S213132

IN THE

SUPREME COURT OF CALIFORNIA

RANDALL KEITH HAMPTON, et al.

Plaintiffs and Petitioners,

vs.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT AND RESPONDENT COUNTY OF SAN DIEGO

After a decision by the California Court of Appeal
Fourth Appellate District, Division One,
(No. D061509)

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APPLICATION

In accordance with Rule 8.520(f) of the California Rules of Court, the League of California Cities and the California State Association of Counties (collectively, "amici")[1] respectfully request permission to file the amici curiae brief included in this application.

The League is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide significance.

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

The Committee has identified this case as being one such case.

The California State Association of Counties is a non-profit corporation. Its members are the 58 California counties. CSAC sponsors a Litigation Coordination Program. The County Counsel's Association of California administers that program. CSAC's Litigation Overview Committee, made up of county counsels throughout the state, oversees the program. The Litigation Overview Committee monitors litigation that is of concern to counties statewide. It has determined that this case affects all of the Counties in California.

The amici organizations' city and county members have a direct interest in the legal issues presented in this case. Those members collectively own, operate, and maintain thousands of public improvements throughout California. The members rely on the design immunity prescribed in Government Code section 830.6 to protect them from liability for the discretionary decisions they have made to approve the

plans and designs for those improvements. This case will resolve a split in authority on the burden of proof those members (and other California public entities) bear in proving this affirmative defense.

The majority of lower courts have ruled that public entities can establish design immunity by proving the three elements set forth in section 830.6: (1) causal connection between injury and design or plan; (2) approval of plan, design, or standards in advance of construction, by a body or employee authorized to exercise discretion to do so; and (3) substantial evidence that a reasonable body or employee could have approved the design.

A minority of lower courts have imposed an additional requirement, not set forth in section 830.6: To establish the second element, discretionary approval, the public entity must prove that the body or employee made an "informed" decision, and specifically considered whether the design or plan deviated from the entity's own design standards.

As discussed in the attached brief, any decision that imposes extra-statutory burdens of proof on public entities attempting to establish design immunity threatens to thwart the Legislature's intent to safeguard governmental design and planning decisions from re-examination by courts and juries; and thus to interfere with the freedom of decision-making by those public officials vested with the function of making those decisions.

Further, making this defense more difficult to prove threatens to increase the amici's members' exposure to liability for damages.

The amici therefore have a direct stake in this case's outcome.

The amici also believe that this brief will assist the Court in deciding this case. As the Court stated in a previous decision interpreting Government Code section 830.6, "amicus curiae presentations assist the court by broadening its perspectives on the issues raised by the parties . . . ."

(*Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 77.) Indeed, the *Cornette* opinion devoted considerable discussion to the points raised in the amici curiae brief that CSAC and 105 California cities filed in that case. (*Id.* at pp. 77-80.) Although the *Cornette* Court ultimately did not adopt the arguments in the amici's brief, the Court evidently found that addressing those arguments assisted it in analyzing the legal underpinnings of the issue before it.

Similarly, bringing an additional, statewide perspective to the issue here, through consideration of the points set forth in this brief, will help the Court thoroughly analyze whether the burden of proof under section 830.6 should be expanded beyond the requirements of that statute.

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Amici therefore respectfully request leave to file the attached brief.

DATED: May 12, 2014 POLLAK, VIDA & FISHER

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PROPOSED AMICI CURIAE BRIEF

Introduction

Government Code section 830.6's design immunity is an affirmative defense to a public entity's liability under Government Code section 835 for a dangerous condition of public property. The Legislature intended that immunity to protect public entities from having courts and juries examine and second-guess their design decisions. It did so by allowing public entities to establish immunity by simply proving that a challenged design feature was approved by an official or body with the power to do so; and that there is substantial evidence that such an approval could be reasonable. And that is the way the majority of courts have interpreted the statute.

Plaintiffs/appellants the Hamptons, however, urge this Court to follow a minority view -- imposed by *two* reported decisions -- that require public entity defendants to prove

more than section 830.6 requires. Those cases require defendants to prove that not only that the challenged design was approved, but that the approval was "informed"; and that if the design deviated from the entity's own design standards, the approving official both knew of the deviation and approved it.

Such an interpretation is not only unsupported by section 830.6's language, but it thwarts the Legislature's intent in passing the statute. It subjects the approval process to reexamination by a court or jury -- exactly what the statute was intended to prevent. Further, it increases the burden of proof on public entity defendants far beyond that which section 830.6 prescribes. It requires proof of what an official thought and considered when approving a plan or design -- even though the approval decision may have been made decades before the injury took place, and the decisionmakers may no longer be available.

And the Hamptons have presented no good reason for doing so. Going behind the approval decision and

establishing that it was "informed" isn't necessary to proving that the decision was reasonable. Instead, reasonableness is addressed by a separate element of design immunity, which requires only substantial evidence that a reasonable official or body *could* have approved the challenged design. The Hamptons also appear to contend that additional burdens of proof are necessary because immunities from liability are somehow "disfavored." But they are not. They represent a legislative decision that the policy of remedying injuries must give way to protecting a function that is important to society. Here, that function is deciding whether plans and designs for public improvements are appropriate.

If the Hamptons wish to change the law immunizing design decisions, they should resort to the Legislature, not the courts. The amici respectfully request that the Court follow the majority rule, and affirm that, under section 830.6, "Discretionary approval simply means approval in advance of

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construction by the legislative body or officer exercising discretionary authority."[2]

Discussion

1. The Goal of Design Immunity Is to Prevent Courts and Juries from Second-Guessing the Reasonableness of Design Decisions

This is a statutory-construction case. When the Court engages in statutory construction, its ultimate goal is to adopt the construction that best effectuates the purpose of the law. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1087.)

The purpose of Government Code section 830.6's design immunity is to prevent a jury from second-guessing a public entity's design or planning decision by reviewing the identical

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[2] *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 526.

questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. (*Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 69, citing *Baldwin v. State of California* (1972) 6 Cal.3d 424, 432, fn. 7, 434.) The reason for doing so is separation of powers: The judicial branch, through a court or a jury, should not review the discretionary decisions of legislative bodies or officials. (*Cameron v. State of California* (1972) 7 Cal.3d 318, 326.) Such review creates a danger of impolitic interference with freedom of decision making by public officials in whom the function of making those decisions has been vested. (*Ibid*; *Cornette*, *supra*, at p. 326.)

This goal accords with the long-standing rule precluding judicial inquiry into the motivation or mental processes of legislators or other official decision makers. The validity of official decisions, whether legislative or executive, is determined from the decision itself, not the reasoning or evidence that went into it. An otherwise proper decision cannot be undermined on the ground that it was reached for

the wrong reason, or based on the wrong information. (*Sierra Club v. California Coastal Com'n* (2005) 35 Cal.4th 839, 864; *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 778-779; *County of Los Angeles v. Superior Court (Burroughs)* (1975) 13 Cal.3d 721, 727-728, 731.) As Justice Tobriner wrote in *County of Los Angeles*, "The potential passages and pathways of legislative motivation are as complex as those of the labyrinth of King Minos of Crete." (*Id.*, 13 Cal.3d at p. 731.) The law therefore concerns itself only with the decisions that emerge from the labyrinth, not the twists or turns they negotiated finding their way out.

Section 830.6 serves that goal by prescribing three elements that a public entity defendant must prove to establish immunity for a design decision: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette*, *supra*, 26 Cal.4th at p. 63.) The third element -- reasonableness -- is

an objective one: Instead of examining the actual reasoning of the official or body who approved the design, or whether they made a reasonable decision, section 830.6 merely requires "any substantial evidence upon the basis of which" a reasonable employee or body "could have" approved the design or plan. (Gov. Code, § 830.6.)

The third element is typically established by presenting an expert's declaration or testimony that the plan or design was reasonable. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1264.) The expert's opinion provides substantial evidence that a reasonable decisionmaker *could have* approved the design or plan, even if another expert disagrees. (*Ramirez*, *supra*, 192 Cal.App.3d 515, 525-526.)

The analysis does not examine the twists and turns negotiated in reaching a design decision, or approving it. It merely looks at the result, and determines whether any reasonable decisionmaker could have approved it. That safeguards official decisionmaking from second guesses.

2. The Hamptons' Proposed Interpretation of the Discretionary-Approval Element Would Thwart That Goal

The Hamptons' proposed interpretation of section 830.6 requires courts and juries to do exactly what section 830.6 was designed to avoid: second-guess design and planning decisions. And it does so by digging into the very matters that the law deems irrelevant to reviewing official decisions: The evidence, reasoning, and motivations of the decisionmakers.

The Hamptons insist that the public entity must not only prove what the statute requires -- that a body or employee with authority to do so approved the design -- but also that the approval decision was an "informed" one that involved "careful consideration." (Opening Brief on the Merits ["OBM"]:12, 18, 23; Reply Brief on the Merits ["RBM"]:15.)

In particular, where the design approved deviates from standards the entity previously set forth, they contend that the entity must prove the approving body or official was aware

of the standard; aware of the deviation; and approved the deviation. (OBM:11-17.)

They further insist that the defendant prove that the specific official or body that approved the plan or design was aware of the deviation from the standard, and that the official or body "made a conscious engineering judgment" to approve the design. (RBM:12, fn. 4.) (The Hamptons' proposed standard for discretionary approval would therefore apparently require every member of a local legislative body that approves a plan, design, or standard to be an engineer.)

The Hamptons propose various ways public entities could prove the decision makers' thought processes. "[D]irect testimony" from the official or officials who approved the design or plan "would obviously be helpful . . . ." (RBM:27.) And memos and correspondence to and from the decisionmakers could be used to prove that a decision maker "knew the [design] deviated from governing standards." (RBM:28.)

The interpretation of section 830.6 the Hamptons advocate would therefore require courts and juries to reexamine the particular discretionary decisions the officials who approved the designs or plans made -- exactly what section 830.6 is intended to avoid. (*Cornette*, *supra*, 26 Cal.4th at p. 69.) And to permit that reexamination, the Hamptons would require public entity defendants to present the testimony of the decisionmakers about their decisions, and other evidence of their reasoning, motivation, and the information they considered -- exactly the sort of evidence this Court has repeatedly held irrelevant and improper. (*Sierra Club*, *supra*, 35 Cal.4th at p. 864; *County of Los Angeles*, *supra*, 13 Cal.3d at pp. 727-728.)

Does anything in section 830.6, or the case law interpreting it, support a construction of section 830.6 that imposes such a burden of proof on public entities? As discussed next, the answer is no.

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3. Neither the Statutory Language, Nor the Legislative History, Nor the Case Law Interpreting the Discretionary-Approval Element Supports the Hamptons' Construction of That Element

The principles of statutory analysis are well established. The Court first looks to the words of the statute, the most reliable indicator of legislative intent. If the statutory language is clear and unambiguous, the inquiry ends. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1394.) If that language does not provide an unambiguous plain meaning, the Court looks to extrinsic sources, such as legislative history, to determine the statute's meaning. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 155.) And the Court may also look at how both the Court and lower appellate courts have interpreted the statute in the past. (E.g., *Avila*, 38 Cal.4th at p. 156.)

The Court also looks at the purpose of the statute, and whether that purpose counsels a broad or strict interpretation. (E.g., *Pineda*, *supra*, 50 Cal.4th at p. 1394

[interpreting statutes that protect employees broadly].)

In that regard, the Hamptons argue that tort immunities such as Government Code section 830.6 are "disfavored" and therefore "should not easily be awarded." (OBM:24; see also RBM:29.) They cite *Baldwin*, *supra*, 6 Cal.3d at pp. 435-436, which interprets section 830.6 narrowly. (*Id.*, at p. 436 [addressing changed conditions after immunity has been approved].) But that approach is too simplistic: This Court has given the immunities of the Government Claims Act broad interpretation in some cases, and narrow interpretations in others. (See Van Alstyne, et al. 1 Cal. Government Tort Liability Practice (Cont.Ed.Bar 2013) §§ 1.46-1.151.)

Further, the Court's approach to section 830.6 in *Baldwin* was shaped by the Court's opinion at that time that, both before and after the passage of the Government Claims Act, "'when there is negligence, the rule is liability, immunity is the exception.'" (*Baldwin*, *supra*, 6 Cal.3d at p. 435.) In

the 42 years since, the Court's approach to the Act has evolved to recognize that the Act creates a "general rule of immunity for public entities" (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183); and that the Legislature's intent in creating the Act was "'to confine potential governmental liability to rigidly delineated circumstances . . . .'" *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127, quoting *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.) The Court therefore views the Act's immunities as policy judgments as to when a public entity should or should not be held liable for injuries on public property. (*Zelig*, at p. 1132.) Immunities -- including section 830.6 -- can no longer be viewed as "disfavored" statutes to be interpreted narrowly.

With those principles in mind, can the "discretionary approval" element of section 830.6 be interpreted to require the proof of "informed" decisionmaking that the Hamptons advocate? As explained below, the answer is no.

A. The Statute's Language Does Not Support the Hampton's Interpretation

Interpretation of section 830.6 must begin, as with every statute, with the statute's language. (E.g., *Cornette*, *supra*, 26 Cal.4th at p. 72.) According to Section 830.6's language, if there is a causal relationship between a plan or design and the plaintiff's injury, and there is substantial evidence that a reasonable employee or body could have approved that plan or design, the entity is immune if it proves that:

> "such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other 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 . . . . (Gov. Code, § 830.6.)

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Therefore, to prove discretionary approval, the entity must merely prove that a body or employee with discretionary authority approved *either* the plan or design, or standards to which a later plan or design conforms.

The statute's language does not impose any particular requirements on the approval, except that the body or employee have the power to approve the design/plan/standards and do so before construction. The statute does not require that the approving officials considered any particular information. It does not require that the decision be informed. It does not even require that the approval be reasonable; it requires only substantial evidence that a reasonable official *could* have made that decision.

Further, it does not require that approving officials expressly consider and approve a design or plan's deviation from the entity's own standards. As the lower appellate court's decision pointed out, section 830.6's only mention of

"standards" is as an *alternative* method of proving discretionary approval: even if a particular design or plan was not approved before construction, the entity can prove immunity if the design or plan conforms with standards previously so approved. (See *Hampton v. County of San Diego* (2013), previously published at 218 Cal.Ap.4th 286, at pp. 180-181; e.g., *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1011-1012, disapproved on other grounds, *Cornette*, *supra*, 26 Cal.4th at p. 73.)

The Legislature's express statement that a plan or design's conformity to "standards" previously proved is an alternative to approval of a plan or design itself contains a negative implication: That a plan or design that *is* approved before construction *need not* conform to previously-approved standards. (C.f., *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 [expression of some things in a statute necessarily means exclusion of other things not expressed]*; In re Jennings* (2004) 34 Cal.4th 254, 273 [use of term in one part of statute and omission from another dealing with related subject shows

different legislative intent applies to the different subjects].)

The text of section 830.6 therefore does not support the Hamptons' construction of it. And that should be the end of the matter. (E.g., *Cornette*, *supra*, 26 Cal.4th at p. 79 ["The problem with amici curiae's argument is that is not what the Legislature said"].)

B. The Legislative History of Section 830.6's Discretionary-Approval Provision Does Not Support the Hamptons' Interpretation

If the plain language of section 830.6 is insufficient to refute the Hamptons' interpretation of the statute, the next question is whether the statute's legislative history supports it. (See, e.g., *Baldwin*, *supra*, 6 Cal.3d at p. 433.)

Section 830.6 was drafted by the California Law Revision Commission in 1963 as part of its comprehensive study of governmental tort liability and sovereign immunity, and was enacted by the Legislature without change.

(*Baldwin*, *supra*, 6 Cal.3d at p. 433.) The Commission's rationale for section 830.6 is set forth in Recommendation of the California Law Revision Commission Relating to Sovereign Immunity, 4 Cal. Law Revision Com. Rep. (1963) p. 801. (*Cabell v. State* (1967) 67 Cal.2d 150, 153, overruled on other grounds by *Baldwin*, *supra*, 6 Cal.3d 424, 427.) And that report's description of the proposed design immunity does not support the Hamptons' argument that discretionary approval of plans or designs be shown to be "informed" or to have analyzed deviations from standards, since that would involve second-guessing the approval decision. Instead, the focus is -- as explained above -- on whether the approval decision *could* have been a reasonable one:

> "There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless there is no reasonable basis for such approval. While it is

> proper to hold public entities liable for injuries caused by arbitrary abuses of discretionary authority in planning improvements, to permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." (4 Cal. Law Revision Com. Rep., *supra*, at p. 823; see also *Cabell*, *supra*, 67 Cal.2d at p. 153 [quoting report].)

At page 850 of the Report, the Law Revision Commission sets forth the proposed text of section 830.6. The discretionary-approval provision proposed in 1963 was adopted without change, and remains the same 51 years later. Page 851 sets forth the Commission's comment on the statute, which was formally adopted as indicating legislative

intent by the Senate Committee on the Judiciary and the Assembly Committee on Ways and Means. (*Baldwin*, *supra*, 6 Cal.3d at p. 433.) The pertinent part of that comment states,

> "Section 830.6 provides immunity when a governmental body exercises the discretion given to it under the laws of the State in the planning and designing of public construction and improvements."

Nothing in that comment supports the Hamptons' interpretation.

The comment at p. 851 also notes that section 830.6's immunity is similar to the immunity New York courts granted public immunities, as discussed in *Weiss v. Fote* (1960) 7 N.Y.2d 579 [200 N.Y.S.2d 409, 167 N.E.2d 63]. And the *Weiss* opinion, like the language above, favors the lower court here's interpretation of section 830.6 rather than the Hamptons'. Although the *Weiss* court noted that the body

that approved the design of the intersection discussed in that case made extensive studies of the clearance interval there (7 N.Y.2d at 586), that was not the basis for the court's ruling. Instead, the court focused on separation of powers, and the need to avoid "submit[ing] to a jury the reasonableness of the lawfully authorized deliberations of executive bodies . . . ." (*Id.* at p. 585.) To do so "would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts." (*Id.* at p. 586.)

The legislative history of section 830.6 therefore does not show any legislative intent to require any more proof of the discretionary approval process than what is set forth in the statute: That a body or employee with discretion approved the plan, design, or standards.

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C. The Majority of Published Case Decisions Support the Lower Court's Interpretation of Section 830.6, Not the Hamptons'

The next step in analyzing section 830.6 is to consider the published case decisions that have addressed the standard of proof for discretionary approval in the 49 years that the statute has been effective.

Naturally, the Hamptons focus on the two cases that have rejected design immunity when a public entity (in both cases, the State of California) deviated from its design standards without showing that the deviation was approved; and that required the public entity defendant to show that the approval was an "informed" one: *Levin v. State of California* (1983) 146 Cal.App.3d 410, 418; and *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 386-388. They also point to *Johnston v. Yolo County* (1969) 274 Cal.App.2d 46, 53-54, in which the appellate court rejected a discretionary approval based on evidence that the employee who approved the design did so against his own

engineering judgment.

These cases indeed support the Hamptons' interpretation of section 830.6. But in requiring public entity defendants to prove more than the fact that a body or employee with discretionary authority approved the plan or design that allegedly caused the injury, those cases are in the minority.

The majority of cases have interpreted section 830.6 to mean what it says:

> "The second element, discretionary approval prior to construction, 'simply means approval in advance of construction by the legislative body or officer exercising discretionary authority.'" (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940-941, quoting *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 526; accord, *Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 734

[quoting *Ramirez*], disapproved on other grounds, *Cornette*, *supra*, 26 Cal.4th at p. 74.)

Grenier, *Ramirez*, and *Alvarez* are part of a line of cases in which appellate courts rejected arguments that, to establish discretionary approval, public entities should have to show more than approval by an employee or body with discretion. For instance, in *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 384, the plaintiff challenged a superintendent of maintenance's approval of a construction plan on the ground that the superintendent was not a licensed engineer or architect. The appellate court rejected that challenge:

"Section 830.6 contains no requirement that the 'employee exercising discretionary authority' be either a licensed engineer or an architect, nor has appellant cited authority for that conclusion. We hold that no such requirement exists." (*Id.* at p. 384.)

Accord, *Hefner*, *supra*, 197 Cal.App.3d at p. 1014; *Uyeno v. State of California* (1991) 234 Cal.App.3d 1371, 1380, disapproved on other grounds by *Cornette*, *supra*, 26 Cal.4th at p. 74.

In *Ramirez*, *supra*, the trial court denied the public entity design immunity because there was no evidence the city engineer "independently" exercised his judgment in deciding to approve the design at issue in that case. The trial court did not believe that section 830.6 permitted the city engineer to "simply approv[e] something that someone else did with respect to a defect of this kind." (*Id.*, 192 Cal.App.3d at p. 524.) The appellate court ruled that the trial court's "attempt to base its decision on a lack of discretionary approval . . . indicates a misunderstanding of that requirement." (*Id.* at p. 526.) Public entities, the *Ramirez* court ruled, are "entitled to rely on what is apparently competent advice in making legislative decisions." (*Id.* at p. 525.)

Similarly, in *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 494, the court affirmed summary judgment based on design immunity against an argument that the defendant county failed to establish discretionary approval because the approving board did not know of one consultant's concerns about the design at issue. The *Alvis* court concluded that an approving board "is entitled to rely on the recommendations of its staff professionals in making decisions on such technical matters." (*Id.* at p. 553.)

The *Alvis* court further rejected any requirement that the defendant prove that the exercise of discretion was "knowing or informed":

> "[S]section 830.6 does not state the approval must be knowing or informed. A court may not rewrite a statute to make it conform to a presumed intent that is not expressed." (*Id.* at p. 552.)

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See also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1263 [upholding summary judgment in absence of evidence of what information the employees who approved the plans considered] and *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 89-90 [detailed plan drawn up by a competent engineering firm and approved by the city council in the exercise of its discretionary authority is "persuasive evidence . . . of prior approval . . . for purposes of the design immunity defense"].)

Even the recent case of *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364[3], which reversed design immunity based on a defendant's failure to establish discretionary approval (because there was no showing of approval of a design, plan, or standards), nevertheless followed the above line of cases, holding that a city engineer's exercise of discretion to approve plans drawn up by a competent engineering firm would present "clear, or even

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[3] Because the *Martinez* decision was filed on April 8, 2014, the defendant county's time to petition for review in that case has not expired as of the time of this brief's writing.

undisputed" evidence of discretionary approval. (*Id.* at p. 884, citing *Grenier*, *Alvarez*, and *Laabs*, all *supra*.)

Compare this line of cases to the three published decisions where appellate courts required public entities to show more than the fact of approval by bodies or employees with discretionary authority to do so. None of those three decisions cite anything in section 830.6 that supports expanding the burden of proving the second element of design immunity.

For instance, in *Johnston v. Yolo County*, *supra*, 274 Cal.App.2d 46, undisputed evidence established that the defendant county's road commissioner approved the design at issue. Nevertheless, the appellate court upheld the trial court's decision not to instruct the jury on design immunity. The commissioner, an engineer, testified that the design was contrary to his professional judgment; but that a county supervisor nevertheless forced him to approve it anyway. (*Id.* at p. 54.) Under those facts, the court ruled, the

commissioner did not really "approve" the design; "he disapproved it but ordered it built anyway." (*Ibid.*) The court held that because the commissioner was both an official and an engineer,

> "His discretion was limited simultaneously by his duty as a public officer and his obligation as a professional engineer. . . . He could approve a plan or design in the sense intended by section 830.6 only when his action simultaneously expressed both official and professional approbation." (*Id.* at pp. 53-54.)

The *Johnston* court did not rely on any language in section 830.6 to support its requirement that approval be both official and based on the approving employee's professional analysis. Instead, it relied on the dictionary definition of "approve." (*Id.* at p. 53.)

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Johnston appears to be an example of hard facts making bad law. (See *Uyeno*, *supra*, 234 Cal.App.3d at p. 1379 [confining *Johnston*'s holding to cases involving "sham approval[s]"].) To the extent it holds that a public entity prove anything more than official approval by a body or employee, it should be rejected in favor of the majority rule, discussed above, holding that proving official approval is sufficient. After all, if there was substantial evidence that a reasonable road commissioner could have approved the design in *Johnston*, should design immunity have been denied merely because the official in that case felt pressured to make his decision?

Moreover, the *Johnston* standard of requiring the approving official to exercise both professional and official approval is unworkable in those cases where plans or designs are approved by public bodies, such as city councils or boards of supervisors, who themselves have no engineering or architectural expertise and depend on either city staff or the professionals who prepared the designs or plans. (See

Ramirez, *supra*, 192 Cal.App.3d at pp. 524-525.)

Next, *Levin*, *supra*, 146 Cal.App.3d 410, reversed summary judgment based on design immunity in a case where the design feature at issue was the absence of a median barrier and guard rails in a reconstruction of the roadway at issue. Even though there was undisputed evidence that the deputy highway engineer who had the authority to approve the design did so, on the recommendation of other engineers, the appellate court held that proving discretionary approval required evidence that the approving engineer decided to ignore the standards for when guard rails or median barriers were required. (*Id.* at p. 418.) The court ruled that "[a]n actual informed exercise of discretion is required" by section 830.6. (*Ibid.*)

Levin did not cite anything in section 830.6 to support its interpretation of that statute. It cited only this Court's decision in *Cameron*, *supra*, 7 Cal.3d at p. 326. (*Id.*, 146 Cal. App.3d at p. 418.) And *Cameron* did not hold that proving

discretionary approval required proving "informed" consent, or approval of deviation from standards.[4] *Cameron* held only that absent evidence that the design at issue in that case -- the uneven superelevation (banking) of a highway -- was approved, the state was not entitled to nonsuit based on design immunity for that design feature. (*Id.* at pp. 325-326 & fn. 11.)

Finally, *Hernandez*, *supra*, 114 Cal.App.4th 376, 386-388, followed *Levin*, and held that the question of whether the state officials who approved the design at issue "did in fact exercise their discretion" by considering and approving deviations from standards was a jury issue that defeated summary judgment based on design immunity. The *Hernandez* court, like the *Levin* court, did not cite anything in

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[4] In addition, *Levin* was decided before the 1987 enactment of Evidence Code section 669.1, which prescribes that state standards like those at issue in *Levin* do not have the force of statutes, ordinances, or regulations; and before this Court's decision in *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 720 that such standards do not establish standards of care.

section 830.6 that required inquiry into the approval decision. (*Ibid.*)[5]

The past five decades have therefore produced multiple published appellate decisions that have followed the language of section 830.6 and required only proof of approval by an official with discretion to establish the second element of design immunity. They have also produced three published opinions that, unsupported by anything in the statute, require proof of more. The Hamptons ask this Court to reject the majority view, and follow the minority view. Nothing in section 830.6's language, legislative history, or purpose supports doing so.

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Although *Hernandez* was decided after the enactment of Evidence Code section 669.1 and the publication of the *Lugtu* decision, *Hernandez* did not mention either one.

4. The Hamptons' Proposed Interpretation of Section 830.6 Imposes a Potentially Insurmountable Burden on Public Entities' Ability to Obtain Design Immunity

Not only does requiring proof that an official's approval of a design was "informed," and that the official specifically considered whether the design departed from standards, require second-guessing the design decision, it also offers proof problems that the Hamptons scarcely address.

One of the problems raised above is the general prohibition on proof of officials' reasoning and motivation for decisions, including inquiring into the evidence and information they considered. That is exactly the sort of information the Hamptons' proposed interpretation would demand: Evidence from officials about what the considered in reaching their design decisions, and why they reached those decisions. (See RBM:27-28.)

Another is the problem the trial court raised during the hearing on the summary judgment here: "So consider this

hypothetical . . . the people who did the signing . . . are deceased and unavailable to you?" (RT:10.) Continued the court:

> "If your theory is right, that would render the design immunity unavailable to any public entity if the person who did the signing wasn't there to presumably go back over what he had signed, in this case years before, and testify precisely as to the thought process, the mental impressions that he had?" (RT:11.)

That is a serious concern. California has been a state since 1850. Public improvements can be years or decades old. In *Cameron*, *supra*, 7 Cal.3d at p. 325, decided in 1972, this Court dealt with highway design plans approved in the 1920s. Even when improvements have been built recently, approving officials may have passed away, or retired and become unavailable, or simply forgotten the details of their decisions.

If all a public entity need prove to establish discretionary approval is that the design in question was approved by an official with authority, the passage of time is less of a concern. *Alvarez*, *supra*, which interpreted "discretionary approval" to "simply mea[n] approval in advance of construction by the officer exercising discretionary authority" (*id.*, 79 Cal.App.4th at p. 734), rejected the premise that discretionary approval can be established only by a percipient witness. (*Id.* at pp. 730-731, and cases cited therein.) Evidence of the date an improvement was built, along with documentary evidence that a plan, design, or standard for the improvement was approved by a body or employee with the discretion to do so, will suffice to prove discretionary approval. (E.g., *Cameron*, *supra*, 7 Cal.3d at p. 325; see Fisher, *Design Immunity for Public Entities* (1991) 28 San Diego L.Rev.241, 247-253 [discussing methods for proving discretionary approval].)

But if public entities must establish that approving officials made an "informed" decision, and considered and

approved deviation from the entity's standards, proving design immunity for vintage improvements becomes much more difficult. Proving the fact that a 1922 public works director approved a building design may be as simple as locating a building plan with a dated approval signature. Proving what was inside the director's head when he signed off on those plans is a far different proposition.

And ultimately, what is the point of doing so? An official's thoughts and considerations when deciding to approve a design or plan are not relevant to the reasonableness of the approval. Reasonableness is determined under the third element. If a 2014 engineer opines that a reasonable official could have approved a design, why do the thoughts of an official who approved the plan 100 years before matter?[6]

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[6] Which is not to say that 2014 design standards would govern whether a reasonable design official in 1914 could have approved a design. (See *Thomson*, *supra*, 61 Cal.App.3d at p. 387.)

The Hamptons' proposed interpretation of section 830.6 therefore imposes a potentially insurmountable burden on public entities attempting to prove discretionary approval. That is another reason to reject their interpretation, and adopt the majority rule that proving approval by an official with discretionary authority is sufficient.

5. The Hamptons Have Failed to Establish Any Good Reason for Increasing the Burden of Proving Discretionary Approval

Amici have presented multiple reasons why this Court should side with the majority of lower court decisions, and limit the burden of proving discretionary approval to that set forth in the text of Government Code section 830.6. The next question is whether the Hamptons have shown any compelling argument for increasing that burden. An examination of their principal arguments establishes that they have not.

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A. The Standard of Proof for "Exercise of Discretion" under Government Code Section 820.2 Does Not and Should Not Apply to Discretionary Approval under Section 830.6

One of the Hamptons' central arguments is that this Court's interpretation of the statutory term "discretion" in *Johnson v. State of California* (1968) 69 Cal.2d 782, 794, fn. 8 establishes the definition of "discretion" under section 830.6. (OBM:15-16; RBM:9.) In *Johnson*, the Court held that a public entity could not obtain discretionary immunity under Government Code section 820.2 without "showing that . . . a policy decision, consciously balancing risks and advantages, took place." (*Id.* at p. fn. 8.) According to the Hamptons, this holding "confirms that *mere possession* of discretionary authority is *insufficient* to establish discretionary approval under section 830.6 . . . ." (OBM:16 [italics in original].)

The problem with this argument is that it assumes the standard of proof for "exercise of discretion" under section 820.2 also establishes the standard of proof that a plan was

approved by a body or employee "exercising discretionary authority to give approval" under section 830.6. (OBM:16.) No authority supports that leap in logic. Although *Baldwin*, *supra*, 6 Cal.3d at p. 436, fn. 9 found *Johnson*'s distinction between policy and ministerial decisions a useful analogy for addressing design immunity in light of changed physical conditions, *Baldwin* stopped short of holding that section 830.6 requires the same standard of proof as section 820.2. Moreover, this Court has held that if a more specific immunity under the Government Code than section 820.2 applies, a public entity need not also prove the elements of section 820.2's general discretionary immunity to defeat liability. (*Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 635.)

Further, importing the *Johnson* standard of proof for section 820.2 wholesale into section 830.6 ignores the differences between the two statutes.

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One important difference is in statutory language. Section 820.2 immunizes public employees from liability for injuries resulting from an act or omission that "was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Section 830.6, on the other hand, immunizes public entities from liability for injuries resulting from designs or plans if the plans were approved by a body or employee "exercising discretionary authority to give such approval" and there is substantial evidence that the decision could have been reasonable.

These two tests for immunity differ in two important ways. First, the question under section 820.2 is whether there *has been* an exercise of discretion; but the question under section 830.6 is whether the body or official *had authority to exercise discretion* to give approval. Hence, while *Johnson* requires proof that "discretion" (the weighing of risks and advantages) actually took place (*id.*, 69 Cal.2d at fn. 8), section 830.6 requires only proof that the official or officials who approved the design had the power to exercise discretion.

(See *Ramirez*, *supra*, 192 Cal.App.3d at p. 526.) Second, under section 820.2 the mere exercise of discretion in making a decision (whether or not "abused") is sufficient to establish immunity, while section 830.6 imposes the additional requirement of substantial evidence that the decision could have been *reasonable*. A higher standard of proof for "exercise of discretion" is therefore warranted under section 820.2, since the discretion exercised need not be "reasonable" to establish immunity under that statute.

A further, and perhaps more important, difference between the two statutes are their different purposes. While both immunities stem from separation of powers considerations (see *Johnson*, *supra*, 69 Cal.2d at p. 793), section 830.6 is specifically designed to *prevent* courts and juries from "reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan." (*Baldwin*, *supra*, 6 Cal.3d at p. 434.) Yet applying *Johnson*'s standard of proof to section 830.6 would *require* the public entity to prove (and thus the

court or jury to review) the balancing of risk and advantage that the approving officers considered. (*Johnson*, *supra*, 69 Cal.2d at fn. 8.)

Johnson's holding therefore does not control the issue in this case. The Hamptons' arguments otherwise fail.

B. The Hamptons' Proposed Requirement That an Approval Decision Be "Careful" Would Defeat The Entire Purpose of Design Immunity

The Hamptons also argue that the public entity's "careful consideration of the risks and benefits" of setting aside standards in approving a design "forecloses subsequent judicial scrutiny of that decision." (RBM:12.) They appear to argue that only a "careful" design approval decision will justify immunity. If so, they appear to misapprehend the nature of immunities, and in particular design immunity.

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An immunity that applies only if the immunized party satisfies a duty of care is of limited utility. If a defendant met a duty of care, the defendant usually does not need an immunity. That is why immunities generally apply regardless of whether the defendant met a duty of care. (See *Blanks v. Shaw* (2009) 171 Cal.App.4th 336, 378.)

In particular, Government Code section 830.6 immunizes design decisions even in the face of expert evidence that the design approval decision was *not* careful: A plaintiff's expert's declaration that no reasonable official could have approved a particular design will not defeat immunity. (*Ramirez*, *supra*, 192 Cal.App.3d at p. 525.)

Any requirement that a design approval decision must be "careful" to be immunized under section 830.6 should therefore be rejected.

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C. Adopting The Hamptons' Proposed Requirement That the Approving Official Apply Engineering Expertise Would Judicially Repeal Section 830.6's Provision That "Bodies" May Grant Approval

Another thread that runs through the Hamptons' arguments is their contention that an official who approves a plan or design must make an "engineering judgment" to approve the plans. (E.g., RBM:12, fn. 4 [the employee who approved the plans, not "junior engineers," must "ma[ke] a conscious engineering judgment to approve" the plan or design here]; see also RBM:8, 10-12, 14, 16, 18, 25.) They argue that the discretionary-approval element of section 830.6 "asks, as a factual matter, [if] the official who approved the design actually exercised professional judgment." (RBM:18.) Their argument appears to echo the holding in *Johnston v. Yolo County*, *supra*, 274 Cal.App.2d at

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p. 54 that an official can approve a plan or design under section 830.6 "only when his action simultaneously expres[s] both official and professional approbation."

But the Hamptons' argument disregards the case decisions since *Johnston* that have held that the approving officials need not be licensed engineers or architects, and may rely on the expertise of either the entity's staff or the architects or engineers who prepared the design. (*Thomson*, *supra*, 61 Cal.App.3d at p. 384; *Ramirez*, *supra*, 192 Cal.App.3d at 526.)

What is more serious is that it disregards the language of Government Code section 830.6, which prescribes that plans, designs, and standards may be approved "by *the legislative body of the public entity* or by some other body or employee exercising discretionary authority to give such approval . . . ." (Emphasis added.)

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The Hamptons' proposed standard of proof for discretionary approval would judicially repeal the portion of section 830.6 permitting legislative bodies to approve plans, designs, or standards. There is no requirement that every member of a city council, board of supervisors, or other legislative body be licensed engineers or architects. Those legislators depend on the architectural and engineering judgment of their entity's staff, or of outside consultants. Yet the Hamptons would require each member of a body who votes to approve a public works design to have his or her own engineering expertise, and to exercise that expertise in approving the plan. Further, the Hamptons would have the public entity *prove* that each approving member exercised that judgment.

A proposed interpretation of a statute that would render portions of that statute unenforceable should not be adopted. (*Cornette*, *supra*, 26 Cal.4th at pp. 73-74.) The Hamptons' argument therefore fails.

D. Enforcing the Statute As Written Is Not "Bad Policy"

Finally, the Hamptons argue at pages 24-28 of their Opening Brief on the Merits that adopting the lower court's interpretation of Government Code section 830.6's discretionary-approval element would be "bad policy" because it "would all but guarantee design immunity in virtually every road-design case by rendering toothless the one element in the three-element test for design immunity that had any real bite." Incorrect.

Interpreting the discretionary-approval element as it is written in the statute -- that is, requiring public entities to prove that plans, designs, or standards were approved by a body or employee exercising discretionary authority to approve them -- would not render section 830.6 a rubber stamp. Public entities must still prove that the specific design feature that the plaintiff alleges is dangerous and caused the injury was approved. (See, e.g., *Cameron*, *supra*,

7 Cal.3d at p. 326 [failure of proof on that point defeats design immunity]; *Martinez*, *supra*, 225 Cal.App.4th at 883 [same].) They must still provide substantial evidence that a reasonable body or official could have approved the design. As the County explains at pages 24-25 of its Answering Brief, proof of that element, even with expert testimony, is not automatic.

Finally, even if an entity establishes all three elements of design immunity, it may still face the question of whether the immunity has been lost through changed circumstances. If the evidence on that issue is disputed, it is a question for the jury. (*Cornette*, *supra*, 26 Cal.4th at p. 80.)

Affirming the lower court's interpretation of section 830.6 would therefore not render the section's requirements toothless. It would simply enforce the statute as it was written, and as it has remained for over 50 years. If the Hamptons believe that the resulting immunity is too

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expansive, they should ask the Legislature to change the statute.

CONCLUSION

The lower court's interpretation of Government Code section 830.6 was correct. To obtain design immunity under that statute, the amici should not be required to prove anything more than what the statute requires. The Hamptons' argument otherwise should be rejected.

DATED: May 12, 2014 POLLAK, VIDA & FISHER

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this application and brief contain approximately 8,151 words, including footnotes, which is less than the maximum number of words permitted under rule 8.520(c)(1) of the California Rules of Court. Counsel relied on the word count feature of the word processing program on which the brief was produced.

DATED: May 12, 2014 POLLAK, VIDA & FISHER

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11150 W. Olympic Boulevard, Suite 980, Los Angeles, California 90064.

On **May 13, 2014**, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT AND RESPONDENT COUNTY OF SAN DIEGO** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

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

Executed on **May** 13**, 2014**, at Los Angeles, California.

Cindy Bischop

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