No. S253702

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BETHANY MODISETTE ET. AL,

Plaintiffs and Appellants,

v.

APPLE INC.,

Defendant and Respondent.

After a Decision by The Court of Appeal
Sixth Appellate District, Case No. H044811
Santa Clara County Superior Court Case No. 16CV304364
The Honorable Theodore C. Zayner, Judge Presiding

DEFENDANT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs fail to identify any proper basis for this Court to review the Court of Appeal's unanimous decision that applied well-settled tort principles to the specific factual allegations of this case. Instead, failing to even cite rule 8.500(b)(1) of the California Rules of Court, plaintiffs make no attempt to, and indeed cannot, establish that review is "necessary to secure uniformity of decision or to settle an important question of law."

The Court of Appeal's decision does not break any new ground or otherwise warrant this Court's review. To the contrary, its holding echoes what courts in California and nationwide have consistently recognized: that product manufacturers are not liable for distracted driving accidents. (*Post*, p. 10 & fn. 4.) By contrast, plaintiffs "do not point . . . to a single case involving similar facts" to support their legal theory. (Slip opn., p. 22.) Review is therefore unnecessary to "secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

Nor is review necessary to "settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The duty and causation principles the Court of Appeal applied are well-established, and review is not warranted simply whenever a court applies these principles to a new set of facts. (See *Metcalf v. Cty. of San Joaquim* (2008) 42 Cal.4th 1121, 1129 [a "fact-specific issue does not present an issue worthy of review"].)

To reach its conclusion that Apple did not owe plaintiffs a duty of care, the Court of Appeal analyzed the factors set forth in this Court's precedents in *Rowland v. Christian* (1968) 69 Cal.2d 108, and *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, and concluded that those factors "weigh[ed] more strongly against a finding of duty" because "there was not a 'close' connection between Apple's conduct and the Modisettes' injuries," and because "the extent of the burden to [Apple] and the consequences to the community . . . would be too great if a duty were recognized." (Slip opn.,

pp. 8–9, internal quotation marks omitted.) Plaintiffs do not identify any reason for this Court to review these conclusions regarding duty. In fact, the three grounds offered in the Petition confirm the fact-bound nature of the Court of Appeal's duty ruling, ignore or misstate the court's ruling (which considered many of the specific arguments that plaintiffs now claim that the court ignored), and otherwise demonstrate why review is unnecessary. After extensive briefing and oral argument, the Court of Appeal carefully considered all of plaintiffs' contentions and rejected their attempt to dramatically expand tort law to impose a legal duty in these circumstances.

Nor have plaintiffs established any basis for reviewing the Court of Appeal's ruling on causation. Plaintiffs again misconstrue both the opinion and the law, and their arguments do not rebut the public policy considerations underlying the limitations on causation that the court properly recognized and correctly applied.

Finally, plaintiffs urge review of the fact-bound issue of whether the Superior Court abused its discretion in denying leave to amend, but they identify nothing in the Court of Appeal's opinion indicating that their new allegations would have affected its analysis.

Accordingly, the Court should deny the Petition.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Bethany, James, and Isabella Modisette are Texas residents who lost their young daughter and sister, Moriah, in a tragic car accident caused by Garrett Wilhelm when he collided into their vehicle on a highway in Denton County, Texas on December 24, 2014. (Slip opn., pp. 1–2.) Plaintiffs alleged that at the time of the accident, plaintiffs' vehicle had been stopped due to police activity, and Mr. Wilhelm collided into their vehicle while he was making a video call on his phone. (*Id.* at p. 2.) Plaintiffs were injured during the accident, and Moriah later died as a result of her injuries.

(*Ibid.*) In August 2015, Mr. Wilhelm was indicted for manslaughter, and his criminal trial is expected to begin on June 3, 2019. (*State of Texas v. Wilhelm* (Tex. 367th Jud. Dist. Ct., 2015, No. F15-1577-367) [Register of Actions].)

Plaintiffs filed their complaint in the Superior Court on December 23, 2016, asserting seven causes of action under California law (see, e.g., Respondent's Appendix ("RA") at p. 19): "general negligence," "gross negligence," "products liability – negligence," "products liability – strict," "negligent infliction of emotional distress," "intentional infliction of emotional distress," and "loss of consortium."[1] Plaintiffs' product liability claims are based on theories of defective design, manufacturing defect, and failure to warn. (RA32.) On January 20, 2017, plaintiffs amended their complaint to add an eighth cause of action for "public nuisance." (Appellants' Appendix ("AA") at p. 1.)

The Superior Court sustained Apple's demurrer to the first amended complaint and dismissed the action on May 8, 2017. (Slip opn., p. 4.) Following full briefing and oral argument, the Court of Appeal affirmed the dismissal. The court concluded that plaintiffs did not establish the duty and causation elements of their claims. First, the Court of Appeal carefully applied this Court's *Rowland* decision, and it determined that while certain factors favored a finding of a duty, other factors—including the closeness of the connection, the extent of the burden to Apple, and the public policy considerations—weighed more strongly against a finding of duty. (*Id.* at pp. 5–18.)

Second, the Court of Appeal held that Apple was not a proximate cause of plaintiffs' injuries because no "reasonable person would consider

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[1] Plaintiffs appeared to assert their claims under California law, even though the accident occurred in Texas. (Slip opn., pp. 1–2.)

Apple a cause of the accident," given the "tenuous connection" between Apple's conduct and their injuries. (*Id.* at pp. 19, 22.)

Finally, the court affirmed the denial of plaintiffs' request for leave to amend to plead new allegations regarding Apple's "Do Not Disturb While Driving" feature, because these allegations would not "render the connection between Apple's conduct and the Modisettes' injuries less remote" or "alleviate any of the policy concerns," and therefore would not change the conclusion that Apple is not liable for plaintiffs' injuries. (Slip opn., p. 24.)

Plaintiffs filed a petition for rehearing, which the Court of Appeal denied on January 9, 2019.

In parallel with the current action, plaintiffs' counsel also litigated a substantially similar products liability lawsuit, involving a different accident caused by another Texas distracted driver, in the U.S. federal courts in Texas. The U.S. District Court dismissed those claims in August 2017, and the U.S. Court of Appeals for the Fifth Circuit recently affirmed. (See *Meador v. Apple Inc.* (E.D.Tex., Aug. 17, 2017, No. 15-715) 2017 WL 3529577, affd. (5th Cir. 2018) 911 F.3d 260, rehg. den. Jan. 17, 2019.)[2]

ARGUMENT

Plaintiffs' Petition purports to enumerate the ways in which the Court of Appeal's "opinion erred" (e.g., Petn., p. 6), but these fact-based critiques

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[2] In addition to this action and *Meador*, there have been three other lawsuits filed in California courts that have attempted to impose legal liability on Apple (and other phone manufacturers) for actual or potential distracted driving accidents. Each of these lawsuits has been dismissed on the pleadings, and the one decision that was appealed has been affirmed by the Second Appellate District. (See *CADD v. Apple Inc.* (May 1, 2018, B278992) 2018 WL 2016665, review den. Aug. 15, 2018, No. S249149; see also *Riggs v. Apple Inc.* (Super. Ct. Santa Clara County, 2017, No. 17CV308219); *Ceja v. Apple Inc.* (Super. Ct. L.A. County, 2017, No. BC647057).)

offer no basis for this Court's review. Notably, plaintiffs do not even cite—much less attempt to apply—rule 8.500(b)(1) of the California Rules of Court, which specifies the grounds for review. As this Court has explained, review is "strict[ly] limit[ed]" to when review is necessary to "secur[e] uniformity of decision" or to "settl[e] . . . important questions of law." (*People v. Davis* (1905) 147 Cal. 346, 350; Cal. Rules of Court, rule 8.500(b)(1).)[3] Plaintiffs assert a host of supposed errors by the Court of Appeal—some premised on arguments raised for the first time in their Petition—but they fail to show why review is warranted under either ground. The Court of Appeal's opinion faithfully applies well-established legal principles to the specific factual allegations in this case. The Court should deny the Petition.

A. Review Is Unnecessary To Secure Uniformity Of Law Because No Conflict Exists

The Court of Appeal's holding—that Apple did not owe plaintiffs a duty of care, and that Apple's design of the iPhone was not a proximate cause of plaintiffs' injuries—is consistent with the holding of every other court to have addressed these and similar issues, both in California and across the nation. These courts have uniformly declined to hold device manufacturers liable for the acts of distracted drivers. (See *Ceja v. Apple Inc.* (Super. Ct. L.A. County, Oct. 11, 2017, No. BC647057) 2017 WL 5759675, at *3; *Riggs v. Apple Inc.* (Super. Ct. Santa Clara County, Aug. 24, 2017, No. 17CV308219) 2017 WL 4018064, at *3.)[4] As the Fifth Circuit

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[3] The other grounds for review in rule 8.500(b)(2)–(4) do not apply here.

[4] See also *Durkee v. C.H. Robinson Worldwide, Inc.* (W.D.N.C. 2011) 765 F.Supp.2d 742, 743, 749, affd. sub nom. *Durkee v. Geologic Sols., Inc.* (4th Cir. 2013) 502 F.App'x 326; *Meador v. Apple Inc.* (E.D.Tex., Aug 16, 2016, No. 15-715) 2016 WL 7665863, at *4, report and recommendation adopted (Aug. 17, 2017) 2017 WL 3529577, affd. (5th

concluded only days after the Court of Appeal issued its opinion in this case, in affirming the dismissal of another distracted driving case brought by plaintiffs' counsel against Apple, "no court in the country" had held "a smartphone manufacturer . . . liable for a user's torts," and "no authority indicates . . . that Texas courts, contemplating reasonable persons and ordinary minds, would . . . hold the phone's manufacturer responsible" based on "a person's induced responses to her phone." (*Meador v. Apple Inc.* (5th Cir. 2018) 911 F.3d 260, 265.)

Likewise, as the Court of Appeal observed, plaintiffs cannot identify "a single case involving similar facts" that conflicts with these rulings. (Slip opn., p. 22.) At most, they claim that the Court of Appeal "*misapplie[d]*" the duty and causation analysis (Petn., p. 18), but this Court does not grant review merely to second-guess how a court applied settled law to a particular set of factual allegations. (See *Metcalf*, *supra*, 42 Cal.4th at p. 1129 [a "fact-specific issue does not present an issue worthy of review"].) Review is therefore not needed "to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

B. Plaintiffs Identify No Important Or Unsettled Questions Warranting Review

Despite courts' uniform rejection of their arguments, plaintiffs nonetheless urge review because they claim the Court of Appeal erred when analyzing legal duty and causation. But the Court of Appeal's opinion demonstrates that it carefully reviewed plaintiffs' pleadings, properly "[a]ccept[ed] the Modisettes' non-conclusory allegations as true," and faithfully applied this Court's precedents to reach well-reasoned conclusions. (See Slip opn., p. 7.) This case does not present any "important" or

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Cir. 2018) 911 F.2d 260, rehg. den. Jan. 17, 2019; *Williams v. Cingular Wireless* (Ind.Ct.App. 2004) 809 N.E.2d 473, 479; *Estate of Doyle v. Sprint/Nextel Corp.* (Okla.Ct.App. 2010) 248 P.3d 947, 951.

"unsettled" questions of law that require this Court's review. (Cal. Rules of Court, rule 8.500(b)(1).)

1. *The Court Of Appeal Correctly Applied Well-Established Duty Principles To Conclude There Was No Legal Duty.*

The Court of Appeal analyzed this Court's precedents in *Rowland v. Christian*, *supra*, 69 Cal.2d 108, and *Kesner v. Superior Court*, *supra*, 1 Cal.5th 1132, and concluded that the factors identified in those decisions "weigh[ed] more strongly against a finding of duty" because "there was not a 'close' connection between Apple's conduct and the Modisettes' injuries" and "the extent of the burden to Apple and the consequences to the community . . . would be too great if a duty were recognized." (Slip opn., pp. 8–9.) Plaintiffs insist the Court of Appeal's analysis was incorrect for three principal reasons, but none of these contentions undermines the conclusion that there was no duty of care in this case:

a. The Court Of Appeal's Application Of The *Rowland* Factors Is Consistent With *Kesner* And This Court's Other Precedents. First, plaintiffs contend the Court of Appeal's *Rowland* analysis was erroneous because it "failed to consider . . . foreseeability in its 'closeness of connection' analysis." (Petn., p. 20.) This argument mistakenly equates "foreseeability" with legal duty, and ignores the "normative inquiry" that "supports finding an exception to the default duty of care." (Slip opn., p. 8.)

As this Court has repeatedly emphasized, "'foreseeability is not synonymous with duty; nor is it a substitute.'" (Slip opn., p. 8, quoting *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 364.) Thus, while there may be "'circumstances . . . in which a given injury may be 'foreseeable' in the fact-specific sense, . . . the 'foreseeability' examination called for under . . . [*Rowland*] is a very different normative inquiry.'" (Slip opn., p. 8, quoting *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476.) That is why this Court has identified other factors—including the closeness-of-

connection and public policy considerations—that limit "the otherwise potentially infinite liability which would follow from every negligent act." (*Kesner*, *supra*, 1 Cal.5th at p. 1143, internal quotation marks omitted.)

Those other considerations are particularly important here. The Court of Appeal carefully analyzed foreseeability, but it ultimately concluded that the closeness-of-connection and public policy factors weighed against a finding of a duty of care. (Slip opn., p. 18.) Far from being inconsistent with this Court's decisions, the Court of Appeal's conclusion is expressly contemplated by decisions recognizing that "policy considerations may dictate a cause of action should not be sanctioned *no matter how foreseeable the risk*." (*Parsons*, *supra*, at p. 476, internal quotation marks omitted.)

Plaintiffs nonetheless disagree with the Court of Appeal's analysis, arguing that it was inconsistent with this Court's analysis of duty in *Kesner* and *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40. In fact, both cases support the Court of Appeal's holding that Apple owed no duty here:

- *Kesner* held that an employer may have a duty to prevent an employee's household members from being exposed to asbestos, but this Court expressly distinguished employers or landowners from "[p]roduct liability defendants," whose duty "differ[s] significantly" because they "have no control over the movement of asbestos fibers once the products containing those fibers are sold." (*Supra*, 1 Cal.5th at p. 1162.) Plaintiffs argue that *Kesner* nevertheless dictates a finding of duty because Mr. "Wilhelm's conduct was derivative and closely connected to Apple's conduct" (Petn., p. 21), and *Kesner* reasoned that "[a]n employee's role as a vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the workplace" (*supra*, at p. 1148).

But plaintiffs' analogy fails, because Mr. Wilhelm was not a passive "vector." Instead, he made a deliberate choice to misuse his device while

driving in a way that has led to prosecution for criminal manslaughter. As the Court of Appeal observed, *Kesner* also "recognized the limits of the duty owed." (Slip opn., p. 10.) In particular, even if it was "foreseeable" that employees would "come into contact" with others and expose them to asbestos, the Court held that the employers' duty "extend[ed] only to members of a worker's household" because of "the need for a limitation on the scope of the duty." (*Kesner*, *supra*, 1 Cal.5th at pp. 1140, 1154.) The Court of Appeal thus faithfully applied *Kesner* when considering the limits to Apple's legal duty, notwithstanding whether Mr. Wilhelm's conduct was foreseeable in some abstract sense. (See Slip opn., p. 8 [distinguishing between foreseeability in a "fact-specific sense," and "the 'foreseeability' examination called for under a duty analysis pursuant to [*Rowland*]"], citing *Parsons*, *supra*, 15 Cal.4th at p. 476.)

- Nor does *Weirum* support review. (See Petn., p. 22.) Setting aside the fact that a Court of Appeal is not required to "discuss every case . . . raised by counsel" (*Lewis v. Sup. Ct.* (1999) 19 Cal.4th 1232, 1263),[5] *Weirum* is distinguishable for several reasons. The case involved a radio station contest that rewarded teen drivers for being the first to reach a disc jockey driving around the area. This conduct was *specifically designed* to "stimulate[]" reckless driving by creating a "competitive scramble" in which the station "intensified" the "thrill of the chase" through its live broadcasts of the automotive pursuit. (*Weirum*, *supra*, 15 Cal.3d at pp. 47–48.) Thus, as in *Kesner*, the defendant "directly put the plaintiffs in danger." (Slip opn., p. 10, citing *Kesner*, *supra*, 1 Cal.5th 1132, *Lugtu v. Cal. Highway Patrol* (2001) 26 Cal.4th 703.) Plaintiffs alleged no such conduct by Apple, nor can

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[5] Plaintiffs' complaint that "[t]he court of appeal . . . failed to address . . . *Weirum*" (Petn., p. 22) is unfounded, as plaintiffs only devoted a few lines to *Weirum* in their opening brief (see Appellants' Opening Brief ("AOB") at p. 26), and they did not cite the case at all in their Reply Brief.

they. At most, their allegations suggested that handheld devices are generally distracting to all users, but the possibility a driver could be distracted by his or her device falls far short of actively encouraging reckless driving.

b. The Court Of Appeal Thoroughly Considered Plaintiffs' Allegations And Did Not Rely On "Erroneous Assumptions." Next, plaintiffs claim that the Court of Appeal erred by "failing to acknowledge" certain allegations about "the level of distraction created for a driver by" an iPhone, instead making the "erroneous assumption[]" that "the iPhone (and smartphones generally) are an equivalent distraction to a 'map, a radio, a hot cup of coffee, or makeup.'" (Petn., pp. 22–23.) Plaintiffs also complain that the Court of Appeal misunderstood plaintiffs to be arguing that "there are no safe uses [of phones] while driving." (*Id.* at p. 24)

As an initial matter, these fact-specific arguments do not raise "an important question[] of law" that merits this Court's discretionary review. (*Davis*, *supra*, 147 Cal. at p. 350; Cal. Rules of Court, rule 8.500(b)(1); see also *Metcalf*, *supra*, 42 Cal.4th at p. 1129.) Plaintiffs' arguments are also unfounded, because the Court of Appeal specifically considered and "[a]ccept[ed] the Modisettes' non-conclusory allegations as true." (Slip opn., p. 7; see also *id*. at pp. 5, fn. 3, 17.) Plaintiffs incorrectly assume that the court "failed to acknowledge" an allegation if it was not cited in the opinion, but a decision need not "discuss every case or fact raised by counsel in support of the parties' positions." (*Lewis*, *supra*, 19 Cal.4th at p. 1263.)

Nothing in the Court of Appeal's analysis turned on whether phones are equivalent to other distractions. As the court observed, regardless of the type or level of distraction, liability only attaches when "the plaintiffs' harm was closely tied to the defendants' actions," such as when a defendant "directly put the plaintiffs in danger." (Slip opn., p. 10, citing *Kesner*, *supra*, 1 Cal.5th 1132, *Lugtu*, *supra*, 26 Cal.4th 703; see also Slip opn., p. 21, quoting *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 68 ["Legal

responsibility must be limited to those causes which are so close to the result . . . that the law is justified in making the defendant pay."].) And there were several other factors and conduct here—unrelated to the distraction—necessary for the injury to occur. Thus, regardless of the nature of the distraction—whether it is a map, a radio, a hot cup of coffee, or a phone—it was Mr. Wilhelm's conduct that "directly put the plaintiffs in danger." (Slip opn., p. 10; accord *Meador*, *supra*, 911 F.3d at p. 267 ["[T]he law . . . places the onus of distracted driving on the driver alone."].)[6]

Nor did the Court of Appeal err by supposedly failing to accept as true plaintiffs' allegations that the iPhone "could have been configured to 'allow or not allow certain applications deemed to be unsafe.'" (Petn., p. 24.) In fact, the court recognized that "cellular phones are safely used in many different contexts every day" (Slip opn., p. 16, internal quotation marks and alteration omitted), and it cited the California Legislature's "approval of certain cell-phone use by drivers" as embodied in multiple legislative enactments (*id.* at pp. 15–16, citing Veh. Code, §§ 23123, 23123.5). The court properly considered these safe and desirable uses when analyzing the *Rowland* public policy factors, noting that the issue involves "complex public policy considerations" that are best left to legislative determination, which the California Legislature is already doing. (Slip opn., p. 18; see also *Romito v. Red Plastic Co.* (1995) 38 Cal.App.4th 59, 67 ["Delineating the risks of

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[6] Plaintiffs argue that the Court of Appeal equated the iPhone to other driver distractions because it "fail[ed] to consider" that the National Highway Transportation Safety Administration's Phase 2 Guidelines "clearly expresses the close connection between the design of smartphones, driver distraction and crashes." (Petn., p. 23.) But plaintiffs are wrong both about the Court of Appeal's analysis (see *ante*, pp. 15–16) and about the NHTSA Report. The NHTSA Report also states that "'it remains the driver's responsibility to ensure the safe operation of the vehicle,'" and that the "proposed federal guidelines" were merely non-binding "recommendations." (Slip opn., pp. 3–4, quoting RA127.)

harm to be eliminated by . . . manufacturers is a function better suited to the Legislature than the judiciary."]; *Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 711 [finding "no reason to disturb this *carefully considered balance*," and explaining that some "matters [are] properly resolved on the other side of Tenth Street, in the halls of the Legislature," italics added].)

c. The Court Of Appeal Correctly Analyzed Duty At A "Higher Level Of Generality," As *Kesner* Requires. Plaintiffs also claim that the Court of Appeal "erroneously broadened the scope of duty alleged by the Modisettes[,] resulting in an erroneous legal conclusion." (Petn., p. 25.) In particular, they criticize the Court of Appeal for misunderstanding their argument as capturing all "cell phone" manufacturers, rather than only those "smartphone" manufacturers that have access to the technological capability to selectively prevent access to "overly distracting applications while driving at highway speed." (Petn., pp. 25–29.) This issue does not provide a basis for review for several reasons:

First, this argument is not a proper basis for review because plaintiffs waived it. Throughout the merits briefing, plaintiffs failed to define the scope of duty that they sought to impose, at times suggesting it was a duty to automatically lock out FaceTime while driving at highway speeds (see AOB14–15, quoting AA17), and at other times stating that the "Do Not Disturb While Driving Feature" was "*exactly the design 'fix' . . . necessary* for Apple to comply with its statutory duty" (AOB34, italics added)—even though "Do Not Disturb While Driving" is voluntary and not limited to the FaceTime app. It was not until oral argument and their Petition for Rehearing that plaintiffs sought to narrow their proposed duty. (See Petn. for Rehg. at pp. 14–15.) Having failed to timely define the scope of the duty they alleged, plaintiffs cannot belatedly argue that the Court of Appeal somehow improperly broadened the scope of the duty. (See, e.g., *Camsi IV v. Hunter Tech. Corp.* (1991) 230 Cal.App.3d 1525, 1542 ["[A] reviewing court need

not consider points raised for the first time on petition for rehearing."]; see Cal. Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal."].) And even though plaintiffs cite various snippets in their pleadings to support the narrow duty they now advocate (see Petn., p. 27), they "cannot reasonably [have] expect[ed] [the Court of Appeal] to search the record in order to find them" (*Whitby v. Rowell* (1890) 82 Cal. 635, 636).

Second, plaintiffs' argument that the Court of Appeal "erroneously broadened the scope of duty alleged" is contrary to this Court's instruction to analyze duty at a "higher level of generality." (*Kesner*, *supra*, 1 Cal.5th at p. 1158.) As plaintiffs would have it, the duty at issue would be "limited to Apple" based on the "express foreseeability and patent protection" they alleged in their complaint, which they assert would not apply to any other manufacturer. (Petn., p. 29.) But the *Rowland* factors should be "evaluated at a relatively broad level of factual generality," and not simply based "on the facts of the particular case before" the court. (*Kesner*, *supra*, at p. 1143.) Plaintiffs' insistence that the Court of Appeal should have artificially circumscribed the duty analysis therefore conflicts with this Court's instruction to consider whether "carving out an entire category of cases from th[e] general duty rule is justified by clear considerations of policy." (*Id.* at pp. 1143–1144.) The Court of Appeal did just that, noting the "undesirable consequences of allowing potential liability" on the public and other phone manufacturers. (*Id.* at p. 1150, internal quotation marks omitted.)

Third, plaintiffs suggest that the Court of Appeal misunderstood their duty as applying to all *cell*phone manufacturers, instead of only to *smart*phone manufacturers like Apple. (Petn., pp. 26–28.) As discussed above, plaintiffs waived this argument because they never drew this distinction between cellphones and smartphones until oral argument and their

Petition for Rehearing. (*Ante*, pp. 17–18.) Moreover, the distinction they now try to draw between cellphones and smartphones is contradicted by their own pleadings, which include phone-related distracted driving allegations that pertain to features of both cellphones in general, as well as smartphones in particular. (See, e.g., AA8 [discussing "[t]ext messaging"-related distractions]; RA51 [discussing distractions caused by "sending or receiving a text message with a hand-held phone"]; RA71, 74 [discussing studies analyzing "cell phone subtasks" like "text messaging and dialing"].) Plaintiffs do not explain why their proposed duty would not also implicate cellphone manufacturers.

Fourth, plaintiffs' argument that the opinion "ignores the Modisettes' allegation that Apple's invention was granted patent protection" (Petn., pp. 28–29) is wrong: The court expressly understood the alleged duty as encompassing only those "cell-phone manufacturer[s who] *ha[ve] available* the technology to disable use of the phone while the user is driving." (Slip opn., p. 18, italics added.) Thus, plaintiffs' argument about Apple's patent is irrelevant.

2. *Settled Principles Of Proximate Causation Support The Court Of Appeal's Conclusion.*

Plaintiffs also fail to identify any basis to review the Court of Appeal's holding that Apple was not a proximate cause of plaintiffs' injuries, which independently supported the judgment. Plaintiffs contest this holding on three grounds, none of which warrants review.

First, plaintiffs insist that "[i]f the full range of Apple's conduct as alleged and accepted as true is actually considered, a jury could reasonably conclude that Apple's conduct was [a] proximate cause of the Modisettes' injuries, thus making it a question of fact for a jury." (Petn., p. 30.) But as plaintiffs acknowledge, the question of proximate causation is "one of law, not of fact," when "the only reasonable conclusion is an absence of

causation." (Petn., p. 30, citing *State Dept. of State Hospitals v. Sup. Ct.* (2015) 61 Cal.4th 339, 353.) Here, the Court of Appeal expressly "[a]ccepted the Modisettes' non-conclusory allegations as true," and held that no "reasonable person would consider Apple a cause of the accident." (Slip opn., pp. 7, 22.) And while plaintiffs assert in a conclusory fashion that a jury could reasonably conclude that Apple was a proximate cause of their injuries, plaintiffs "do not point . . . to a single case involving similar facts" supporting that contention. (*Id*. at p. 22.) To the contrary, *every* court to have considered liability for distracted driving accidents has reached the same result that the Court of Appeal reached: that the legal liability rests on the driver alone. (See *ante*, pp. 10–11; *Meador*, *supra*, 911 F.3d at p. 265 ["[N]o court in the country has yet held that" "a smartphone manufacturer should be liable for a user's torts" and "numerous courts have declined to do so."].)

Second, plaintiffs argue that the Court of Appeal's causation analysis was erroneous because it "d[id] not take into account the foreseeability of Wilhelm's conduct and Apple's conditioning of Wilhelm to engage in this conduct." (Petn., p. 31.) This argument fundamentally misunderstands the decision, which obviously *did* consider and analyze foreseeability, but nevertheless concluded that the judgment should be affirmed because the other factors would not make it "just to hold [Apple] liable" here. (Slip opn., p. 22.)

Plaintiffs ignore that under California law, mere foreseeability is *not* sufficient to establish proximate causation. As this Court has explained, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 668.) As with legal duty (see *ante*, pp. 12–13), proximate causation also requires the court to weigh the

"'various considerations of policy that limit an actor's responsibility for the consequences of his conduct.'" (*PPG Indus., Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 316; see also *Kumaraperu*, *supra*, 237 Cal.App.4th at p. 68 ["As a matter of practical necessity, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay."]; Rest., Torts, § 431, com. a [factor is a proximate cause of injury when it "has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility"].) Applying these well-established principles, the Court of Appeal correctly determined based on public policy considerations that that "the gap between Apple's design of the iPhone and the Modisettes' injuries is too great for the tort system to hold Apple responsible." (Slip opn., p. 23.)

Third, plaintiffs urge review because the Court of Appeal did not "consider[] . . . the derivative nature of Wilhelm's conduct to the conduct of Apple and its iPhone." (Petn., p. 32.) Although plaintiffs alleged that "Wilhelm's conduct . . . is . . . derivative of APPLE INC.'s conduct" (AA17), that averment is simply a "contention[], deduction[], or conclusion[] of fact or law" that is not assumed to be true on demurrer. (*Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 125; see also Slip opn., p. 17, fn. 12.) Plaintiffs' argument about the derivative nature of Mr. Wilhelm's conduct also does not alter the Court of Appeal's finding that "Wilhelm caused the Modisettes' injuries when he crashed into their car while he willingly diverted his attention from the highway." (Slip opn., p. 21.) As the court reasoned, Apple's conduct was simply a "necessary antecedent" that "did nothing more than create the condition that made Plaintiffs' injuries possible," not unlike "the police activity that slowed traffic on the interstate that day." (*Ibid.*) Thus, even if Mr. Wilhelm's distraction derived from his

iPhone, plaintiffs' "injuries were not a result of Apple's conduct" in manufacturing the iPhone. (*Ibid*.)

3. *Plaintiffs' Request For Leave To Amend Does Not Present Any Unsettled Issue For Review.*

Finally, the Court need not consider plaintiffs' final, highly fact-bound issue for review—the alleged error by the Court of Appeal in affirming the Superior Court's discretionary decision to deny further leave to amend to add new allegations regarding Apple's "Do Not Disturb While Driving" feature. (See Petn., pp. 32–33.) As the court observed, leave to amend would have been futile because the feature "does not render the connection between Apple's conduct and the Modisettes' injuries less remote, nor does it alleviate any of the policy concerns" discussed in the opinion. (Slip opn., p. 24.)

Plaintiffs nonetheless argue that the "Do Not Disturb While Driving" feature is "relevant to the 'burden on defendant' *Rowland* factor," and thus "certainly [would] have a material affect [*sic*] on a properly considered duty analysis under *Kesner*." (Petn., p. 33.) As with many of their other contentions, plaintiffs' argument is untimely because they did not raise it until their Petition for Rehearing. (See *Camsi IV*, *supra*, 230 Cal.App.3d at p. 1542; Cal. Rules of Court, rule 8.500(c)(1).) And the Court of Appeal already considered plaintiffs' allegation that "Apple had the technology to automatically prevent drivers from utilizing FaceTime while driving when it manufactured the iPhone 6 Plus," and it never identified the need to invent this technology as one of the burdens on Apple or the community that were dispositive when analyzing that *Rowland* factor. (Slip opn., p. 24.) Amending the complaint to include allegations about the "Do Not Disturb While Driving" feature would have been futile, and the Court of Appeal correctly held that the Superior Court did not abuse its discretion in denying leave to amend.

CONCLUSION

The Court of Appeal's decision joins the unbroken line of cases rejecting attempts to expand tort liability for distracted driving accidents. In reaching this conclusion, the decision below carefully applied well-established legal principles to plaintiffs' allegations, and the Petition does not raise any important or unsettled question of law that would warrant this Court's review.

Apple respectfully requests that the Court deny the Petition.

DATED: February 12, 2019

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 

Christopher Chorba

Attorneys for Defendant and Respondent Apple Inc.

CERTIFICATE OF WORD COUNT

Pursuant Rule 8.504(d)(1) of the California Rules of Court, the undersigned hereby certifies that this Defendant's Answer to Petition for Review contains 5,570 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

DATED: February 12, 2019

Christopher Chorba

PROOF OF SERVICE

I, Lia Vanatta, declare as follows:

I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years and not a party to this action. My business address is 1881 Page Mill Road, Palo Alto, California 94304, in said County and State. On February 12, 2019, I served the following document:

DEFENDANT'S ANSWER TO PETITION FOR REVIEW

on the parties stated below, by the following means of service:

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☑ **BY ELECTRONIC SERVICE**: I caused a true and correct copy of the above-titled document to be electronically served on the interested parties to this action at their email addresses listed above.

Supreme Court of California 350 McAllister Street San Francisco, CA 94102	*By Overnight Delivery (FedEx)*

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

Executed on February 12, 2019, at Palo Alto, California.

Lia Vanatta