CITY AND COUNTY OF SAN FRANCISCO

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October 22, 2018

The Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

Re: *City of Oakland v. Superior Court (In Re Ghost Ship Litigation)*
California Supreme Court No. S251459
Court of Appeal, First Appellate District, Division Two, No. A154686
Civil Case No. RG16843631 (Alameda County Superior Court)

Amici Curie Letter of the League of California Cities and
the California State Association of Counties
In Support of Petition for Review (Rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The League of California Cities and the California State Association of Counties (collectively, "Amici") respectfully submit this letter brief in support of the Petition for Review filed by the City of Oakland.

A. Amici's Interest

The League of California Cities ("League") 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 League's Legal Advocacy Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

B. Background

This case involves the tragic death of 36 people in the December 2, 2016 fatal "Ghost Ship" warehouse fire in the City of Oakland ("City"). Amici extend their deepest sympathies for the loss to their families, friends, and communities.

Plaintiffs sued the City, among other defendants, alleging in relevant part that the City had notice that the building was "substandard and dangerous," and therefore the City had a mandatory duty to abate the code violations in the building, but failed to do so.

The City filed a demurrer, arguing that: (1) plaintiffs failed to identify a mandatory duty that the City failed to exercise, and (2) even if there were a mandatory duty the City failed to exercise, the City is nevertheless immune from liability by virtue of Government Code section 818.6, which immunizes the City from liability for injury "caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property . . . for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety."

The Superior Court overruled the demurrer. First, the Superior Court held that because the City is alleged to have been on notice of dangerous condition on private property, it had a mandatory duty to abate the substandard conditions. Second, it held that the City was not immune from liability under Government Code section 818.6 – which provides express statutory immunity for failure to make an inspection or for making an inadequate or negligent inspection – because plaintiffs sufficiently alleged that the City knew of the unsafe conditions as a result of conduct unrelated to the inspection process itself.

Under California law, however, local governments are not, and should not be, the insurer of private property. Because the Superior Court's decision appears to require just that, local governments cannot wait to have this important issue decided.

The City filed a Petition for Writ of Mandate with the Court of Appeal. The League and CSAC filed an amici letter in support of the City's writ petition explaining the immediate, statewide consequences for local governments if the trial court's demurrer ruling remained intact. The Court of Appeal requested opposition briefing, and subsequently summarily denied the writ petition. Thus, under California Rules of Court, Rule 8.500(b)(1), this Court should grant review of Superior Court's decision in order to secure uniformity of decision or settle an important question of law.

C. The City's Petition for Review Should Be Granted

1. Holding the City Liable Creates a Heretofore Unknown Tort of Dangerous Condition of Private Property

Under the Government Claims Act (Gov. Code, § 810 *et seq*.), there is no common-law tort liability for public entities. Rather, absent a constitutional claim, public entities may be liable only where a statute creates liability. (Gov. Code, § 815(a); see also *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897.)

Here the Superior Court purports to base liability against the City on Government Code section 815.6, which provides for public entity liability only under limited circumstances:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

(Gov. Code, § 815.6.)

The Superior Court grounded that mandatory duty to enforce building and safety standards and to abate substandard conditions in California Health & Safety Code sections 13145, 17960, 17961 and 17920.3, and in the City's municipal code. Notably, each state law and municipal code section cited by the Superior Court involves enforcing building and safety standards in local jurisdictions.

Section 815.6 does not impose liability if a public entity or its employees have discretion to carry out the requirements of an enactment. (*Haggis v. City of L.A.* (2000) 22 Cal.4th 490, 498; *Creason v. Dept. of Health Services* (1998) 18 Cal.4th 623, 631-33.) In *Haggis*, the California Supreme Court noted:

> [A]pplication of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not be taken. *It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion.*

(*Haggis, supra*, 22 Cal.4th at p. 498, citations omitted, emphasis added; see also *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1242-44 [holding that despite the use of "shall" abate in Health & Safety Code section 17980, the statute makes clear that the enforcement authority has a choice, and therefore discretion, to choose a course of action, preventing the finding of a mandatory duty to implement abatement procedures].) The rule that abatement decisions involve discretion makes sense in the overall scheme where local governments are tasked with determining which substandard conditions to abate, which to institute proceedings against, and which to deprioritize based upon the resources available to the local government and the severity of the conditions.

This Court has recognized that, in some instances, a finding that there is not a mandatory duty "works some injustice against plaintiffs." (*Guzman*, *supra*, 46 Cal.4th at p. 910.) Nevertheless, it held that to find a mandatory duty, a court must find the specific duty is "phrased in explicit and forceful language," and must contain an "explicit intent" to make the government a "fail-safe" to ensure compliance. (*Id.* at pp. 910-11.) As the City's Petition for Review makes clear, there is no such explicit intent in the inherently discretionary function of enforcing building standards. (See Petition for Review at pp. 14-22.)

In a case directly analogous to the instant one, this Court held that a local ordinance requiring a locality to take action where it becomes aware of hazardous conditions was non-actionable under section 815.6. In *Haggis*, a homeowner brought an action against the City of Los Angeles after his home was demolished following earthquake-related landslides. (*Haggis*, *supra*, 22 Cal.4th at p. 496.) Though the Los Angeles Municipal Code required that the City record a certificate of substandard condition showing that the property was unstable and prone to landslides, the City had not only failed to record the property's known substandard condition, but also permitted buildings upon the property without requiring stabilization of the land to prevent future landslides. (*Id.* at pp. 496-98.) After a large earthquake destroyed the homeowner's property, he sued Los Angeles for failure to comply with the recording requirement, claiming it to be a mandatory duty under section 815.6. (*Id.* at p. 498.)

This Court held that the municipality's decision regarding "whether a property is unstable, and what conditions make it so and thus must be remedied" rests with the building department, and therefore is not a mandatory duty. (*Haggis*, *supra*, 22 Cal.4th at p. 502.) California law routinely recognizes that enforcing building codes involves discretion, and thus this Court found that there is no mandatory duty.

The Superior Court's decision runs afoul of these rulings when it uses section 815.6 to convert building codes into mandatory abatement duties on private land. This is a sweeping expansion of the tort of dangerous condition of public property to include private property. A public entity is liable for a dangerous condition to *public* property. (Gov. Code, § 835.) In that statutory tort, a plaintiff must establish the existence of a "dangerous condition" and that the City had actual or constructive notice of the dangerous character. (Gov. Code, § 835.2.) A "dangerous condition" is "a

condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) Public property includes real property "owned or controlled" by the public. (Gov. Code, § 830, subd. (c).) But the reach of the statute excludes "easements, encroachments and other property that are located on the property of a public entity *but are not owned or controlled* by the public entity." (*Ibid.*, emphasis added.) The Legislature wisely distinguished between public property, which the government controls, and private property, which it does not.

The Superior Court's ruling, however, wipes away the distinction between public and private property – and between property that the government controls and that which it does not – and now includes liability for public *and private* property where (1) a dangerous condition exists, and (2) the public entity has notice of that condition. This transformation cannot be supported by the simple recitation of section 815.6.

2. Statutory Inspection Immunity Is Broad

Even assuming arguendo that a mandatory duty exists, to the extent that plaintiffs' allegations hinge on failures of City officials to act once they had knowledge of the substandard conditions of the warehouse, the City is immune.

> A public entity is not liable for injury caused *by its failure to make an inspection*, or by reason of making an inadequate or negligent inspection, of any property […], for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

(Gov. Code, § 818.6, emphasis added.)

Plaintiffs and Real Parties in Interest here, however, argued to the Court of Appeal that the only way the City can immunize itself is *by making an inspection*:

> If the City employee with knowledge of a dangerous condition informs the building department, and it sends an inspector out, then the City has discharged its mandatory duty with reasonable diligence. If the City does nothing, then is has not and, as a result, faces liability under Section 815.6.

(Real Parties in Interest Letter Response to Amici Curiae Letter, in Court of Appeal, dated July 26, 2018, at p. 3.) There are two problems with that argument. First, it eliminates the section of Government Code section 818.6 that provides immunity "for injury caused by its failure to make an inspection." Second, it is at odds with case law that holds that inspection immunity applies even where there is a mandatory duty.

In *Haggis*, discussed above, this Court held that liability was precluded not only because there was not a mandatory duty, but also due to statutory inspection immunity. The *Haggis* court reasoned that allowing liability would negate the important public policies underpinning the statutory immunity of section 818.6:

> [A]llowing liability for failure to fully report, by recordation, the results of an inspection, while immunizing the failure to make an inspection at all, would have the effect, contrary to the evident legislative intent, of discouraging municipal safety and health inspections. Even if plaintiff's first cause of action stated a valid claim for breach of a mandatory duty, therefore, section 818.6 would immunize the City from liability for that breach. (See Gov. Code, § 815(b) [immunity provisions of Tort Claims Act prevail over liability provisions].)

(*Haggis*, *supra*, 22 Cal.4th at p. 505.)

In another case, *Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, the Court of Appeal, First District, looked to legislative history in holding that section 818.6 has broad scope. There, the San Mateo Fire Marshall learned – through a telephone call in 1975, rather than through an inspection – that hazardous conditions existed in a building. Two subsequent inspections in 1977 and 1978 differed on whether the hazardous condition existed. (*Id.* at p. 408.) When a fire broke out in 1978, the court held the city was immune.

> As the legislative committee comment to section 818.6 points out: 'Because of the extensive nature of the inspection activities of public entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this immunity were not granted.' This legislative statement clearly underscores the important reasons of public policy which support the broad scope of this immunity.

(*Id.* at p. 412.)[1]

The Superior Court here unreasonably limited the immunity to instances in which the City learned of the unsafe conditions through an inspection itself, and excluded immunity for any instances where the City learned of it "as a result of conduct unrelated to any inspection activity" or through "the by-product of an observation unconnected to any inspection activity." (Superior Court Order at pp. 17-18.) But *Cochran* also involved a dangerous condition that a city learned of unrelated to an inspection, instead learning of it through a phone call. (*Cochran*, *supra*, 155 Cal.App.3d at p. 408.) Two years later the city conducted inspections, the first of which noted the dangerous condition, and the second of which missed it. (*Ibid.*) The fire broke out just after the second inspection. Under the Superior Court's reasoning, the city would have been liable for failing to abate the condition upon receipt of the phone call, and not entitled to immunity merely because of the manner it learned of the dangerous condition. While it is unclear whether the Superior Court here would find immunity for the later fire given the intervening inspections, what is clear is that the decision below erases the term "failure to make an inspection" from the immunity statute. The narrowing of the statutory inspection immunity has no support in the law.

The City is entitled to the same broad scope of the immunity under section 818.6, as identified by the Courts of Appeal and this Supreme Court, whether it learned of the substandard conditions through an inspection or otherwise.

3. Public Policy Requires That Local Governments Maintain Close Ties to the Community Without Becoming the Insurer of All Private Property

The Superior Court's decision finding that a case can proceed against the City on these facts not only contravenes the law, but creates uncertainty, and potentially vast liability, for local governments throughout California. The Superior Court's decision ignores the many ways in which cities and counties come into contact with residential and commercial buildings in our

[1] This Court cited this same legislative committee comment when it held that "section 818.6 must reasonably be construed to insulate a public entity from any liability which might arise as a result of an entity's failure to detect noncompliance with one of the myriad safety regulations contained in local or statewide building codes." (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 916.) The *Morris* Court ultimately decided that inspection immunity did not apply to a county's failure to insure compliance with a workers' compensation insurance coverage requirement, but that does not narrow the Court's broad construction of section 818.6 reaching noncompliance with the state's various building codes.

communities, potentially exposing cities and counties to liability in any instance in which they gain knowledge of a substandard structure.

Cities and counties have set up 311 call centers to make it easy for community members to report all types of issues to the government, which can include complaints about code violations on private property. Currently, 311 call centers route those calls to the proper departments, which in turn set up systems to process them. Under the Superior Court's ruling, forwarding those reports to the building inspector would create instant liability for the city or county, no matter how reasonable and diligent the city or county is in addressing those complaints – the city or county would be liable for damages simply because it had knowledge of the alleged dangerous condition. Such a result would discourage cities and counties from using 311 call centers or other complaint-based enforcement systems, resulting in less-safe conditions and undermining the public policy underlying the inspection immunity.

Local social service agencies go to workplaces and homes to meet with individuals who are receiving services for any number of needs, including workforce engagement, direct services to families in need, and evaluations for conservatorship. Those professionals are charged with carrying out their duties to make our communities safer by providing much needed safety net services, not with inspecting properties.

Local public health departments send home healthcare workers into our communities to assist the elderly and infirm. Those workers enter the homes, not to look for "obvious dangerous conditions," but instead to provide comfort, care and assistance to those in need.

Local police officers enter homes and buildings to assist community members in need: to respond to on-going break-ins, to intervene in domestic violence incidents, and to investigate other serious and violent crimes. Those officers should not be diverted to assessing building violations rather than focusing on the tasks at hand.

But the Superior Court's decision leads to these exact situations. It relies on plaintiffs' allegation "that the City knew of the unsafe conditions, not because it had conducted an inspection, but as a result of conduct unrelated to any inspection activity" in setting aside section 818.6 immunity. (Superior Court Order at p. 17.) And it couples that with its newly announced rule that a local government may be relieved of its mandatory duty only if "no City employee charged with enforcing the subject building and safety code violations ever had notice of the conditions of an unsafe and substandard building." (*Id*. at p. 14.) In order to avoid liability, a city or county would need to take immediate action to abate every code violation it learns of outside the context of a formal inspection.

The Superior Court's reasoning not only eviscerates the broad statutory immunity, but potentially turns all city workers into de facto building inspectors. Or, worse, encourages them to ignore any unsafe conditions for fear that the homes they visit will be "red-tagged" by the city or county simply for reporting an unsafe condition to the building department.

Cities and counties should be able to prioritize nuisance abatement in their jurisdictions without becoming the insurer for all private property. Residents should be able to contact their local government without fear of the potential loss of their home. Cities and counties of California should be able to rely on the well-balanced tort and immunity system set up by the Legislature. The Superior Court's decision upends that reliance, and Amici respectfully request that the Court grant the Petition for Review to resolve this important issue.

Very truly yours,

THE LEAGUE OF CALIFORNIA CITIES,
THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

/s/Ronald P. Flynn

RONALD P. FLYNN
Chief Deputy City Attorney
Office of the City Attorney, Dennis J. Herrera

PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102. On October 22, 2018, I served the following document(s):

Amici Curie Letter of the League of California Cities and
The California State Association of Counties
In Support of the Petition for Review

on the following persons at the locations specified:

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San Francisco, CA 94103

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Defendant, In Pro Per

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

and on the following persons at the locations specified:

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	Adam Kennon v. Ng, et al. Alameda County Superior Court Case No. RG 17866657 Andrew Kershaw, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17861362, Catherine and Michael Madden, et al. v. Ng, et al. Alameda County Superior Court Case No. RG16843633; Michael and Toshiko Morris, et al. v Ng, et al. Alameda County Superior Court Case No. RG17845655; Hunter Morton v. Ng, et al. Alameda County Superior Court Case No. RG17871997; Kyle O'Brien v. Ng, et al. Alameda County Superior Court Case No. RG 17881032; Gretchen Porter, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17860470; Andrew Ruiz, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17877854 Michael Russell v. Ng Alameda County Superior Court Case No. RG17872021 *Susan Slocum. V. Ng, et ai,* Alameda County Superior Court Case No. RG17854977; *Leah, Manuel and Maria Vega* v. *Ng, el al.* Alameda County Superior Court Case No. RG17866652; *Edward and Susanne Wadsworth, et al.* v. *Ng, et al.* Alameda County Superior Court Case No. RG16843856
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in the manner indicated below:

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through **TrueFiling** in portable document format ("PDF") Adobe Acrobat.

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

Executed October 22, 2018, at San Francisco, California.

Pamela Cheeseborough