cal. Edison Co.*, 268 F.3d 763, 770 (9th Cir. 2001) [the substantial factor "standard minimally requires that the contribution of the individual cause be more than negligible or theoretical" without any mention of "but for" causation.]; *In re Hanford Nuclear Reservation Litig.*, 497 F.3d 1005, 1014 (9th Cir. 2007) ["[T]he district court properly instructed the jury that to impose liability, it had to find Hanford was the 'but for' cause of Plaintiffs' diseases and not just a contributing cause under the *more lenient* 'substantial factor' test."] (emphasis added). Just over four months ago a federal district court published an opinion finding a "conflict between Delaware and New Jersey law" because Delaware followed the rule of "'but for' cause" whereas New Jersey followed the substantial factor test. *Guinan v. A.I. duPont Hosp. for Children* (E.D. Pa. 2009) 597 F. Supp. 2d 517, 526.

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9 Legal scholars commonly fail to appreciate the legal relationship between "substantial factor" and "but for" cause, treating the two formulas as different standards. *See* Moore, Michael, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 San Diego L. Rev. 1181, 1183-84 (2003) [the predominant rule of causation is the but for test "despite" the adoption of the "substantial factor" test by the Restatement of Torts]; Resnik, David, *Liability for Institutional Review Boards*, 25 J. Legal Med. 131, 162-3 (2004) [causation can be analyzed in two ways: "but for" or substantial factor]; Shelly Brinker, Comment, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. Rev. 1289, 1297 (1999) ["[a] factual causal relationship can be demonstrated using either the but-for test or the substantial-factor test."]; Michel Baumeister and Dorothea Capone, *Expert Admissibility Symposium: Reliability Standards--Too High, Too Low, Or Just Right?: Admissibility Standards As Politics--The Imperial Gate Closers Arrive!!!*, 33 Seton Hall L. Rev. 1025, 1030 ["[f]rom a public policy perspective, substituting the substantial factor test for the rigid and seemingly insurmountable "but for" test makes it more likely that a negligent defendant will be held responsible for the harm, and future wrongful conduct will be deterred."]; David Jakubowitz, *Help, I've Fallen And Can't Get Up!" New York's Application Of The Substantial Factor Test* (note), 18 St. John's J.L. Comm. 593, 594 (2004) [discussing confusion over the substantial factor test]; David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 277 (2005) ["Over the years, courts . . . used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate. As a result, the test now creates unnecessary confusion in the law and has outlived its usefulness."]; David W. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1779-80 (1997) ["[t]he real trouble begins when courts go a step further and start treating the relatively vague substantial factor vocabulary as an improvement upon the but-for test with respect to any multiple causation case in which analysis appears difficult."].

It is hardly surprising that the implicit relationship between substantial factor and "but for" causation that often befuddles courts and legal professionals is not readily understood by jurors, who are not told about it and have no legal training. The jury that decided *Viner* clearly did not understand the substantial factor test to require a showing of "but for" causation: that jury made its substantial factor finding even though the "Viners presented no evidence at all, substantial or otherwise, indicating that, but for [defendants'] negligence, it was more likely than not they would have obtained a more favorable result in their negotiations with MEI." *Viner II*, *supra,* 117 Cal.App.4th at p. 1226. It is evident the jury in this case did not intuit the requirement of "but for" causation from the legal term "substantial factor" either: the trial court and the Court of Appeal effectively reversed the jury's verdict as inconsistent with the undisclosed requirement of "but for" causation.

Jurors who are told "[y]ou must follow the law exactly as I give it to you" cannot follow the law if they are not told what it is. Elaborate legal constructs in which plain English is "redundant" because it is "subsumed" by an amorphous legal term are no help to a jury which, as a result of those constructs, is being required to answer a question that has not been fully explained. Review by this Court is necessary to address the common sense need for an instruction that the jury can understand.

B. This Court Should Not Allow the Courts of Appeal to Nullify the Work of the Judicial Council in Promulgating for CACI 430 an Explicit Statement of the "But For" Requirement.

Review by this Court is also necessary to protect the Judicial Council's determination that the requirement of "but for" causation should be explained to juries in a proper case. Where, as here, evidence is presented that raises an issue of "but for" cause, the bracketed sentence adopted by the Judicial Council in CACI 430 should be included in that instruction if requested.

The plain English instructions are the cornerstone of the Judicial Council's longstanding efforts to reform the jury instructions that in 1996 it found to be "simply impenetrable to the ordinary juror[.]" *Final Report of the Blue Ribbon Commission on Jury System Improvement* (May 6, 1996) at p. 93. CACI instructions were to be written in "plain, straightforward language, to provide an alternative to often confusing legal terminology[.]" This would "make jurors' experiences more meaningful and rewarding and . . . improve the quality of justice by ensuring that jurors understand and apply the law correctly in their deliberations." Judicial Council of California, *Task Force on Jury System Improvement: Final Report* (April 15, 2004), at p. 72. California has received high marks in the academic literature for being one of the few jurisdictions to take seriously the problem that too often jury instructions are written for lawyers, not jurors. Easley, *Plain English Jury Instructions: Why They're Still Needed and What the Appellate Community Can Do to Help*, 78 Fl. Bar J. 66, 68 (2004) ["The new plain English jury instructions are a major contribution to the Judicial Council's historic efforts to reform the California jury system."].

Respondent tries to make it appear that he is defending the language adopted by the Judicial Council in CACI 430. He writes that "thoughtful consideration by a distinguished committee gave rise to CACI No. 430, a 'plain English' explanation of California law," Answer, at pp. 9-10, n. 6, and purports to defend that instruction from "petitioners' claim that CACI No. 430 is an incorrect statement of the law," *id.*, at p. 11. But Respondent is engaging in a sleight of hand; he does not defend the Judicial Council's decision to include a bracketed "but for" instruction in CACI 430, which, according to Respondent, is "redundant" of the words that precede it. The question is not, as Respondent presents it, whether the "substantial factor" language in CACI 430 is a correct statement of the law. Amici believe that it is. Rather, the question is whether a defendant, upon request in a case where "but for" causation is at issue, is entitled to an instruction that "makes this explicit." CACI 430 (2008 Ed). On this issue Respondent, like the courts of appeal below and in *Mayes*, is diametrically opposed to the determinations of the Judicial Council and essentially asks this Court to treat the bracketed language as superfluous.

As part of this effort to craft plain English instructions, the Judicial Council ultimately decided it would be appropriate for juries to be told explicitly, and not only by implication, about the "but for" requirement. It thus added the optional sentence, "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct," and included a Directions For Use statement that, based on *Soule*, "it may be error not to give" the bracketed instruction. CACI 430 (2007 Ed.). The decision to make the "but for" requirement explicit was made only after four years of deliberations, full notice and opportunity to comment, *supra*, Part II, and what Respondent admits was "thoughtful consideration by a distinguished committee." Answer, at pp. 9-10, n. 6.

Normally trial courts can have confidence in the instructions promulgated by the Judicial Council. The Judicial Council is "the rule-making arm of the California court system[.]" *NASD Dispute Resolution, Inc. v. Judicial Council* (9th Cir. 2007) 488 F.3d 1065, 1067. The instructions it approves "are the official instructions for use in the state of California," and their use is "recommended" and "strongly encouraged." Cal. R. of Crt. 2.1050. "Courts have given . . . deference to the rules of court that the Judicial Council has promulgated," *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1012, and that deference would presumably apply to the Judicial Council's decision to include the bracketed language in CACI 430.

But this normal confidence is undermined when the courts of appeal in this case and in *Mayes* tell litigants and trial courts "that a 'but for' instruction [is] redundant according to *Mitchell*, *Viner*, and the revised versions of CACI 430." *Mayes*, 139 Cal.App.4th at p. 1096; Decision, **58-61. Thus, while the Judicial Council ultimately included a bracketed "but for" instruction and a warning that failure to give it could be error in certain cases, these cases effectively advise trial courts that the Judicial Council has actually reached the opposite conclusion. Whether or not such statements are made in a published or unpublished opinion hardly matters: trial courts will not give an instruction that their reviewing court has labeled "redundant." Of course, the Judicial Council would not have added a "but for" instruction if it thought the instruction was redundant and therefore unnecessary. But that is the illogical

conclusion that the Decision below and *Mayes*, as well as Respondents, are asking this Court to reach.

There is not much more that the Judicial Council could have done to create a "new and proper 'but for' instruction," *Mitchell*, 54 Cal.3d at p. 1054, n. 10, than to include the bracketed language in CACI 430. But the Decision in this case and the holding in *Mayes* have undermined that effort by telling trial courts that they may disregard the bracketed language altogether since it is merely "redundant"—that trial courts need not give a "but for" instruction even where the evidence squarely presents the issue. The trial courts confronting this issue every day need to hear from this Court that the words adopted by the Judicial Council have meaning.

C. This Court Should Grant Review to Resolve a Conflict Between the Decision Below and *Mayes*, On the One Hand, and *Viner II*, On the Other Hand.

Finally, this Court should grant review to resolve an explicit conflict between the district courts of appeal. In *Mayes* and the Decision below, the Second Appellate District, Division Three and the Fourth Appellate District, Division Two, respectively, held that instructing on "but for" cause is "redundant" and properly rejected even where there is evidence that plaintiff's injury could have been caused by something other than defendant's conduct, but in *Viner II* the Second Appellate District, Division Seven held on similar facts that it is "fundamental error" to refuse a "but for" instruction. The confusion caused by this conflict is exacerbated by the fact that this Court expressly held in *Soule* that it was error not to give a requested "but for" instruction when the evidence presents the issue for the jury, and the Judicial Council's Directions for Use cite *Soule* for the proposition that "in some cases it may be error not to give the [bracketed] sentence." CACI 430 Directions for Use (2008 Ed.).

In *Viner II* the trial court refused defendant's request for an instruction that "[i]n order to recover damages . . . the plaintiff must establish that, but for the attorney's negligence, plaintiff would in fact have been successful . . . in obtaining the desired term in the agreement . . . ." *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1222, n. 3. It instead gave BAJI 3.76, a substantial factor instruction. *Id.* at p. 1226, n. 7. On remand from this Court, the Court of Appeal found "the trial court's omission of an appropriate ['but for'] causation instruction was ***fundamental error*** that in all probability affected the jury's verdict in favor of the Viners." *Id.* at p. 1224 (initial capitalization omitted) (emphasis added); *accord Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.

Mayes and the Decision below reached precisely the opposite result on similar facts: they found it proper for trial courts to refuse "but for" instructions even though defendants had presented evidence that the injuries would have occurred had defendants not been negligent. *Mayes*, 139 Cal.App.4th at p. 1092 (refused instruction stated "To be a cause of an injury, plaintiff must show that but for the alleged malpractice . . . plaintiff would have obtained a more favorable result."); Decision, *52 (same).

These conflicting outcomes cannot be explained by differences between BAJI 3.76 and CACI 430: both use the Second Restatement's "substantial factor" terminology, which, as a matter of legal principle "subsumes the 'but for' test" in either instruction. *Viner, supra,* 30 Cal.4th at p. 1239. Nor can they be explained by differing facts. In each of these cases—the Decision below, *Mayes, Viner II,* and *Soule*—the defendant offered evidence tending to show that the plaintiff's injury would have occurred even in the absence of the defendant's allegedly wrongful conduct. In *Viner II* and *Soule* it was held that a requested "but for" instruction was necessary under those facts, and in *Mayes* and the Decision below, the courts of appeal held that it was not.

This conflict leaves trial courts in an impossible position. Faced with a request for either the bracketed "but for" instruction or a special "but for" instruction, they are on the one hand told by the court below and *Mayes* "that a 'but for' instruction [is] redundant according to *Mitchell*, *Viner*, and the revised versions of CACI No. 430," *Mayes*, 139 Cal.App.4th at p. 1098, while on the other hand *Soule* holds that such a refusal is "error," *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 and *Viner II* instructs that refusing such a request is "fundamental error." *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1224. In these challenging times judicial resources are too scarce for something as routine as choosing a proper causation instruction to be abandoned to such uncertainty. Accordingly, Amici respectfully request that this Court grant review to resolve this conflict.

IV. CONCLUSION

Juries in California are called upon every day in all manner of civil cases to decide whether a defendant's conduct caused plaintiff's alleged harm. They are instructed that the court will "tell you the law that you must follow to reach your verdict," but then, in some courts, such as the trial court below, that promise is promptly broken on the element of causation. They are told that they must determine whether the defendant's conduct was a "substantial factor" in causing the plaintiff's harm—a term that even the courts and legal scholars frequently find confusing, a century old legal term they have never heard before—but they are not told by the trial courts in *Mayes* or this case that the defendant's "[c]onduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." It defies common sense for the Judicial Council of this State, on the one hand, to endeavor for years to arrive at jury instructions in "plain, straightforward language, to provide an alternative to often confusing legal terminology," while at the same time some of the courts of appeal continue to insist that juries should be instructed only with the more ambiguous "substantial factor" term when a more explicit and accurate explanation of "but for" cause is available. Aside from perhaps instructing

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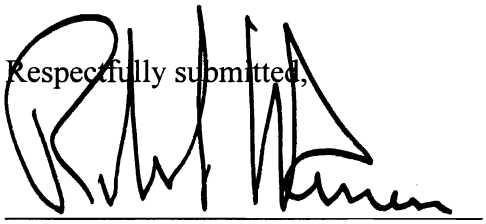
the jury in Latin, it is difficult to imagine a process that does more to exalt "confusing legal terminology" and less to "explain the law" in "plain, straightforward language" understandable to jurors. Review by this Court is needed.

Respectfully submitted,



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