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IN THE SUPREME COURT OF CALIFORNIA

ALEKSANDR VASILENKO et al.,
Plaintiffs and Appellants,

v.

GRACE FAMILY CHURCH,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, THIRD APPELLATE DISTRICT
CASE NO. C074801

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF DEFENDANT AND RESPONDENT GRACE FAMILY CHURCH

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IN THE SUPREME COURT OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT GRACE FAMILY CHURCH

Pursuant to California Rules of Court, rule 8.520(f)(1), the Association of Southern California Defense Counsel (ASCDC) and the Association of Defense Counsel of Northern California and Nevada (ADCNCN) request permission to file the attached amicus curiae brief in support of defendant and respondent Grace Family Church.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

ASCDC is a preeminent regional organization of lawyers who specialize in defending civil actions. It has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae.

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including summary judgment and trial practice. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADCNCN has filed briefs as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal across the state.

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on some matters of shared interest, such as this application and brief.

The Associations' members frequently represent private landowner and business defendants, and are interested in ensuring that their clients are not subjected to the new and potentially limitless liability that the Court of Appeal's opinion in this case permits. The proposed amicus brief supplements the parties' briefs

by providing a broader perspective on how the legal issues raised in this appeal will affect California landowners and businesses. The brief also provides this Court with information concerning how other jurisdictions have handled issues like those presented here.

Accordingly, amici request that this Court accept and file the attached amicus curiae brief.

January 6, 2017

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AMICUS CURIAE BRIEF

INTRODUCTION

Until the majority decision in *Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146, 153 (*Vasilenko*), California courts consistently refused to impose a duty on those who own or control land[2] to protect persons from off-premises dangers the landowners did not create or control. (E.g., *Sexton v. Brooks* (1952) 39 Cal.2d 153, 156-158 (*Sexton*) [business had no duty to protect invitees from a ridge in the public sidewalk abutting the business's entrance unless the sidewalk was controlled by the landowner or constructed for his special benefit]; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 386 (*Owens*) [supermarket that allegedly encouraged customers to double-park in street traffic owed no duty to customer who was struck when double-parking]; *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 487-488 (*Seaber*) [hotel had no duty to warn exiting patron about adjacent dangerous crosswalk].)

This established law is based on sound and practical public policy, which recognizes the need to place rational limits on landowners' exposure to liability. "[I]t is impossible to define the scope of any duty owed by a landowner off premises owned or controlled by him." (*Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, 1147 (*Steinmetz*).) In light

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[2] For simplicity, this brief will refer to those who own, lease, or control land as "landowners" or "property owners."

of this reality, imposing such a burden on landowners would be "onerous" and would risk exposing them to unlimited and crushing liability for conduct and conditions that are beyond the landowners' control. (*Seaber*, *supra*, 1 Cal.App.4th at p. 493.)

Yet, notwithstanding well-established California case law, the majority held that a church became responsible for ensuring safe passage across public roads because it provided an off-site, overflow parking lot. The *Vasilenko* majority held that the church "created the danger" by maintaining its overflow lot. (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 157.) But under this rationale, the supermarket owner in *Owens* would have been held to "create the danger" by encouraging its patrons to double-park, and the business owners in *Sexton* and *Seaber* would have been held to "create the danger" by locating their entrances next to a dangerous sidewalk or crosswalk. *Sexton, Owens,* and *Seaber* correctly recognized that even though a landowner can influence the conduct of visitors on public streets, the landowner is not responsible for the safety of an adjacent street because the landowner does not control the street. Because the *Vasilenko* majority failed to appreciate this, it dramatically expanded a landowner's liability for dangers on adjacent property.

The Court of Appeal's unprecedented conclusion in this case rests upon an analysis which is flawed in two critical respects.

First, the majority relied on *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139 (*Bonanno*) and *Barnes v. Black* (1999) 71 Cal.App.4th 1473 (*Barnes*), but these authorities are readily distinguishable. *Bonanno* addressed whether a bus stop, which could have been located anywhere, was dangerous

because it could not be reached safely at its current location. (*Bonanno*, at p. 147.) Here, the church was not dangerous and the off-site parking lot was not dangerous. The only alleged danger arose from crossing a public road *not* owned or controlled by the church. It is the local government's responsibility—not the responsibility of adjacent landowners—to ensure the safety of public roads. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 716-718 (*Ducey*) [state can be held liable if its failure to make a capital improvement results in a dangerous condition].) *Barnes* held that maintaining a playground near a steep hill could be dangerous because its configuration essentially *ejected* a child onto the street. (*Barnes*, at p. 1480.) Here, Vasilenko entered the street on his own volition.

Second, the Court of Appeal did not substantively engage the factors laid out in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113 (*Rowland*) because Grace Family Church itself "made no attempt to apply the *Rowland* factors." (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 155.) But if this Court departs from preexisting law, embodying public policy, that landowners are not liable for off-site dangers not in their control, it should perform a full analysis of the *Rowland* factors, which will show that public policy requires no duty be imposed here.

The Court of Appeal's decision here had broad implications for *all* landowners, which the court did not recognize. Under the majority's analysis, even the most responsible landowners could be held liable for the negligent acts of third parties on adjacent roadways. This follows because, in hindsight, a plaintiff will

virtually *always* be able to argue a defendant property owner in some manner "controlled" the access to its land and could have taken more or different steps to prevent the specific accident that occurred. (See *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1194.)

That the majority decision is contrary to sound public policy is confirmed by the fact that the decision is out of step with the decisions in many other states, including those that have adopted California law. (E.g., *Davis v. Westwood Group* (1995) 420 Mass. 739 [652 N.E.2d 567, 568, 570 & fn. 10] (*Davis*) [racing park had no duty to provide safe passage for patrons to cross a public highway when approaching the park from its own parking lot on the opposite side of the highway].)

This Court should reject the *Vasilenko* majority opinion and adopt an analysis consistent with the dissenting opinion. Otherwise, property owners will be subjected to potentially unlimited liability for hazards on public roads that the landowner did not create or control. Accordingly, this Court should reverse *Vasilenko* and restore uniformity in California case law limiting the scope of landowners' duties.

Alternatively, even if this Court does not reverse, it should clarify that the duty recognized here arises only when the landowner actually *controls* the off-site parking lot, not merely when the landowner *selects* an off-site parking lot for its visitors or *directs* a visitor to an off-site parking lot.

LEGAL ARGUMENT

I. IMPOSING A DUTY ON ADJACENT LANDOWNERS TO GUARD AGAINST OFF-SITE DANGERS THEY NEITHER CREATED NOR CONTROLLED IS CONTRARY TO ESTABLISHED LAW.

A. The majority's decision conflicts with prior California decisions.

Under California law, it is well established that a property owner does *not* owe a duty to plaintiffs injured on adjacent land unless the owner created or controlled the off-premises hazards. Indeed, aside from *Vasilenko*, no California case has ever imposed such a broad and onerous duty on landowners, nor should there be such a duty. This no-duty principle is even more important where—as here—the adjacent land is a public street or sidewalk. The safety of streets and sidewalks is the responsibility of the government. (See, e.g., *Ducey*, *supra*, 25 Cal.3d at pp. 716-718.) It is not, and should not be, the responsibility of adjacent landowners.

Liability is "restricted within the context of landowners whose property abuts public sidewalks and streets." (*Seaber*, *supra*, 1 Cal.App.4th at p. 489.) Thus, "absent statutory authority to the contrary, a landowner is under no duty to maintain in a safe condition a public street or sidewalk abutting upon his property [citation], or to warn travelers of a dangerous condition not created by him but known to him and not to them." (*Id.* at pp. 487-488; see *Owens*, *supra*, 198 Cal.App.3d at p. 386 ["The courts . . . have

consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control"].) This rule comports with public policy, which avoids imposing potentially limitless liability on landowners for hazards not on their own property—hazards over which they have no control.

The imposition of a duty of care on Grace Family Church here cannot be reconciled with *Sexton*, *Owens*, *Seaber,* and *Steinmetz*.

The principle that a landowner owes no duty to act affirmatively to protect others from dangers on adjacent property that it did not create was recognized by this Court over half a century ago in *Sexton*, *supra*, 39 Cal.2d at pp. 156-158. The Court held that jury instructions should have conformed to the law that even if a landowner knows that a dangerous adjacent sidewalk will be used to access his business, the landowner has no duty to protect invitees from the danger unless the sidewalk was controlled by the landowner or constructed for his special benefit. (*Ibid*.)

More recently, *Owens* reaffirmed this general principle and held a supermarket had no duty to protect patrons injured while double-parking on the street in front of the supermarket, notwithstanding the fact that the supermarket was alleged to have encouraged patrons to double-park there. (*Owens*, *supra*, 198 Cal.App.3d at pp. 382, 388.)

Plaintiffs contend *Owens* was wrongly decided (ABOM 48), but *Owens*'s principle is reflected in later cases, which correctly recognize that the duty to maintain the safety of public streets resides with the government and not adjacent landowners (see

Brooks v. Eugene Burger Management Corp. (1989) 215 Cal.App.3d 1611, 1623 (*Brooks*); *Seaber*, *supra*, 1 Cal.App.4th at p. 489).

In *Seaber*, *supra*, 1 Cal.App.4th at pages 484-485, 492-493, the Fourth Appellate District found a hotel had no duty to warn a patron who was killed while exiting the hotel via a crosswalk, notwithstanding that passing motorists' view of the crosswalk was obstructed because of the slope of the roadway and that the hotel knew the crosswalk was dangerous. The *Vasilenko* majority acknowledged that "*Seaber* stands for the proposition that an adjacent landowner has no duty to warn of alleged dangers outside of his or her property if the owner did not create the danger," but ultimately distinguished *Seaber*: "Here, unlike *Seaber*, GFC *created the danger* by maintaining the overflow lot in a location that required invitees to cross a busy thoroughfare that it knew lacked a crosswalk or traffic signal in order to reach the church." (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 157, emphasis added.) As emphasized by Presiding Justice Raye in dissent, "[t]ruly, this is a distinction without a difference." (*Id.* at 161.)

"[T]he issue in *Seaber* was not whether the hotel acted reasonably, but whether the hotel had a duty at all given that the allegedly dangerous crosswalk, though adjacent to the hotel, was owned by the State of California, and in light of the rule that the hotel owed no duty 'to persons injured in adjacent streets . . . .' " (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 162 (dis. opn. of Raye, J.), internal quotation marks omitted, citing *Seaber, supra,* 1 Cal.App.4th at p. 489.) Accordingly, it is not enough to allege Grace Family Church created the danger by selecting a lot next to a busy

street over which people needed to cross, any more than the hotel in *Seaber* created the danger by establishing its entrance next to a dangerous crosswalk. (*Vasilenko*, at p. 162 (dis. opn. of Raye, J.).)

In *Steinmetz*, the Third Appellate District found sponsors of a business mixer held in a neighborhood known to be dangerous had no duty to provide adequate parking or protect the attendees against crime when they returned to their cars. (*Steinmetz*, *supra*, 169 Cal.App.3d at p. 1147.) The court declined to impose a duty, reasoning that "it is impossible to define the scope of any duty owed by a landowner off premises owned or controlled by him." (*Ibid.*)

The *Vasilenko* majority unduly expanded what it means to "create the danger." (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 157.) The location of the parking lot did nothing to increase or intensify the risk that pedestrians crossing the road would be hit by negligent drivers. Rather, the street was equally safe or dangerous no matter where the parking lot was located.

The danger—to the extent there was any—was inherent in the public street and the government's alleged failure to provide safe crossing at reasonable intervals. If Grace Family Church "created" this danger by locating a parking lot across the street, then so too did the business in *Sexton* create a danger (by locating its business next to a dangerous sidewalk), the supermarket in *Owens* (by encouraging its patrons to double-park), the hotel owner in *Seaber* (by maintaining an entrance next to a dangerous crosswalk across from a parking lot), and the mixer sponsor in *Steinmetz* (by inducing people to walk through a dangerous part of town at night). Of course, none of those cases reached that result.

These authorities correctly recognize that holding a landowner responsible for off-premise hazards—whether known or foreseeable—risks imposing unlimited liability for conduct and features that are fundamentally beyond the landowner's control. (See *Owens*, *supra*, 198 Cal.App.3d at pp. 386-387; *Seaber*, *supra*, 1 Cal.App.4th at pp. 492-493; *Steinmetz*, *supra*, 169 Cal.App.3d at pp. 1146-1148; accord, *McGarvey v. Pacific Gas & Elec. Co.* (1971) 18 Cal.App.3d 555, 562 [no duty to prevent employees from making U-turns to reach convenient street parking]; *Brooks*, *supra*, 215 Cal.App.3d at p. 1624 [no duty to prevent child from wandering off premises].) This is because a comprehensive statutory scheme directs placement of traffic control devices and markings on any road by the government, and prohibits private parties from attempting to direct the movement of traffic. (Veh. Code, §§ 21350-21351, 21400-21401, 21465; 23 U.S.C. § 402(a); 23 C.F.R. §§ 655.601, 655.603, 655.604 (2005).) "[T]he power to control public streets and regulate traffic lies with the state," (*Owens*, at p. 387), not adjacent landowners. Accordingly, landowners have not been liable for the safety of adjacent streets.

B. *Bonanno* and *Barnes* are inapposite because the mere location of the overflow parking lot did not *create* a cognizable danger to Vasilenko.

The Court of Appeal's decision is based upon *Bonanno* and *Barnes*, which are legally and factually distinguishable from this case.

Bonanno addressed a public entity's liability for locating a bus stop at a place where it could not be safely reached. Unlike the case here, *Bonanno* did not apply common law. Rather, the Court construed California Government Code section 830's definition of dangerous condition and tailored its holding accordingly. (See *Bonanno*, *supra*, 30 Cal.4th at p. 154 ["[W]e emphasize the limits of our holding in this case"]; *id.* at p. 156 ["Liability of public entities is set by statute, *not* common law" (emphasis added)].)

Moreover, the Court recognized that a bus stop, unlike a building, can be relocated to reduce or eliminate dangers involved in accessing the bus stop. (*Bonanno*, *supra*, 30 Cal.4th at p. 152 ["[W]e agree with the Court of Appeal that the feasibility of moving or removing a bus stop—an option not available to the hotel owners in *Seaber*—distinguishes the present case from *Seaber*. In this sense, as the Court of Appeal observed, the case at bar is closer to those involving *mobile* places of business, such as *Schwartz. v. Helms Bakery Limited* (1967) 67 Cal.2d 232 [citation] (bakery truck), than it is to *Seaber*."]; see *Owens*, *supra*, 198 Cal.App.3d at p. 388 [agreeing with the distinctions drawn in *Steinmetz* and declining to extend the duty recognized in street vendor cases to commercial enterprise operating at a *fixed* location].)

Indeed, *Bonanno* expressly cautioned lower courts that its holding was limited: "[P]lacing the bus stop at [that specific intersection] created a dangerous condition because the stop could, at that location, only be reached . . . by one of two approaches . . . *both of which* were unnecessarily unsafe." (*Bonanno*, *supra*, 30 Cal.4th at p. 151, fn. 4.) This Court further explained that "[t]he

principle at work . . . is not that property owners must 'ensure the safety of all persons who encounter nearby traffic-related hazards in reaching their property,' but that public entities are subject to potential liability (not as insurers but for their own negligence, and *not as a matter of common law* but by mandate of sections 830 and 835) when their facilities are located in physical situations that *unnecessarily* increase the danger to those who, exercising due care themselves, use the facilities in a reasonably foreseeable manner." (*Ibid.*, citations omitted and emphases added); *id.* at p. 152 [declining to find public entity liability coextensive with private liability].)

Moreover, this Court noted, "[o]ur order limiting review . . . assumes the existence of a dangerous crosswalk, posing only the question whether a *bus stop* may be deemed dangerous because bus users, to reach the stop, *must* cross at that dangerous crosswalk." (*Bonanno*, *supra*, 30 Cal.4th at p. 147, emphasis added.) In contrast to *Bonanno* and *Barnes*, here Grace Family Church "erected nothing and there is nothing to suggest the parking lot was dangerous." (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 161 (dis. opn. of Raye, J.).) Rather, the church "simply made its parishioners aware of nearby parking and provided attendants to facilitate the positioning of their cars within the facility. The danger asserted by plaintiffs was not in entering the property but in leaving it to cross Marconi Avenue, a dangerous street if not crossed with care." (*Ibid.*)

The *Vasilenko* majority also relied on *Barnes*, but *Barnes* is consistent with the principle that a landowner is not responsible for off-site dangers and is easily distinguishable on its facts. In *Barnes*,

a child was killed by an automobile when the tricycle he was riding veered out of control off an apartment complex's private sidewalk and rolled down the adjacent steep private driveway into the public street. (*Barnes*, *supra*, 71 Cal.App.4th at p. 1476.) *Barnes* recognized the principle that "a landowner has no duty to prevent injury on adjacent property . . . if the owner did not create the danger" and concluded the landowner in that case owed a duty because the danger at issue was *on the landowner's property*, *was created by the landowner*, and was *within the landowner's control*—none of which is true in this case. (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 153.)

The key to *Barnes* was the fact that the hazardous, steep driveway on the landowner's property "ejected" children into an adjacent street. (*Barnes*, *supra*, 71 Cal.App.4th at p. 1480; see *Vasilenko*, *supra*, 248 Cal.App.4th at p. 160 (dis. opn. of Raye, J.).) That hazard was something over which the defendant landowner had control. By contrast, in this case, the hazard—i.e., oncoming traffic on Marconi Avenue—was not on Grace Family Church's property and was not a feature over which the church had any ownership or control. Nor was there anything on the overflow parking lot property which forced Vasilenko to cross at the middle of the block or otherwise "ejected" him onto Marconi Avenue. (See *Vasilenko*, at p. 160 (dis. opn. of Raye, J.).)

Accordingly, the Court of Appeal decision cannot be supported by the two authorities on which it relies.

C. The majority's decision conflicts with authority from other jurisdictions, including jurisdictions that previously adopted California law.

The Court of Appeal's decision conflicts with the law of many other states, including Massachusetts, Illinois, Rhode Island, New York, North Carolina, South Carolina, Minnesota, Utah, Texas, Georgia, North Dakota, and Pennsylvania. These jurisdictions follow the principle that a landowner owes no duty to guard against dangers on a public street or sidewalk. Indeed, two of these jurisdictions expressly followed California law on this point, and the highest courts in six other states have also held that no duty exists in these types of cases:

- **Massachusetts:** *Davis*, *supra*, 652 N.E.2d at pp. 568, 570 & fn. 10 [following California law] [racing park had no duty to provide safe passage for patrons to cross a public highway when approaching the park from its own parking lot on the opposite side of the highway];
- **Rhode Island:** *Ferreira v. Strack* (R.I. 1994) 636 A.2d 682, 686, 688 [following California law] [church had no duty to protect exiting parishioners when crossing the street, including no duty to warn of the occasions a traffic officer was not present];
- **Minnesota:** *Kopveiler v. Northern Pac. Ry. Co.* (1968) 280 Minn. 489 [160 N.W.2d 142, 144] [railroad had no duty to provide safe passage or warn a visitor of a hole adjacent to the railroad's platform, which was located on the street customarily used for visitor parking];

- **Utah:** *Tripp v. Granite Holding Co.* (1969) 22 Utah 2d 175, 176 [450 P.2d 99, 100] ["There exists no obligation on the part of an abutter to keep the sidewalk adjoining his premises in repair . . . . His obligation can only arise where he creates through use or otherwise some unsafe or dangerous condition."];
- **North Dakota:** *Holter v. City of Sheyenne* (N.D. 1992) 480 N.W.2d 736, 739 [property owner had no duty to protect minor child leaving owner's premises from danger posed by automobiles on roadway not within the owner's control]; and
- **Texas:** *Grapotte v. Adams* (1938) 130 Tex. 587, 589-590 [111 S.W.2d 690, 691] [garage operator had no duty to repair hole in sidewalk where vehicle entering and exiting the garage contributed to the depression and the defendant knew or should have known of the defective condition of the sidewalk].

In addition, a significant number of out-of-state court of appeal decisions have reached the same conclusion and hold there is:

- No duty for restaurant owner to protect patrons from motorists traveling on the public roadway located between its restaurant and its parking lot (*Swett v. Village of Algonquin* (1988) 169 Ill.App.3d 78 [523 N.E.2d 594, 602]);
- No duty for a college to protect student who was struck by an automobile as she was walking across city-owned street, which ran through campus and which students were required to cross to attend classes (*Obiechina v. Colleges of the Seneca* (N.Y.Sup.Ct. 1996) 171 Misc.2d 56 [652 N.Y.S.2d 702]);

- No duty for a storeowner to provide safe passage for customers to cross a busy, three-lane street when leaving the store to get to a customer-designated parking lot located across the street (*Laumann v. Plakakis* (1987) 84 N.C.App. 131 [351 S.E.2d 765, 767]);
- No duty for skating rink to protect skater who was struck by an automobile while crossing abutting highway after leaving the skating rink (*Mahle v. Wilson* (S.C.Ct.App. 1984) 283 S.C. 486 [323 S.E.2d 65, 66]);
- No duty for bank to ensure that its patrons' use of its exit did not render the sidewalk unsafe (*Smith v. Bank of Utah, Inc.* (Utah Ct.App. 2007) 157 P.3d 817, 818-819);
- No duty for a store owner to protect driver turning left into parking lot, notwithstanding that store appeared to invite traffic to enter at a point with limited traffic visibility (*Allen v. Mellinger* (1993) 156 Pa.Commw. 113 [625 A.2d 1326, 1327, 1329]); and
- No duty for a landlord to protect tenant who was struck by an automobile while crossing a highway from a temporary parking area of apartment complex to the entrance of the apartment complex (*Walton v. UCC X, Inc.* (2006) 282 Ga.App. 847 [640 S.E.2d 325, 327]).

The foregoing opinions reflect a coherent unifying legal principle on the question of a landowner's duty—it does not extend to protecting patrons, visitors, and invitees against alleged dangers on public roads neither controlled nor created by the adjacent landowner.

II. PUBLIC POLICY REQUIRES DECLINING TO IMPOSE A DUTY IN ORDER TO AVOID PAVING THE WAY FOR UNLIMITED LANDOWNER LIABILITY.

The Court of Appeal in this case eviscerated the well-founded rule that a landowner owes no duty to guard against dangers on adjacent property which it did not create or control. In doing so, the court engaged in a perfunctory and flawed analysis of the public policy implicated by its decision.

Under *Rowland*, a court must balance several public policy considerations to determine whether a particular duty should be imposed. (*Rowland*, *supra*, 69 Cal.2d at pp. 112-113.) These factors include, among others, the foreseeability of harm to a plaintiff, the closeness of the connection between a defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the extent of burden to a defendant and consequences to the community of imposing a duty with resulting liability for breach. (*Id.* at p. 113.) Courts are required to evaluate the *Rowland* factors "at a relatively broad level of factual generality" to determine whether a duty should be imposed in "an entire category of cases"—i.e., whether, as a general matter, landowners should owe a duty to protect against off-premises hazards. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772 (*Cabral*).) When addressing the duty question, "the factual details of the accident are not of central importance." (*Id.* at p. 774.)

The Court of Appeal did not substantively engage the *Rowland* factors because, in its view, Grace Family Church "made no attempt to apply the *Rowland* factors." (*Vasilenko*, *supra*, 248

Cal.App.4th at p. 155.) But if this Court departs from preexisting law, embodying public policy, that landowners are not liable for off-site dangers not in their control, it should perform a full analysis of the *Rowland* factors, which will show that public policy requires no duty be imposed here. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [new legal theory based on facts appearing in the record may be considered for the first time on appeal].)

Plaintiffs argue that because Vasilenko was directed to park in a place that required him to cross a busy thoroughfare and "induce[d]" him to cross at an alleged dangerous location, it is "highly foreseeable" he could be hit by a car. (ABOM 24.) However, "almost any result [is] foreseeable with the benefit of hindsight. . . . For that reason, foreseeability is not coterminous with duty. . . . A court may find that no duty exists, despite foreseeability of harm, because of other factors and considerations of public policy." (*Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 407, citations and internal quotation marks omitted.) Accordingly, the foreseeability of harm, one *Rowland* factor, should be given little weight here. Otherwise, this factor will support imposing a duty on every defendant that is located anywhere near a busy road or high crime area. In any event, it is not foreseeable that a pedestrian would endanger himself by crossing a street without ensuring he could make it across safely.

Moreover, a close connection between the defendant's conduct and the plaintiff's injury, another *Rowland* factor, is lacking. It can hardly be said that a close connection existed between Grace Family Church's operation of the parking lot and the injuries Vasilenko

suffered when hit by a motorist on the adjacent highway. The church did nothing more than provide parking in a location that required invitees to cross Marconi Avenue to reach the church. The mere provision of parking caused no harm.

Next, plaintiffs contend that Grace Family Church is morally blameworthy, another *Rowland* factor, because it "failed to employ any one of several simple precautions to mitigate" the "grave risk to invitees crossing Marconi from its pool lot." (ABOM 26-27.) But " 'the moral blame that attends ordinary negligence is generally not sufficient' . . . courts require a *higher degree of moral culpability*." (*Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 32, emphasis added.) Furthermore, it is admirable, not blameworthy, that a church provided overflow parking for its attendees. Requiring them to search for their own off-site parking might have created different and greater risks than directing them to a nearby parking lot.

The next two *Rowland* factors—the extent of the burden to the defendant and the consequences to the community if the court imposes a duty of care—weigh heavily against Vasilenko.

The factual details of the incident here, including the allegation that the church's employees were instructed to warn those who parked in the overflow lot about the dangers of crossing Marconi Avenue or that churchgoers could have parked in an allegedly safer lot, are irrelevant in the same way as the factual details mentioned but then dismissed by this Court in *Cabral*. The factual details are not determinative for purposes of this inquiry. (*Cabral*, *supra*, 51 Cal.4th at pp. 772-774.) Rather, the factual

details may be important to the jury's determination regarding *breach* of duty—not the existence of a legal duty itself. (See *id.* at p. 774.) Yet plaintiffs assessed whether to recognize a duty by examining the specific facts of this case and the alleged burden preventing this particular accident would create, without adequately addressing how this duty would affect landowners in general. (See, e.g., ABOM 23, 28.)

When the facts and policies are analyzed at the requisite level of generality, it is clear that if a general duty of care is imposed on *all* owners of private property located adjacent to public streets, millions of property owners would be required to assume responsibility for safe passage from any off-site parking lot they suggest their visitors might use. However, those private property owners will not know the exact extent of that duty and how to satisfy it. How busy must a street be, and how far must a crosswalk be from the parking lot and the business, before the owner must take preventative measures or provide an alternative parking location? What specific preventative measures must be taken regarding each danger? Must the owner consider the speed limits of the streets its patrons must cross to reach its premises, and provide parking near a crosswalk on high-speed streets? Or, if a crosswalk is not required, exactly what other preventative measures must a landowner take to avoid potential liability for substantial damages in the event a patron jaywalks and is hit by a vehicle on a busy public road?

The benefit to the community of imposing a legal duty in this context is uncertain, at best. People can be expected to cross a

street safely without help from an adjacent landowner. If the street's condition is unreasonably dangerous, an injured person may pursue a claim against the responsible government entity. Moreover, as aptly pointed out by Grace Family Church (OBOM 20-21), it not only had no duty to regulate traffic outside its premises on the public roadway, it had no *ability* to do so either. (See *City of El Segundo v. Bright* (1990) 219 Cal.App.3d 1372 and cases and statutes cited therein [landowners prohibited from altering public roadways].)

In contrast, imposing a duty on landowners to protect against off-site dangers would create a tremendous burden, both financial and emotional. (See Priest, *The Expansion of Modern U.S. Tort Law and its Excesses* (2010) 1, 22, 28 <http://buckleysmix.com/wp-content/uploads/2010/10/Priest1.pdf> [as of Dec. 28, 2016] [characterizing liability in modern tort law as an "instrument" that "harms economic welfare in the U.S. and places the U.S. at a substantial competitive disadvantage to other nations" because "the increased insurance burden acts as a deadweight tax on innovation" and observing that past increases in liability judgments result in products and services being withdrawn from the market]; Klemm Analysis Group, *Impact of Litigation on Small Business* (Oct. 2005) Small Business Administration, Office of Advocacy <https://www.sba.gov/sites/default/files/files/rs265tot.pdf> [as of Dec. 28, 2016] [Survey found the impact of litigation on small business goes "well beyond the purely financial impact of legal fees and damages. Because most small business owners are invested in their small businesses, litigation causes not just financial loss, but

also substantial emotional hardship, and often changes the tone of the business."].) If a landowner can be liable for the dangers inherent in crossing public streets, it would be saddled with the duty to "investigate, monitor and evaluate" those dangers. (*Balard v. Bassman Event Security, Inc.* (1989) 210 Cal.App.3d 243, 250.) This duty would be not only burdensome but also duplicative of the government's responsibility for its own property.

As for the availability and cost of insurance, another *Rowland* factor, it is reasonable to assume that insurance rates would be adversely affected by imposing a duty under the circumstances presented here. The price of insurance will necessarily rise, possibly to unaffordable levels, to encompass the new duty, and the resulting potential liability, recognized by the *Vasilenko* majority. (See *N.N.V. v. American Assn. of Blood Banks* (1999) 75 Cal.App.4th 1358, 1387 [finding no duty in part because "the cost of insurance could be high"].) And even if insurance is available, the landowner would still face substantial costs. For example, the landowner, as defendant in the tort suit, must still "participate and incur the associated costs of time, anxiety, and so on." (Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care* (Feb. 22, 2009 draft) 1, 17-18 <http://tortssymposium.law.wfu.edu/papers/geistfeld.pdf> [as of Dec. 28, 2016] ["The availability of liability insurance does not mean that courts can ignore the financial burden that is borne by individuals subject to an uncertain duty"].)

Plaintiffs also argue that, when deciding whether to recognize a legal duty, courts should focus on the burden of discharging the

duty (see ABOM 28-29), rather than the burden that would result from imposing liability for breach of the duty. In other words, plaintiffs urge this Court to focus more on a *fiction*—how burdensome it would be if we could go back in time and impose a duty on Grace Family Church before the accident—rather than focusing on the *realities* that would occur today if the Court were to impose a duty on all California landowners adjacent to public streets.

Plaintiffs' argument is misguided for several reasons. First, the "burden" factor under *Rowland* has never been so narrowly confined. From the beginning, this Court urged lower courts to evaluate the "burden" factor by taking into account the broader social consequences of imposing a duty, not just the narrow question of how burdensome it would have been to discharge the duty in a particular case. *Rowland* directed courts to consider the "consequences to the community of imposing a duty to exercise care *with resulting liability for breach*." (*Rowland*, *supra*, 69 Cal.2d at p. 113, emphasis added.)

Consistent with that mandate, this Court, when considering the *Rowland* "burden" factor, has considered not only the burden of discharging the duty, but also the burden on the defendant and society that would arise from imposing liability. (See, e.g., *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 365 [declining to impose a duty on manufacturers to prevent injuries from other manufacturers' products, in part because "a duty of care would clearly impose a significant burden on defendants and all other companies that could potentially be held liable for injuries caused by products they

neither made nor sold"]; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 404-405 [declining to impose a duty on auditors to protect third parties who might rely on audit reports, in part because imposing "unlimited negligence liability" would increase the cost and availability of audits].)

The Court of Appeal tried to assuage concerns that its holding would expose landowners to unlimited liability by restricting duty to cases where the landowner gives parking instructions to a lot that it *controls*. (*Vasilenko*, *supra*, 248 Cal.App.4th at p. 157.) But as recognized by Presiding Justice Raye in dissent, "[t]ruly, this is a distinction without a difference." (*Id.* at p. 161 (dis. opn. of Raye, J.).) Contrary to the majority's assertion, the circumstances of this case *are* analogous to the case of a downtown restaurant owner who provides off-site parking instructions. (*Vasilenko*, at p. 157.) The salient fact in this case is that the church *selected* the parking lot, not that it operated the parking lot. The actions of its valet attendants did nothing to increase the danger from the public road—Vasilenko would have been exposed to the exact same risk of harm if the church did not control the lot. Thus, the church's selection of the lot, not its control of the lot, is what drove this case.

A rule that requires private property owners to assume responsibility for the safety of public roads merely because their properties abut the roads will impose a substantial economic burden on property owners without increasing safety, since property owners have no obligation or authority to remedy any hazards on public property. Despite plaintiffs' efforts to minimize the consequences of the duty they propose, the reality is that a ruling in plaintiffs' favor

would subject this state's landowners to lawsuits by persons injured by all sorts of off-site dangers, who claim the landowner *created* the danger even when the actual danger was inherent in public streets. Saddling landowners with potential liability to that limitless group of plaintiffs would be bad public policy.

III. ALTERNATIVELY, THIS COURT SHOULD CLARIFY THAT THE DUTY RECOGNIZED HERE REQUIRES THE LANDOWNER'S *CONTROL* OF AN OFF-SITE PARKING LOT, NOT MERELY ITS SELECTION OF, OR DIRECTION TO, AN OFF-SITE PARKING LOT.

If this Court recognizes a duty here, the Court must then decide whether to set any limits on the duty. Does the duty extend only to invitees whom the landowner affirmatively directs to off-site, landowner-controlled parking lots? What about invitees who are told about parking options but not directed where to park? Or invitees who are not directed but who, as a practical matter, must park in an area that requires them to cross a dangerous street?

As noted in *Owens* and *Steinmetz*, it is difficult to define the scope of such a duty. (*Owens*, *supra*, 198 Cal.App.3d at p. 386; *Steinmetz*, *supra*, 169 Cal.App.3d at pp. 1146-1147.) Indeed, the difficulty in drawing this line is one of the reasons courts nationwide have rejected imposing liability for off-site hazards. Recognizing a duty towards anyone claiming the location of a business or its parking lot "exposed" its invitees to "an unreasonable

risk of danger" would open the door to expensive lawsuits of questionable merit.

For that reason, if the Court decides to impose a duty at all (and it should not, for the reasons addressed above), the duty should extend only to invitees who suffer injury while crossing a road that runs between the landowner's property and the parking lot that the landowner controls. Although drawing the line there would be somewhat arbitrary in the context of this action because Grace Family Church's *control* of the parking lot did not substantially increase any danger, that line would place at least some restriction on the multiplicity of premises liability cases that California courts will be facing if a duty is recognized in this case.

CONCLUSION

The *Vasilenko* majority opinion is based on faulty legal reasoning. The new duty that it announces will adversely impact landowners, even those who already have gone to great lengths to protect their guests, by exposing landowners to liability whenever a person walking, or perhaps driving, to and from the landowner's property is injured on a street or sidewalk. This Court should recognize that landowners are not insurers against every conceivable risk that their patrons might encounter on adjacent property. The Court should reverse *Vasilenko* and confirm the continued vitality of the longstanding principle that a landowner does not owe a duty to guard its invitees against any dangers inherent in adjacent public streets, notwithstanding it may foresee

that its invitees will cross those streets to reach the landowner's premises.

January 6, 2017

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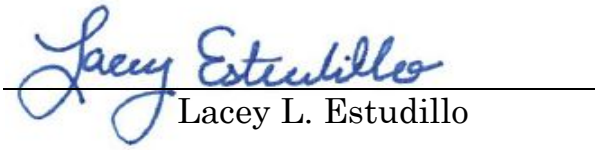
By: 
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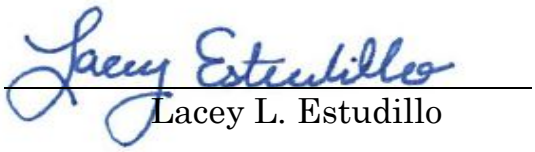

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Supreme Court of California Case No. S235412

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