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The Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-3600

Re: ***Kim v. County of Monterey***
California Supreme Court No. S260257
Second Appellate District Case No. H045577
Superior Court Case No. 16CV001236 (Monterey County Superior Court)

To the Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Amici Curiae California State Association of Counties ("CSAC") and League of California Cities ("League") respectfully submit this letter under California Rules of Court, rule 8.500(g) in support of the Petition for Review filed by the County of Monterey in the above-named case.

In a 2-1 decision, the Court of Appeal reversed a trial court order granting summary judgment in favor of defendants, the owners and operators of a racetrack, and concluded that there were triable issues of fact as to whether defendants were grossly negligent in placing sandbags adjacent to the track for drainage maintenance. CSAC and the League join in the arguments made by Monterey County in its Petition for Review, and submit this letter to emphasize the importance of resolving conflicting opinions and settling the important questions of law presented in this case.

The common law primary assumption of risk doctrine and the hazardous recreational activity immunity provided by Government Code section 831.7 both further a critical public policy goal. Hazardous sports and vigorous recreational activities that have inherent risks are not essential for life, and would therefore be subject to elimination all together if would-be defendants were not shielded from a duty to protect would-be plaintiffs who voluntarily engage in such activities. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148; *Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 468.) However, these liability protections do not apply if the defendant was found to have engaged in grossly negligent conduct. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750-751.)

Thus, the distinction between ordinary and gross negligence defines the boundary between risks that a recreational participant assumes (for which the taxpaying public is not ultimately responsible), and risks that a public agency creates through its grossly negligent conduct. Unfortunately, as made clear in the split

decision in this case, the line between ordinary and gross negligence is muddled, and there is further confusion on whether that line is a matter of law to be determined by the court, or a question of fact. Relatedly, there are conflicting Court of Appeal opinions on the relevance of evidence of a lack of prior accidents in dangerous condition of public property claims. These are all critical issues that warrant this Court's review. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

**Interest of Amicus Curiae**

CSAC is a non-profit corporation. The membership consists 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.

The League is an association of 478 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 is 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.

**Reason Review Should Be Granted**

There are several aspects of the majority opinion's conclusion that are important questions of law that should be settled by this Court.

First and foremost, as the dissenting opinion notes, "[w]here to draw the line between ordinary and gross negligence as a legal matter is not well developed . . . ." (*Kim v. County of Monterey* (2019) 43 Cal.App.5th 312, 332.) The lack of guidance on this issue is critical not only to cities and counties, which provide many of the facilities where high risk sports and recreational activities take place, but also to users of the facilities, who are entitled to understand the exact nature of the risks they are assuming when participating in such activities. The dividing line between ordinary and gross negligence is critical for establishing which statutory immunities and common law defenses are available to a dangerous condition of public property case.

The Courts of Appeal have struggled to find a clear standard to apply in making that determination. The Petition for Review includes a long list of cases that tend to recite facts and reach a conclusion without much analysis. (Pet. for Review, p. 22, fn. 6.) Legal scholars have acknowledged similar confusion at the doctrinal thread in gross versus ordinary negligence cases in which courts tend to examine facts and move straight to a conclusion. For example, in examining distinctions between gross and ordinary negligence shortly after the *Santa Barbara* decision was issued by this Court, one scholar noted: "When courts take it upon themselves to issue rulings of law as detailed as the ones now being issued, the result is a hopelessly confused

doctrine, in which courts and lawyers parse fact patterns in pursuit of minute and meaningless distinctions in order to reconcile conflicting cases." (Esper & Keating, *Symposium: Putting "Duty" in its Place: A Reply to Professors Goldberg and Zipursky* (2008) 41 Loyola L.A. L.Rev. 1225, 1289, fn. 195 (2008).) Similarly, the case law's focus on "scant care" or "an indifferent attitude" can be viewed as meaning that "the difference between negligence and gross negligence is a matter of motive or state of mind." (Antonie & Diamond, *To Assist or Not to Assist?: Still the Question, as California's Legislative Response to* Van Horn v. Watson *Provides Inadequate Guidance to Good Samaritans* (2009) 37 Western State U. L.Rev. 85, 104.) This concept of intent is all the more confusing when applied to a fact pattern such as the one in this case, where the alleged hazard was installed precisely with the intent of helping to avoid injury. (*Kim, supra,* 43 Cal.App.5th at p. 322.) Review is clearly needed to provide guidance on this issue.

In addition, the dissent notes a critical concern in the majority opinion, which is allowing the trier of *fact* to be the final arbiter of the *legal* concept of ordinary versus gross negligence. (*Kim, supra,* 43 Cal.App.5th at p. 332.) This problem arises from a lack of guidance on how to square two essential, but potentially conflicting, points gleaned from the case law: (1) the existence of gross negligence is generally a fact dependent question that is often not appropriate for summary judgment (*Chavez v. 24 Hour Fitness USA, Inc*. (2015) 238 Cal.App.4th 632, 640 ); and (2) "the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in appropriate circumstances." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 767.)

The difficulty in applying these principles is apparent in the procedural history of this case, with the trial court granting summary judgment, two justices of the Court of Appeal concluding the matter involved issues of fact for the jury, and a dissenting judge concluding it was a legal question to be resolved by the court. This confusion brings real world consequences for the public agencies that operate recreational facilities. Without a clear understanding of the distinctions between legal issues to be resolved by the court and factual issues to be resolved by the jury, cities and counties must always consider the added expense of preparing for and prevailing in a jury trial. This stance carries evident policy consequences related to the costs of providing facilities for inherently dangerous recreational activities.

Finally, Amici believe review by this Court is warranted to resolve a conflict in the Courts of Appeal on the issue of what weight is given to evidence of public property being free of accidents in dangerous condition cases. Citing to a footnote in *Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, the majority opinion below concluded that whether a "'paucity of accidents' is 'attributable to luck rather than expertise' necessarily involves factual inferences that are reserved for a jury." (*Kim, supra,* 43 Cal.App.5th at p. 331.) However, in a case decided just last month, the First Appellate District specifically relied on a lack of evidence of any accidents in the last ten years in affirming a trial court order granting a city's summary judgment motion to a dangerous condition of public property claim. (*Thimon v. City of Newark* (Jan. 27, 2020, A152093) ___ Cal.App.5th ___ [p. 21][2020 Cal.App.LEXIS 64].)

In *Thimon,* the court stated that evidence of a lack of prior accidents "tends to prove that any risk is remote, rather than constitutes a risk" of a substantial dangerous condition as required by statute. (*Id.* at p. 21, fn. 9.) The analysis in *Thimon* on this point is more than just a passing reference. Rather, the court took effort to explain why a lack of accidents at a

particular cite supports the inference that the statutory requirements for a dangerous condition of public property claim are not met, citing case law, the Law Revision Commission and treatises on the subject. (*Id.* at p. 12.)[1] This directly contradicts the majority opinion's conclusion here that the lack of accidents could just be a matter of luck, and therefore was just another factual matter to be decided by the jury. This lack of uniformity on an issue of such significance warrants this Court's review.

For these reasons, CSAC respectfully urges this Court to grant the Petition for Review filed in this case.

Sincerely,

/s/

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[1] Citing *Salas v. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, 1064, 1071; *Mixon v. Pacific Gas & Elec. Co.* (2012) 207 Cal.App.4th 124, 138; *Fredette v. City of Long Beach* (1986) 187 Cal.App. 3d 122, 130, fn. 5 [Legislature was concerned with frequency or probability that injury would occur, not extent of injury]; Law Revision Commission Comment to Gov. Code, § 830.2 ["courts are required to determined that there is evidence from which a reasonable person could conclude that a substantial, as opposed to a possible, risk is involved before they may permit the jury to find that a condition is dangerous"]; 2 Cal. Government Tort Liability Practice (4th ed. 1999, 2019 rev.) § 12.20 [the "substantial risk of injury" requirement "reflects the legislature's concern that an undue burden would be placed on public entities if they were responsible for the repair of all conditions creating any possibility of injury, however remote that possibility might be."].