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CASE NO. S284303

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TY WHITEHEAD,
Plaintiff and Appellant,

v.

CITY OF OAKLAND,
Defendant and Respondent.

Court of Appeal, First District, Division Three, No. A164483;
Alameda County Superior Court
Hon. Richard Seabolt; No. RG18896233

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QUESTION PRESENTED

Does the release in this case extend to a claim that the City of Oakland violated Government Code section 835 et seq., in light of Civil Code section 1668, which provides in relevant part that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law, whether willful or negligent, are against the policy of the law?"

INTRODUCTION

As this Court has recognized, the Government Claims Act is intended to carefully cabin the liability of public entities because, unlike private parties, the government cannot go out of the business of governing. Ironically, Whitehead—for the first time in the history of this litigation—wants to use a law whose purpose is to largely shield public entities from liability as a basis for *imposing* liability on them. According to him, Civil Code section 1668 prohibits the release of any and all statutory claims. Because he asserts that the City negligently maintained its roadways, resulting in the pothole that injured him, and because that claim is grounded in a statute (Government Code section 835), he contends the release he voluntarily signed is therefore void and unenforceable. That argument is wrong. It is wrong under the plain language of section 1668 and this Court's decision in *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92; it is wrong in promoting a false and artificial distinction between common-law and statutory negligence claims, particularly in light of the ongoing codification of common-law principles; it is wrong given the type of statute section 835 is (a

statute waiving sovereign immunity); and it is wrong under the protections specifically afforded elsewhere by the Government Claims Act and the policies animating the Act. In short, there is not a single thing to recommend Whitehead's newly advanced argument and this Court should reject it.

Whitehead hangs his hat on the clause in section 1668 prohibiting the release of claims predicated on "violation[s] of law." He interprets this—as a handful of Court of Appeal decisions have—as referring to statutory violations. Because he alleges his claim under Government Code section 835, he reasons that the release he signed is unenforceable. The problem with this contention is that the phrase "violation of law" in section 1668 is, by its plain terms, expansive. It naturally encompasses common-law claims as well as statutory ones and it therefore defies the limitation that Whitehead seeks to impose upon it. Indeed, whether a liability is rooted in statute or common law is a distinction that makes no substantive difference and one that elevates form over substance. In *Tunkl*, this Court did not directly address the meaning of "violation of law," but it noted that some courts had construed it as Whitehead does to mean that statutory negligence claims (unlike common-law negligence claims) are precluded from being released. The Court implicitly expressed skepticism of this distinction insofar as it cited Witkin, which criticized (and continues to criticize) any differential treatment of statutory negligence claims from common-law ones. *Tunkl*'s overriding goal of setting forth a uniform rule for determining the enforceability of negligence releases is further

proof that it did not intend for statutory negligence claims to fall outside the analysis it adopted.

If statutory negligence claims are altogether barred from being released, then defendants will almost never be able to obtain negligence releases. *Tunkl* and the robust body of consistent case law it has generated will fall by the wayside. This is so because plaintiffs will almost always be able to plead statutory negligence claims. Indeed, they could rely on Civil Code section 1714, which codifies the general negligence duty of care, or the doctrine of negligence *per se*, which permits plaintiffs to borrow statutes that supply a particular standard of care. As long as they can find some statute that speaks to the conduct they are complaining about, plaintiffs can plead their way into a statutory negligence claim and out of the releases they knowingly and voluntarily signed. Given the regular codification of common-law principles, that should be easy to do.

Next, the lower court decisions that have deemed statutory negligence claims *per se* incapable of being released contain no reasoning to support their decisions. Their holdings are mere assumptions devoid of analysis. Those cases are also distinguishable because they involved *regulatory* statutes that prescribe rules the regulated parties must comply with. Section 835 is not a regulatory statute. It does not set forth anything that public entities must do to properly maintain the public premises, like streets and roads. Instead, section 835 is a statute that waives public entities' sovereign immunity under specified, limited circumstances. At bottom, claims brought under section

835 do not fit within the ambit of section 1668's "violation of law" clause because public entities cannot "violate" section 835 since it does not impose any requirements upon them. Public entities can only *lose their immunity* under section 835 if plaintiffs can make the rigorous showing demanded by the statute.

In addition, the Government Claims Act expressly authorizes public entities to rely on any defense that would be available to a private party. (See Govt. Code, § 815, subd. (b).) AIDS/LifeCycle would be able to rely on its release had Whitehead sued it. The City is also entitled to rely on the release. A ruling that claims brought under section 835 can never be released would deprive the City of this defense and effectively write section 815, subdivision (b), out of the Government Claims Act.

Finally, we end where we began, with the policy considerations that make the Government Claims Act the limited waiver of sovereign immunity that it is. The drafters of the Act sought to ensure that public entities, with their numerous responsibilities and finite resources, would not be burdened with overwhelming liability. The statute provides that in specific, narrow circumstances, the public at large must pay for the negligence of its government. But when a highly experienced long-distance cyclist signs a release to participate in a recreational activity, imposing the ensuing liability on the public is inconsistent with the letter and spirit of the Act.

ARGUMENT

A. The *Tunkl* public-interest analysis should govern irrespective of whether a plaintiff asserts common-law or statutory causes of action.

The City does not dispute that Whitehead's claim for dangerous condition of public property is a statutory claim, nor does it dispute that all liability against public entities is created by statute (the Government Claims Act), not the common law. These are uncontroversial, well-established propositions.

What the City *does* dispute, however, is Whitehead's new argument that claims for statutory violations, like his dangerous-condition claim, are *per se* prohibited from ever being released under section 1668. Whitehead now contends for the first time in this case that claims premised on statutes fall within the meaning of "violation[s] of law" in section 1668 and are barred from being released irrespective of whether they implicate the public interest. After consistently framing his arguments in terms of the *Tunkl* public-interest analysis at every stage of this case—including in his merits briefing before this Court—Whitehead now says *Tunkl* is irrelevant. Not true.[1]

[1] Throughout his collective briefing in the trial court, the Court of Appeal, and this Court, Whitehead relied on *Tunkl*. If there were ever a case of forfeiture, his eleventh-hour abandonment of *Tunkl* in favor of an entirely different argument has to be it. (See e.g. *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC* (2024) _ Cal.5th _; 2024 WL 5164746, *8.)

1. Neither the plain language of section 1668, nor Tunkl, support treating common-law and statutory claims differently.

Section 1668 was enacted in 1872. It provides:

> All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

As described below, some courts have construed the phrase "violation of law" to refer exclusively to statutory violations and have held that *Tunkl* governs only the release of common-law negligence. According to these courts, section 1668 automatically voids any release of statutory claims such that there is no need to determine under *Tunkl* whether the transaction the release was intended to facilitate affects the public interest. *Tunkl*, in other words, has no role to play with respect to releases of statutory violations. This is an illogical interpretation.

To begin with, there is no sound basis for construing the phrase "violation of law" to cover strictly statutory claims but not common-law claims. By its plain terms, "violation of law" is general and expansive enough to logically encompass both. Ordinary negligence is as much a "violation of law" as is the breach of a statute. It makes no sense to enforce the release of *common-law negligence claims* where the public interest is not implicated but invalidate the release of *statutory negligence claims* where the public interest is *also* not implicated. The best reading of "violation of law, whether willful or negligent," is that

it covers: (1) willful statutory violations, (2) negligent statutory violations, and (3) common-law negligence.[2]

This reasoning is consistent with *Tunkl*. This Court's purpose in *Tunkl* was to harmonize the then-existing "diverse" interpretations of section 1668 by setting forth a single overarching rule for how section 1668 should be applied. (*Tunkl*, *supra*, 60 Cal.2d at p. 95 [stating that "[t]he course of section 1668 . . . has been a troubled one," and that "the courts' interpretations of it have been diverse"].) After surveying the case law, the Court explained that "the decisions are uniform" insofar as they "have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.'" (*Id.* at p. 96.) The Court therefore adopted a public-interest inquiry as a unifying analysis for determining the enforceability of releases under section 1668. *Tunkl* did not differentiate between common-law negligence and statutory negligence. In fact, it noted that some courts had construed "violation of law" in section 1668 to refer exclusively to statutory violations, but it went on to note that "[t]his interpretation [has been] criticized" in case law and in Witkin. (*Id.* at p. 95 n.3 [citing *Werner v. Knolls* (1948) 89 Cal.App.2d 474].) Witkin dubbed "debatable" the interpretation of "violation of law" as being confined to statutes and said this interpretation "make[]s an unsatisfactory distinction" between non-statutory negligence

[2] Common-law intentional torts would presumably be covered by the phrase "willful injury to the person or property of another," but could also be included under the "violation of law" portion of the statute.

claims which may be released and statutory negligence claims which are precluded from being released. The relevant passage from the 1960 version of Witkin cited in *Tunkl* reads in full:

> Apart from the debatable interpretation of 'violation of law' as limited strictly to violation of *statutes*, the explanation appears to make an unsatisfactory distinction between (1) valid exemptions from liability for injury or death resulting from types of ordinary or gross negligence not expressed in statutes, and (2) invalid exemptions where the negligence consists of violations of one of the many hundreds of statutory provisions setting forth standards of care.

(*Tunkl*, *supra*, 60 Cal.2d at p. 95 n. 3 [quoting 1 Witkin, Summary of California Law 228 (7th ed. 1960)].) The identical language continues to appear in the modern edition of Witkin. (See 1 Witkin, Summary 11th Contracts, § 692 (2024).)

Although the *Tunkl* Court did not expressly adopt Witkin's reasoning, its decision to cite it, combined with its aim of eliminating disparate applications of section 1668, strongly suggests the Court did not think the enforceability of exculpatory provisions should depend on whether plaintiffs assert common-law negligence or statutory negligence claims. (See also *City of Santa Barbara v. Super. Ct.* (2007) 41 Cal.4th 747, 755, 763 [characterizing *Tunkl* as setting forth "a general rule" and "a categorical rule"].)[3]

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[3] It's worth noting that if claims based on statutory violations are *per se* barred from being released, then decisions enforcing

2. Those lower-court cases holding that statutory negligence claims can never be released are conclusory and unpersuasive.

Next, none of the cases in which courts have declined to enforce the release of statutory claims have provided any reasoning in support of their decisions. None explain why *Tunkl*'s public-interest inquiry applies to ordinary negligence but not to negligence embodied in statutes. These Court of Appeal holdings devoid of analysis do not merit any deference.

The earliest case that recognized the release of statutory-negligence claims as distinct from the release of common-law negligence claims was apparently the 1948 Court of Appeal decision in *Werner*, *supra*, 89 Cal.App.2d at pp. 475-476. *Werner* did not explain why it construed the phrase "violation of law" to refer exclusively to statutory violations, not common-law ones. It merely reasoned that section 1668 does not prohibit the release of common-law negligence claims because the word "negligent" in the statute modifies "violation of law." (*Id.* at p. 476 [the prohibited contracts under section 1668 are those exempting "one from the consequences of his own fraud, willful injury or violation of law, whether willful or negligent . . . ."].) But that does not shed any light on, let alone persuasively explain, why "violation

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releases in favor of public entities have all been wrongly decided since *all* liability against public entities is imposed by statute. (See e.g., *City of Santa Barbara*, *supra*, 41 Cal.4th at p. 750 [leaving intact Court of Appeal's decision enforcing release of ordinary negligence claim against public entity]; *Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5th 1003; *Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267; *Okura v. United States Cycling Federation* (1986) 186 Cal.App.3d 1462.)

of law" does not rationally cover both statutory negligence and common-law negligence. What's more, as noted above, *Tunkl* expressly cited Witkin's criticism of *Werner*'s differential treatment of statutory negligence from common-law negligence for purposes of applying section 1668.[4] (*Tunkl*, *supra*, 60 Cal.2d at p. 95 n.3.)

In the wake of *Tunkl*, some courts continued to hold that section 1668 precludes the release of statutory claims but they did not explain their reasoning nor, significantly, did they consider *Tunkl* and whether its public-interest analysis should govern both common-law and statutory negligence claims. (See e.g., *Halliday v. Greene* (1966) 244 Cal.App.2d 482, 488; *Hanna v. Lederman* (1963) 223 Cal.App.2d 786, 792.)

Then, in 1986, the Court of Appeal commented in *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 716, that section 1668 "made it clear a party could not contract away liability for his fraudulent or intentional acts or for his negligent violations of *statutory* law." (italics in the original.) *Gardner* did not provide any analysis or authority in support of this statement (not even *Werner* or *Mills*) and it did not address Witkin's skepticism of the artificial distinction between common-law

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[4] *Tunkl* also cited *Mills v. Ruppert* (1959) 167 Cal.App.2d 58 as another case that distinguished between statutory and common-law negligence claims. (*Tunkl*, *supra*, 60 Cal.2d at p. 95.) *Mills*, however, simply cites *Werner* for this proposition without any further analysis. And importantly, neither *Werner*, nor *Mills*, concerned any statutory violations and both upheld the releases at issue in the face of section 1668 challenges. (*Werner*, *supra*, 89 Cal.App.2d at pp. 476-477; *Mills*, *supra*, 167 Cal.App.2d at pp. 62-63.)

negligence and statutory negligence. But *Gardner*'s comment had staying power, having been cited by several cases, although none contribute any additional analysis to the question beyond citing *Gardner*. (See e.g., *Capri v. L.A. Fitness Internat., LLC* (2006) 136 Cal.App.4th 1078, 1084; *Health Net of California, Inc. v. Dept. of Health Services* (2004) 113 Cal.App.4th 224, 234; *Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471-1472; *Nunes Turfgrass, Inc. v. Vaughan-Jackson Seed Co.* (1988) 200 Cal.App.3d 1518, 1538.)

Those cases suggesting that statutory negligence claims are *per se* prohibited from being released under section 1668 have nothing to recommend them. They do not reflect the best interpretation of the actual language of section 1668 or the best interpretation of *Tunkl* and its focus on ensuring a consistent approach to applying section 1668. And, they do not provide any compelling reason to treat statutory negligence claims differently from common-law negligence claims. A release of *statutory* negligence claims that do not implicate the public interest should be upheld no less than a release of *common-law* negligence claims that likewise do not implicate the public interest. This outcome makes sense because whether embodied in a statute or the common law, negligence is negligence. The *Tunkl* factors can just as easily be applied to statutory negligence as they can to common-law negligence.[5]

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[5] The *Tunkl* factors include: (1) whether the "transaction" at issue "concerns a business of a type generally thought suitable for public regulation;" (2) whether "[t]he party seeking exculpation is engaged in performing a service of great importance to the public,

3. Holding that releases of statutory negligence claims are void and unenforceable will make negligence releases a thing of the past because the ongoing codification of the law means that plaintiffs can virtually always allege statutory negligence claims.

Next, distinguishing between negligence claims rooted in statute and those rooted in the common law will have unintended and anomalous results.

First, plaintiffs will presumably be able to evade the releases they signed by styling their negligence claims as ones brought under Civil Code section 1714. That provision sets forth "[t]he 'general rule' governing duty," *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213 (internal citation omitted), and says: "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ." Merely by invoking section

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which is often a matter of practical necessity for some members of the public;" (3) whether "[t]he party holds himself out as willing to perform this service for any member of the public who seeks it;" (4) whether "the party seeking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services;" (5) whether the party seeking exculpation "confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence;" and (6) whether "as a result of the transaction, the person or property of the purchaser is placed under the control of the seller." (*Tunkl*, *supra*, 60 Cal.2d at pp. 98-101.)

Interestingly, the first factor implicitly assumes that a statute may be in play since it speaks to whether the transaction "concerns a business of a type generally thought suitable for *public regulation*." (italics added)

1714 in their complaints, plaintiffs will be able to contend that their negligence claims constitute statutory "violation[s] of law" within the meaning of section 1668, thus making the releases they knowingly signed void and unenforceable. If all negligence claims are fundamentally statutory in nature, thanks to section 1714, then all negligence claims are *per se* prohibited from being released under section 1668—at least if the Court adopts the false distinction between statutory and common-law negligence that Whitehead urges. (See e.g., *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [stating that "some common law judges and commentators have urged that the principle embodied in [section 1714] serves as the foundation of our negligence law"].) That, of course, will spell the end of *Tunkl*.

Second, having one rule for common-law negligence claims (*Tunkl*) and a different rule for statutory negligence claims (not *Tunkl*) will encourage artful pleading. *Capri*, on which Whitehead relies, is an illustrative example. (136 Cal.App.4th at p. 1081.)

There, the plaintiff signed a release when he joined a fitness club in which he agreed to waive any claim that he was injured as a result of the club's negligence. After slipping and falling on the pool deck, the plaintiff brought a personal-injury action alleging claims for negligence and negligence *per se*. (*Id.* at p. 1082.)

The court held that the plaintiff's negligence claim was barred by the release because he was engaged in a recreational activity that did not implicate the public interest. (*Id.* at p. 1084.)

On the other hand, the court permitted the plaintiff to proceed with his negligence *per se* claim. It reasoned that this claim substantively alleged that the club violated provisions of the Health and Safety Code requiring public swimming pools to be maintained "in a sanitary, healthful, and safe manner." (*Ibid.*) Because the plaintiff alleged that the club's violation of these statutes is what caused him to slip and fall, the court concluded that his claim fell within "the explicit prohibition in section 1668 against contractual exculpation for a 'violation of law.'" (*Id.* at p. 1085; see *Elsner v. Uveges* (2004) 34 Cal.4th 915, 925-927 [explaining that Evidence Code section 669 "codifies the common-law doctrine of negligence *per se*, pursuant to which statutes and regulations may be used to establish duties and standards of care in negligence actions"].) The release was therefore invalid as to that claim.

The holding in *Capri*—enforcing the release as to the negligence claim but invalidating it as to the negligence *per se* claim—is irrational. There was no real difference between the two claims, except for the fact the plaintiff was able to dig up a regulatory statute to undergird a negligence *per se* claim. Under *Capri* then, plaintiffs can systematically get out from under the releases they sign if they locate some statute somewhere in California's Codes that regulates the conduct they are complaining about. All they need to do is denominate their claims as ones for "negligence *per se*" and argue that section 1668 prohibits enforcement of the release because a statute supplies the duty of care the defendant allegedly breached. That should

not be the law and is another reason to conclude that *Tunkl* applies to all negligence claims, statutory and common law alike.

Third, the Legislature is free to codify common-law claims at any time. An exculpatory provision upheld one day as releasing an ordinary negligence claim might be invalidated the next because the Legislature enacted a statute governing the allegedly negligent conduct. The terms of the exculpatory agreement would not have changed; the allegedly negligent conduct would not have changed; and the impact on the public interest would not have changed. The only thing that would have changed would have been the source of the law providing the plaintiff's claim—previously, the common law, and now, statutory law.[6]

Take, for instance, cases enforcing releases of ordinary negligence in favor of fitness clubs because exercise is a recreational activity that does not implicate the public interest. (See e.g., *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 637-638.) In *Grebing*, the plaintiff was injured while using one of the club's exercise machines. (*Id.* at p. 634.) The court held his common-law negligence claim was extinguished by the release he signed. (*Id.* at pp. 637-638.) If the Legislature were to enact statutes governing the safety and maintenance of exercise machines at fitness clubs, what had previously been an enforceable release of an ordinary negligence claim (as in *Grebing*) might well become an unenforceable release

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[6] Indeed, the Government Claims Act is a quintessential example of the Legislature codifying liability for negligence. (See e.g., *Metcalf v. County of San Jose* (2008) 42 Cal.4th 1121, 1135.)

of a statutory negligence claim. That is non-sensical. As noted above, negligence is negligence, whether it is embodied in the common law or in a statute. Both types of claims should be governed by *Tunkl*'s public-interest analysis.

B. The statute under which Whitehead has sued is not a regulatory statute but a waiver of sovereign immunity.

The cases in which courts have voided releases of statutory claims have all involved *regulatory* statutes, as described below, that impose affirmative duties on the regulated entities. That is not true here. Government Code section 835, under which Whitehead sues, is part of the Government Claims Act. It, along with the other provisions of the Act, is not a regulatory statute, but rather a statutory waiver of sovereign immunity. Section 835 does not prescribe any rules or standards public entities must comply with for maintaining their roads or streets. In fact, it does not require them to do anything at all. Section 835 simply describes the limited circumstances under which a public entity may lose its immunity to liability.

"Sovereign immunity is the rule in California; governmental liability is limited to exceptions specifically set forth by statute." (*County of San Bernardino v. Super. Ct.* (2022) 77 Cal.App.5th 1100, 1108.) Section 815 of the Act establishes the general rule that public entities are not liable for injuries caused by their acts or omissions. They may be liable only insofar as the provisions of the Act specifically waive their sovereign immunity. The purpose of the Act "is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential

governmental liability to rigidly delineated circumstances; immunity is waived only if the various requirements of the Act are satisfied." (*Metcalf*, *supra*, 42 Cal.4th at p. 1129; see also *Leon v. County of Riverside* (2023) 14 Cal.5th 910, 917-918 [describing the history of governmental immunity in California and the enactment of the Government Claims Act].)

To hold the City liable under section 835, Whitehead must establish that: (1) the pothole he struck was a "dangerous condition," (2) his injuries were proximately caused by this dangerous condition, (3) the pothole created a reasonably foreseeable risk of the kind of injury that occurred, and (4) the City negligently created the pothole, or had actual or constructive notice of the pothole sufficiently before Whitehead's injury to take steps to protect against it. (Govt. Code, § 835.) On the constructive-notice element, Whitehead must show that the pothole existed long enough and was obvious enough that in the exercise of due care, the City should have discovered it. (*Id.*, § 835.2, subd. (b).) The City may be able to show it did indeed exercise due care by adducing evidence that it maintained a reasonably adequate inspection system for learning about dangerous conditions (as it did) but still did not discover the pothole at issue. (*Id.*)

Even if Whitehead is able to establish each of the elements of section 835, the City still would not be liable if it reasonably took steps to protect against the risk of injury or reasonably failed to do so. (*Id.*, § 835.4, subd. (b).) "Reasonableness," in this context, is assessed according to "the time and opportunity" the

City had to take action and "weighing the probability and gravity of potential injury . . . against the practicability and cost of protecting against the risk of such injury." (*Id.*)

The dangerous-condition provisions of the Government Claims Act thus do not impose any obligations on any public entity, including the City. The Act does not specify any standards or requirements by which public entities are to construct, inspect, repair, or otherwise maintain public premises, including public streets and roads. To be sure, the Act *incentivizes* public entities to take reasonable precautions to learn about and eliminate dangerous conditions of public property by subjecting them to potential liability if they do not, but it does not require public entities to do so.

As far as the City is aware, no court has ever held that claims premised on section 835's waiver of sovereign immunity—or claims premised on any statutory waiver of sovereign immunity—cannot be released under section 1668. Indeed, the courts that have invalidated releases of statutory claims under section 1668 have done so in the context of claims predicated on *regulatory* statutes that impose affirmative obligations on the defendants. *Capri* and *Health Net*, invoked by Whitehead, are prime examples.

Recall that in *Capri*, *supra*, 136 Cal.App.4th at p. 1084-1085, the Court of Appeal held that the plaintiff's negligence *per se* claim was not barred by the release he signed because the plaintiff relied on Health and Safety Code statutes requiring swimming pools to be maintained "in a sanitary, healthful, and

safe manner." The court reasoned that "these statutes are part of a detailed regulatory scheme which includes construction standards, safety standards, and sanitation requirements for public swimming pools." (*Id.* at p. 1085.)

Health Net likewise concerned a regulatory statute. There, plaintiff Health Net, along with Blue Cross of California, both contracted with the California Department of Health Services ("DHS") to provide services to Medi-Cal patients in Tulare County. (113 Cal.App.4th at p. 227.) Health Net argued that in violation of Welfare and Institutions Code section 14087.305, subdivision (j), DHS assigned to Blue Cross everyone who, over a two-month period, failed to select a plan. (*Ibid.*) Health Net sought damages but the trial court held these were unavailable under Health Net's contract with DHS. (*Id.*) The Court of Appeal reversed. (*Id.* at pp. 233-235.) Quoting *Gardner*, it reasoned that under section 1668, "'a party [cannot] contract away liability . . . for his negligent violations of *statutory* law,' regardless of whether the public interest is affected." (*Id.* at p. 234 [quoting *Gardner*, *supra*, 180 Cal.App.3d at p. 716].)

The Welfare and Institutes Code statute at issue in *Health Net* prescribes how Medi-Cal beneficiaries are to be presented with healthcare options and enrolled in plans. Subdivision (e) of section 14087.305 says that beneficiaries who do not specifically choose a plan shall be enrolled in an appropriate Medi-Cal plan providing service within the area where the beneficiary lives. And subdivision (j), under which Health Net sued, says that "[t]o the extent possible," assigning beneficiaries to healthcare plans

under subdivision (e) “shall provide for the equitable distribution of Medi-Cal beneficiaries among participating prepaid health plans, or managed care plans.” Thus, like the statutes in *Capri* imposing affirmative obligations on the owners of public swimming pools concerning their maintenance and sanitation, the statutes in *Health Net* imposed affirmative obligations on DHS as to how Medi-Cal beneficiaries are assigned to health plans. (See also *Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC* (2024) 99 Cal.App.5th 44, 60-62 [holding that section 1668 barred the release of the plaintiff's claim where the plaintiff alleged the defendant failed to comply with a Health and Safety Code statute requiring the disclosure of asbestos on a property]; *In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1065 [invalidating an agreement in which the parties waived a statutory requirement that they disclose their assets, liabilities, income, and expenses].)

In contrast to *Capri*, *Health Net*, and the other cases cited above, Government Code section 835, under which Whitehead sues, does not impose any affirmative obligations on public entities. Section 835 is part of the Government Claims Act. It, along with the other provisions of the Government Claims Act, is not a regulatory statute, but rather a statutory waiver of sovereign immunity.

Indeed, section 835 merely sets forth the highly circumscribed situations in which a public entity may be said to have forfeited its sovereign immunity such that it may be held liable. It is thus nothing like the regulatory statute in *Capri* that

mandated “construction standards, safety standards, and sanitation requirements for public swimming pools.” (*Capri*, *supra*, 136 Cal.App.4th at p. 1085.) Nor is it like the regulatory statute in *Health Net*, which prescribes how Med-Cal beneficiaries are to be assigned to private health plans, or the statutes in *Epochal Enterprises* and *Fell* that mandate disclosure of certain information. (*Health Net*, *supra*, 113 Cal.App.4th at p. 227; *Epochal Enterprises*, *supra*, 99 Cal.App.5th at pp. 57-58; *Fell*, *supra*, 55 Cal.App.4th at p. 1062.)

In addition, treating section 835 claims as falling within the “violation[s] of law” clause of section 1668 is contrary to the plain language of the latter statute. Because section 835 does not prescribe anything that public entities are required to do to maintain public premises, it cannot be “violated.” More to the point, a statute that merely waives sovereign immunity under certain conditions is not a statute that a public entity can “violate.” In *Rybicki v. Carlson* (2013) 216 Cal.App.4th 758, 764, for example, the Court of Appeal held that Civil Code section 1714, subdivision (d) “cannot be ‘violated’ because it does not prohibit any conduct . . . .” That provision says that claims are not precluded against parents or other adults who furnish alcohol to people who they know, or should know, are under 21.[7] That

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[7] Civil Code section 1714, subdivision (d) reads in full:

> (d)(1) Nothing in subdivision (c) shall preclude a claim against a parent, guardian, or another adult who knowingly furnishes alcoholic beverages at his or her residence to a person whom he or she knows, or should have known,

statute is thus just like the wavier of sovereign immunity here in that neither requires or prohibits any conduct but simply permits claims to be brought under certain circumstances. Because section 835 cannot be "violated," claims brought pursuant to it are not subject to the "violation of law" clause of section 1668.[8]

In sum, section 1668 should not be construed to mean that claims predicated on statutory waivers of sovereign immunity can never be released—even if in other contexts (e.g., claims predicated on regulatory statutes that impose affirmative duties on the regulated parties), section 1668 might invalidate a release.

C. Another provision of the Government Claims Act authorizes the City to rely on the release here, irrespective of the statutory nature of Whitehead's claim.

Because all liability of public entities is statutory, adopting Whitehead's argument that the statutory nature of his claim precludes enforcement of the release he signed would effectively

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> to be under 21 years of age, in which case, notwithstanding subdivision (b), the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death.
> (2) A claim under this subdivision may be brought by, or on behalf of, the person under 21 years of age or by a person who was harmed by the person under 21 years of age.

[8] It's also worth considering that when section 1668 was enacted in 1872, public entities were protected by sovereign immunity. The Legislature could not have intended, by enacting section 1668, to deprive public entities of the benefits of releases executed in their favor.

amend Government Claims Act section 815, subdivision (b). As explained in the City's Answer Brief, that provision states that public entities are entitled to assert "any defenses that would be available to the public entity if it were a private person." In other words, if the City were a private party subject to common-law negligence liability—like ALC, the sponsor of the training ride—it would be entitled to rely on the release. Section 815, subdivision (b) makes clear that this defense remains fully available to the City, even though it is a public entity.

If the Legislature did not want public entities to be able to enforce release agreements it would not have drafted section 815, subdivision (b) to encompass "all defenses" available to private parties. It instead would have specifically excluded releases or enumerated only those private-party defenses it wanted to extend to public entities. Failing to recognize release agreements as a defense the City is entitled to rely on would therefore write a limitation into section 815, subdivision (b) that its plain language does not support.

Moreover, although section 1668 and section 815, subdivision (b), are not inconsistent so long as the former is reasonably construed to permit releases of statutory negligence claims that do not implicate the public interest, if this Court were to conclude the two provisions *do* conflict, section 815, subdivision (b) controls as the later enacted and more specific statute. (*Mercury Ins. Co. v. Golestanian* (2022) 82 Cal.App.5th Supp. 1, 9; *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1504.)

According to Whitehead, section 1668 means that his dangerous-condition claim cannot be released because it is predicated on a statute. But the later enacted section 815, subdivision (b) addresses this very situation. By enabling public entities to rely on releases as a defense to liability, and since all public-entity liability is a matter of statute, section 815, subdivision (b) necessarily means that the City is entitled to invoke the release here as a defense, *irrespective of the statutory nature of Whitehead's claim*.

Nunes Turfgrass is helpful to the City on this front. (200 Cal.App.3d at p. 1518.) There, the plaintiff alleged that the defendant seed seller failed to comply with federal and state statutes when it warranted that its seeds were sold in conformance with applicable seed laws. (*Id.* at p. 1538.) The parties' contract contained a limitation-of-liability clause in which they agreed that the plaintiff would be limited to damages equal to the purchase price of the seeds if the defendant were held liable for a breach of warranty. (*Id.* at p. 1533.) The court held that this clause "appears to violate section 1668," but it nonetheless upheld it. (*Id.* at p. 1538.) It did so on the grounds that another statute—section 2719 of the California Uniform Commercial Code—expressly authorizes such limitation-of-liability provisions. (*Id.* at pp. 1538-1539.) It explained that when a special and general statute are in conflict, the special statute controls. (*Id.* at p. 1539.) Thus, the Uniform Commercial Code provision prevailed over the more general section 1668.

The same is true here. Section 815, subdivision (b) authorizes public entities to rely on release agreements as a defense to liability to the same extent as a private person. As a specific provision concerning public entities and release agreements, it takes precedence over section 1668.

D. The public-policy considerations underlying the Government Claims Act support enforcing the release here.

When it enacted the Government Claims Act, the Legislature allowed for only "relatively circumscribed liability" against public entities. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1132.)[9] One of the most critical objectives of the Act was to ensure that public entities, which occupy a unique and indispensable place in society, are not burdened with unfair liabilities. The Law Review Commission that drafted the Act explained that it considered recommending a scheme in which public-entity liability would be the rule, subject to certain exceptions, but that it rejected this approach because it would expose public entities to an "indefinite area of liability" and "expand[] the amount of litigation and the attendant expense" they would face. (4 Cal. Law Revision Com. Rep. (1963) p. 811.) The Commission instead endorsed a scheme in which immunity is the rule and public entities cannot be liable unless a statute says otherwise. (*Ibid.*) The irony here is that Whitehead's

[9] Whitehead also cites *Zelig* but that decision does not help him. *Zelig* rejected the plaintiff's efforts to improperly expand a public entity's liability beyond what is permitted under section 835. (*Zelig*, *supra*, 27 Cal.4th at p. 1132.)

argument that statutory violations can never be released amounts to saying that a statute intended to *confine* public-entity liability may actually be used as a basis for *imposing* liability by voiding releases. That turns the Government Claims Act on its head.[10]

The Law Review Commission explained that imposing liability on public entities to the same extent as private parties is unfair because "public entities are fundamentally different from private persons:"

> Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.

(*Id.* at p. 810.)

Because the City has no choice but to provide the public streets, the Government Claims Act ensures that its liability to users of the streets is carefully cabined. Holding that the release here is not invalid under section 1668 will not upset the balance of public policies undergirding the Act, as Whitehead claims, but

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[10] Here ALC organized the ride and failed to survey the course in advance, while the City had no idea the ride was occurring and was prevented from taking any protective measures. Yet based on a purported distinction between statutory and common-law theories of liability, the City could be on the hook for Whitehead's damages, while ALC may not. That outcome is inequitable.

is in keeping with the Legislature's objective of limiting governmental liability. And while the authors of the Act recognized that because "[g]overnment operates for the benefit of all," it must sometimes bear the burden of injuries sustained by the public, the Act expressly gives public entities the right to invoke any defense available to private persons, naturally including releases. It is thus incorrect to say, as Whitehead does, that a ruling in the City's favor will "disproportionately distribute the burden of government-caused injuries on members of the public."[11] As tragic as Whitehead's accident was, he was a highly experienced cyclist engaged in a recreational activity who routinely, and knowingly, signed ALC's releases. Enforcing that release is entirely consistent with the letter and spirit of the Government Claims Act and this Court's precedents.

CONCLUSION

For all the reasons set forth above and its Answer Brief, the City respectfully requests that the Court affirm the Court of Appeal's holding that the release is enforceable.

Dated: January 14, 2025

Ryan Richardson,
Oakland City Attorney

/s/ Allison L. Ehlert
Allison L. Ehlert
Deputy City Attorney

[11] Whitehead also claims the City is trying to circumvent the state-wide requirements of the Act by relying on the release. That is wrong. The Act *authorizes* the City to rely on the release, as described above. (Govt. Code, § 815, subd. (b).)

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that pursuant to California Rule of Court 8.520, subdivision (c), this brief has been produced using 13-point Roman type, including footnotes, and contains 6,137 words, as calculated by the Microsoft Word software application in which it was written.

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

Executed on January 14, 2025, at Oakland, California.

/s/ Allison L. Ehlert
Allison L. Ehlert

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