No. S235412

IN THE SUPREME COURT OF CALIFORNIA

Aleksandr Vasilenko, et al.,
Plaintiffs and Appellants,

v.

Grace Family Church,
Defendant and Respondent,

After a published decision of the Court of Appeal,
Third Appellate District

Case No. C074801

Appeal from a Judgment of the Superior Court,
County of Sacramento
Case No. 34201100097580

APPLICATION OF CALIFORNIA WALKS TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA WALKS IN SUPPORT OF PLAINTIFFS AND APPELLANTS ALEKSANDR VASILENKO, ET AL.

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APPLICATION OF CALIFORNIA WALKS TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS

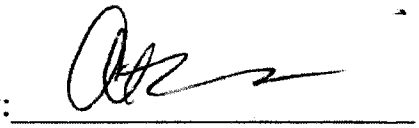
California Walks respectfully requests permission under California Rule of Court 8.250, subdivision (f) to file a brief as amicus curiae in support of plaintiffs and appellants Aleksandr and Larisa Vasilenko.

California Walks is a statewide organization of affiliated nonprofit and volunteer groups dedicated to creating healthy, safe, and walkable communities. Its mission is to provide a statewide voice for pedestrian safety and walkable communities through policy advocacy, community empowerment, and a growing unified statewide network of local community organizations and affiliates—with a focus on healthy equity and communities disparately impacted by pedestrian injuries and fatalities.

California Walks believes the attached brief will assist this Court in understanding and analyzing the policy issues involved in this case. In determining whether to recognize a duty of care or whether to establish an exception to the general duty of care, the Court looks to certain public policy factors. (See *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142-1143; *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771; *Rowland v. Christian* (1968) 69 Cal.2d 108, 112; Civ. Code, § 1714, subd. (a).) This brief focuses on the following factors: "the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach ... ." (*Rowland v. Christian*, *supra*, 69 Cal.2d at p. 113.) In particular, this brief addresses the importance of walkability and protecting pedestrian safety, and why acknowledging a duty in the context of this case would be more beneficial to our communities without imposing an undue burden on landowners.

The Court's resolution of this case will affect not only the plaintiff, Mr. Vasilenko, who was severely injured in a pedestrian-vehicle crash, but all pedestrians who encounter similar circumstances and are placed in a dangerous position at the direction of another. Under such circumstances and given this State's policy of encouraging pedestrian activities, the general duty of ordinary care should prevail.

No party or counsel for a party has authored the proposed brief in whole or in part; and no person or entity has made a monetary contribution intended to fund preparation or submission of the brief, other than counsel for amicus curiae California Walks.

Dated: January 6, 2017 By: 

C. Athena Roussos
Attorney for California Walks

BRIEF OF AMICUS CURIAE CALIFORNIA WALKS IN SUPPORT OF PLAINTIFFS / APPELLANTS

INTEREST OF AMICUS

California Walks is the statewide voice for pedestrian safety and healthy, walkable communities for people of all ages and abilities, through equity, engagement, education, advocacy and collaboration. California Walks submits this brief in support of the plaintiffs and appellants, Aleksandr and Larisa Vasilenko. California Walks has an interest in this matter because it believes that acknowledging a duty of ordinary care in the context of this case would protect the safety of pedestrians and promote safer, more walkable communities. Acknowledging such a duty when one who owns, possesses, or controls premises abutting a public street directs invitees to park in a lot across that street, will reduce pedestrian-vehicle crashes without imposing an undue burden on landowners. On the other hand, exempting such landowners from a duty of ordinary care would have negative repercussions to our communities.

No party or counsel for a party has authored the proposed brief in whole or in part; and no person or entity has made a monetary contribution intended to fund preparation or submission of the brief, other than counsel for amicus curiae California Walks.

INTRODUCTION

The majority opinion of the Third District Court of Appeal in this case is well-reasoned and based on well-settled principles of tort liability. There is no reason to depart from the general rule that "[e]veryone 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 ... ." (Civ. Code, § 1714, subd. (a).)

Recognizing a duty in the context of this case furthers the important public policy of preventing future harm to pedestrians who are victims of car crashes.[1] Car crashes involving pedestrians are particularly dangerous to pedestrians. Only one out of ten persons hit by a car traveling over forty miles per hour will survive.[2] California commonly has the highest number of pedestrian fatalities, and has a high rate of fatalities compared to other states.[3] Pedestrians comprise a large group of people in California—most of us are pedestrians nearly every single day since we tend to walk somewhere, even if we are driving or taking public transit. Pedestrians also

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[1] Pedestrians include those who walk on two feet and those persons who walk or roll using an assisted device—such as a baby in a stroller, a youth on skates, or a person using a cane, crutches or a wheelchair. (See, *e.g.*, *Gallardo v. Luke* (1939) 33 Cal.App.2d 230, 231-232; *Jermane v. Forfar* (1952) 108 Cal.App.2d 849, 850-851 [collecting cases]; see also County of Sacramento Department of Transportation, *Pedestrian Master Plan* (Apr. 2007), available at http://www.sacdot.com/Pages/PedestrianMasterPlan.aspx (last accessed Dec. 22, 2016) ("Sacramento County Pedestrian Plan"), at p. 18 ("Pedestrians also may use baby strollers, wheelchairs or other devices to support their personal mobility").

[2] See, e.g., U.S. Department of Transportation National Highway Traffic Safety Administration ("NHTSA"), Literature Review on Vehicle Travel Speeds and Pedestrian Injuries (Oct. 1999), available at https://one.nhtsa.gov/people/injury/research/pub/HS809012.html (last accessed Jan. 5, 2017).

[3] See California Strategic Highway Safety Plan ("SHSP") Version 2 (Sept. 2006) "*Challenge Area 8: Make Walking and Street Crossing Safer*" at p. 26, using Fatality Analysis Reporting System (FARS) data, available at http://www.dot.ca.gov/hq/traffops/survey/SHSP/SHSP-Booklet-version2_%20PRINT.pdf; see also SHSP 2015 Update (Sept. 2015) at p. 48, available at http://www.dot.ca.gov/trafficops/shsp/docs/SHSP15_Update.pdf (pedestrian fatalities and severe injuries are increasing in California) (both links last accessed Dec. 29, 2016).

include many of our most vulnerable members of the public—young, elderly, disabled, and poor persons who cannot drive. Having safe, walkable communities is thus vital for California.

Here, the defendant directed the plaintiff, an invitee making his first visit to the church, to park at a lot across the street, requiring the plaintiff to cross a major five-lane highway, at night, in the rain, with cars traveling at speeds exceeding 50 miles per hour. (I CT 231, 254; II CT 407, 494-495, 500, 503, 528, 549-550, 582, 588-589, 592-593, 595; see also ABOM at p. 4, Fig. 1 [also at II CT 433, 530].) The defendant's conduct increased the risk of harm, because the plaintiff could have made a variety of other, safer choices had he not been directed to park at an unsafe location. Recognizing a duty is appropriate and fair in such circumstances.

In addition, recognizing a duty here would not be unduly burdensome on landowners. This is not a case of mere passive activity; rather, the defendant engaged in affirmative action increasing the risk of harm. The location of the parking lot where the plaintiff was directed to park was unsafe in relation to the defendant's premises, and the defendant was well aware of this fact. (I CT 235-236, 266; II CT 517-518, 539-540, 546, 557-559.) The defendant had several other options available, such as 1) directing invitees to its other, safer overflow lot that did not require invitees to cross Marconi Avenue, a dangerous five-lane highway; 2) guiding its invitees on a safe route of travel rather than sending them blindly on their way across Marconi Avenue; 3) providing some warning to invitees of the danger of crossing Marconi Avenue; or 4) simply not directing invitees to park in an unsafe location at all.

Finally, creating a new blanket exemption simply because the collision occurred off-premises would have severe negative consequences

to the community. There would be little reason for landowners[4] of commercial establishments to minimize risks when they direct their patrons to parking areas that require dangerous street crossings, if landowners are categorically immune from liability. The burden would instead unfairly fall primarily on victims and the public. There is a huge economic cost of car crashes involving pedestrians, including high medical costs and public assistance for victims, loss of their economic productivity, as well as costs for first-responders and repairs to infrastructure caused by collisions. The duty to exercise ordinary care is neither burdensome nor unfair.

ARGUMENT

I.
CALIFORNIA GENERALLY IMPOSES LIABILITY FOR DAMAGES CAUSED BY ONE'S NEGLIGENCE; JUDICIALLY-CREATED EXCEPTIONS ARE ONLY APPROPRIATE WHERE CLEARLY SUPPORTED BY PUBLIC POLICY.

"'California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others. (Civ. Code, § 1714, subd. (a).)'" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142 ("*Kesner*"), quoting *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770 ("*Cabral*").) "'[I]n the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where "clearly supported by public policy."'" (*Id.* at p. 1143, quoting *Cabral, supra*, 51 Cal.4th at p. 771, and *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 ("*Rowland*").)

In determining whether such an exception should be created, the Court considers the factors set forth in *Rowland* and *Cabral*. This brief will focus on the following factors: "the policy of preventing future harm, the

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[4] As used in this brief, the term "landowner" includes one who owns, possesses, or controls premises.

extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach...." (*Rowland, supra*, 69 Cal.2d at p. 113.) "Because Civil Code section 1714 establishes a general duty to exercise ordinary care in one's activities ... we rely on these factors not to determine 'whether a *new duty* should be created, but whether an *exception* to Civil Code section 1714 ... should be created.'" (*Kesner, supra*, 1 Cal.5th at p. 1143, quoting *Cabral, supra*, 51 Cal.4th at p. 783 (Court's italics).)

I.
RECOGNIZING A DUTY OF ORDINARY CARE OWED BY LANDOWNERS WHO DIRECT INVITEES TO PARK AT A LOCATION WHERE INVITEES HAVE TO CROSS A DANGEROUS STREET WOULD FURTHER THE IMPORTANT PUBLIC POLICY OF PREVENTING FUTURE HARM

A. Requiring tortfeasors to pay costs of their negligent conduct serves to prevent future harm.

"'The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible.'" (*Kesner, supra*, 1 Cal.5th at p. 1150, quoting *Cabral, supra*, 51 Cal.5th at p. 781.) "In general, internalizing the cost of injuries caused by a particular behavior will induce changes in that behavior to make it safer. That consideration may be 'outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability.'" (*Kesner, supra*, 1 Cal.5th at p. 1150, quoting *Cabral, supra*, 51 Cal.4th at p. 782.)

B. Recognizing a duty in the context of this case would serve to prevent future vehicle crashes with pedestrians.

1. Pedestrian safety is an important concern in California.

Collisions involving pedestrians are a serious problem in California. Each day in California, from 2000 to 2009, an average of 42 collisions involving pedestrians, 2 pedestrian fatalities, and 5.4 severe injuries occurred.[5] California typically has the most pedestrian fatalities of any state.[6] In 2009, the year before the plaintiff in this case was hit by a car, 21% of California's total traffic fatalities and 18% of the total severe injuries involved pedestrians.[7] When comparing all traffic collisions to all pedestrian collisions in California for 2009, pedestrian collisions were 150% more likely to result in death.[8] Eighty percent of pedestrians hit by a

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[5] California Statewide Integrated Traffic Records System ("SWITRS") data query using the University of California Berkeley SafeTREC Transportation Injury Mapping System ("TIMS"), located at http://tims.berkeley.edu/.

[6] See, e.g., NHTSA, Traffic Safety Facts 2014 Data: Pedestrians, available at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812270, and NHTSA, Traffic Safety Facts 2013 Data: Pedestrians, available at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812124 (both last accessed Jan. 5, 2017).

[7] SWITRS data query using the University of California Berkeley SafeTREC TIMS, located at http://tims.berkeley.edu/.

[8] SWITRS data query using the University of California Berkeley SafeTREC TIMS, located at http://tims.berkeley.edu/.

car traveling 40 miles per hour are likely to be killed; almost all are likely to be killed when struck by a car traveling 50 miles per hour or more.[9]

Promoting safe, walkable streets is vital for our communities. Nearly all of us are pedestrians; for many it is a daily activity. Walking is a part of every trip, just as it was for the plaintiff in this case, who drove to the defendant's church before he was hit while crossing the street. (I CT 264; II CT 592; see Sacramento County Pedestrian Plan, *supra*, at p. 18 ("Most travelers walk during some portion of their trip ... Pedestrians have the same needs as automobile drivers: direct, continuous and safe routes to and from their destinations.")

Protecting the safety of pedestrians is thus a paramount concern for our communities. For example, in the Sacramento metro area, where the collision with the plaintiff occurred, the Sacramento Area Council of Governments ("SACOG") developed a Bicycle and Pedestrian Master Plan.[10] This plan recognizes the importance of increasing walking in communities and protecting pedestrian safety:

> An important goal of this plan is to reduce bicyclist and pedestrian injury and fatality rates while increasing bicycling and walking. Bicyclists and pedestrians should be given increased priority in road safety programs....

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[9] See NHTSA, Literature Review on Vehicle Travel Speeds and Pedestrian Injuries (Oct. 1999), available at https://one.nhtsa.gov/people/injury/research/pub/HS809012.html (last accessed Jan. 5, 2017). The plaintiff in this case was very fortunate to survive, given that he was hit by a car traveling at speeds of 50 to 55 miles per hour. (I CT 253-254.)

[10] SACOG, *Regional Bicycle, Pedestrian, and Trails Master Plan* (Update 2011), available at http://www.sacog.org/sites/main/files/file-attachments/h-1_bicycle_and_pedestrian_master_plan.pdf (last accessed Dec. 22, 2016) ("SACOG Plan").

> Bicyclists and pedestrians are often difficult for drivers to see and therefore are vulnerable to injury if hit by a vehicle, particularly when traffic speeds are moderate or high. Pedestrians are particularly sensitive to traffic congestion, detours, roadway conditions, street aesthetics, and street crime.
>
> Pedestrians are injured and killed in much higher proportion to their trip making than travelers using other modes of transportation. In California pedestrians are involved in 3% of all collisions, but account for 22% of the traffic fatalities statewide. [Citation.] Those who have a choice will not walk if there is a lack of safe facilities. Therefore pedestrian-friendly facilities are essential to achieving an increase in walking.

(SACOG Plan at pp. A11-12, citing California Pedestrian Safety Task Force Report: *Walking Towards a Brighter Future*, March 1999.)

Sacramento County's Pedestrian Plan also emphasizes the importance of encouraging walking and protecting pedestrian safety. "It is now widely recognized that walking has health, environmental, economic and quality of life benefits." (Sacramento County Pedestrian Plan, *supra*, at p. 4.) "Safety concerns prevent some individuals from walking more frequently. Pedestrians have conflicts primarily with motor vehicles ... ." (*Id.* at p. 39.) In unincorporated Sacramento County—where the crash here occurred—from 1996 to 2001, there were an average of 12 pedestrian fatalities per year. (*Ibid.*) "Almost one-third of all pedestrian collisions in unincorporated Sacramento County involve children under 14 years old." (*Ibid.*) In fact, Marconi Avenue was the third highest corridor for collisions per mile (and fatalities per mile) from 1996 to 2001, with a total of 41 collisions, 5 fatalities, and 42 casualties—an average of 8.4 collisions per mile and 1 fatality per mile. (*Id.* at p. 40.) Several intersections on Marconi were considered as high-collision intersections. (See *id.* at p. 41.)

The crash in this case demonstrates typical conditions in which pedestrians are often seriously injured or killed. The plaintiff had to cross a five-lane thoroughfare with cars traveling at high speeds. (I CT 231; II CT 495.) There was no marked crosswalk at the intersection and no traffic signals. (II CT 508-509, 583.) The crash occurred at night. (II CT 500, 503, 549, 550.) Most pedestrian fatalities occur after 6:00pm until midnight.[11] Because of the high speeds of cars on Marconi Avenue, pedestrians often had to cross in two stages, stopping in the middle lane; this is an especially dangerous situation for pedestrians. (II CT 379, 400, 567.) All of this was known to the defendant. (See I CT 235-236, 266; II CT 379, 400, 517-518, 539-540, 546, 557-559, 567.)

2. The defendant's conduct in directing the plaintiff to an overflow lot across a major highway increased the risk of harm to the plaintiff.

The defendant here increased the risk of harm by directing the plaintiff and others to park at the swim school lot. Had the defendant not directed the plaintiff to park there, the plaintiff would have been free to choose a different, safer area, without having to cross Marconi Avenue in the dark, while it was raining. As the majority correctly recognized in the opinion below, "[t]his is not simply a case where a business merely provided instructions about where to park; rather, this is a case where an entity maintained and operated a parking lot in a location that required its invitees to cross a busy thoroughfare *and* directed its invitees to that lot when its main lot was full." (*Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146, 157, rev. granted Sept. 21, 2016 ("*Vasilenko*").)

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[11] See NHTSA, Traffic Safety Facts 2014 Data: Pedestrians, available at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812270 (last accessed Jan. 5, 2017).

The defendant argues that "Directing someone to a place where he or she is then required to cross a street to get to a particular location does not make the act of crossing the street more dangerous than it already is." (RBOM at p. 19.) This statement misses the point. By directing patrons to park at the swim school lot directly across Marconi Avenue from the church entrance, patrons *had* to cross Marconi Avenue to get to the church. There was no way to avoid crossing Marconi Avenue to get to the church. The defendant thus controlled the actions of their invitees by directing them to park at a particular location requiring them to cross Marconi Avenue. Directing patrons to do so at night and in the rain, further increased the danger of a collision on Marconi Avenue. The defendant was also aware of the dangers of crossing Marconi Avenue, and took no steps to warn the plaintiff or assist him in making the dangerous crossing. (I CT 235-236, 266; II CT 500, 517-518, 539-540, 546, 557-559, 595-596; OBOM at p. 4.) Notably, the defendant had a key to the locked gate at the swim school lot, and therefore had affirmatively unlocked the gate to make it available for parking on the night of the crash. (I CT 202, 214.)

The defendant's attempt to characterize Mr. Vasilenko as a "jaywalker" is also without support. (See RBOM at pp. 33-34.) The applicable ordinance provides, "No pedestrian shall cross a roadway at any place other than by a route at a right angle to the curb or by the shortest route to the opposite curb except in a marked crosswalk." (Sac. County Code, tit. 10, ch. 10.20.040.) The defendant misreads this section to require all crossings in marked crosswalks. (RBOM at p. 34.) The phrase "other than" plainly provides that a pedestrian may cross the street "at a right angle to the curb *or* by the shortest route to the opposite curb ...." (Sac. County Code, tit. 10, ch. 10.20.040 [emphasis added].) Mr. Vasilenko did both—he crossed at a right angle and by the shortest route from the swim

school lot to the church. (See ABOM at p. 4, Fig. 1.) Notably, there are no marked crosswalks in this area of Marconi Avenue. (II CT 508, 509.)

Moreover, the defendant easily could have directed the plaintiff to another safer location with more parking on the same side of Marconi Avenue. (II CT 476, 512.) The defendant also could have easily advised the plaintiff to cross at Root Avenue, which had more lighting (II CT 500), and where church attendants with flashlights were stationed to help pedestrians cross Marconi Avenue. (See I CT 198-199, 212, 223, 266, 271; II CT 533, 539.) Finally, the defendant could simply have not directed plaintiff to park at an unsafe lot in relation to the church entrance.

As noted previously, Marconi Avenue has a very high rate of collisions and fatalities. (Sacramento County Pedestrian Plan, *supra*, at pp. 40-41.) Looking at collision data from 2005 to 2013, there were 18 collisions with pedestrians and 28 collisions with bicycles within a half-mile of where the crash with the plaintiff occurred (including the crash in this case).[12]

The dangerous condition at issue is not merely that Marconi Avenue is adjacent to the defendant's premises; rather, the dangerous condition is the location of the overflow lot in relation to the church premises. The majority decision correctly recognized this distinction. (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 154.)

Recently, this Court recognized that landowner liability is not limited to injuries occurring on its premises. "We have never held that the physical or spatial boundaries of a property define the scope of a landowner's liability." (*Kesner*, *supra*, 1 Cal.5th at p. 1159.) "The Courts of Appeal have repeatedly concluded that '"[a] landowner's duty of care to

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[12] SWITRS data query using the University of California Berkeley SafeTREC TIMS, located at http://tims.berkeley.edu/.

avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner."'" (*Ibid.*, quoting *Garcia v. Paramount Citrus Assn., Inc.* (2008) 164 Cal.App.4th 1448, 1453 and citing *Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478 ("*Barnes*") and *McDaniel v. Sunset Manor Co.* (1990) 220 Cal.App.3d 1, 7-8.) "'Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1159, quoting *Barnes*, *supra*, 71 Cal.App.4th at p. 1478.) Here, the defendant maintained an overflow parking lot across Marconi Avenue, and directed the plaintiff to park there, exposing the plaintiff to a risk of injury because he had to cross Marconi Avenue to reach the church. Recognizing a duty here is thus consistent with well-established case law.

Contrary to the defendant's argument in its reply brief on the merits, the plaintiffs are not raising "new theories" regarding the duty owed.[13] The theories and facts in appellants' brief on the merits are reasonably encompassed by the first amended complaint's allegations. (See 1 CT 186-187.) The allegations must be construed broadly. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1252-1258; and *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 224, 226.)

In sum, imposing tort liability on landowners who fail to exercise a duty of ordinary care when directing invitees to park at a location requiring the invitees to cross a dangerous public street will prevent future vehicle collisions with pedestrians and will promote public safety.

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[13] The Third District Court of Appeal's opinion does not address this issue, and it does not appear the defendant petitioned for rehearing on this issue.

II.
RECOGNIZING A DUTY OF ORDINARY CARE UNDER THESE CIRCUMSTANCES WOULD NOT BE UNDULY BURDENSOME TO LANDOWNERS

A. The duty arises only when a defendant engages in affirmative conduct directing invitees to a parking area requiring them to cross a public street to reach its premises.

The duty at issue here is one that arises only where the defendant has engaged in affirmative conduct—as in this case, where the defendant operated an overflow parking lot and directed its invitees to park there, requiring its invitees to cross Marconi Avenue, thereby creating a foreseeable risk of harm.

The distinction between misfeasance and nonfeasance is well established. Misfeasance affirmatively creates risk, whereas nonfeasance is associated with passively failing to prevent harm. (Rest.3d Tort, Liability for Physical and Emotional Harm, § 37, com. *c*.) Where the distinction is difficult to ascertain, "[t]he proper question is not whether an actor's failure to exercise reasonable care entails the commission or omission of a specific act" but rather "whether the actor's entire conduct created a risk of harm." (*Ibid.*) So, even if the specific conduct alleged to have breached the duty of reasonable care was an omission, the conduct is classified as misfeasance if the entirety of the actor's conduct created a risk of harm. (*Ibid.*)

The court of appeal correctly classified the defendant's conduct as misfeasance because its conduct created the unreasonable risk of harm to invitees of having to cross Marconi Avenue. The defendant identified the locations of its overflow parking lots, created maps identifying those locations, and placed attendants in locations to direct invitees to the selected lots. (*Vasilenko, supra*, 248 Cal.App.4th at p. 149.) While the defendant places great emphasis on *where* the collision occurred (*i.e.*, off-

site), the appropriate inquiry instead focuses on the *nature* of the defendant's conduct. A duty arises with the associated burden of due care when the defendant *creates* the risk of harm, regardless of whether the actual injury occurs on or off the defendant's premises.

In *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 488-89, the hotel did not own, maintain, or control the private parking lot owned by a third party across the street from the hotel and, although the lot was frequently used by patrons and invitees of the hotel, the hotel did not affirmatively direct its invitees to the parking lot. There was no affirmative conduct on the part of the hotel in terms of invitees parking at the lot and, therefore, the owner did not create the danger and had no duty to warn of dangers beyond its own property. (*Id.* at p. 492.)

Here, the defendant's conduct created the unreasonable risk of harm and the defendant, thus, voluntarily assumed the duty of reasonable care. (See 2 CT 312, 314 and RT 14, 20, 24, 29 discussing *Schwartz v. Helms Bakery* (1967) 67 Cal.2d 232.)[14] The defendant's action is similar to the transit authority's conduct in *Bonnano v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, because the transit authority had located the bus stop in the specific location and could have located it at a different

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[14] If the Court finds no duty under Civil Code section 1714, it should reach the voluntary assumption question that the court of appeal did not reach. (See ABOM, pp. 54-55.) This Court may decide "any issues that are raised or fairly included in the petition or answer." (Cal. Rules of Court, rule 8.516, subd. (b)(1).) Whether the defendant voluntarily assumed a duty is within the scope of the question on review for two reasons. First, the defendant has framed the issue as to whether it had a duty to act to protect the plaintiff. (See RBOM at pp. 9, 14 fn. 2, 20-21.) Second, the defendant denies that it "engaged in the conduct that Vasilenko alleges it should have but failed to engage in." (RBOM at pp. 20-21.)

location. The bus stop could be considered a dangerous condition because accessing it required crossing a dangerous intersection. (*Id.* at p. 148.)

The appropriate inquiry regarding the "burden" of due care under *Rowland* should thus focus on the burden associated with the landowner's affirmative creation of the risk of harm.

B. The burden is one of ordinary care.

The burden on the defendant is a duty of "ordinary care" or "due care." (Civ. Code, § 1714, subd. (a); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472; *Cabral, supra*, 51 Cal.4th at p. 772.) Contrary to the defendant's characterization, the burden focuses on what the defendant could have done in ordinary and due care to mitigate the risk created by the defendant's affirmative actions. In this regard, the *Rowland* factors are evaluated at a relatively broad level of factual generality. (*Cabral, supra*, 51 Cal.4th at p. 772.)

Recognizing a duty here would not create an endless sphere of liability for property owners. As this Court explained in *Cabral*, "[b]ecause the duty at issue is only that of ordinary care, our rejection of the exemption [defendant] seeks does not mean all [similar activity] can result in negligence liability; whether the duty of ordinary care has been breached depends on the particular circumstances ... ." (*Cabral, supra*, 51 Cal.4th at p. 783.) Thus, the defendant's argument that to avoid liability property owners will need to refrain from providing off-site parking or to suggest where visitors can park off-site holds no water. The duty of ordinary and due care attaches to the affirmative conduct of the property owner. If and when he takes an affirmative act that increases the risk of harm to another, he must do so with ordinary and due care. Whether or not he acted with ordinary and due care is a determination for the jury based on the specific facts at issue in that case. (*Id.* at p. 772.)

Recognizing a duty would not place heavy burdens on property owners, business owners, or the community in the defendant's circumstances. (*Id.* at p. 782.) Courts must not "risk[ ] usurping the jury's proper function of deciding what reasonable prudence dictates under those particular circumstances." (*Id.* at p. 774.) In contrast, a finding of "no duty" is "'a global determination that, for some overriding policy reason, courts should not entertain causes of action for cases that fall into certain categories,' even if some defendants in such cases did actually cause the harm of which the plaintiffs complained. [Citation.]" (*Kesner*, *supra*, 1 Cal.5th at p. 1154.) This factor weighs heavily in favor of recognizing a duty here.

A landowner with knowledge of the safety concerns to pedestrians with respect to parking lots under its control and to which it directs its invitees is in a better position than the invitees to know of the dangers to pedestrians, and to take reasonable precautions to avoid injuries to pedestrians that may result from the landowner's direction of where to park or cross a street.

C. The burden to the defendant to mitigate the risk created by its affirmative conduct was minimal.

The "relevant burden in the analysis of duty is not the cost to the defendants of compensating individuals for past negligence," but rather "the cost to the defendants of upholding, not violating, the duty of ordinary care." (*Kesner*, *supra*, 1 Cal.5th at p. 1152.) Under the facts in this case, the "burden to the defendant" factor is minimal.

Here, the defendant was well positioned, relative to its patrons, to undertake preventive measures such as warnings or directions to patrons when it undertook the affirmative act of directing patrons to park at the pool lot. There is no evidence to suggest that such warnings or directions

would have been unreasonably costly. The defendant had already undertaken to direct Mr. Vasilenko where to park and its parking attendants could have provided the additional information regarding safe crossing in a matter of seconds. (II CT 500, 595-596.) And, since the defendant routinely used the pool lot for parking (I CT 213, 232-233; II CT 476, 504), it could have made reusable signs with directions and warnings. Such a one-time expense would not be unreasonably costly. The defendant had printed maps identifying alternate places to park, which could easily have included warnings or directions for pedestrians to lessen the risks of traveling across Marconi Avenue. Also, the defendant could have directed its invitees to park at the shopping center lot on the same side of the street as the church—in a much safer location for pedestrians. This lot contained ample parking. (II CT 479, 483.) Finally, the defendant could have simply not directed its patrons to park at a known unsafe location at all.

Defendant has raised no arguments that implementation of precautions to prevent risk of injury would have unreasonably interfered with its services, impeded on its ability to carry out an activity with social utility, or required expenditure of significant sums of money. Even if a duty under these circumstances would result in increased insurance costs and tort damages, such costs are not the appropriate focus for this inquiry. (*Kesner*, *supra*, 1 Cal.5th at pp. 1152-1154.)

III.
CREATING A CATEGORICAL EXEMPTION FOR INJURIES OCCURRING OFF-PREMISES WOULD RESULT IN SEVERE NEGATIVE CONSEQUENCES TO THE COMMUNITY

Creating a new exception because the injuries occurred during a collision in a public street, and not on the land controlled by the defendant, would have severe negative consequences to the community. The burden

of pedestrian collisions caused by negligent conduct of landowners would fall unfairly upon victims and the public.

The fact that the defendants will have to pay damages associated with these injuries is not properly considered a consequence to the community. In *Kesner*, this Court emphasized that "the tort system contemplates that the cost of an injury, instead of amounting to a 'needless' and 'overwhelming misfortune to the person injured,' will instead 'be insured by the [defendant] and distributed among the public as a cost of doing business.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1153, quoting *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 462 [conc. opn. of Traynor, J.].) "Such allocation of costs serves to ensure that those 'best situated' to prevent such injuries are incentivized to do so.'" (*Ibid.*) The duty at issue here would be limited to situations where the landowner directs invitees to parking areas that require invitees to make street crossings the defendant knows are unreasonably dangerous. (See *Kesner*, *supra*, 1 Cal.5th at pp. 1154-1155 [defendant's concerns about uncertainty and unmanageability of future claims did not justify a categorical exemption, but rather a limitation of the scope of the duty].) The scope of the duty would depend on the particular facts of the case; in general, it is a duty to exercise ordinary care. (See *Cabral*, *supra*, 51 Cal.4th at p. 783.)

If landowners are immune from liability, they will have no reason to take steps to minimize vehicle collisions with pedestrians who visit their premises. As discussed in the section above, the duty of care is merely a duty of reasonable, ordinary care and will not impose undue burdens on landowners. Such steps will reduce vehicle crashes with pedestrians.

A categorical exemption here would unfairly place the burden on victims and the public, rather than on the tortfeasor. Injuries from vehicle collisions with pedestrians result in significant medical costs. In a 2010

study by the San Francisco Injury Center entitled "Cost of Auto-versus-Pedestrian Injuries" in San Francisco, researchers reviewed data regarding almost 3,600 patients visiting San Francisco General Hospital (the only Level 1 Trauma Center serving San Francisco) for auto-versus-pedestrian injuries from 2004 to 2008.[15] The study revealed that the total cost of pedestrian injuries for the five-year period was $74.3 million. About 76% ($56.7 million) of the total cost was paid for by Medicare, MediCal, and patients themselves. Private insurance paid for about 24% ($17.6 million). Uninsured patients were directly billed for costs ranging from about $5,100 to over $505,000 during this period. For those patients who were not admitted to the hospital, the mean cost per pedestrian was over $6,400 in 2008. For those who were admitted—staying an average of 11.6 days in the hospital—the mean cost was over $72,000 in 2008.

These medical costs are only some of the costs involved. There are also long-term care costs when a pedestrian, like Mr. Vasilenko, suffers severe injuries requiring lifelong care. There are other costs, including loss of economic productivity, public assistance costs, other losses to the victim's family, costs of infrastructure repair from crashes, and costs for first responders. Landowners who placed pedestrians at risk for vehicle collisions by directing them to park in areas requiring them to cross dangerous streets are in a better position to take steps to reduce those risks than the pedestrians. Mr. Vasilenko, for example, was visiting the defendant's church for the first time. (II CT 407, 528, 582, 588-589.) The defendant was aware of the dangers of high-speed traffic on Marconi Avenue and could have taken simple steps to reduce the risk of harm, as discussed previously.

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[15]Available at http://sfic.surgery.ucsf.edu/media/1585937/pedcost.pdf (last accessed Dec. 28, 2016).

Recognizing a duty here would not mean that a landowner who directs invitees to park at its lot across the street from its premises would always be liable. As this Court stated in *Cabral*, "whether the duty of ordinary care has been breached depends on the particular circumstances, including those aggravating or mitigating the risk created and those justifying the decision ... ." (*Cabral, supra*, 51 Cal.4th at p. 783.) These kinds of decisions are made by juries every day in deciding negligence cases. (See *id.*) Moreover, the duty would be limited to those situations where landowners are directing their invitees to park in areas requiring invitees to cross public streets.

CONCLUSION

For all the foregoing reasons, amicus curiae California Walks respectfully requests that the Court affirm the decision of the Third District Court of Appeal, recognizing that a duty of reasonable, ordinary care exists when landowners direct their invitees to park in areas requiring invitees to make dangerous street crossings.

Dated: January 6, 2017

By: 

C. Athena Roussos
Attorney for Amicus Curiae
California Walks

WORD COUNT CERTIFICATION

I certify, pursuant to rule 8.204, Subdivision (c)(1), California Rules of Court, that the attached **Brief of Amicus Curiae California Walks In Support of Plaintiffs and Appellants** contains **5,799** words, as measured by the word count of the computer program used to prepare this brief.

Dated: January 6, 2017

By: _____

C. Athena Roussos
Attorney for Amicus Curiae
California Walks

PROOF OF SERVICE
(CCP Sections 1013a, 2015.5)

I, C. Athena Roussos, declare:

I am an active member of the State Bar of California. I am over the age of eighteen years and not a party to the within cause. My business address is 9630 Bruceville Road, Suite 106-386, Elk Grove, CA 95757.

On **January 6, 2017**, I served the within **APPLICATION OF CALIFORNIA WALKS TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA WALKS IN SUPPORT OF PLAINTIFFS AND APPELLANTS ALEKSANDR VASILENKO, ET AL.** on the interested parties in said action by depositing true copies, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows:

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There is delivery by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **January 6, 2017,** at Elk Grove, California.

C. ATHENA ROUSSOS