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August 8, 2016

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Tani G. Cantil-Sakauye, Chief Justice
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-7303

Re: *Vasilenko v. Grace Family Church*
(2016) 248 Cal.App.4th 146
Supreme Court No. S235412

Honorable Justices:

The Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada (the "Associations") urge this Court to grant the pending petition for review or, at the least, depublish the Court of Appeal's 2-1 decision in *Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146. And if the Court grants review, it should order the decision not citable under new California Rule of Court 8.1115 (e)(3).

A. The Associations' Interest.

The Associations are two of the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions, comprised of over 2,000 leading civil defense bar attorneys in California and Nevada. They are active in assisting courts on issues of interest to its members. They have appeared numerous times as amicus curiae in this Court and the Courts of Appeal. (E.g., *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148; *Lee v. Hanley* (2015) 61 Cal.4th 1225; *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899.) They provide their members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multi-faceted support, including a forum for the exchange of information and ideas.

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Many of the Associations' members have considerable experience litigating premises liability and other negligence lawsuits. They regularly confront instances in which personal injury plaintiffs in search of deep pockets seek to expand the concept of duty beyond all reasonable bounds. This is such an instance.

No party has paid for or drafted this letter.

B. Review Should Be Granted Because *Vasilenko* Creates A New And Untenable Rule Of Landowner Liability That Conflicts With Other Court Of Appeals Decisions.

1. *Vasilenko's* new landowner duty rule is contrary to sound public policy.

The Court of Appeal's *Vasilenko* decision paints with a broad brush. In sweeping terms, it holds that if a landowner invites a visitor to park his car where the visitor must cross a public street to get to the landowner's premises, that parking location must be near a marked crosswalk or signal-controlled intersection." (248 Cal.App.4th at pp. 154, 157.) Otherwise, the landowner will be liable if the visitor is injured crossing the street. In this particular case, the Court of Appeal holds there is such a duty even though the visitor, plaintiff Alexsandr Vasilenko, was hit by a negligent motorist on a public street while Mr. Vasilenko was jaywalking at night in the rain from an offsite parking lot that defendant Grace Family Church was permitted to use when its own onsite lot was full. (*Id.* at pp. 149-150; 2 AA 450 [plaintiff's statement of undisputed material facts].)

No California case has ever imposed such a broad and onerous duty on landowners, nor should there be such a duty. As emphasized by Presiding Justice Raye in dissent, "The safety of streets and crosswalks has never been the responsibility of parking lot operators or businesses that rely on such parking lots. . . ." (248 Cal.App.4th at pp. 162-163.) Imposing such a duty would have a profound adverse impact on every sort of landowner—and anyone else who occupies premises and does not or cannot provide secure onsite parking adequate to house the vehicles of every potential visitor—including businesses large and small, public entities, religious institutions, and even homeowners and renters.

One of the primary factors to consider in the duty analysis is "'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.'" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) "In some

cases, when the consequences of a negligent act must be limited to avoid an intolerable burden on society, 'policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk.'" (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 364, quoting *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274.)

Policy considerations dictate against the Court of Appeal's new-found duty. It is an unavoidable fact of modern life that pedestrians must cross busy streets from time to time to get to where they are going. Few businesses, churches, or others can afford unlimited onsite parking, and in urban areas onsite parking often is impossible. Still fewer could afford, and none would even have the authority, to provide safe passage over public streets to the premises from wherever a visitor parked. (*City of El Segundo v. Bright* (1990) 219 Cal.App.3d 1372, 1376 ["The Brights had no duty to install traffic signs or signals"].) Likewise, no public entity is obligated to, or even could, provide marked crosswalks or traffic controls at every intersection. (Gov. Code, § 830.8 ["Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code"]; *Mixon v. State* (2012) 207 Cal.App.4th 124, 136 ["the absence of a pedestrian crossing sign at the 3rd and R Streets intersection does not prove a dangerous condition"].) Yet under *Vasilenko*, Grace Family Church would be liable for that very same condition—all despite the combined negligence of Mr. Vasilenko attempting to jaywalk across the road at night in the rain and the motorist traveling too fast to avoid a collision with him.

If the Court of Appeal's new-found duty rule were to be upheld, the only way to avoid liability would be to refrain from providing offsite parking or even suggesting where visitors can park offsite. That would serve no one's best interests.

Here is just one example of how onerous and unworkable this duty rule would be. The First District Court of Appeal informs visitors on its website: "**No parking is available in the building.** Directly across the street from the Earl Warren Building and Courthouse is the Civic Center Plaza Garage at 355 McAllister Street. Current rates are $3.00/hour or $24.00 maximum/day. Other public lots and limited metered street parking are available in the Civic Center area."[1] Under *Vasilenko*'s duty rule, the Court of

[1] *Contact Us – 1DCA* (July 26, 2016) California Courts <http://www.courts.ca.gov/2969.htm#tab7341>.

Appeal would have breached its duty if, as the Court suggested, a visitor parked at a meter on a public street, and the visitor was hit by a negligent motorist while lawfully crossing at an intersection where there was no marked crosswalk or stop signs. This result would stretch the concept of duty beyond reason, just as it does in this case.

2. *Vasilenko* conflicts with other California decisions.

As the Church's petition for review points out, the general rule is that a landowner has no duty to protect visitors from injuries suffered outside the premises. (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 197.) The rule makes perfect and necessary sense because the landowner has no control over what happens outside the premises. (*Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, 1147; *Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1623 ["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 or control"].)

Accordingly, numerous California cases have held that landowners have no duty to protect visitors from the dangers of crossing a street to get to the premises. (E.g., *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 487-488 [pedestrian struck by motorist while crossing street to get to parking lot across the street]; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 386 [pedestrian leaving market struck by motorist on adjacent public street]; *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, 804 [child struck by car while crossing public street alone to reach grand-opening carnival on premises of supermarket]; *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 720 [school had no duty to student attacked on adjacent sidewalk]; *A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 663 [landowner owed no duty to bike-rider struck on public street by truck making delivery to the property].)

There is nothing materially different about the *Vasilenko* case that would warrant an exception to the rule. It creates a conflict in the decisions of the Courts of Appeal that require this Court's resolution. (Cal. Rules of Court, rule 8.500(b)(1).)

3. *Vasilenko* addresses an important, recurring statewide issue.

But even if prior case law did somehow support the unbounded duty rule adopted by the Court of Appeal, there is still good reason for this Court to grant review. The issue of a landowner's duty to prevent injuries to those off the premises is a recurring one in a variety of contexts in California cases, both published and unpublished. (E.g., *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38-39 [duty to design exit from property so as not to impede visibility of adjacent highway]; *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 29 [no duty to protect family members of workers on premises from secondary exposure to asbestos]; *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1170 [triable issue of fact as to whether the landowner exercised control over strip of land abutting property and therefore owed a duty of care to protect or warn plaintiff of allegedly dangerous condition of that land]; *Hamilton v. Gage Bowl, Inc*. (1992) 6 Cal.App.4th 1706-1714 [no duty to protect visitor from sign falling from adjacent building over which landowner had no control]; *Corcoran v. City of San Mateo* (1953) 122 Cal.App.2d 355, 356 [no duty to prevent child from passing over premises and falling into ditch on adjacent land]; *Saran v. W.M. Bolthouse Farms* (Cal. Ct. App., April 18, 2006, No. F047107) 2006 WL 1000354; *Grazulis v. Harborland Ventures, Inc.* (Cal. Ct. App. Feb. 1, 2007, No. G036405) 2007 WL 283053.)

Absent clear boundaries for determining this off-the-land landowner duty—and the Court of Appeal draws none—plaintiffs and defendants will continue to litigate and clog our already-overcrowded trial and appellate courts with cases that either should never have been filed or that should have been quickly settled. Only this Court can definitively draw those boundaries.

C. At The Least, *Vasilenko* Should Be Depublished Because It Creates A Rule Of Liability Broader Than Necessary On The Facts Of The Case.

Even if this Court were not inclined to grant review, it should nevertheless depublish the *Vasilenko* opinion. (Cal. Rules of Court, rule 8.1125.) *Vasilenko* stretches duty principles beyond all tenable limits. Moreover, *Vasilenko* states a rule of law far broader than the facts of the case warrant. Mr. Vasilenko chose to jaywalk in the middle of the block at night in the rain when he was hit by a negligent motorist. It therefore would not have mattered in the slightest if there was a marked cross-walk or traffic-controlled intersection nearby. Yet the Court of Appeal holds that Grace Family Church

had a duty not to invite any visitor to park where Mr. Vasilenko parked because there was no marked cross-walk or traffic signal controls at a nearby intersection. (248 Cal.App.4th at pp. 154, 157.) The determination of whether a duty should exist in a situation not presented by the case should be left to a future case that actually presents that situation.

D. Conclusion.

The Associations urge this Court to grant review to resolve the conflict between Court of Appeal decisions on an important question of landowner duty and to lay down definitive limits for such a duty. Once review is granted, *Vasilenko* should be ordered not citable. At the least, *Vasilenko* ought to be depublished because it purports to expand landowner liability to circumstances beyond those presented by the case.

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **August 9, 2016**, I served the foregoing document described as **Amicus Curiae Letter Brief** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated below.

BY MAIL: I mailed a copy of the document identified above as follows:

I placed the envelope(s) for collection and mailing on the date stated above, at Los Angeles, California, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

The envelope was or envelopes were addressed as follows:

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Executed on **August 9, 2016**, at Los Angeles, California.

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

Rebecca E. Nieto

Rebecca Nieto

From: nobody@jud.ca.gov
Sent: Tuesday, August 09, 2016 1:40 PM
To: Rebecca Nieto
Subject: Case S235412, Vasilenko v. Grace Family , Submitted 08-09-2016 01:39 PM

The following Appellate Document has been submitted.

Case Type: Civil

Case Number: S235412

Case Name: Vasilenko v. Grace Family Church

Name of Party: ADCNCN and ASCDC

Type of Document(s):
Amicus Curiae Brief

Name of Attorney or Self-Represented Party Who Prepared Document: Marc J. Poster

Bar Number of Attorney: 48493

List of Attachment(s):

S235412_S235412_ACB_ADCNCN-ASCDC.pdf