SUPREME COURT
FILED

MAY 21 2018

Jorge Navarrete Clerk

Deputy

No. S242250

In the Supreme Court of California

REBECCA MEGAN QUIGLEY,
Plaintiff and Appellant,

v.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal For the Third Appellate District
3rd Civil No. C079270
Superior Court of the State of California For the County of Plumas
Case No. CV10-00225, The Honorable Janet Hilde

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS GARDEN VALLEY FIRE PROTECTION DISTRICT ET AL.

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TABLE OF CONTENTS

Page

APPLICATION 7

PROPOSED AMICI CURIAE BRIEF 13

1.0. Introduction 13

2.0. Discussion 16

2.1. The Legislature Passed Government Code Section 850.4 to Protect Firefighters from Being Deterred by Fear of Second-Guessing by Juries 16

2.2. Because a Public Entity and Employee Liability Is Entirely Statutory, a Statutory Absolute Immunity from Liability Is Jurisdictional and Cannot Be Waived 20

2.3. Because the Government Claims Act Provides Notice of Applicable Absolute Immunities, Omitting Them from Pleading Does Not Deprive Plaintiffs of Notice 25

2.4. Adopting Quigley's Argument That Government Code Section 850.4 Immunity Must Be Specifically Pleaded Will Create Hardship for Firefighting Agencies Throughout California ... 29

3.0. Conclusion 31

Certificate of Compliance 32

TABLE OF AUTHORITIES

Page

Cases

Buford v. State of California
(1980) 104 Cal.App.3d 811 22

Bunch v. Coachella Valley Water Dist.
(1997) 15 Cal.4th 432 23

Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.
(2005) 35 Cal.4th 1072 16

Cochran v. Herzog Engraving Co.
(1984) 155 Cal.App.3d 405 ..... 24, 25

Cornette v. Department of Transportation
(2001) 26 Cal.4th 63 ..... 11, 12

De La Rosa v. City of San Bernardino
(1971) 16 Cal.App.3d 739 23

Hata v. Los Angeles County Harbor/UCLA Medical Center
(1995) 31 Cal.App.4th 1791 ..... 22, 23, 26, 27

Heieck and Moran v. City of Modesto
(1966) 64 Cal.2d 229 19

McMahan's of Santa Monica v. City of Santa Monica
(1983) 146 Cal.App.3d 683 23

Muskopf v. Corning Hospital Dist.
(1961) 55 Cal.2d 211 21

People ex rel. Grijalva v. Superior Court
(2008) 159 Cal.App.4th 1072 ..... 19, 24

People v. Superior Court of City and County of San Francisco
(1947) 29 Cal.2d 754 22

Quigley v. Garden Valley Fire Protection District
(2017) 10 Cal.App.5th 1135 23

State Dept. of State Hospitals v. Superior Court (Novoa)
(2015) 61 Cal.4th 339 21

State v. Superior Court (Rodenhuis)
(1968) 263 Cal.App.2d 396 22

State v. Superior Court (Wanda Nagel)
(2001) 87 Cal.App.4th 1409 ..... 17, 18, 19

Tubbs v. Southern Cal. Rapid Transit Dist.
(1967) 67 Cal.2d 671 27

Union Bank v. Wendland
(1976) 54 Cal.App.3d 393 28

Statutes

Code of Civil Procedure section 469 28

Code of Civil Procedure section 576 28

Government Code section 815 ..... 21, 24

Government Code section 815, subdivision (a) 21

Government Code section 815, subdivision (b) 21

Government Code section 820, subdivision (a) 21

Government Code section 820.2 17

Government Code section 830.6 23

Government Code section 845.8 ..... 22, 23

Government Code section 850 ..... 13, 16, 23, 29

Government Code section 850.1 13

Government Code section 850.2 ..... 16, 17

Government Code section 850.3 13

Government Code section 850.4 ..... passim

Government Code section 850.5 13

Government Code section 850.6 13

Government Code section 854.8 26

Other Authorities

4 Cal.L.Rev.Comm. Reports 801 (1963) 16

Van Alstyne, California Government Tort Liability Practice (1981 CEB), § 3.76 at p. 301 23

Van Alstyne, California Government Tort Liability Practice (Cont.Ed.Bar 1980), § 4.30, pp. 371-372 19

APPLICATION

In accordance with rule 8.520(f) of the California Rules of Court, amici curiae League of California Cities, California State Association of Counties, California Association of Joint Powers Authorities, California Special Districts Association, and International Municipal Lawyers Association (collectively, "Amici")[1] respectfully request permission to file the amici brief included in this application.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide

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[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made any monetary contribution intended to fund the preparation or submission of this brief, other than the contributions of time and preparation costs by the counsel who authored this brief.

or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

California Association of Joint Powers Authorities, CAJPA, consists of 99 joint powers authorities ("JPAs") providing group self-insurance and risk management services to a vast majority of the public entities in California, including counties, cities, schools and special districts. This group self-insurance frequently includes liability coverage. CAJPA's members' first defense against liabilities is assisting the participants in their programs to reduce the risk of loss. However, when a claim is made and CAJPA's members are called upon to defend the case, immunities are essential to

limiting the cost of claims and litigation. Thus, the issue of when an immunity may be raised as a defense is extremely important to CAJPA's ability to control the costs of litigation to its members.

The California Special Districts Association ("CSDA") is a California non-profit corporation consisting of approximately 1,000 special district members throughout California. These special districts provide a wide variety of public services to urban, suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA has identified this case as having statewide significance for special districts.

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

Amici have a direct interest in the outcome of this case. The appellant's position that a public entity defendant must identify in its answer all Government Code immunities on which the entity will rely, or else waive that defense, threatens to erode the Legislatively-granted immunity of every public entity, agency, and employee in California.

In particular, the appellant's argument threatens to erode the effectiveness of Government Code section 850.4's

immunity from liability for injuries caused by the condition of fire-fighting facilities or equipment. Amici's members include numerous fire-fighting agencies, each vital to protecting Californians' lives and property from fire. In a time when wildfires regularly ravage the state, firefighting agencies need the immunities that the Legislature designed to protect their budgets. They also need the discretion the immunities grant when determining how to allocate resources to provide firefighting protection, and when providing that protection, determining the extent to provide and the facilities to use in providing it. They should not be hampered in those decisions by concerns about legal liability if a court later determines that they should have made a different decision. Further, firefighters have ample incentive to carefully maintain their equipment and facilities without the threat of legal liability. The immunities protecting firefighting agencies should not depend on whether an attorney representing the agency pleads the immunity at the outset of the case.

Amici believe that the proposed brief will assist the Court in deciding this case. Not only does it advise the Court of the impact of the Court's decision, but amicus curiae presentations assist the Court by broadening the Court's perspective on the issues the parties raise. (See *Cornette v.*

Department of Transportation (2001) 26 Cal.4th 63, 77 [denying motion to strike arguments in amici brief].)

Amici therefore respectfully request leave to file the attached brief.

DATED: May 11, 2018

POLLAK, VIDA & BARER

By: _____
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PROPOSED AMICI CURIAE BRIEF

1.0. Introduction

Fifty-five years ago, the Legislature established that public entities such as Amici's members, and their employees (when sued for acting within the scope of their employment), could be sued for damages under California law only as provided by statute. The Legislature passed a comprehensive structure of statutes that prescribed when public entities could and could not be sued. It designed a set of immunities to promote policies vital to the state and its citizens. Among those immunities were Government Code sections 850 through 850.6, which established immunities protecting firefighting decisions. The structure included Government Code section 850.4, which established absolute immunity from liability for injuries resulting from the condition of fire protection or firefighting equipment or facilities. By adopting that absolute immunity, the Legislature intended to protect fire fighters from being deterred in any action by fear that a jury would eventually second-guess their decisions.

This statutory structure set up a carefully-crafted system of sovereign immunity: Public entities and their employees may not be sued where the Legislature has established their absolute immunity. Further, this Court has established that the defense of sovereign immunity from suit is a jurisdictional question. And jurisdictional questions cannot be waived. When applied to the Government Code's immunities from tort, this rule against waiver ensures that public entities like Amici's members are entitled to the protections the Legislature crafted, regardless of whether the facts known at the outset of a case persuaded the defense attorney that a particular immunity should be pleaded.

Appellant Rebecca Megan Quigley appears to concede that immunities such as Government Code section 850.4 are jurisdictional. She nevertheless argues that "jurisdictional" does not really mean "jurisdictional" in the subject-matter jurisdictional sense; and that jurisdictional immunities therefore are waived if they are not pleaded. Quigley's opening brief's and reply brief's exegesis of the various shades and nuances of "jurisdictional" may make for interesting discussions among academics. But as a practical matter, they provide no ground for disturbing the rule that the Legislatures' absolute-immunity protections for governmental

functions, such as section 850.4, should not be held waived simply because they are not pleaded in an answer. Such a ruling would undermine the very purpose of absolute immunity.

Quigley expresses concern that omission of an absolute statutory immunity from a public entity's answer will deprive a plaintiff of notice that an immunity will be asserted. As case law has established, that is not a realistic concern. The Government Code spells out its absolute immunities. A plaintiff who seeks to sue a public entity for an injury allegedly resulting from the condition of a firefighting facility—like the camp here—is charged with knowledge that Government Code section 850.4 immunizes public entities from liability for such injuries.

Amici respectfully request that the Court affirm the Third District Court of Appeal's ruling that the Government Code's absolute immunities, and particularly Government Code section 850.4, are jurisdictional, and are not waived.

2.0. Discussion

2.1. The Legislature Passed Government Code Section 850.4 to Protect Firefighters from Being Deterred by Fear of Second-Guessing by Juries

This is a statutory interpretation case. When the Court interprets a statute, its goal is to ascertain the intent of the enacting legislative body so that the Court may adopt the construction that best effectuates the purpose of the law. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1087.)

The statute at issue is Government Code section 850.4. The Law Revision Committee Comments to Government Code section 850 explains section's 850.4's purpose. Section 850.4, section 850, and Government Code section 850.2 "provide for a broad immunity from liability for injuries resulting in connection with fire protection service." (4 Cal.L.Rev.Comm. Reports 801 (1963).)

In particular,

> "Section 850.4 provides for absolute immunity from liability for injury caused in fighting fires (other than injuries resulting from operation of motor vehicles) or from failure to properly maintain fire protection equipment or facilities. There are adequate incentives to careful maintenance of fire equipment without imposing tort liability; and firemen should not be deterred from any action they may desire to take in combatting fires by a fear that liability might be imposed if a jury believes such action to be unreasonable." (*Ibid.*)

Thus, section 850.4, and related statutes such as section 850.2, "were enacted to protect the discretion of public officials in determining whether fire protection should be provided at all, and, if so, to what extent and with what facilities." (*State v. Superior Court (Wanda Nagel)* (2001) 87 Cal.App.4th 1409, 1413.) "The statutes recognize that these are essentially political, policy-making decisions that should not be second-guessed by judges or juries." (*Ibid.*)

Further, unlike the broader discretionary immunity set forth in Government Code section 820.2, section 850.4 and

the related statutes protect not only policy-level decisions, but routine day-to-day or "operational" decisions, negligence, and mischance. (*State v. Superior Court*, *supra*, 87 Cal.App.4th at p. 1413.)

State v. Superior Court explains the vital need for this immunity:

> "As the Legislature has recognized, the activity of fighting fires necessarily creates danger to both property and persons, and to firefighters as well as members of the public. Decisions must often be made under stressful circumstances and require a balancing of risks against the odds of success which must be imperfect at best. The Legislature has determined that the wisdom of such decisions is unlikely to be affected for the better by a fear of financial liability." (*State v. Superior Court*, *supra*, 87 Cal.App.4th at p. 1414.)

The decisions interpreting section 850.4 and its sister statutes have recognized that the immunity's protection of those decisions is best served by barring not only ultimate liability for injuries, but also barring suit against them for

such decisions from proceeding (e.g., *State v. Superior Court*, *supra*, 87 Cal.App.4th at p. 1411 [directing trial court to sustain demurrer without leave to amend], and eliminating any duty the entities owe to injured parties for purposes of apportioning fault (*People ex rel. Grijalva v. Superior Court* (2008) 159 Cal.App.4th 1072, 1078). Further, an entity cannot waive the immunity by bringing suit against those who cause fires. (*Grijalva*, *supra*, at p. 1079.)

In adopting the immunity, the Legislature codified pre-Government Claims Act case law denying liability for defective fire-protection facilities; and rejected limitations on that immunity that Professor Arvo Van Alstyne suggested in the study on which the Act was largely based. (See *Heieck and Moran v. City of Modesto* (1966) 64 Cal.2d 229, 233, fn. 3; Van Alstyne, California Government Tort Liability Practice (Cont.Ed.Bar 1980), § 4.30, pp. 371-372.)

The importance of section 850.4's protections to the members of Amici is highlighted by the wildfires that have plagued California, and that seem to be increasing in frequency and intensity. Firefighters battling these blazes cannot be hampered by the fear that a mistake in

maintaining a firefighting camp or equipment will lead to a jury imposing liability later. Further, when the firefighters' lives depend on their care in maintaining their equipment and facilities, there is no need for tort law to provide an additional incentive.

That is the immunity that Quigley argues a public entity waives if its attorney does not plead the immunity before trial. Any such procedural limitation on the immunity threatens to thwart the Legislature's intent in enacting it. And as discussed next, Quigley's attempt to argue that the immunity may be waived by not pleading it fails.

2.2. Because a Public Entity and Employee Liability Is Entirely Statutory, a Statutory Absolute Immunity from Liability Is Jurisdictional and Cannot Be Waived

In her opening brief on the merits, Quigley concedes that the immunities provided in the Government Claims Act "are 'jurisdictional' . . . . They govern the manner in which a court may exercise its power . . . ." (OBM:32.) The Government Claims Act's parameters on when a public entity

or employee may and may not be sued for damages—and thus the court's power over them in a suit for damages under California law—are jurisdictional.

Government Code section 815, subdivision (a), establishes that a public entity is not liable for an injury except as provided by statute. Subdivision (b) of section 815 provides that the liability of a public entity "is subject to any immunity of the public entity provided by statute, including this part . . . ." Government Code section 820, subdivision (a) prescribes that public employees are liable for their acts or omissions to the same extent as a private person, "[e]xcept as otherwise provided by statute . . . ."

These statutes are part of the Government Claims Act, "a comprehensive scheme of governmental liability and immunity statutes." (*State Dept. of State Hospitals v. Superior Court (Novoa)* (2015) 61 Cal.4th 339, 348.) They reinstated the sovereign immunity this Court abolished in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 221. (*State Dept. of State Hospitals, supra*, at p. 347.) The statutes define when a public entity or employee may and may not be sued for damages under California law.

Early in the 1963 Act's history, *State v. Superior Court (Rodenhuis)* (1968) 263 Cal.App.2d 396, 398–399 held that liability under the Act concerns "the defense of sovereign immunity" which "presents a jurisdictional question . . . ." The court cited as support this Court's decision in *People v. Superior Court of City and County of San Francisco* (1947) 29 Cal.2d 754, 756, which held, "The defense of sovereign immunity from suit presents a jurisdictional question."

In *Buford v. State of California* (1980) 104 Cal.App.3d 811, 826, the court, citing *State v. Superior Court, supra*, held that an absolute immunity under the Act, Government Code section 845.8 (immunity for injury caused by patient of mental institution) was jurisdictional; was not waived by failure to raise it in a sustained demurrer; and could be raised for the first time on appeal.

Hata v. Los Angeles County Harbor/UCLA Medical Center (1995) 31 Cal.App.4th 1791,1803-1804 agreed with *Buford, supra*, and held Government Code section 845.8 to be jurisdictional. It ruled that the immunity did not have to be pleaded in an answer or summary judgment motion to be raised in a nonsuit. (*Id.* at p. 1804.) It distinguished section

845.8 from immunities such as Government Code section 830.6 (design immunity from liability for dangerous property condition), which require an affirmative showing by the public entity and must be pleaded. (*Id.* at pp. 1801-1802.)

The *Hata* court also distinguished Government Code section 850.4—which *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 689, disapproved on other grounds in *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447-451, held had to be pleaded or waived—on the ground that it, like Government Code section 830.6, was a dangerous condition immunity. (*Hata, supra,* 31 Cal.App.4th at p. 1802.) But as the lower court correctly ruled in the present case, *McMahan's* lumped section 850.4 in with other dangerous condition immunities, without elucidation, in holding that section 850.4 must be pleaded or else waived. (*Quigley v. Garden Valley Fire Protection District* (2017) 10 Cal.App.5th 1135, 1141–1143; see *McMahon, supra,* at p. 689 [citing *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 747 [section 830.6 is an affirmative defense that must be pleaded or waived] and Van Alstyne, California Government Tort Liability Practice (1981 CEB), § 3.76 at p. 301 [addressing affirmative defenses and immunities in dangerous condition cases: "Statutory

immunities and limitations on liability are regarded as affirmative defenses for this purpose"].)

This line of cases establishes that the lower-court decision here is based on a solid legal foundation: Absolute Government Claims Act defenses are an expression of sovereign immunity, are therefore jurisdictional, and cannot be waived.

As *People v. Grijalva, supra*, 159 Cal.App.4th at p. 1079 explained, in rejecting an argument that a public entity waives section 850.4 liability by bringing suit,

> "Government Code section 815 provides there is no implied waiver of statutory immunities. Pursuant to that statute, public entities are immune from liability, "'[e]xcept as otherwise provided by statute....' (Gov.Code, § 815.) '[S]overeign immunity is the rule in California; governmental liability is limited to exceptions specifically set forth by statute.' (*Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, 409, 205

Cal.Rptr. 1.) Here, the statutes grant immunity rather than waive it."

Quigley argues that sovereign immunity can be waived. She relies on case law from other jurisdictions. (OBM:37-39.) But there is no need to resort to other jurisdictions' law where there is California law on point. The law discussed above shows that the Legislature imposed a careful scheme of sovereign immunity and liability. The Legislature decided where the immunity would be waived, and where it would be imposed. Absolute immunities such as section 850.4 codify specific areas where, for policy reasons, sovereign immunity is imposed.

2.3. Because the Government Claims Act Provides Notice of Applicable Absolute Immunities, Omitting Them from Pleading Does Not Deprive Plaintiffs of Notice

A theme throughout Quigley's brief is that public entities and employees should be required to plead absolute immunities such as Government Code section 850.4 so that plaintiffs have notice that the defendant is asserting the immunity (rather than waiving it), can assert a demurrer to

the answer, and can prepare to address the immunity in the lawsuit. That theory fails for at least four reasons.

The first reason was explained in *Hata, supra*, 31 Cal.App.4th at pp. 1806-1807. The *Hata* trial court granted the plaintiff in that case a new trial based on "surprise," because the public entity defendant relied on Government Code section 854.8 (immunity for injury to inpatient of mental institution) for the first time at trial, without pleading it or moving for summary judgment based on the immunity. The appellate court held that there was no surprise. Since the plaintiff was suing a public entity for an injury that occurred while he was an inpatient of a mental institution, the court reasoned, the Government Claims Act itself put the plaintiff on notice of the immunity. "A review of the listed immunities would have advised Hata of the availability and applicability of a section 854.8 defense." (*Id.* at p. 1807.)

The same reasoning applies to absolute immunities such as Government Code section 850.4. Quigley sued for an injury she contended resulted from negligence involving a firefighting facility. Government Code section 850.4 prescribes absolute immunity for injuries caused by the

condition of firefighting facilities. Attorneys are charged with knowledge of the Government Code's provisions. (See *Tubbs v. Southern Cal. Rapid Transit Dist.* (1967) 67 Cal.2d 671, 679 [attorney charged with knowledge of the Act's statutes of limitation].) Quigley and her counsel were therefore on notice from the time they first pursued their suit that they would have to address Government Code section 850.4's immunity, and plead and prove facts establishing that it did not apply, to establish liability.

The second reason is that while demurrers to affirmative defenses are allowed, and occasionally occur, as a practical matter they are seldom brought. There is little point. Affirmative defenses pleaded in an answer that do not apply to the facts or that are unsupported by the law generally will not prevent the plaintiff from recovering.

The third reason is that when a public entity is sued, it does not always have all the facts to determine the specific statutory immunities that will ultimately apply to the case. Entities may plead a broad range of potentially applicable statutes, rather than specifying each immunity statute that applies. (See, e.g., *Hata, supra*, 31 Cal.App.4th at p. 1804.)

Doing so should ensure that any immunity in that range is preserved. It should not waive an absolute immunity to liability.

The final (and related) reason is the rule that pleadings may be amended at trial to conform to proof, so long as the amendment is based on the same general set of facts as the defenses that were originally pleaded. (Code Civ. Proc., §§ 469, 576; *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400–401, overturned due to legislative action (May 1, 2012).) In a case like this one, where the facts on which the absolute statutory immunity is based are present throughout the case, amendment to add an immunity from liability would and should be liberally granted. "Amendments to conform to proof, if not prejudicial, are favored since their purpose is to do justice and avoid further useless litigation." (*Union Bank*, *supra*, at p. 400.)

Purported lack of notice is not a ground for holding that an absolute statutory immunity from liability is waived if not pleaded.

2.4. Adopting Quigley's Argument That Government Code Section 850.4 Immunity Must Be Specifically Pleaded Will Create Hardship for Firefighting Agencies Throughout California

Under Heading 2.1, Amici discussed the policies behind the absolute immunity granted by section 850.4. The corollary is the consequences of holding, as Quigley argues, that a mere failure to specifically identify section 850.4 as an affirmative defense will waive the immunity.

Firefighting is critical to protecting lives and property—particularly in wildfire-plagued California. The absolute immunities in Government Code section 850 et seq., particularly section 850.4, are critical to providing firefighting services.

The Court is no doubt aware that California wildfires are becoming more deadly and destructive. A Washington Post article explained the unprecedented havoc last year's wildfires wreaked:

> "The wildfires that raced across California in 2017 caused historic levels of death and destruction. Nearly 9,000 wildfires tore through the state, burning 1.2

million acres of land . . ., destroying more than 10,800 structures and killing at least 46 people." (https://www.washingtonpost.com/graphics/2017/national/california-wildfires-comparison/?utm_term=.91dab4734212hat, link checked on May 11, 2018.)

Fighting those fires requires the immunity Government Code section 850.4 prescribes.

Holding the immunity may be waived will have the financial impact on firefighting agencies throughout California that the Legislature sought to prevent. The logistics and support of firefighting operations require both long-term planning and sudden emergency decisions. By enacting section 850.4, the Legislature sought to prevent agencies from being faced with the danger that if they make a misstep in the midst of fighting a fire—including setting up base camps during firefighting—financial liability for resulting injuries will drain money that would otherwise go to firefighting resources.

Further, finding the immunity waivable may result in more difficulty in hiring and retaining firefighters and other first responders. The dangerous and grueling job of running toward the danger, plunging into blazes, saving lives and

battling devastation should not carry with it the threat of tort liability if the employee makes a negligent misstep.

3.0. Conclusion

Law, policy, and practicality all support the lower court's ruling that the Government Claims Act's absolute immunities, and Government Code section 850.4 in particular, are jurisdictional and are not waived by failure to plead them. Amici respectfully ask the Court to affirm the lower court's decision.

DATED: May 14, 2018

POLLAK, VIDA & BARER

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies, in accordance with rule 8.520(c)(1) of the California Rules of Court, that the attached Application and [Proposed] Brief is produced using 13-point Roman type (including footnotes) (with 14-point headings) and contains approximately 4,064 words, which is less than the total number of words permitted by the rules of court. The undersigned relies on the word count of the computer program used to prepare this Application and [Proposed] Brief.

DATED: May 14, 2018

POLLAK, VIDA & BARER

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California State Association of
Counties, California Association
of Joint Powers Authorities,
California Special Districts
Association, and International
Municipal Lawyers Association

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11150 West Olympic Boulevard, Suite 900, Los Angeles, California 90064-1839.

On May 15, 2018, I served the foregoing document described as APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS GARDEN VALLEY FIRE PROTECTION DISTRICT ET AL. on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

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[X] I have mailed the above document by First-Class Mail, postage prepaid, for delivery within 3 calendar days to all of the above addressees.

[X] State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 15, 2018, at Los Angeles, California.

Elia Leyba