Case No. S284303

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TY WHITEHEAD,
*Plaintiff and Appellant,*
*v.*
CITY OF OAKLAND,
*Defendant and Respondent.*

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## [PROPOSED] AMICUS BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, COUNTY ENGINEERS ASSOCIATION OF CALIFORNIA, CALFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES AND PUBLIC RISK INNOVATION SOLUTIONS AND MANAGEMENT IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF OAKLAND

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On Review of the Court of Appeal of California
First District, Division Three
No. A164483

Superior Court of California
Alameda County
No. RG18896233
Hon. Richard Seabolt

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## Table of Contents

## Table of Authorities

### Federal Cases



### State Cases

**State Statutes**

**Other**

## Introduction

Maintaining roadways in a manner that would eliminate road hazards for long-distance group cycling events is a practical impossibility, given limited available tax funding. The member jurisdictions of amici California State Association of Counties (CSAC) and League of California Cities (Cal Cities) are responsible for maintaining over 85% of the State's roadways, over 144,530 centerline miles of roads[1]. Over 20% of these roads are in poor condition. There is a chronic underfunding of local road maintenance needs in the State. Approximately 70 billion dollars[2] would be necessary to improve all roads to good condition over the next 10 years. The roads in poor condition would only be remediated if the shortfall was fully funded.

In 2024 there were approximately 109 privately organized long-distance bicycle riding events conducted on public roads throughout California[3]. Many, like the AIDS LifeCycle event, are

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[1] P. 6, California Statewide Local Streets and Roads Needs Assessment, Final Report, April 2023, NCE, Point Richmond, CA, available at Statewide-Needs-2022-FINAL.pdf (savecaliforniastreets.org) accessed August 23, 2024. Amici CSAC, Cal Cities, and County Engineers Association of California (CEAC) are among the sponsors, and staff of those organizations provided oversight for the study. *Ibid*., p. 9 – 10.

[2] *Ibid.,* p. 65.

[3] Including the Bay Ride 2024, the California Coast Classic Bike Tour, the Beach City Double/Century/Metric, the Tour de Summer Camps, Bike the Bridges, FCC Bass Lake Powerhouse Double Century, Asti Tour de Vine 2024, Riverside Citrus Classic 2024, Tour de Lincoln 2024, Back to You Bike Ride, Cycle of Hope, Victor Valley Bicycle Tour 2024, Ride the Point, 2025 Granfondo San Diego, Tour de Big Bear 2025 listed on Bike Rides in California: Cycling Events Calendar 2024 & 2025, accessed August 23, 2024. See also, Bike Around the Buttes

charitable fund-raisers. Commonly, assumption of risk and waivers of liability agreements are required to register to participate in these events. The agreements frequently include releases of the public agencies responsible for the roads over which the events are conducted[4]. Organized long-distance bicycle rides on public highways appropriated for use by private entities involve physical exertion and athletic risks done for enjoyment and a physical challenge involve an extreme test of the participant's physical and mental limits with the potential for death or serious injuries not generally associated with ordinary individual bicycle riding on public streets or on bicycle lanes or paths.

Increased liability exposure resulting from unenforceability by public entities of releases and liability waivers obtained by organizers of privately sponsored long-distance recreational group bicycle rides on public roads, involving only a small self-selecting set of participants who expressly assume the risk of pavement defects, would inevitably significantly diminish already inadequate resources available for road maintenance. Local public agencies are almost universally self-insured for tort liabilities (Gov. Code § 990). Actuarially reviewed loss reserve retentions are maintained on the balance sheets of public agency general funds to cover potential claims. (Gov. Code § 990.4 (a).)

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Bike around the Buttes (Sutter County), Tour of the Unknown Coast https://tuccycle.org (Humboldt County).

[4] E.g. https://tuccycle.org/wp-content/uploads/Waiver.pdf. Last accessed Dec. 16, 2024, and waiver quoted in *Spence v. United States* (E.D. Ca 2009) 629 F.Supp.2d 1068, 1075.

Excess liability coverage is most often provided by risk pooling Joint Powers Authorities (Gov. Code § 990.8, §§ 6500, et seq.)[5]. Funds paid out or set aside as loss reserves or expended as experience-rated premiums for excess liability coverage for personal injury claims by participants in privately organized long-distance bicycling events are not available for road maintenance that would benefit *all* road users[6].

Legislatively expressed public policy supports waiver of public entity liability for injuries incurred while engaged in hazardous recreational activities (Gov. Code § 831.7) and where the practicability and cost of protecting against the risk of injuries exceed limited manpower and budgets. (Gov. Code § 835.4.) For the reasons set forth in greater detail below, third-party assumption of risk and waivers of liability that include public agencies as among the parties released obtained by organizers of long-distance group bicycling events should continue to be enforced.

**Summary of Facts**

On March 25, 2017, Ty Whitehead participated in an organized 65.9-mile bicycle training ride. The route selected by

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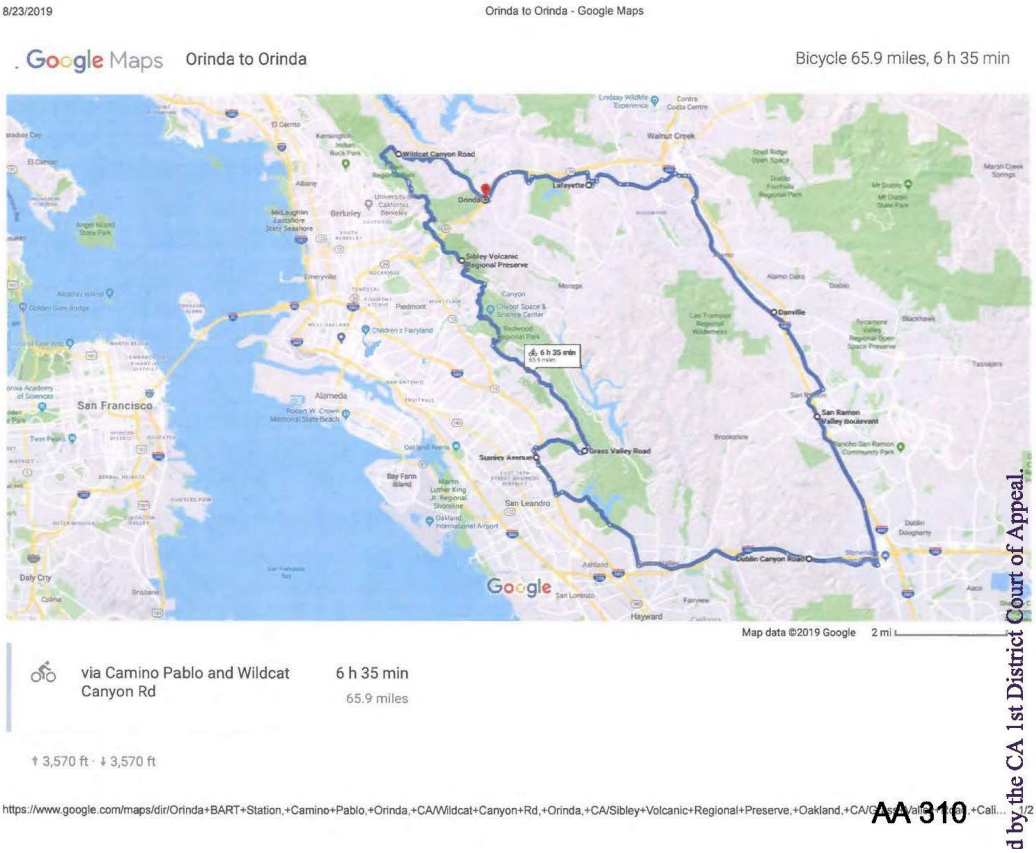
[5] Amicus California Joint Powers Association (CAJPA) is an association of public sector risk-pooling JPAs. Amicus Public Risk Innovation Solutions and Management (PRISM) is a JPA that provides services, support and excess liability coverage to public agencies, as described at greater length in the Application to File Amicus Brief filed herewith.

[6] *Sacramento Bee*, "Sacramento didn't invest much in road safety. It paid $21 million for car crash lawsuits," Ariane Lange, December 02, 2024, Read more at: https://www.sacbee.com/news/local/article295221134.html#storylink=cpy.

ALC organizers would traverse local roads maintained by twelve different jurisdictions including the City of Oakland[7]. The ALC organizers and training ride leaders did not inspect the route for road conditions prior to the ride that day but warned that there may be potholes or other road hazards due to recent rainy weather. (Vol 1, AA 151.)

Before beginning the ride, Whitehead signed the General Information and Release and Waiver of Liability, Assumption of




[7] The route included the City of Orinda, unincorporated portions of Contra Costa County in part within the East Bay Park District, the City of Berkeley, the City of Oakland, the City of San Leandro, unincorporated portions of Alameda County (Castro Valley), the City of San Ramon, the City of Danville, unincorporated portions of Contra Costa County (Alamo), the City of Walnut Creek, unincorporated portions of Contra Costa County (Saranap), and the City of Lafayette. (Vol. 1 AA 148 – 150, Wedgwood deposition; Also see map at Vol. 2, AA 310, reproduced above).

Risk, and Indemnity Agreement (ALC Release) prepared by ALC, at issue in this matter (Vol. 7 AA 1325 – 1326)[8]. None of the jurisdictions responsible for the roads on the route were consulted about the route selected, or the terms of the ALC Release. None issued permits authorizing the ride, promoted or charged fees for the event. (Vol. 7 AA 1312 – 1313).

The ALC Release expressly defined the "Event" as including training rides leading up to the seven-day ride from San Francisco to Los Angeles. The ALC Release also included a waiver and release provision:

> **WAIVER AND RELEASE**. To the maximum extent permitted by law, I hereby release, waive, forever discharge and covenant not to sue the Releasees .... from all liabilities, claims, costs, expenses, damages, losses and obligations, of any kind or nature ... which may arise or result (either directly or indirectly) from my participation in the Event.

The release went on:

> For the avoidance of doubt, the Released Liabilities include all bodily injury ... I may suffer which arises or results (either directly or indirectly) from my participation in the Event, including through any negligence of the Releasees.

As relevant here, the release defined "Releasees" as including

> (B) *the owners/lessors of the course or facilities used in the Event. Including, but not limited to* the (i) State of California; (ii) – (iv) cities and counties [listing local

[8] Exculpation agreements may take the form of express assumption of risk or advance waiver of liability agreements, or be a combination, as with the ALC Release. (*Coates v. Newhall Land & Farming* (1987) 191 Cal.App.3d 1, 7; *R.H. v. Los Gatos Union Sch. Dist.* (N.D. Ca 2014) 33 F.Supp.3d 1138, 1166.

jurisdictions along the route of the 545-mi. ride from San Francisco to Los Angeles.] (Italics added.)

About twenty-one miles into his ride, while slaloming down across the width of the single downhill lane of a long straightaway on Skyline Boulevard in the City of Oakland at a speed of between 15 and 30-mph, Whitehead hit a 8" x 8" x 18" triangular 1" deep pothole in the left 1/3 of the single, shoulder-less traffic lane approximately 4 feet from the center double yellow centerline (Vol. 1 AA 93, AA 126; Vol 10 AA 1829, line 22). He was thrown from his bike, landing on the back of his helmeted head, incurring serious injuries.

## Law and Argument

## I. CIVIL CODE SECTION 1668 DOES NOT APPLY TO PUBLIC ENTITY LIABILITY FOR A DANGEROUS CONDITION OF PUBLIC PROPERTY PURSUANT TO GOVERNMENT CODE SECTION 835 (b).

### A. Review of Government Claims Act Provisions for Public Entity Liability for Dangerous Condition of Public Property.

Since 1963, public entity premises liability applicable to all types of governmental entities is codified largely in its current form in Government Code sections 830 - 840.6. (SB 42 (Cobey) Stats. 1963, ch. 1681, Section 1. Part 2, Chapter 2 entitled Dangerous Conditions of Public Property)[9]. The revised provisions are significantly more nuanced, but retain the element of the prior statutory formulation for liability only after notice under the Public Liability Act of 1923 in Section 835 (b).

Section 830 provides:

> As used in this chapter:
> (a) "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.
> (b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.
> (c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by

[9] Appellant Whitehead's description of the Government Claims Act in his supplemental brief filed December 10, 2024 is limited to a reference to § 835, without discussion of the requirement of notice under § 835 (b) and § 835.2 or the immunities available under § 835.4 and § 831.7.

> the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

The basis for liability set forth in Sections 835 – 835.4 differs from common law ordinary negligence (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 [action under section 835 is not an ordinary negligence case]; *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130 [basis for public liability under section 835 (b) is "notice" and employee "negligence" under 835 (a)].)[10]

> 835. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Under subsection (b) the element of notice is critical. As the Law Revision Commission comment[11] makes clear,

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[10] Following dismissal of Whitehead's second cause of action for employee negligence, the action is exclusively grounded on Gov. Code § 835 (b).

[11] State of California, Law Revision Commission 1964 Annual Report, (Dec. 1963), Appendix II, Special Report by Senate Committee on Senate Bill No. 42, pp. 232 - 233

Subdivision (b) declares the traditional basis for holding an entity liable for a dangerous condition of property: failure to protect against the hazard after notice. Unlike the 1923 Act, this section does not leave the question of notice to judicial construction. The requisite conditions for notice are stated in Section 835.2.

* * *

Liability does not necessarily exist if the evidentiary requirements of this section are met. Even if the elements stated in the statute are established, a public entity may avoid liability if it shows that it acted reasonably in the light of the practicability and cost of pursuing alternative courses of action available to it. In addition to the defenses available to public entities under Section 835.4, a public entity also may use any other defense-such as contributory negligence or assumption of the risk-that is available under subdivision (b) of Section 815 to avoid liability under this section.

Notice is governed by section 835.2:

(a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
(b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:
(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection

> weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.
> (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

As the Law Revision Commission Report[12] makes clear:

> Where the dangerous condition has not been created by the negligent or wrongful act of an employee of the entity, the entity should be liable only if it acts unreasonably in failing after notice to repair the condition or otherwise to protect persons against the risk of injury. (p. 824)
>
> A public entity should not be charged with notice of a dangerous condition of its property if the condition and its dangerous nature would not have been revealed by a reasonable inspection system. (p. 825)
>
> The proposed legislation makes it clear that public entities are not chargeable with notice if they establish either that reasonable inspections would not have revealed the dangerous condition or that they made reasonable and careful inspections of their property and did not discover the dangerous condition. (Law Rev Comm Rpt. p. 825)

There is no evidence in the record below that the City of Oakland had actual notice of the existence of the pothole that

[12] California Law Revision Commission Recommendation Relating to Sovereign Immunity, Number 1 – Tort Liability of Public Entities and Public Employees (Jan. 1963) 4 Cal. Law Revision Com. Rep. (1963).

was involved in Whitehead's accident. Initially it is the plaintiff's burden to establish that a reasonably adequate inspection system should have discovered the dangerous condition. See, e.g. *Maksimow v. City of South Lake Tahoe* (3rd Dist. 2024) 106 Cal.App. 5th 514 (summary judgment affirmed in slip and fall case caused by ice on city parking lot when insufficient evidence of actual or constructive notice of whether accumulated snow and ice in the parking lot existed for such a period that the city could have discovered them and their dangerous character.)

If this Court holds that the ALC Waiver is not enforceable by Oakland, trial on remand would center on the disputed expert testimony regarding whether the prior existence of alligator cracking of pavement on Skyline Boulevard provided adequate notice of the potential emergence of the pothole to impart constructive notice sufficient to establish Oakland's liability[13]. Trial would also provide the opportunity for Oakland to assert the statutory affirmative defenses outlined below.

[13] The trial court ruled on Oakland initial summary judgment motion that conflicting expert testimony whether, "seriously deteriorated or even 'failed' pavement conditions imparted constructive notice of a dangerous condition (the 'pothole-to-be')" was sufficient to defeat summary judgment. (Order dated March 26, 2021, Vol 4. AA-736 – 743) Oakland sought a writ challenging the trial court's ruling on the basis that the evidence of Oakland's actual or constructive notice of the existence of the "pothole-to-be" was insufficient as a matter of law. The petition was denied by the Court of Appeal. (1st Appellate District, Div. 3, Case No. A162482, Docket https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2346926&doc_no=A162482&request_token=NiIwLSEnXkg%2BW1BZSCNNUExIQDg6UVxfJSI%2BVzJTUCAgCg%3D%3D accessed Nov. 23, 2024.)

The 1963 Government Claims Act created an entirely new affirmative defense for public agencies -- Section 835.4. It reiterates the balancing test found in section 835.2 (b) of considering the cost and practicality of measures to protect against the risk of injury weighed against the probability and gravity of potential injuries.

> 835.4. (a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.
> (b) A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

The California Law Revision Commission Comment to Section 835.4 states:

> Under this section, a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been

> too costly and impractical for the public entity to have done anything else.
> This defense has been provided public entities in recognition that, despite limited manpower and budgets, there is much that they are required to do. Unlike private enterprise, a public entity often cannot weigh the advantage of engaging in an activity against the cost and decide not to engage in it. Government cannot "go out of the business" of governing. Therefore, a public entity should not be liable for injuries caused by a dangerous condition if it is able to show that under all the circumstances, including the alternative courses of action available to it and the practicability and cost of pursuing such alternatives, its action in creating or failing to remedy the condition was not unreasonable. No similar defense is provided to public entities by the Public Liability Act of 1923.
> In addition to the defense specified here, the defenses normally available to private litigants—contributory negligence and assumption of the risk—are available to the public entity under subdivision (b) of Section 815.

Citing the Law Revision Comment in *Metcalf v. County of San Joaquin, supra,* 42 Cal. 4th 1121 at 1138 this Court explained, "public entities may also defend against liability on the basis that, because of financial or political constraints, the public entity may not be able to accomplish what reasonably would be expected of a private entity."

In 1983 the Legislature added a new immunity for public entity or public employee potential liability to participants in hazardous recreational activities that occur on public property. (AB 555 (Campbell), Stats. 1983, ch. 863, filed Sept. 16, 1983, Sec. 1, adding Gov. Code § 831.7), which currently reads:

> (a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, . . . who knew or reasonably

> should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk . . . for any damage or injury to property or persons arising out of that hazardous recreational activity.

Hazardous recreational activity is defined in subdivision (b) as,

> a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant risk of injury to a participant or a spectator.

Subdivision (b) goes on to include a long non-exclusive list of specific examples of activities for which immunity may apply, amended from time to time to list more specific examples, including bicycle racing or jumping, bicycle motocross, and mountain bicycling, the latter of which does not include riding a bicycle on paved pathways, roadways or sidewalks. The issue of whether a plaintiff was engaged in a "recreational hazardous activity" not specifically identified in the statute where there is no dispute as to facts is a question of law for appellate courts. (*Yarber v. Oakland Unified School Dist.* (1992) 4 Cal.App.4th 1516, 1519 [adult pickup basketball game in school gymnasium is a hazardous recreational activity]; *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 476 [gymnast injured during school-sponsored extracurricular activity not a recreational hazardous activity]; *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300, 1306 – 1307 [college student participation in intramural soccer game is hazardous recreational activity], overruled in part by *Avila v. Citrus*

*Community College Dist.* (2006) 38 Cal.4th 148, 160, fn. 5; *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 634 [disapproves suggestion that section 831.7 always immunizes universities against liability for injuries of adult student-athletes].

Subdivision (c)(1) lists five exceptions to liability limitation, none of which are relevant under the facts of this case. Subdivision (c)(2) states, "Nothing in this subdivision creates a duty of care or basis of liability for personal injury or damage to personal property."

Subdivision (d) clarifies that the immunity of section 831.7 does not apply to private organizations, such as ALC, operating hazardous recreational activities on public property. Private organizations would therefore need to rely upon participants signing an assumption of risk and advance release of liability agreement for their protection.

### B. *Tunkl* Does Not Apply to Government Code section 835 (b) Claims.

Whitehead now apparently concedes that any liability on the part of Oakland must be established under the Government Claims Act provisions regarding the Dangerous Condition of Public Property, Government Code section 835, not common law negligence. He argues that the ALC Release is therefore invalid as a violation of statutory law under Civil Code section 1668, irrespective of the public interest analysis under *Tunkl v. Regents of University of Cal.* (1963) 60 Cal.2d 92 (Whitehead's Supplemental Opening Brief on the Merits, Dec. 10, 2024). It is unclear whether Whitehead is abandoning the prior argument in

his Opening and Reply briefs exclusively predicated on *Tunkl,* or his supplemental brief is to be considered in the alternative. In an abundance of caution, the applicability of *Tunkl* to invalidate releases for liability arising from participation in hazardous recreational activities including organized long-distance bicycle rides will be addressed here.

*Tunkl* interprets Civil Code section 1668 to invalidate a patient waiver of liability for common law negligence by hospital employees obtained as a condition of admission for treatment. *Tunkl* established a six-part test to determine whether otherwise valid contractual exculpation agreements were in violation of the public interest, and therefore unenforceable. *Tunkl* was decided before the comprehensive reform of government tort liability with the adoption of Chapter 1681, Statutes of 1963, Government Code §§ 810, *et seq*. The reported cases under *Tunkl* all address liability under ordinary negligence liability principles, not under the distinct requirements for government liability for the dangerous condition of public property set forth in the Government Claims Act as outlined in Section I. A. of this brief.

The parties' arguments concerning the applicability of each element of the six-part public interest test under *Tunkl* are addressed in detail in their initial briefs and will not be repeated here. The primary question in the briefs revolved around whether the *Tunkl* analysis applies to the transaction in which the release is given, or the service being provided by the party seeking to enforce the release. Oakland relies upon the many cases holding that releases given as a condition of voluntary participation

recreational activities do not affect the public interest. (Oakland's Answer Brief, pp. 33 – 44).

Oakland's obligation for road maintenance is neither contractual -- transactional on the city's part -- nor does it involve a "service," as Whitehead urges, that Oakland is free to provide or not. It is instead a basic duty of government. (Sts & Hy Code §§ 27, 29.) The provision of roads has been a fundamental governmental function since at least Roman times. There is no debate that the condition of roads is a matter of great public importance and high public interest. However, the government is not an insurer of the safety of travelers on its streets. (*George v. Los Angeles* (1938) 11 Cal.2d 303, 308 [citing the predecessor statute, the Public Liability Act of 1923]; *accord*, *Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 518 [citing current law]). The duty imposed by Government Code section 835 is to exercise ordinary care to maintain streets in a reasonably safe condition for their use in a proper manner once accepted into the city street system. (Sts & Hy Code § 1806.) Counties are likewise responsible for maintenance of roads accepted into the county road system. (Sts & Hy Code § 941 (a)). Public agencies are obligated to repair dangerous conditions of streets and roads only within a reasonable time after actual or constructive notice of the existence of the danger prior to the occurrence of the injury – an essential qualification that Whitehead completely glosses over.

The ALC Release does not absolve or relieve Oakland, or the other public entities named in it, from their responsibility to safely maintain roads for *general use* (including individual casual

bicycle recreational use or bike commuters) -- only for participants in ALC events. Section 835 (b) will hold public entities liable for resulting injuries from failure to repair road hazards within a reasonable time after notice, when no recreational sport related waiver has been signed. (Oakland Answer Brief, pp 59 - 62). There is no anomaly in the distinction, as argued by Whitehead in his Opening Brief, pp. 28 - 31. ALC event participants have expressly assumed the risk and waived liability for injuries that they may incur due to pavement defects, whether or not previously known to the public entities responsible for road maintenance on the route. Members of the general public have not.

Whitehead's claims are not based on ordinary negligence. Oakland did not enter into any sort of transaction with Whitehead. Oakland has no discretion to offer or withhold a service for road maintenance. *Tunkl* is simply inapposite.

### C. Liability Under Section 835 (b) Is Not a Violation of Law, the Waiver of Which Is Proscribed by Civil Code Section 1668 or 3513.

Civil Code section 1668's proscription is against contracts that exempt anyone from responsibility for a violation of law. Similarly, Civil Code section 3513 provides, "a law established for a public reason cannot be contravened by a private agreement." Both statutes were enacted in 1872 and are derived from the Field's Draft New York Civil Code. Both are inapplicable to the Government Claims Act provisions providing for public entity liability for the dangerous condition of public property (Gov. Code §§ 830–840.6) as explained below.

The Government Claims Act establishes an exemption from general governmental immunity (Gov. Code § 815), a high bar for liability requiring notice and specific immunities for public entities that are not available to private individuals or entities. These sections are *sui generis*. They are not primarily public safety statutes but exist to establish public entity liability to injured individuals, balanced against limited government resources.

The provisions for public entity liability for the dangerous condition of public property are contingent and complex, providing multiple immunities as befits the competing public policy interests that the Legislature chose to balance in its adoption of comprehensive reform in 1963. (Law Revision Commission Report No. 1, pp. 824 – 825, quoted at p. 17, *supra*.) A subsequent amendment in 1983 specifically addressed governmental immunity for injuries resulting from hazardous recreational activities conducted on public property. Taken together, the provisions of Government Code section 830–840.6 are consistent with enforcement of the ALC Release, as explained in Point II, *infra,* such that the policy of Civil Code sections 1668 and 3513 does not apply.

The multiple policy considerations incorporated in the Government Claims Act is not reducible to a straightforward statutory or regulatory public health or safety measure, like swimming pool regulations (*Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078), or Medi-Cal managed care statutes and regulations (*Health Net of California, Inc. v.*

*Department of Health Services* (2003) 113 Cal.App.4th 224.), the liability for which were found to be proscribed by section 1668. The court in *Capri* found violation of pool public health and safety statutes and a local ordinance as negligence *per se*, and therefore a waiver of liability in the health club agreement was ineffective to a slip and fall injury due to algae accumulation causing a slippery pool deck under Civil Code section 1668, independent of the public interest analysis under *Tunkl.* In *Health Net* the agreement between two health plans and the California Department of Health Services (DHS) for managed care services to Medi-Cal patients limited the parties to equitable relief and barred recovery of contract damages for any violation of law not expressly incorporated into the contract. DHS sought to invoke this clause to exculpate it from liability for damages for a violation of the applicable statutory law and implementing regulations that were not incorporated into the contract. The court held that this provision violated Civil Code section 1668, even if the *Tunkl* public interest test did not apply.

Although Civil Code section 3513 provides that laws established for a public reason cannot be contravened by private agreements, the doctrine of waiver is generally applicable to all the rights and privileges to which a person is legally entitled, including those conferred by statute unless otherwise prohibited by specific statutory provisions. (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 41.) To determine whether Government Code section 835 (b) bars the application of the waiver doctrine, a court must evaluate (1) whether the

statute is for the benefit of an individual or is instead for a public purpose, and (2) whether there is any language in the Government Claims Act prohibiting a waiver. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048-1049 [holding the timelines specified in the Permit Streamlining Act were subject to waiver by the applicant] superseded by statute as stated in *Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842, 852.)

It would appear self-evident that the Government Claims Act primarily benefits individual injured parties rather than the public at large, which must bear liability if the requisite elements are established. The public at large may benefit incidentally to the extent that public entities are incentivized to repair dangerous conditions of roads and other public property after notice and as soon as reasonable, given limited resources, less those resources spent on payment of claims. Nowhere in the Government Claims Act is a prohibition against waiver to be found. To the contrary, the Act explicitly retains all defenses for public entities that are available to private parties. (Gov. Code § 815 (b).) An assumption of risk and waiver of liability agreement is one such defense. Therefore, neither Civil Code section 1668 nor 3513 prohibits enforcement of the ALC Release.

## II. MULTIPLE PUBLIC POLICY CONSIDERATIONS SUPPORT ENFORCEMENT OF THE ALC RELEASE IN FAVOR OF OAKLAND.

Even if Civil Code section 1668 doesn't apply under the facts of this case so as to invalidate the ALC Release as argued above, this Court has determined that public policy considerations apart

from the public interest test enunciated in *Tunkl* narrow the enforceability of recreational activity liability waivers to ordinary negligence. In *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750 fn 1, this Court left undisturbed the conclusion of the Court of Appeal that the recreational activity waiver in that case was an effective bar to claims for ordinary negligence by a public employee (Gov. Code § 820) and the vicarious liability of her public entity employer (Gov. Code § 815.2 (a)) under the *Tunkl* analysis. The Court upheld the Court of Appeal's additional holding that recreational activity liability waivers do not provide a shield for *gross* negligence. The Court found that consistent with dicta in California cases, the vast majority of out-of-state cases, and other authority, a release of liability for gross negligence violates public policy and is unenforceable. Whitehead includes no facts in his complaint or in the record below that would support a claim for gross negligence against Oakland in this case.

California courts have also held that an express assumption of risk, waiver and release of liability agreement for strict products liability is void as against public policy, without reference to the *Tunkl* public interest test – even in the hazardous recreational activity context (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1741–1746). Strict products liability is not an element of Whitehead's claims against Oakland in this case.

It is therefore appropriate to examine the public policy principles underlying claims for government premises liability for

dangerous condition of public property and private organization waivers of liability for recreational use of public property, specifically including highways. While maintaining the safe condition of public roads is a matter of great public importance, other strong public policy considerations apply, including those that are incorporated in the Government Claims Act, that support enforcement of the ALC Release in this case.

### A. Enforcement of the ALC Release Protects the Viability of Organized Recreational Long-Distance Bicycle Events.

Assumption of risk, waiver and release agreements involving hazardous recreational activities insulate those otherwise beneficial voluntary recreational activities from high defense costs of litigation and risk of substantial personal injury awards. As was observed in *Nat'l & Internat. Bhd. of St. Racers v. Superior Court (1989)* 215 Cal.App.3d 934, 938:

> In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.

(Quoted in full with approval, *Allabach v. Santa County Fair Ass'n* (1996) 46 Cal.App.4th 1007, 1016; *Buchan v. United States Cycling Fed'n* (1991) 227 Cal.App.3d 134, 147.)

The organizers of recreational long-distance group bicycle rides appropriate the use of public roadways knowing full well changing pavement conditions including potholes may emerge at

any given moment during the conduct of their events without the knowledge, opportunity, or adequate resources available for the responsible public agencies to inspect or repair them. Mindful of the dangers this presents, ALC organizers prepared the ALC Release and insist the participants in the events it sponsors sign it to protect the organization, its sponsors, affiliate organizations, officials, volunteers, members of the medical team, training ride leaders and other participating in the event to avoid the prospect of litigation. Defense costs alone – not to mention time expended by event sponsors, staff and volunteers in discovery and trial, and the potential for millions of dollars in judgments, would threaten the very existence of the event and is continued viability as a charitable enterprise[14].

The public entities that own and are responsible for the maintenance of the roads over which the event occurs are specifically identified as releasees because public acceptance of and governmental entity cooperation with ALC events, however passive, is equally critical. Large taxpayer-funded personal injury awards to ALC participants could quickly erode public acceptance

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[14] On September 11, 2024, AIDS/LifeCycle announced that the annual fundraiser ride will end after 30 years with the 2025 event in June due to increased costs of production.
https://www.aidslifecycle.org/__townhall/
The sponsors of AIDS/LifeCycle, the San Francisco AIDS Foundation and the Los Angeles LGBT Center are co-defendants in *Goeritz v. City of Los Angeles, et al*., Los Angeles Superior Court Case No. 23STCV12008, a wrongful death action involving a cyclist who was killed in 2022 on a 67-mile training ride for the AIDS/LifeCycle event by a drunk driver encroaching on a bike lane on Crystal Springs Drive in Griffith Park. The sponsors consolidated motions for summary judgment on the basis of the ALC Release are pending hearing on May 5, 2025.

and support for the event and others like it, if a release was found not to protect public entities. Public agencies would be under great pressure to find other ways to limit liability due to large, organized group long-distance bicycling events, such as imposing permit requirements that could include insurance and indemnity conditions for the event sponsors, and insurance for participants. Those expenses could frustrate the charitable purpose of this type of event.

Whitehead emphasizes that Oakland designated Skyline Boulevard as a Class III Bikeway in support of his argument that there is an increased duty to prioritize it for inspection and repair of pavement defects. To guard against the future prospect of enhanced liability for bikeways, Oakland may consider revocation of the designation – frustrating the public policy for the establishment of a bicycle transportation system found by the Legislature in the California Bicycle Transportation Act (Sts & Hy Code § 890, *et seq*.)

It is in the public interest to support both the beneficial health effects of the sport of long-distance recreational bicycling and the events, like the ALC event and training ride, that promote the sport, and the charitable function that they serve. Not insulating public entities from potential liabilities arising from such events will disincentivize the creation and designation of bikeways that can be used by commuters and more casual recreational users. Upholding the enforceability of the ALC Release for both the event sponsors and participants, and the

public entities responsible for the roads on which these events depend, is in the broad public interest.

### B. Enforcement of the ALC Release Maintains Equity Between the Defenses Available to Event Organizers and Public Agency Defendants.

Section 815 (b) of the Government Claims Act provides that the liability of a public entity is subject to any immunity provided by statute *and to any defenses that would be available to it if it were a private person* [emphasis added]. The Law Revision Comment to this provision states the underlying policy:

> Subdivision (b) also makes it clear that the sections imposing liability are subject to the ordinary defenses, such as contributory negligence and assumption of the risk, that are available in tort litigation between private persons[15].

To the extent that the ALC Release provides an absolute defense for the event organizers, sponsors, and other participants, it should also be available to the public entities responsible for the roadways over which ALC events occur. Not only does the Government Claims Act not *prohibit* enforceable waivers of liability and assumption of risk agreements, it expressly preserves them with Government Code section 815 (b).

### C. Enforcement of the ALC Release Recognizes the Limits of Public Resources to Adequately Maintain Public Roads.

In its comprehensive reform of government liability and immunities, the California Law Revision Commission

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[15] State of California, Law Revision Commission 1964 Annual Report, Appendix II, Special Report by Senate Committee on Senate Bill No. 42, p. 228.

recommended, and the Legislature adopted the recognition that public entities have missions that exceed available resources. Unlike individuals or private enterprise they cannot simply go out of business if despite reasonable efforts they cannot eliminate all hazardous conditions of public facilities. This immunity is set up in Government Code section 835.4 as an affirmative defense that in many instances would ordinarily present contested issues of fact necessitating trial. However, the underlying policy is not inconsistent with or antithetical to enforcement of an express assumption of risk and advance waiver of liability agreement that acknowledges the limitations of government to maintain hazard-free roadways for use by organized, long-distance recreational bicycle events. Enforcement of the ALC Release furthers the public policy to avoid the diversion of scarce public resources for defense costs to assert an affirmative defense and the risk of a capricious jury verdict when participants have already expressly acknowledged and assumed the risk.

### D. Enforcement of the ALC Release Is Consistent with the Public Policy Inherent in Section 831.7.

In *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 155-158, this Court examined the legislative history of section 831.7 to find that the statute's roots are in Civil Code section 846. Its purpose was to remove uncertainty over whether Civil Code section 846 immunity extended to public entities exposure to premises liability to recreational users of public property who might injure themselves during hazardous unsupervised activities and attempt to attribute their injuries to

conditions of public property. Section 831.7 was adopted as a premises liability measure designed to limit liability based on a public entity's failure to either maintain public property or to warn of dangerous conditions on public property. The qualified immunity of section 831.7 is patterned after Civil Code section 846 and its intent to encourage landowners to make their land available to the general public for recreational purposes without risk of tort liability.

In the present case, the ALC Release helps achieve the public policy inherent in the statute to encourage public entities to make their roads available for organized long-distance bicycle events without risk of tort liability for permitting that use. Here, Whitehead expressly acknowledged that in participating in the organized group long-distance training ride over public streets he was engaging in potentially hazardous activity when he signed the ALC Release on the day in question. Organized long-distance recreational group bicycle rides on public highways with large numbers of riders have been judicially characterized as hazardous recreational activities for purposes of the primary assumption of risk doctrine or the application of immunity under Civil Code section 846. (*Moser v. Ratinoff* (2003) 105 Cal. App. 4th 1211, 1221; *Spence v. United States* (E.D.Ca, 2009) 629 F. Supp. 2d 1068, 1089-1090; affirmed, *Spence v. United States* (9th Cir. 2010) 374 Fed. Appx. 717.)

The AIDS LifeCycle Events are voluntary recreational activities conducted on public property (roads) of public entities (the State of California and counties and cities within it). The

ALC Release clearly acknowledges and warns that the strenuous long-distances involved in both the 7-day event and the long preparatory training rides are potentially hazardous and create a substantial risk of injury to participants. The hazards are explicitly identified as including broken pavement and debris on public streets, and the possible negligence of public entities to adequately maintain the roadways selected by the organizers for the events. The public entities have not granted permission to participants to engage in AIDS LifeCycle events in exchange for a fee. The public entities have played no role in promotion of the AIDS LifeCycle event, much less a reckless one or with evidence of gross negligence. No act of gross negligence by a public entity or public employee is alleged to have been the proximate cause of Whitehead's injuries. These are all elements of the statutory immunity provided by Government Code section 831.7. The ALC Release essentially encapsulates hazardous recreational activity immunity, without the burden on public entities to assert and prove all its elements as an affirmative defense. The ALC Release provides a shortcut to alleviate public entities and the courts from having to litigate the details.

### E. Enforcement of the ALC Release Promotes the Public Policy Goal of Judicial Economy.

Litigation at the early demurrer, judgment on the pleadings or summary judgment stage to determine the existence and enforceability of a express assumption of risk and advance waiver of liability agreement can spare the parties and the court of the cost, delays, and expenditure of limited time and resources

of extended discovery, pretrial motion practice, and trial. While courts exist to resolve disputes and civil liability, no public policy suggests that the full panoply of litigation tools and techniques need be unnecessarily exhausted in every case. Efficiency and prompt resolution are public benefits themselves in an appropriate case. Enforcement of the ALC Release in this case is strongly supported by those policies in this case.

## III. PUBLIC ENTITIES RESPONSIBLE FOR ROADS CHOSEN BY AIDS/LIFE-CYCLE FOR ITS EVENTS ARE ENTITLED TO RELY UPON THE EXPRESS ASSUMPTION OF RISK AND ADVANCE WAIVER AND RELEASE OF LIABILITY.

The public entities responsible for the road networks over which ALC conducts its events are not parties to the ALC Release but are explicitly recognized as third-party beneficiaries. The list of public entities that are explicitly named as "Releasees" in the agreement is not exclusive[16]. As written, all public entities responsible for the roads ALC chooses as routes for its training rides are all entitled to rely upon the ALC Release, including the City of Oakland.

The modern rule as stated in the Restatement Second of Torts is that a release does not discharge nonparties *unless the contracting parties so intend*. (*Zenith Radio Corp. v. Hazeltine*

[16] "The ALC Release provides: "'Releasees' means: . . . (B) *the owners/lessors of the course or facilities used in the Event, including, but not limited to* the (i) State of California; (ii) – (iv) cities and counties [listing local jurisdictions along the route of the 545-mi. ride from San Francisco to Los Angeles.] (Italics added.) . . . and (D) the directors, officers, officials, employees and agents of the entities listed in (A)-(C)."

*Research* (1971) 401 U.S. 321, 343-347 [adopting Restatement rule in antitrust action]; see also Rest.2d Torts, § 885.) Code of Civil Procedure section 877, which provides that where one or more tortfeasors is claimed to be liable for the same tort, a release given to one tortfeasor does not discharge any other tortfeasor from liability, "*unless its terms so provide*." (*See General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 439). The ALC Release expressly provides that the public entities that are the owners of the course used in the event (including training rides) are released from liabilities of any kind or nature which may arise from participation in the event.

In a release given in the context of a hazardous recreational activity (skiing), the Court of Appeal sustained summary judgment in favor of the defendant ski shop on the basis of a release of liability and express assumption of risk clause contained in the rental agreement as to causes of action for negligence and breach of express or implied warranty, but not strict liability for defective product[17]. (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715). The Court noted that to be effective a liability limiting agreement must be clear, explicit and comprehensible in each of its essential details and that the terms were intended by both parties to apply to the particular conduct that may cause the harm (*Ibid.* at p. 1730.)

The ALC Release clearly and explicitly states that, "the Event is potentially a hazardous activity, and that accidents

[17] The Court noted the extensive precedent that exculpatory agreements for strict products liability are void against public policy.

during the Event could lead to serious injury, death and/or property damage, both to me and to others." First among the non-exclusive list of risks associated with the Event is "using public streets and facilities where hazards such as broken pavement and road debris may exist[.]" The list goes on to include "negligence or carelessness of . . . owners/lessors of the course or facility owners (which may include state and local government entities)[.]" The list of risks concludes, "negligence or carelessness in the implementation or enforcement of any rules, regulations or guidelines related to the Events and/or in the selection, use, or maintenance of any equipment, course, competition, facility or service related to the Events[.]"

In *Westlye,* 17 Cal.App.4th 1715 at p. 1728, the Court of Appeal held that the agreement did not apply to the distributor or manufacturer defendants who were not named in it, citing Civil Code section 1558, that "it is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them," observing "[n]othing in the rental agreement identifies the distributor defendants as parties to be bound or benefitted by the agreement," and "while contract need not identify the third party by name, the third party must show that it is one of a class of persons for whose benefit the contract was made." (citing *General Motors Corp*. v. *Superior* Court (1993) 12 Cal.App.4th 435, 443-444).

While the City of Oakland is not identified by name in the ALC Release, it is clearly included in the class of entities – the owners of the public roads on which ALC events are staged – as

among those for whose benefit the contract was made. The ALC Release clearly, expressly, and unambiguously identifies road hazards such as broken pavement as a risk, as well as negligence or carelessness of state and local public entities in the maintenance of the course or facilities related to the ALC Events. Public policy supports its enforcement as outlined above. Oakland is therefore entitled to rely upon the ALC Release.

**Conclusion**

Organized long-distance recreational bicyclists comprise a small and unique self-selecting high-risk class of users of public highways. The inherent vulnerability of bicyclists coupled with extreme potential liability due to vulnerabilities of distance, endurance, speed, variable skill and fitness levels present in this activity present significant potential exposure to public liability for injuries due to pavement conditions unless notice, reasonable opportunity to repair or warn prior to the injury and consideration of limited resources are taken into account. Public entities lack of control of organized long-distance recreational bicycle events to reduce risks. To fully protect against risks to cyclists due to continually deteriorating pavement conditions would require an inordinate allocation of scarce resources to the detriment of the broader public interest in maintenance of the entire local road network.

No group is more intimately familiar with the limitations, variability and dangers of pavement conditions than frequent long-distance bicyclists, who are therefore best prepared to assume the risk to pursue their passion. In an ideal world with

unlimited public resources, there would be safe, dedicated bicycle lane networks everywhere, where heavier vehicle traffic would not compromise pavement conditions or collide with bicyclists. Regrettably that world is a distant goal, not likely to be realized in the foreseeable future.

The general public is not prepared to provide compensation to recreational long-distance bicyclists from the occasional but severe consequences of their voluntary choice to engage in their sport at the risk of serious injuries and long-term disabilities. This presents a zero-sum dynamic – public funds are either held in reserve to compensate injured recreational bicyclists or are available to be applied in a programmatic way to address pavement conditions that are most severe and benefit the greatest number of users of all types.

Civil Code section 1668, either as applied to invalidate exculpatory agreements for ordinary negligence claims that affect the public interest as interpreted by *Tunkl*, or as is applied to regulatory statutes, does not apply to liability waivers of Government Code section 835 (b) claims.

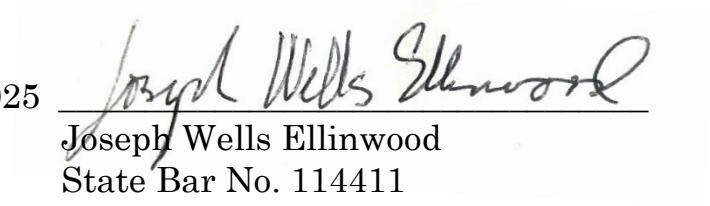
Public policy, including those incorporated in Government Code sections 831.7 and 835.4, and the longstanding judicial recognition of the validity of liability waivers by those engaging in recreational activities as necessary to preserve the freedom and opportunity for them to engage in enjoyable, but risky pursuits, and avoidance of needlessly costly litigation, supports enforcement of the ALC Release by the City of Oakland.

Finally, the ALC Release is clear in its intent to include all public entities responsible for the roads on which ALC conducts its events, including the City of Oakland.

For the foregoing reasons, this Court should hold that the ALC Release is effective and a complete defense for the City of Oakland.

Respectfully submitted,

Dated: January 2, 2025



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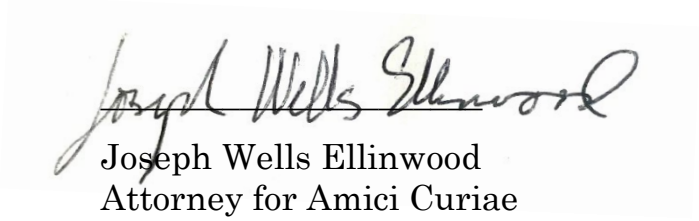
Certificate of Compliance with California Rules of Court, Rule 8.520 (b)(1) and (c)(1)

I hereby certify that this brief has been prepared using proportionately one-and-one-half-spaced 13 point Century Schoolbook typeface. According to the word count feature in my Microsoft Word software, this brief contains 8,743 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 2nd day of January, 2025 at Cameron Park, California.



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