SUPREME COURT OF CALIFORNIA

S267453

BETTY TANSAVATDI,

Plaintiff & Respondent,

v.

CITY OF RANCHO PALOS VERDES,
Defendant & Petitioner.

California Court of Appeal,
Second Appellate District, Division Four
B293670

Superior Court for Los Angeles County
BC633651/BC652435
Judge Robert Broadbelt

Application to File Amicus Curiae Brief; Brief of Consumer Attorneys of California as Amicus Curiae in Support of Plaintiff

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CERTIFICATE OF INTERESTED PARTIES

This is the initial certificate of interested entities or persons submitted on behalf of Consumer Attorneys of California as amicus curiae in the case number listed above.

The undersigned certify that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208, for Consumer Attorneys of California.

Dated: 10/18/21

By: */s/Benjamin I. Siminou*
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APPLICATION TO FILE AMICUS CURIAE BRIEF

Consumer Attorneys of California ("Amici") hereby request this Court to accept the attached amicus curiae brief in support of Plaintiff and Respondent Betty Tansavatdi under California Rules of Court, rule 8.520(f).

Founded in 1962, Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 attorneys practicing throughout California. CAOC has taken a leading role in advancing and protecting the rights of California consumers in both the courts and the California Legislature. CAOC's members frequently represent individuals injured by dangerous conditions of public property throughout California.

As an organization dedicated to seeking redress for victims of dangerous conditions of public property, CAOC is interested in the issues presented by this appeal. The Court's resolution of this appeal will have lasting and fundamental ramifications on cases alleging dangerous conditions of public roadways.

Counsel for Amici is familiar with all of the briefing filed in this case to date. Amici's attached amicus brief argues that it would be bad law and bad policy for this Court to overrule its decision in *Cameron v. State of California* (1972) 7 Cal.3d 318.

No party to this action has provided support in any form regarding the authorship, production, or filing of this brief. Amici's sole interest in this action are its ramifications on the interests of California citizens that CAOC represents.

INTRODUCTION

This Court granted review to address whether a public entity can be liable "for failure to warn of an allegedly dangerous design of public property that is subject to Government Code section 830.6 design immunity."[1]

Although this Court indicated that issue arises out of the interplay between sections 830.6 and 830.8, CAOC respectfully submits that that issue actually arises out of the interplay of between sections 835 and 830.6.

As set forth in this brief, the authorities that inspired sections 835 and 830.6, the text of those statutes, and this Court's decisions applying them all demonstrate that, regardless of design immunity, public entities have an ongoing duty to warn if experience has revealed a dangerous condition of a public roadway that would not be reasonably apparent to a person using the roadway with due care.

Accordingly, CAOC urges this Court to reaffirm that rule by reaffirming its decision in *Cameron* and disapproving of the contrary Court of Appeal decisions in *Weinstein* and *Compton*.[2]

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[1] All subsequent statutory references are to the Government Code unless otherwise noted.

[2] Citations to the Petitioner's Opening Brief on the Merits are abbreviated "OBOM." Citations to the Respondent's Answer Brief on the Merits are abbreviated as "ABOM." Citations to the Petitioner's Reply Brief on the Merits are abbreviated as "RBOM."

DISCUSSION

1. Statutory Background

1.1. 1963 Tort Claims Act

Sections 835 and 830.6 were both enacted as part of the 1963 Tort Claims Act. That Act resulted from legislation recommended by "the Law Revision Commission, working at the behest of the Legislature." (*Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 522, citing 4 Cal.Law Revision Com.Rep. (1963) 803, 804, 807.) Indeed, the Legislature adopted the Law Revision Commission's proposals for sections 835 and 830.6 "without change." (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 433 [section 830.6]; *Ramirez*, *supra*, 192 Cal.App.3d at p. 522 ["Section 835 was adopted virtually verbatim by the Legislature in the form recommended by the commission."].)

Two authorities appear to have been particularly influential on the Law Revision Commission in drafting the 1963 Tort Claims Act.

The first was *Weiss v. Fote* (1960) 7 N.Y.2d 579. (*Baldwin*, *supra*, 6 Cal.3d at p. 433.)

Weiss arose when two cars collided at an intersection. The plaintiffs claimed that "the traffic signal lights … at the intersection … were negligently designed." (*Weiss*, *supra*, 7 N.Y.2d at p. 583.) Specifically, the plaintiffs alleged "that the 'clearance interval'—the four-second interval between the time the green signal for east-west traffic … ended and the signal for north-south traffic … turned green—was too short." (*Ibid.*)

By a 4-to-3 vote, *Weiss* granted judgment for the city. In doing so, *Weiss* drew a crucial distinction between two forms of municipal negligence.

The first category consists of negligence attributable to "[l]awfully authorized planning by governmental bodies." (*Weiss*, *supra*, 7 N.Y.2d at p. 583.) *Weiss* cautioned *against* liability in this scenario:

> To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.

(*Weiss*, *supra*, 7 N.Y.2d at p. 585–586.)

The second category consists of negligence that "aris[es] out of the day-by-day operations of government—for instance, the garden variety injury resulting from the negligent maintenance of a highway." (*Weiss*, *supra*, 7 N.Y.2d at p. 585.)

Weiss supported liability in this scenario. As *Weiss* explained, "once having planned [an] intersection, the State [is] under a continuing duty to review its plan in the light of its actual operation." (*Id.* at p. 587.) *Weiss* further explained that a public entity violates the "continuing obligation to maintain the safety of the highways," where, for example, it fails to re-install a stop sign at an intersection even though "a number of accidents had occurred after the stop sign had been removed." (*Weiss*, *supra*, 7 N.Y.2d at p. 587, citing *Eastman v. State of New York* (1951) 303 N.Y. 691.)

Ultimately, *Weiss* concluded that the case before it fell into the first category, not the second: Here, the Court emphasized evidence that "the Common Council of Buffalo, acting through its delegated agent, the Board of Safety," made the determination "that four seconds represented a reasonably safe "clearance interval." (*Weiss*, *supra*, 7 N.Y.2d at p. 586.) And there was no evidence to support a negligent-maintenance theory under the second category: "There is no proof either of changed conditions *or* of accidents at the intersection which would have required the city to modify the signal light 'clearance interval.'" (*Weiss*, *supra*, 7 N.Y.2d at p. 588, italics added.)

Professor Van Alstyne was another influence on the Law Review Commission. Indeed, "Professor Van Alstyne was the consultant to the California Law Revision Commission." (*Baldwin*, *supra*, 6 Cal.3d at p. 433, fn. 7; OBOM at p. 32, fn. 8.)

For Professor Van Alstyne, "the presence or absence of notice to the public entity" was "the crucial factor in determining whether or not to impose liability" for a dangerous condition of public property. (*Baldwin*, *supra*, 6 Cal.3d at p. 433, fn. 7.) Thus, like *Weiss*, Professor Van Alstyne saw two forms of municipal negligence, only one of which was actionable:

The first category consisted of cases where the public entity did not know about the dangerous condition. In that scenario, Professor Van Alstyne felt that imposing liability for a failure to remedy or warn about the dangerous condition "would create too great a danger of impolitic interference with freedom of decision-

making by those public officials." (*Baldwin*, *supra*, 6 Cal.3d at p. 433, fn. 7, quoting 5 Cal. Law Revision Com. Rep. (1963) 442–443.)

The second category consisted of cases "[w]here the public entity knows of the hazardous condition." (*Baldwin*, *supra*, 6 Cal.3d at p. 433, fn. 7.) In those cases, "Professor Van Alstyne would impose liability for its inaction," noting that "'negligent failures to remedy or warn have long been actionable under Public Liability Act.'" (*Baldwin*, *supra*, 6 Cal.3d at p. 433, fn. 7, quoting 5 Cal. Law Revision Com. Rep. (1963) 442–443.)

1.2. Sections 835 and 830.6

Not surprisingly, the two-category approach to municipal liability endorsed by *Weiss* and Professor Van Alstyne is reflected in sections 835 and 830.6.

Under section 835, subdivision (a), a public entity is liable for a dangerous condition created by "[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment."

Consistent with *Weiss* and Professor Van Alstyne's first category (in which negligence for design-related injuries is not actionable), liability under subdivision (a) is limited by section 830.6, which serves to immunize public entities for injuries "caused by [a] plan or design" for an improvement to public property "where such plan or design has been approved … by some … body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved."

But consistent with *Weiss* and Professor Van Alstyne's second category (in which negligent maintenance is actionable), section 835, subdivision (b), makes a public entity liable for a dangerous condition if it "had actual or constructive notice of the dangerous condition … a sufficient time prior to the injury to have taken some measures to protect against the dangerous condition." Notably, "protect against" in subdivision (b) "includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, *or warning of a dangerous condition*." (Gov. Code, § 830, subd. (b), italics added.)

1.3 *Cabell* and *Becker*

This Court's earliest interpretations of section 830.6 did not address section 835, subdivision (b). Not coincidentally, those decisions read section 830.6 incredibly broadly.

Cabell v. State (1967) 67 Cal.2d 150, is illustrative.

There, a student was injured by a plate-glass lavatory door in a dormitory at a State college. (*Cabell*, *supra*, 67 Cal.2d at p. 153.) The student sued, alleging the State was negligent for not using glass "'of the safety variety.'" (*Id.* at p. 151.)

The State moved for summary judgment, asserting design immunity under section 830.6. As support for that claim, the State introduced evidence that the door met prevailing design standards. (*Id.* at pp. 153–154.) The trial court granted summary judgment. This Court affirmed by a 5–2 vote.

Writing for the majority, Justice Burke emphasized that the glass door that injured the plaintiff was built according to plans

prepared by "the State Division of Architecture," "the State Architect," "the State Public Works Board," and "the State Department of Public Works." (*Cabell*, *supra*, 67 Cal.2d at p. 153.) Accordingly, Justice Burke held that the "State has established its immunity under section 830.6." (*Id.* at p. 154.)

Justice Burke also addressed the plaintiff's claim that "replacement of the broken glass with the same type as originally used constituted maintenance of a dangerous condition by defendant State to which the plan or design immunity does not apply." (*Cabell*, *supra*, 67 Cal.2d at p. 154.) Here, the plaintiff emphasized that "the glass originally installed had … been shown to be dangerous" in light of prior incidents in which other students were injured by plate-glass lavatory doors in the same dormitory. (*Id.* at p. 154.) Without citing section 835, subdivision (b), Justice Burke rejected the claim, holding that "the immunity [provided by section 830.6] applies with respect to ordinary routine maintenance of public property." (*Cabell*, *supra*, 67 Cal.2d at p. 155.)

Justice Peters dissented, joined by Justice Tobriner.

Justice Peters noted that section 830.6 was intended "to adopt the rule of *Weiss*," and that *Weiss* "makes it crystal clear that the immunity granted for plan and design was not intended to apply to negligent maintenance after the agency has notice that the improvement has created a dangerous situation." (*Cabell,* supra, 67 Cal.2d at p. 156 (dis. opn. of Peters, J..)

Here, Justice Peters explained that negligent-maintenance claims are categorically different than negligent-design claims because the former do not present the same separation-of-powers concerns that justify the latter: "Where the charge of failure to perform the duty to maintain" public property "is based on the actual operation of the improvement as shown by accidents occurring subsequent to the approval of the plan or design, the jury is not merely reweighing the matters considered by the governmental agency when it approved the plan or design." (*Cabell, supra*, 67 Cal.2d at p. 157 (dis. opn. of Peters, J.)

Thus, Justice Peters concluded that "nothing in the language of section 830.6" would "immunize governmental entities from their duty to maintain improvements free from dangerous defects or that would permit them to ignore, on the basis of a reasonable decision made prior to construction of the improvement, the actual operation of an improvement where such operation shows the improvement to be dangerous." (*Cabell, supra*, 67 Cal.2d at p. 158 (dis. opn. of Peters, J..)

Accordingly, referencing section 835, subdivision (b), Justice Peters explained that "section 830.6 of the Government Code does not preclude recovery, at least where the governmental agency has failed to remedy a dangerous condition after it has learned of the danger and had ample time to correct it." (*Cabell, supra*, 67 Cal.2d at p. 156 (dis. opn. of Peters, J.)

Becker v. Johnston (1967) 67 Cal.2d 163, was decided the same day as *Cabell*.

That case "arose out of a collision of automobiles at an intersection" maintained by the County of Sacramento. (*Becker*, *supra*, 67 Cal.2d at p. 165.) The accident occurred as a result of the intersection's atypical "Y" configuration. (*Ibid.*) The trial court granted summary judgment for the county under section 830.6. (*Ibid.*) As in *Cabell*, this Court affirmed by a 5-to-2 vote.

Writing for the majority yet again, Justice Burke emphasized the plans for the intersection "were approved by F. W. Hazelwood, Division Engineer, Division III; Fred Quinn, Engineer, Surveys and Plans; and R. W. Morton, State Highway Engineer." (*Becker*, *supra*, 67 Cal.2d at pp. 172–173.) Accordingly, Justice Burke concluded that the county had established immunity under section 830.6. (*Id.* at p. 173.)

Justice Burke also addressed the plaintiff's argument that "lighting or signs warning of the Y intersection … should have been provided at some point in time prior to her accident." (*Becker*, *supra*, 67 Cal.2d at p. 173.) Justice Burke rejected that claim, noting that those measures "would serve only to lessen the hazard which … was created by the manner in which the intersection was designed, and for which section 830.6 extends immunity."

Again, Justice Peters dissented, joined by Justice Tobriner.

There, Justice Peters once again explained that section 830.6 "does not grant public entities immunity for failure to maintain improvements free from defects and dangerous conditions disclosed by the actual operation of the improvements." (*Becker*, *supra*, 67 Cal.2d at p. 174 (dis. opn. of Peters, J.).) Instead, Justice

Peters explained that a "jury could properly conclude" that the county negligently "maintained [a] dangerous condition after the actual operation of the improvements disclosed it" based on "the history of accidents at the intersection." (*Id.* at p. 176.)

In sum, this Court's early decisions on section 830.6, presented two divergent views:

Justice Burke believed design-immunity under section 830.6 applied to section 835, subdivision (b), and thereby "applies with respect to ordinary routine maintenance of public property." (*Cabell*, *supra*, 67 Cal.2d at p. 155.)

Justice Peters believed design-immunity under section 830.6 did *not* apply to section 835, subdivision (b), and thus did *not* preclude a claim against a public entity that negligently "maintained [a] dangerous condition after the actual operation of the improvements disclosed it" based on "the history of accidents." (*Id.* at p. 176.)

The California Law Revision Commission agreed with Justice Peters. "In 1969, the California Law Revision Commission recommended that the Legislature effectively overrule *Cabell* and *Becker*." (*Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 70.) To do so, the Law Revision Commission proposed amending section 830.6 to expressly state that design immunity terminates when it is shown "that (1) the plan or design, as effectuated, has actually resulted in a 'dangerous condition' at the time of an injury, (2) prior injuries have occurred that demonstrate that fact, and (3) the public entity has had knowledge of these prior injuries and a

reasonable time to protect against the dangerous condition." (*Cornette*, *supra*, 26 Cal.4th at p. 70, quoting Recommendation Relating to Sovereign Immunity (Sept. 1969) 9 Cal. Law Revision Com. Rep. (1969) p. 819.)

The City claims that "no case law that has precedential value supports Justice Peters's position." (RBOM at p. 42.) But as discussed below, two of this Court's own precedents support Justice Peters's view of where design-immunity under section 830.6 ends, and liability for negligent maintenance under section 835, subdivision (b), begins.

1.4. *Baldwin*

Five years after *Cabell* and *Becker*, this Court issued its landmark decision in *Baldwin v. State of California* (1972) 6 Cal.3d 424.

Baldwin arose when a driver waiting to make a left-hand turn at an intersection was rear-ended by another car. As constructed, the intersection "had no special left-turn lane at this intersection." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.)

The plaintiff claimed "the state's failure to provide a left-turn lane … constituted a dangerous condition." (*Baldwin*, supra, 6 Cal.3d at pp. 430–431.) But rather than a negligent-*design* claim, the plaintiff alleged "the state had actual notice" that the intersection was in a dangerous condition without a left-run lane "a sufficient time prior to the accident to have taken measures to protect against the dangerous condition." (*Ibid.*)

The State countered with evidence "that the intersection was constructed in accordance with plans which made no provision for such a turning lane." (*Ibid.*) The trial court granted summary judgment for the State.

This Court granted review to resolve the dispute between Justice Burke and Peters regarding whether "design immunity remained intact even though changed circumstances had clearly revealed the defects of the plan." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.) A unanimous court chose Justice Peters's view: "Upon reconsideration of this question, we are convinced that the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.) Accordingly, *Baldwin* held that "*Cabell* and *Becker* should be overturned." (*Ibid.*)

Citing "[t]he clear teaching of *Weiss*," *Baldwin* explained "that design immunity persists only so long as conditions have not changed. Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan." (*Baldwin*, *supra*, 6 Cal.3d at p. 434.) *Baldwin* further explained that when a plaintiff alleges the public entity has ignored the actual operation of the plan, "the plaintiff's action … is grounded on section 835, subdivision (b), of the Government Code." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.)

According to *Baldwin*, claims under section 835, subdivision (b), are distinct from design claims in at least two key ways that undercut the rationale for immunity:

First, unlike a claim for negligent *design* (which seeks to impose fault for a lack of foresight), a negligent *maintenance* claim is retrospective, and seeks to hold a public entity liable for an unreasonable failure to respond when "experience has revealed the dangerous nature of the public improvement." (*Baldwin*, *supra*, 6 Cal.3d at p. 435.) Thus, with a claim for negligent maintenance, "the trier of fact will not simply be reweighing the same technical data and policy criteria which went into the original plan or design." (*Ibid.*) Instead, the jury will be reviewing "objective evidence arising out of the actual operation of the plan," information that "could not have been contemplated by the government agency or employee who approved the design." (*Baldwin*, *supra*, 6 Cal.3d at p. 435.)

Second, this Court "distinguished between the 'planning' or 'basic policy' level of decision-making, for which there is immunity, and the 'operational' or 'ministerial' implementation, for which there is not." (*Baldwin*, *supra*, 6 Cal.3d at p. 436.) Here, this Court explained that, unlike planning decisions, "supervision of the design after it has been executed is essentially operational or ministerial." (*Id.* at p. 436, fn. 7.)

Applying the foregoing principles, *Baldwin* held that a "public entity does not retain the statutory immunity … conferred on it by section 830.6" where "a plan or design …, although shown to have been reasonably approved in advance …, nevertheless in

its actual operation under changed physical conditions produces a dangerous condition." (*Baldwin*, *supra*, 6 Cal.3d at p. 438.)

1.5. *Cameron*

Six months after *Baldwin*, this Court decided *Cameron v. State of California* (1972) 7 Cal.3d 318.

There, a car left the roadway while traversing an "S" curve on a state highway. The plaintiffs sued the State, asserting two theories: First, the plaintiffs alleged the highway was in a dangerous condition because "the curve was improperly graded or banked" such "that an automobile could not negotiate the curve." (*Cameron*, *supra*, 7 Cal.3d at p. 322). Second, the plaintiffs alleged "that the state had failed to warn of this dangerous condition." (*Ibid.*) After a trial, the trial court granted a nonsuit for the State on the ground "the state was immune from liability under Government Code section 830.6." (*Cameron*, *supra*, 7 Cal.3d at p. 323.)

This Court granted review to address two questions:

First, whether "the design immunity conferred by Government Code section 830.6 is inapplicable since the design plan … did not specify the degree of superelevation … which constituted the dangerous condition causing the accident." (*Cameron*, *supra*, 7 Cal.3d at p. 322.)

Here, the Court held that the State was *not* entitled to design immunity because it "presented no evidence that the superelevation which was actually constructed on the curve … was the result of or conformed to a design approved by the public entity

vested with discretionary authority." (*Cameron*, *supra*, 7 Cal.3d at p. 326.)

But the Court acknowledged that "upon remand … the state could produce evidence to show that the superelevation was the result of a reasonable design which was approved by an appropriate body or employee vested with discretionary authority." (*Cameron*, *supra*, 7 Cal.3d at p. 327.)

With that mind, this Court addressed the second question on which it granted review: Whether "the concurrent negligence by the state in failing to warn of the dangerous condition provides an independent basis for recovery," "even if 'design immunity' applies to immunize the state for negligence in the creation of the dangerous condition." (*Cameron*, *supra*, 7 Cal.3d at p. 322.)

In answering that question, this Court relied heavily on the Court of Appeal's decision in *Flournoy v. State of California* (1969) 275 Cal.App.2d 806.

There, a woman lost control of her car while driving across an icy bridge on a state highway. The plaintiffs sued the state, alleging that "[a]lthough the state had notice of numerous accidents as a result of the icy condition, it had not posted any warning signs indicating an icy condition or indicating the necessity of reducing speed." (*Flournoy*, *supra*, 275 Cal.App.2d at p. 808.) The trial court granted summary judgment under section 830.6, in light of declarations from engineers to the effect that the bridge was built according to "good engineering practice and … is of a well-known and commonly used design." (*Id.* at p. 810.)

The Court of Appeal reversed. It held that "[t]he trial court erred in granting the summary judgment, for the state's motion could affect only one of two available theories of recovery." (*Flournoy*, *supra*, 275 Cal.App.2d at p. 810.) Here, *Flournoy*—citing Professor Van Alstyne—explained that, on its face, section 835 presents "two alternative theories" of liability, each of which "postulated a separate, although concurring, cause of the accident." (*Id.* at p. 811, citing Van Alstyne, California Government Tort Liability (Cont. Ed. Bar 1964) § 6.19, p. 202.)

"[U]nder subdivision (a) of section 835," the "state was liable" if "it had created a dangerous condition by constructing an ice-prone bridge." (*Flournoy*, *supra*, 275 Cal.App.2d at p. 810.)

"[U]nder subdivision (b) of section 835," the "state was liable" if "it had knowledge of a dangerously icy condition (not reasonably apparent to a careful driver) and failed to protect against the danger by posting a warning." (*Flournoy*, *supra*, 275 Cal.App.2d at p. 810.)

Of course, *Flournoy* recognized that liability under section 835, subdivision (a), for creating a dangerous condition by constructing a public improvement was limited by "immunity for designing it (under § 830.6)." (*Flournoy*, *supra*, 275 Cal.App.2d at p. 813.)

But *Flournoy* also recognized that liability under section 835, subdivision (b), represents "negligence independent of design," such as "negligently maintaining" an improvement. (*Flournoy*, *supra*, 275 Cal.App.2d at p. 813.) Accordingly, because

"[b]y force of its very terms the design immunity of section 830.6 is limited to a design-caused accident," *Flournoy* held that design immunity would not prevent the plaintiff from going "before a jury on the passive negligence theory," under section 835, subdivision (b), that the state caused the accident by its "failure to warn the public against icy danger known to it but not apparent to a reasonably careful highway user." (*Flournoy*, *supra*, 275 Cal.App.2d at p. 811, citing Gov. Code, §§ 835, subd. (b), 830.8.)

This, of course, brings us back to *Cameron*: Because the plaintiff there presented evidence "to support a finding that the state was negligent in failing to warn of the dangerous condition on Highway 9" (*Cameron*, *supra*, 7 Cal.3d at p. 327), this Court observed that "[i]n the case at bench, as in *Flournoy*, there is active negligence alleged (the creation of the dangerous condition, namely uneven superelevation) and passive negligence (failure to warn of the dangerous condition) of a single defendant, the state." (*Cameron*, *supra*, 7 Cal.3d at p. 328.) Thus, "[a]greeing with the reasoning and conclusions of *Flournoy*," this Court held that the State's "concurrent negligence in failing to warn of the dangerous condition" was negligence "independent of the negligent design," and therefore actionable despite "conferred immunity under section 830.6." (*Cameron*, *supra*, 7 Cal.3d at pp. 327–329.)

1.6 Court of Appeal Decisions

Consistent with *Cameron*, most Court of Appeal decisions recognize that section 830.6 design immunity does *not* immunize a public entity for failure to warn of a dangerous condition.[3]

Of those Court of Appeal decisions, *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, is the most instructive.

In *Anderson*, a vehicle "failed to negotiate the curve of a road" and crashed, killing a passenger. (*Anderson*, *supra*, 65 Cal.App.3d at p. 86.) The passenger's heirs sued the city, alleging that it created a dangerous condition when it failed to "set up any caution signs … to warn … of the upcoming curve." (*Ibid.*) The trial

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[3] (See *Tansavatdi v. City of Rancho Palos Verdes* (2021) 60 Cal.App.5th 423, 442 ["[D]esign immunity does not, as a matter of law, preclude liability under a theory of failure to warn of a dangerous condition."]; *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 945 ["The failure to warn of a trap can constitute independent negligence, regardless of design immunity."]; *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1018 [evidence that "the entity failed to post adequate signs warning of a dangerous condition" will "override any immunity provided by section 830.6"], abrogated on other grounds by *Cornette*, *supra*, 26 Cal.4th 63; *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 386–387 ["[S]ection 830.6 does not immunize respondent from liability caused by negligence independent of design" such as where "the public entity had … notice of the dangerous condition in sufficient time to … warn of its existence" but failed to do so]; *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 93 [finding that city was not "exempt … from liability for failure to warn of a known dangerous condition" even where the city established "all the elements of design immunity" under section 830.6, and was therefore "immune from liability for the creation of a dangerous condition"].)

court granted summary judgment for the city, finding that was entitled to design immunity under section 830.6.

The Court of Appeal agreed that the city had established "all the elements of design immunity" under section 830.6, and was therefore "immune from liability for the creation of a dangerous condition." (*Anderson*, *supra*, 65 Cal.App.3d at p. 90.)

But citing *Cameron*, *Anderson* held that "a second independent ground of liability … exists for its failure to warn of the dangerous condition if it had actual or constructive notice of such a condition." (*Anderson*, *supra*, 65 Cal.App.3d at p. 91.) Thus, even though the evidence showed that "forms of signing had been considered and rejected" and therefore that "the absence of warning signs prior to the [subject] curve was … an element of the design" (*id.* at p. 90), *Anderson* nonetheless held that the city "cannot exempt itself from liability for failure to warn of a known dangerous condition." (*Id.* at p. 93.)

While the weight of Court of Appeal authority supports *Cameron*, there are two outlier Court of Appeal decisions: *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, and *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52. CAOC discusses those cases elsewhere in this brief.

2. *Cameron* was correctly decided.

The City concedes that, "by definition, design immunity does not extend to hazardous conditions independent of a design." (RBOM at p. 15, citing Gov. Code, § 830.6; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 570, 575.) Thus, if a negligent failure to warn is negligence "independent of a design," then design immunity does not apply.

As just discussed, *Cameron* confirmed that it was: "[E]ven if 'design immunity' applies to immunize the state for negligence in the creation of the dangerous condition, the concurrent negligence by the state in failing to warn of the dangerous condition provides an independent basis for recovery." (*Cameron*, *supra*, 7 Cal.3d at p. 308.)

Thus, under *Cameron*, a public entity may be liable under section 835, subdivision (b), where it negligently fails to warn of a known dangerous condition "which would not be reasonably apparent to, and would not have been anticipated by, a person using the highway." (*Cameron*, *supra*, 7 Cal.3d at p. 327, citing Gov. Code, § 830.8.)

Not coincidentally, the City urges this Court to overrule *Cameron*. But as discussed below, *Cameron* was correctly decided.

2.1. *Cameron* is consistent with the principles behind the 1963 Tort Claims Act.

Cameron's core premise that a negligent failure "provides an independent basis for recovery" that is actionable despite immunity for "negligence in the creation of the dangerous condition" (*Cameron*, *supra*, 7 Cal.3d at p. 308), is wholly consistent with the core principles animating the 1963 Tort Claims Act.

Notable here is *Weiss*, the very case on which section 830.6 was based. (*Baldwin*, *supra*, 6 Cal.3d at p. 433.) *Weiss* recognized that the government should be immune from injuries attributable to "[l]awfully authorized planning by governmental bodies" (*Weiss*, *supra*, 7 N.Y.2d at p. 583.) But *Weiss* also recognized that once a public roadway is built, the government incurs a "continuing obligation to maintain the safety of the highways," and that it was proper to impose liability for "injury resulting from the negligent maintenance of a highway." (*Id.* at p. 585.) To illustrate this sort of claim, *Weiss* offered the example of a city that failed to re-install a stop sign at an intersection even though "a number of accidents had occurred after the stop sign had been removed." (*Id.* at p. 587.)

Also notable is Professor Van Alstyne, the consultant to the California Law Revision Commission." (*Baldwin*, *supra*, 6 Cal.3d at p. 433, fn. 7; OBOM at p. 32, fn. 8.) Professor Van Alstyne recognized that "'negligent failures to remedy or warn have long been actionable under Public Liability Act'" where "the public entity knows of the hazardous condition." (*Baldwin*, *supra*, 6

Cal.3d at p. 433, fn. 7, quoting 5 Cal. Law Revision Com. Rep. (1963) 442–443.)

Finally, in *Baldwin*, this Court—citing *Weiss* and Professor Van Alstyne—likewise noted that "the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.) Noting that ongoing "supervision of the design after it has been executed is essentially operational or ministerial" (*id.* at p. 436, fn. 7), *Baldwin* a public entity who fails to respond when "experience has revealed the dangerous nature of the public improvement" (*id.* at p. 435), is liable under "section 835, subdivision (b), of the Government Code." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.)

In sum, the principles behind the 1963 Tort Claims Act support imposing liability on a governmental entity for withholding a warning when experience has shown the warning is necessary to mitigate a dangerous condition of public property.

2.2. *Cameron* is consistent with section 830.8.

Cameron's holding is also consistent with section 830.8. As *Cameron* explained, that section—which was also adopted as part of the 1963 Tort Claims Act—recognizes that "a public entity may be liable for failure to provide warning signs if a sign was necessary to warn of a dangerous condition which would not be reasonably apparent to, and would not have been anticipated by, a person using the highway with due care." (*Cameron*, *supra*, 7 Cal.3d at p. 327, citing Gov. Code, § 830.8.)

The City counters by arguing that section 830.8 does not itself purport to create an exception to section 830.6. (OBOM at p. 29.) That is probably true, but it misses the point: By drafting section 830.8 to preserve liability "for failure to provide warning signs if a sign was necessary to warn of a dangerous condition which would not be reasonably apparent to … a person using the highway with due care" (*Cameron*, *supra*, 7 Cal.3d at p. 327), the Legislature clearly assumed that this liability existed in the first place.

The City responds by suggesting section 830.8 should be understood as limiting liability to a negligent failure to warn about dangerous conditions arising out of unmaintained roads, or roads that do not have the benefit of design immunity. (RBOM at p. 15, 46–47.) That argument has several flaws.

First, if the Legislature intended section 830.8 to be so limited, it would have been drafted it that way. Instead, section 830.8, by imposing liability for a failure to warn of a dangerous condition that "would not be reasonably apparent to … a person using the highway with due care," tracks the general definition of a "dangerous condition" under section 830. (See Gov. Code, § 830, subd. (b) ["'Dangerous condition' means a condition of property that creates a substantial … risk of injury when such property … is used with due care …."].)

Second, as Justice Peters explained in his *Cabell* dissent, it is unrealistic to expect that many roads "will be or have been built without plans," and thus "it would be absurd to assume that the Legislature had in mind these situations when it included the

exception in section 830.8." (*Cabell*, *supra*, 67 Cal.2d at p. 160, fn. 4.) Accordingly, as Justice Peters noted, the City's construction of section 830.8 would have "the practical effect of reading the exception in the latter section out of the code for any substantial purpose whatsoever." (*Ibid.*)

Third, the City fails to offer a principled reason to impose a duty to warn about a dangerous condition stemming from the entity's failure to maintain the roadway, but to absolve a public entity of any duty to warn about a dangerous condition inherent in the roadway's design. If the entity is aware of the dangerous condition and a warning could mitigate it, the public entity is under an ongoing duty to warn, regardless of who or what caused the underlying condition. (Gov. Code, § 835, subd. (b); RBOM at p. 25, citing *Brown v. Poway Unified School District* (1993) 4 Cal.4th 820, 836.)

2.3. *Cameron* is good public policy.

Apart from its consistency with the principles behind the 1963 Tort Claims Act and its surrounding provisions (including section 830.8), *Cameron* is also good policy.

First, as this Court recognized in *Baldwin*, because a failure-to-warn claim would only arise when "experience has revealed the dangerous nature of the public improvement," (*Baldwin*, *supra*, 6 Cal.3d at p. 435), "the trier of fact will not simply be reweighing the same technical data and policy criteria which went into the original plan or design." (*Ibid.*) Instead, the jury will be reviewing "objective evidence arising out of the actual operation of the plan—

matters which, of necessity, could not have been contemplated by the government agency or employee who approved the design." (*Baldwin*, *supra*, 6 Cal.3d at p. 435.)

Second, a contrary rule would effectively allow public entities to withhold effective warnings for known hazards despite a mounting body count. At the risk of stating the obvious, it hardly serves public policy to allow governmental entities to consciously disregard known, ongoing hazards to the public.

Third, it makes sense to impose a relatively broad duty on public entities to provide necessary warnings. While changing the design of a public improvement to reduce or eliminate known hazards may require "extensive and costly rebuilding programs," "warning signs" present a comparatively simple and "inexpensive remedy." (*Baldwin*, *supra*, 6 Cal.3d at p. 437; see also Gov. Code, § 835.4, subd. (b) [placing weight on "the practicability and cost of protecting against the risk of injury"].)

Fourth, the City's concern that failure-to-warn claims will inevitably become the exception that swallows the design-immunity rule, is wholly misplaced. Indeed, if there are failure-to-warn floodgates, they have been open since *Cameron*. "With no evident basis for concern, the [City]'s warning of a flood of litigation is a mere makeweight." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1142 (dis. opn. of Liu, J.).)

2.4. The Legislature has tacitly endorsed *Cameron*.

The City contends there is no "clear indication of legislative intent" to adopt *Cameron*. (OBOM at pp. 27–28.) Here, the City argues that the Legislature's failure to address *Cameron* in the 1979 amendment to section 830.6 should not be read as "a tacit legislative endorsement of *Cameron*'s holding." (RBOM at p. 32.)

But a canon of statutory construction is that, "in enacting a statute, the Legislature is presumed to have knowledge of existing judicial decisions and to have acted in light of those decisions." (*Watts v. Crawford* (1995) 10 Cal.4th 743, 755, citing *Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.) Thus, "[w]hen a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." (*Stavropoulous v. Superior Court* (2006) 141 Cal.App.4th 190, 196.)

Indeed, that presumption is particularly strong here given that the Legislature's 1979 amendment came a year after a legislative committee (the Joint Committee on Tort Liability) and Department of Justice urged the Legislature to abrogate *Cameron*. (ABOM at pp. 18–20.)

Thus, under well-established rules of statutory construction, the fact that the Legislature did not abrogate *Cameron* in the 1979 amendment to section 830.6 supports a presumption the Legislature approved of *Cameron*.

3. *Weinstein* and *Compton* were wrongly decided.

Rather than *Cameron*, the City urges this Court to adopt *Compton*, *supra*, 12 Cal.App.4th 591, and *Weinstein*, *supra*, 139 Cal.App.4th 52, the two outliner Court of Appeal decisions on this issue.

As a threshold matter, it is telling that neither case properly applied *Cameron*.

Indeed, *Compton* did not cite *Cameron* at all. Thus, it is little surprise that it is directly at odds with *Cameron*. (Compare *Cameron*, *supra*, 7 Cal.3d at p. 322 ["[E]ven if 'design immunity' applies … , the concurrent negligence by the state in failing to warn of the dangerous condition provides an independent basis for recovery under Government Code section 830.8."], with *Compton*, *supra*, 12 Cal.App.4th at p. 600 ["[S]ection 830.8 … in no way purports to create an exception to design immunity under section 830.6" for "failure to provide warning signs …."].)

And although *Weinstein* did cite *Cameron*, it fundamentally misread it. According to *Weinstein*, "*Cameron* involved the failure to warn of a hidden dangerous condition that was not part of the approved design of the highway," and thus did not "obligate" public entities "to warn of conditions that were part of the approved design." (*Weinstein*, *supra*, 139 Cal.App.4th at p. 61.) But while it's true that *Cameron* held that the dangerous condition (uneven superelevation) "did not result from the design or plan introduced into evidence" (*Cameron*, *supra*, 7 Cal.3d at p. 326), *Cameron* confirmed that "even if design immunity is eventually found to be

applicable"—that is, even if the dangerous condition resulted from the design or plan—"it would not immunize the state for its concurrent negligence in failing to warn of the dangerous condition." (*Id.* at pp. 326–327.)

Not coincidentally, neither case was correctly decided.

Both cases believed "[i]t would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous." (*Compton*, *supra*, 12 Cal.App.4th at p. 600; *Weinstein*, *supra*, 139 Cal.App.4th at p. 61.)

But *Weiss*, Professor Van Alstyne, and *Baldwin* did not think this scenario was illogical at all. To the contrary, what is illogical is a rule—endorsed by *Compton*, *Weinstein*, and the City here—that would allow public entities "to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.)

Indeed, perhaps the easiest critique of *Compton* and *Weinstein* is simply to point out that those cases reflect the very same view of design immunity seen in *Cabell* and *Becker*, an incorrect interpretation of design immunity this Court rejected long ago.

Accordingly, this Court should disapprove of *Compton* and *Weinstein*.

CONCLUSION

It is abundantly clear that "the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." (*Baldwin*, *supra*, 6 Cal.3d at p. 427.)

Instead, after a public roadway is built, governmental entities have an ongoing duty to warn if experience has revealed a dangerous condition "which would not be reasonably apparent to, and would not have been anticipated by, a person using the highway" but which reasonably could be cured by a warning. (*Cameron*, *supra*, 7 Cal.3d at p. 327, citing Gov. Code, § 830.8.)

CAOC urges this Court to reaffirm that rule in this case.

Dated: 10/18/21

By: */s/Benjamin I. Siminou*
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On the same date, I served a copy of the "Application to File Amicus Curiae Brief; Brief of Consumer Attorneys of California as Amicus Curiae in Support of Plaintiff" by first class U.S. mail on the Hon. Robert Broadbelt, at the following address:

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

Executed on October 18, 2021, at Coronado, California.

/s/Benjamin I. Siminou
Benjamin I. Siminou

STATE OF CALIFORNIA
Supreme Court of California

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