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November 5, 2018

THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF CALIFORNIA

Re: ***City of Los Angeles v. Superior Court (Babakhanyan)***
Case No. S251661

To The Honorable Chief Justice and Associate Justices of the Supreme Court of California:

This letter is written on behalf of the League of California Cities in support of the Petition for Review filed by the City of Los Angeles in Case No. S251661.

The League of California Cities is an association of 475 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, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

This case is of concern to the League and its member cities because it reflects a significant infringement on the exclusive authority of the Legislature to determine the circumstances and extent to which local municipalities can be subjected to lawsuits and the burdens and expenditures such suits impose on municipalities and their taxpaying citizens. As this Court noted in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980, the Legislature, in enacting

the Government Claims Act, "establishe[d] the basic rule[] that public entities are immune from liability except as provided by statute." And as this Court has repeatedly explained: "[T]he intent of the [Government Claims Act] is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to *rigidly delineated circumstances* ..." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1129; emphasis added; citations and internal quotation marks omitted.)

At issue in the case underlying the City of Los Angeles's present petition for review is the design immunity codified at Government Code section 830.6. In the more than fifty years that that immunity has remained in place, the only change has been the Legislature's decision in 1979 to add a limited exception to the immunity, applicable when the municipality has "notice that [the] constructed or improved public property may no longer be in conformity with [the approved] plan or design". In other words, the "rigidly delineated circumstances" under which a municipality can even potentially be held liable for "for an injury caused by the plan or design of a construction of, or an improvement to, public property," is upon a showing that the exception adopted by the Legislature applies. (Gov. Code § 830.6.) However, what is unclear from the Legislature's work is whether it intended this immunity to merely be a defense against an eventual imposition of liability, or a broader immunity from suit.

It does not appear that this Court has yet attempted to resolve this fundamental question: whether the statutory governmental immunities set out in the Government Code, such as the one codified at Government Code section 830.6, are immunities from suit or merely defenses to liability. But it is a critical issue for the member cities of the League, given the very significant costs they incur every time the resolution of an immunity issue is deferred from summary judgment to trial. The League and its member cities believe that the Legislature was *at least* partly motivated to limit the costs municipalities would incur just in litigating cases to trial, regardless whether they ultimately would be immune from money judgments.

The United States Supreme Court wrote, in regard to the federal concept of qualified immunity (recognized to be an immunity from suit), that the benefits of such an immunity are "effectively lost if a case is erroneously permitted to go to trial." (*Mitchell v. Forsyth* (1985) 472 U.S. 511, 526.) If a California city must defend a lawsuit through trial despite the clear applicability of a statutory immunity, a substantial portion of the benefit of that immunity will be lost to the city. With today's strained municipal budgets, cities are ill-equipped to bear the ever expanding cost of such a policy.

Yet that is the policy the trial judge below appeared to espouse and which the appellate court appears to have ratified. The present case presents a clear opportunity for this Court to consider and resolve this "important question of law" (Cal. Rules of Court, rule 8.500(b)(1)): whether it is the policy of the State of California that decisions regarding the applicability of statutory immunities should routinely be left to be resolved at trial rather than by summary judgment.

Resolution of this issue by this Court (as opposed to simply remanding the matter to the Court of Appeal to decide this issue on the merits as to this individual case) will have an additional benefit. California cities frequently are called upon to defend themselves in federal court in lawsuits that combine claims arising under both state and federal law. The United States Court of Appeals for the Ninth Circuit has explained that while ordinarily the denial of a motion for summary judgment is not immediately appealable, that is not always the case when the ruling involves the applicability of an immunity. "[W]hether a denial of an immunity is immediately appealable turns on whether the immunity at issue is an immunity from suit or only a defense to liability." (*Liberal v. Estrada* (9th Cir. 2011) 632 F.3d 1064, 1073-1074; see also *DC Comics v. Pac. Pictures Corp.* (9th Cir. 2013) 706 F.3d 1009, 1015.) If this Court definitively rules that the statutory immunities set out in the Government Code are immunities from suit and not merely defenses from liability, it will clarify that cities are entitled to file and pursue interlocutory appeals in the Ninth Circuit should a federal district court erroneously decline to apply a state statutory immunity to a claim arising under California law.

For all these reasons, the League of California Cities urges this Court to grant the City of Los Angeles's petition for review.

Very truly yours,

MANNING & KASS
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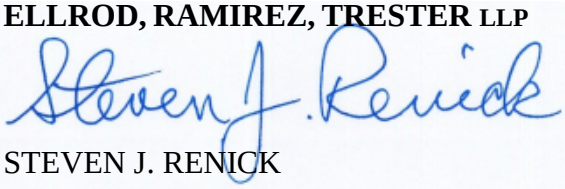

STEVEN J. RENICK