

No. B312241

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

SEE'S CANDIES, INC. AND SEE'S CANDY SHOPS, INC.,
Defendants-Petitioners,

v.

**SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,**
Respondent,

**MATILDE EK, INDIVIDUALLY AND AS SUCCESSOR IN
INTEREST TO ARTURO EK; KARLA EK-ELHADIDY;
LUCILA DEL CARMEN EK; AND MARIA EK-EWELL,**
Real Parties in Interest.

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

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

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

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

The Chamber of Commerce of the United States of America, the California Chamber of Commerce, the California Workers' Compensation Institute, the Restaurant Law Center, the California Restaurant Association, the National Association of Manufacturers, and the National Retail Federation respectfully seek permission to file the attached amicus curiae letter brief in support of petitioners See's Candies Inc. and See's Candy Shops, Inc.'s petition for writ of mandate. The letter brief explains that the issue presented in the petition is extremely important to employers and their employees in California.

California Rules of Court, rule 8.487 expressly permits the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. (Cal. Rules of Court, rule 8.487(e)(1).) The Advisory Committee Comment to that rule, however, makes clear that amicus letters are also permitted before a court issues an alternative writ or order to show cause. (Adv. Comm. Comment to CRC 8.487, subd. (d) and (e) ["These provisions do not alter the court's authority to . . . permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause"].) Courts have relied on amicus letters filed in connection with a writ petition when deciding whether to issue an order to show cause. (See, e.g., *Regents of University of*

California v. Superior Court (2013) 220 Cal.App.4th 549, 557-558.)

No party or counsel for a party in the pending case authored the attached letter brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the attached letter brief.

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country—including throughout California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and federal and state courts. To that end, the Chamber regularly files amicus curiae briefs in cases such as this one that raise issues of concern to the business community.

The California Chamber of Commerce (“CalChamber”) is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While

CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues.

The California Workers' Compensation Institute is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 80% of California's workers' compensation premium, and self-insured employers with \$87B of annual payroll (33.6% of the state's total annual self-insured payroll). Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in numerous cases as amicus curiae before the California Supreme Court and Courts of Appeal.

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The foodservice industry comprises of over one million restaurants and other outlets that represent a broad and diverse group of owners and operators—from large national restaurant chains with hundreds of locations and billions of dollars in revenue, to small single-location, family-run neighborhood restaurants and bars, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Members of the California Restaurant

Association are also automatically deemed members of the Law Center. The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases, such as this one, through amicus briefs speaking as one voice on behalf of its industry.

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

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

agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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

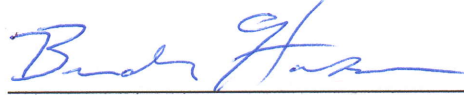
CONCLUSION

The Court should accept the attached letter brief in support of petitioners See’s Candies Inc. and See’s Candy Shops, Inc.’s petition for writ of mandate for filing.

DATED: May 21, 2021

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP



Bradley J. Hamburger

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

[PROPOSED] ORDER

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

IT IS SO ORDERED.

Dated: _____

Presiding Justice

Document received by the CA 2nd District Court of Appeal.

May 21, 2021

VIA TRUEFILING

Presiding Justice Frances Rothschild and Associate Justices
California Court of Appeal
Second Appellate District, Division One
300 South Spring Street, North Tower
Los Angeles, California 90013

Re: *See's Candies, Inc. and See's Candy Shops, Inc. v. Superior Court of California, for the County of Los Angeles (Matilde Ek, et al., Real Parties in Interest)*

Court of Appeal Case No. B312241

Amici curiae letter in support of petition for writ of mandate

Dear Presiding Justice Rothschild and Associate Justices:

We write on behalf of amici curiae the Chamber of Commerce of the United States of America, the California Chamber of Commerce, the California Workers' Compensation Institute, the Restaurant Law Center, the California Restaurant Association, the National Association of Manufacturers, and the National Retail Federation urging the Court to grant petitioners See's Candies Inc. and See's Candy Shops, Inc.'s petition for writ of mandate. The issue presented in the petition is extremely important to employers and their employees in California. As explained in the petition, the Superior Court's overruling of petitioners' demurrer was contrary to the longstanding "derivative injury rule" that establishes workers' compensation as the exclusive remedy for all claims that are derivative of an employee's covered workplace injury—including claims for injuries sustained by members of the employee's household. The Superior Court created a new exception to that bright-line rule for injuries from COVID-19 that allegedly derive from employees who contract the virus in the employer's workplace and then infect their family members.

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The potential impact of this decision on the balance between the workers' compensation system and the civil court system can hardly be overstated. The COVID-19 pandemic has affected all employers, and the Superior Court's rule, if it takes hold, could subject employers to potentially unlimited tort liability for alleged injuries that the Legislature intended to be addressed in the workers' compensation system. Not only does the decision have the potential to devastate businesses already struggling to recover from the COVID-19 pandemic, it creates a clear conflict with a recent decision by a California federal court holding that such claims are barred by the exclusive remedy provisions of California's workers' compensation system.

In short, the petition presents a textbook case for immediate review because it seeks resolution of a legal question of widespread importance. All employers and employees would benefit greatly from immediate review by this Court at this stage, before resources are wasted litigating claims that should not be brought in court. This Court should grant writ relief to resolve this particularly important and pertinent issue of state law.

Authority for Permitting This Amici Letter

California Rules of Court, rule 8.487 expressly permits the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. (Cal. Rules of Court, rule 8.487(e)(1).) The Advisory Committee Comment to that rule, however, makes clear that amicus letters are also permitted before a court issues an alternative writ or order to show cause. (Adv. Comm. Comment to CRC 8.487, subd. (d) and (e) ["These provisions do not alter the court's authority to . . . permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause"].) Courts have relied on amicus letters filed in connection with a writ petition when deciding whether to issue an order to show cause. (See, e.g., *Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557-558.) We

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therefore ask the Court to consider this amici letter in deciding whether to grant the petition for writ of mandate.

Interest of Amici Curiae

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country—including throughout California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and federal and state courts. To that end, the Chamber regularly files amicus curiae briefs in cases such as this one that raise issues of concern to the business community.

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

No party or counsel for a party in the pending case authored the proposed amici curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

Argument

As California businesses recover from the devastating effects of the COVID-19 pandemic and continuously adapt to changing public-health measures, employers and employees rely more than ever on the certainty of the workers’ compensation system, including its well-established standards for when injuries that are derivative of workplace injuries are subject to the exclusivity provisions of California’s Workers’ Compensation Act (“WCA”). The Superior Court’s decision in this case upends the balance between tort liability and workers’ compensation, and its new rule would impose on

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California employers—large and small alike—potential tort liability for COVID-related workplace injuries. The issue affects all employers and employees who rely on the workers’ compensation system, and its importance cannot be overstated.

As the California Supreme Court has explained, “the workers’ compensation bargain offers protection with one hand even as it removes access to civil recourse with the other.” (*Gund v. County of Trinity* (2020) 10 Cal.5th 503, 527.) The statutory scheme affords the employee “relatively swift and certain payment of benefits to cure or relieve the effects of industry injury” regardless of fault “but, in exchange,” requires the employee to “give[] up the wider range of damages potentially available in tort.” (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 (*Vacanti*).) Where a “remedy is available as an element of the compensation bargain it is exclusive of any other remedy to which the worker might otherwise be entitled from the employer.” (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1052 (*King*); see Lab. Code, § 3600, subd. (a) [“Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment”]; *id.*, § 3602, subd. (a) [“[T]he right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer.”].)

The compensation bargain—and thus the bar on civil actions based on injuries to employees—also encompasses injuries “collateral to or derivative of a compensable workplace injury.” (*Vacanti, supra*, 24 Cal.4th at p. 814.) An employer’s compensation obligation is “in lieu of any other liability whatsoever *to any person*” (Lab. Code, § 3600, *italics added*), including the employee’s dependents (*id.*, § 3602) for work-related injuries to the employee. The derivative injury rule applies when a plaintiff’s injury “would not have existed in the absence of injury to the employee.” (*Snyder v. Michael’s Stores, Inc.* (1997) 16 Cal.4th 991, 998 (*Snyder*).) Employers

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and employees have long relied on this derivative injury rule in structuring their employment relationships.

The trial court in this case fundamentally misunderstood the derivative injury rule. Under its mistaken view, a large swath of COVID-related claims stemming from workplace conduct would be placed outside the scope of the workers' compensation system. Contrary to the trial court's ruling, the claims in this action are inextricably intertwined with injuries suffered by the decedent's wife, who allegedly contracted COVID-19 in the course and scope of her employment with petitioners. In other words, plaintiffs seek compensatory damages precisely because of an injury to an employee at work. As the allegations of the complaint make clear, had the decedent's wife not contracted COVID-19 on the job, the decedent's injury "simply would not have existed." (*Snyder, supra*, 16 Cal.4th at p. 998.) That is because there is no allegation that the decedent was ever on petitioners' premises or was otherwise directly harmed by petitioners. Instead, the claims at issue depend on "alleg[ing] injury to another person—the employee" (*ibid.*)—and that brings them squarely within the derivative injury rule and the WCA's exclusive remedy provisions.

The trial court's refusal to apply the derivative injury rule stands in stark contrast to a recent decision by the U.S. District Court for the Northern District of California. In that case, the federal district court correctly dismissed a complaint by an employee's spouse asserting claims against his spouse's employer for the same type of injury because "such claims are barred by the exclusive remedy provisions of California's workers' compensation statutes." (Order Granting Motion to Dismiss, *Kuciemba v. Victory Woodworks, Inc.* (N.D. Cal. May 10, 2021) No. 3:20-cv-09355-MMC.) Parties should not receive divergent outcomes on identical claims brought under state law based solely on whether they are in state or federal court, yet that is precisely the situation created by the *Kuciemba* decision and the decision below. That conflict over "[a] significant legal issue" is further reason why writ review is "clearly appropriate." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 fn. 14; see also *County*

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of Sonoma v. Superior Court (2009) 173 Cal.App.4th 322, 336, fn. 6 [writ review appropriate when a case presents “a novel and significant [] question” and “has generated conflicting trial court decisions”].)

Because the interpretation of the WCA is a matter of California law, it is particularly important that California’s appellate courts address this issue now, before more confusion and conflict results. Guidance from this Court would not only be controlling in California’s trial courts, but would also be of great significance to California’s federal courts. (*Daniel v. Ford Motor Co.* (9th Cir. 2015) 806 F.3d 1217, 1222 [“We must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently.”], quotation marks and citation omitted.) And although there is ample California appellate precedent that makes clear that the derivative injury rule should apply to the factual circumstance alleged here, no California appellate decisions to date have specifically addressed the derivative injury rule in the context of COVID-related injuries. This issue is sure to arise with increasing frequency as the nation emerges from the COVID-19 pandemic.¹

Entertaining derivative-injury claims for COVID-related injuries would be an immensely challenging and complicated enterprise for courts. Determining the source of an employee’s COVID-19 infection, and whether the employee was the source of the family member’s infection, are often both

¹ As the writ petition correctly notes, the issue is also arising in other states, further illustrating the importance of the issue. (See, e.g., *Elijah v. Pilgrim’s Pride Corp.* (E.D. Tex., Apr. 21, 2021) No. 5:21-cv-00047; *Iniguez v. Aurora Packing Company, Inc.* (Ill. Cir. Ct., Kane County, Mar. 31, 2021) No. 20 L 372; *Kurtz v. Sibley Memorial Hospital* (Md. Cir. Ct., Montgomery County, Mar. 25, 2021) No. 483758V; *Estate of William Madden v. Southwest Airlines Co.* (D. Md., Mar. 17, 2021) No.1:21-CV-00672; *Lathourakis v. Raymours Furniture Co.* (N.Y. Sup. Ct., Mar. 8, 2021) No. 59130/2020.)

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unknowable because “the virus can be ‘spread by individuals who are pre-symptomatic or asymptomatic,’ i.e., difficult to identify.” (*South Bay United Pentecostal Church v. Newsom* (9th Cir. 2021) 985 F.3d 1128, 1132.) The risk of contracting COVID-19, as another court has observed, is present “nearly anywhere in this country and the world.” (*Palmer v. Amazon.com, Inc.* (E.D.N.Y. 2020) 498 F.Supp.3d. 359.) Under the workers’ compensation system, remedies are limited and more predictable and expeditious than in traditional civil litigation. Allowing workplace-injury claims to proceed in courts, with the prospect of uncapped liability, would incentivize the parties to engage in wasteful and time-consuming litigation over difficult issues of duty and causation. The costs of delaying appellate review of this issue would thus likely be immense.

For all of these reasons, this Court should grant the petition for writ of mandate. Immediate appellate review would provide certainty for employers and employees on an important and particularly pertinent issue of state law.

Respectfully submitted,



Bradley J. Hamburger

Attorney for Amici Curiae
The Chamber of Commerce of the United States of America
The California Chamber of Commerce
California Workers’ Compensation Institute
Restaurant Law Center
California Restaurant Association
National Association of Manufacturers
National Retail Federation

PROOF OF SERVICE

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

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

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

On May 21, 2021, I served true copies of the following document(s) described as **APPLICATION FOR PERMISSION TO FILE AMICI CURIAE LETTER BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

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

Executed on May 21, 2021, at San Francisco, California.



Susanne Hoang

Document received by the CA 2nd District Court of Appeal.

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

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Hon. Daniel Crowley
Dept. 28
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Trial Judge Case No. 20STCV49673

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