S235412

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEKSANDR VASILENKO, et al.,

Plaintiffs and Appellants,

vs.

GRACE FAMILY CHURCH,

Defendant and Respondent.

ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA WALKS

AFTER A DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
[3d Civil No. C074801]

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I.

INTRODUCTION

Amicus curiae California Walks has filed an amicus brief in support of Plaintiffs and Appellants Aleksandr Vasilenko, et al., arguing that a duty should be imposed on Defendant and Respondent Grace Family Church ("GFC"), and all similarly situated landowners.[1] California Walks' amicus brief raises no meritorious arguments.

The laudable goal of California Walks to create healthy, safe and walkable communities will not be benefited in the least should this Court impose a duty on GFC and on all similarly situated landowners. Indeed, California Walks' principal argument is inapplicable when the danger to the pedestrian community, as in *Vasilenko*, is the danger to pedestrians inherent in all public streets, and the private landowner does not have the power or control to make the act of crossing a public street safer by unilaterally erecting intersections or crosswalks, or directing traffic on a public street. (See California Walks Brief ("CWB") at p. 13.) The rule set forth in C*abral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, that "[t]he overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible," (See, *Cabral v. Ralphs Grocery Co., supra,* 51 Cal.4th at p. 781) has no

[1] All future references to "landowner" encompass one who owns, possesses or controls the premises.

application here. The proposition that "tortfeasors" should pay the cost of their "negligent conduct" when all they did was direct someone to park across the street, will only result in premises owners refraining from telling their visitors where to park. Public streets will still be just as dangerous and pedestrians who have to cross them will be no safer.

Moreover, recognizing a duty would be unduly burdensome as a private landowner cannot make the act of crossing a street safer. Private landowners have no authority and control over the design of public streets and intersections and crosswalks, and have no authority and control in directing traffic on a public street. Such authority and control are solely within the realm of governmental entities.

This is not to say that on occasion the condition of premises adjacent to a public highway may create conditions of liability such as in *Barnes v. Black* (1999) 71 Cal.App.4th 1473, where a steeply sloped on-premises driveway was alleged to have carried a child and his tricycle onto the street, or in *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, where the configuration of a private driveway raised a duty to warn on the part of the adjacent property owner. But when the only alleged "tortious act" is making available the use of an off-site parking lot that necessitates crossing a public street, imposing a duty against GFC in this situation will not result in greater safety for future pedestrians crossing public streets.

Unlike the property owners in *Barnes* and *Annocki*, GFC did not create the danger that was already inherent in crossing Marconi Avenue.

California Walks cites to numerous reports and statistics from state and county governmental agencies to show that car crashes involving pedestrians are dangerous and fatal; however, none of these reports or statistics concludes that improving the safety or preventing dangers to pedestrians is within the power of private landowners. Rather, these reports and statistics from governmental agencies look to what *these agencies* can do since safety measures are within their power. See California Strategic Highway Safety Plan 2015-2019 (Sept. 2015) at p. 45, available at http://www.dot.ca.gov/trafficops/shsp/docs/SHSP15_Update.pdf ("Improve the safety of pedestrian crossings . . . . Expand effective enforcement . . . Increase pedestrian safety-focused coordination among State, regional, and local agencies including on transportation planning and land use efforts.") (last accessed Jan. 30, 2017).

California Walks does not advance the arguments made by Plaintiffs and Appellants Aleksandr Vasilenko and Larisa Vasilenko (collectively "Vasilenko"), but merely reiterates the arguments made in Vasilenko's Answer Brief on the Merits ("ABOM"), and does not present a complete argument based on *Rowland v. Christian* (1968) 69 Cal.2d 108 (*"Rowland"*).) (See, ABOM 3.) The specific facts of this case — that it

was Mr. Vasilenko's first visit to the church, and that he had to cross a major five-lane highway, at night, in the rain, and with cars traveling at speeds exceeding 50 miles per hour —are "not of central importance." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 774 ("*Cabral*").) "[T]he *Rowland* factors are evaluated at a relatively broad level of factual generality . . . . [¶] In applying the . . . *Rowland* factors, . . . we have asked not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy. . . ." (*Cabral, supra,* 51 Cal.4th at p. 772.)

California Walks also ignores the general principle of premises liability set forth in *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134 that a defendant cannot be held liable for a defective or dangerous condition of property which defendant does not own, possess, or control, which has consistently been upheld in cases such as *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 386 (landowner owed no duty where plaintiff was injured on a public street), *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, 1146-1147, and *Nevarez v. Thriftmart, Inc.* (1970) 7 Cal.App.3d 799, 802-804 (landowner owed no duty to child who was injured while crossing a public street).

II.

ARGUMENT

A. The Selective *Rowland* Factors Presented California Walks' Brief Support An Exception to the General Duty of Due Care

California Walks notably omits key *Rowland* factors and only addresses three of the policy considerations enumerated out of all factors. The policy considerations include the policy of preventing future harm, the extent of the burden on the defendant, and the consequences to the community of imposing a duty to exercise care with resulting liability for breach. (*Cabral, supra,* 51 Cal.4th at p. 781; *Rowland, supra,* 69 Cal.2d at p. 113.) An exception to the duty of care is supported by public policy considerations.

> "A duty of care will not be held to exist . . . where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability. [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 502.
>
> "The conclusion that a defendant did not have a duty constitutes a determination by the court that public policy

concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143 ("*Kesner*").)

"By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Cabral, supra,* 51 Cal.4th at p. 772.)

"Analysis of duty occurs at a higher level of generality." (*Kesner, supra,* 1 Cal.5th at p. 1144. Thus, the Court's task is to determine whether a car hitting a pedestrian while crossing Marconi Avenue is "*categorically* unforeseeable, and if not, whether allowing the possibility of liability would result in such significant social burdens that

the law should not recognize such claims." (*Kesner, supra,* 1 Cal.5th at p. 1144.)

Long-standing, existing jurisprudence has already created an exception to the general duty of due care for cases involving premises liability.

This case is simply extending the existing categorical exception for landowners (owing a duty of due care only to those who are injured on premises a landowner owns, controls, or maintains), to those who are injured on adjacent public streets, based on the policy considerations that a landowner does not own, control, or maintain, let alone have the power to own, control, or maintain adjacent public streets.

In addition, an existing exception to the duty of due care as stated in *Barnes* likewise applies.

B. The Policy of Preventing Future Harm

California Walks fails to show how imposing a duty on GFC and similarly situated private landowners would prevent future harm to pedestrians crossing a public street. Despite the statistics provided regarding pedestrian safety, injuries and fatalities in California, none of these statistics correlates with, let alone supports, the contention that the recognition of a duty by landowners to provide safe passage across a public

street after having directed invitees to park in an overflow lot located across the public street, would prevent future vehicular accidents with pedestrians.

The question to be answered in looking at the policy of preventing future harm is "whether that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability." (*Cabral, supra,* 51 Cal.4th at p. 781-782.)

1. The State of California Statutorily Imposes a Duty on Drivers and Pedestrians and Provides Few Restrictions on Pedestrian Movement on Public Streets

As a threshold matter, the policy of preventing future harm of vehicle crashes with pedestrians is already served as a driver of a vehicle owes a duty to exercise due care for the safety of any pedestrian on the roadway[2], including reducing the speed of the vehicle or taking "any other action relating to the operation of the vehicle as necessary to safeguard the safety of the pedestrian." (*Vehicle Code* §§ 21950, subd. (c)-(d); 21954, subd. (b).) A driver of a vehicle is also required to yield the right-of-way to

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[2] "A 'roadway' is that portion of a highway improved, designed, or ordinarily used for vehicular travel." (*Vehicle Code* § 530.) "A 'highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street." (*Vehicle Code* § 360.)

a pedestrian crossing the roadway within any marked crosswalk[3] or within any unmarked crosswalk at an intersection. (*Vehicle Code* § 21950, subd. (a).) Similarly, a pedestrian has a "duty of using due care for his or her safety." (*Vehicle Code* § 21950, subd. (b).)

The fact that the State of California places few restrictions on pedestrians in crossing public streets indicates approval for the act of pedestrians crossing a public street. Pedestrians on "a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection," are required to "yield the right-of-way to all vehicles upon the roadway so near as to constitute an immediate hazard." (*Vehicle Code* § 21954, subd. (a).) The State of California does not prohibit pedestrians from crossing a public street outside of a crosswalk, although a local authority may adopt ordinances prohibiting pedestrian from crossing roadways at other than crosswalks. (*Vehicle Code* § 21961.) The State of California, does however, prohibit pedestrians from crossing a roadway at any place except in a crosswalk "[b]etween adjacent intersections controlled by traffic control signal devices or by police officers. . . ." (*Vehicle Code* § 21955.)

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[3] " 'Crosswalk' is either: (a) That portion of a roadway included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of such lines from an alley across a street. (b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface. . . ." (*Vehicle Code* § 275.)

2. Allowing Liability on Private Landowners Results in Undesirable Consequences

More importantly, allowing liability of a private landowner under the circumstances here would result in undesirable circumstances. One of the unavoidable risks to a pedestrian in crossing a public street is being hit by a vehicle. This risk is inherent in the act itself, whether the pedestrian is crossing at an intersection with a traffic signal, a marked crosswalk, or unmarked crosswalk. To recognize a duty of private landowners to provide safe passage across a public street for a risk that is inherent in the act will not prevent future harm.

Moreover, allowing liability under these circumstances is an act of futility and would result in undesirable consequences because it places responsibility on a person or entity that is powerless to unilaterally make the act of crossing a public street any safer. "It would be inequitable to impose a regulatory and maintenance duty on an entity without the authority to control use." (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 492 ("*Seaber*").) In California, landowners are not permitted to regulate or control public streets or traffic on public streets. (*City of El Segundo v. Bright* (1990) 219 Cal.App.3d 1372, 1377.) As such, private landowners simply do not have the power or control to make a public street safer in a manner that would prevent future vehicle crashes

with pedestrians. Private landowners cannot erect traffic controls, marked crosswalks, or unmarked crosswalks, let alone direct traffic on a public street. (See *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 492 ["For, just as a property owner has no duty to erect signs for the purpose of controlling or regulating traffic on adjacent public roads and may in fact be prohibited by law from doing so, similarly a landowner cannot be responsible for such signage controlling or regulating pedestrian traffic across public highways. [Citations.]"] ("*Seaber*"); *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, 805 ["[t]he power to control public streets and regulate traffic lies with the state which may delegate local authority or municipalities [citations] and only the state [citations] or local authorities, when authorized [citation] may erect traffic signs or signals. . . ."]; *City of El Segundo v. Bright* (1990) 219 Cal.App.3d 1372, 1377 ("*City of El Segundo*"). Such acts are only within the purview of governmental agencies and authorities. (See *Vehicle Code* §§ 21100, 21101, 21102, 21106, 21350-21351, 21352-21356, 21361, 21465.) Private landowners are prohibited from directing traffic on public streets. (*Vehicle Code* § 21465 ["No person shall place, maintain, or display upon, or in view of, any highway any unofficial sign, signal, device or marking, or any sign, signal, device, or marking which purports to be or is an imitation of, or resembles,

an official traffic control device or which attempts to direct the movement of traffic . . . ."].)

Imposing a duty on private landowners to provide safe passage to invitees crossing a public street adjacent to their premises, after having directed the invitee to park in an overflow lot across the public street, because such a duty will prevent future harm, is a fallacy.

3. California Walks Fails to Show that GFC Created an Unreasonable the Risk of Harm to Mr. Vasilenko

California Walks asserts that GFC increased the risk of harm by directing Mr. Vasilenko to park in the swim school lot because had it not directed him to the lot, Mr. Vasilenko would have been "free to choose a different, safer area, without having to cross Marconi Avenue in the dark, while it was raining." (CWB at p. 17.)

GFC did not create or increase the risk of harm in crossing a public street by providing parking in the swim school lot across the street and directing Mr. Vasilenko to park there. GFC also did not create or increase the risk of harm of attending GFC by these acts.

Nevertheless, even assuming that providing parking at the swim school lot and directing Mr. Vasilenko to park there because the main lot was full (See 2 CT 406), created or increased a risk of harm because

parking at the swim school lot required invitees to cross Marconi Avenue to get to the church, creating or increasing a risk of harm, does not resolve the duty question. The general principles of premises liability espoused in *Isaacs*, as well as a separate analysis of the *Rowland* factors support an exception to the general duty of care set forth in Civil Code section 1714(a).

California Walks' assertion also mischaracterizes Mr. Vasilenko's freedom of movement. That GFC directed Mr. Vasilenko to the swim school lot did not restrict his freedom to park wherever else there was an available parking spot. As such, while Mr. Vasilenko may have been directed to park at the swim school lot, GFC did not then control Mr. Vasilenko's actions. Common experience and knowledge dictates that when a driver is directed to any parking lot the driver can choose to park in that other lot or park anywhere else the driver so chooses. While an invitee who parked at the swim school lot would have to cross Marconi Avenue to get to the church, GFC did not direct or control the crossing of Marconi Avenue by invitees. Again, the fact that this occurred at night, and in the rain, is of little importance in analyzing the *Rowland* factors. "[O]n duty California law looks to the entire 'category of negligent conduct,' not to particular parties in a narrowly defined set of circumstances." (*Cabral, supra,* 51 Cal.4th at p. 772, citing *Ballard v. Uribe* (1986) 41 Cal.3d 564,

573, fn. 6 and *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1841.) This is because "[t]o base a duty ruling on the detained facts of a case risks usurping the jury's proper function of deciding what reasonable prudence dictates under those particular circumstances." (*Cabral, supra,* 51 Cal.4th at p. 774.)

4. California Walks Misapplies the Principle for Liability for Injuries Occurring Off-Site Stated in *Barnes*

GFC has no legal right to control either the public street adjoining it, and did nothing to create or aggravate the danger of crossing a public street. (See, *Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th. 146, 162 (disn. Opn. of Raye, J.))

While California Walks accurately quotes the law as set forth in *Kesner* and *Barnes*, California Walks misapplies these principles. Liability for exposing persons to risks of injury that occur off-site occurs when the "landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Kesner, supra*, 1 Cal.5th at p. 1159, quoting *Barnes, supra*, 71 Cal.App. 4th at p. 1478.) California Walks has not met this standard. Although California Walks asserts that GFC created or increased a risk of harm in providing parking at the swim school lot across the street and directing Mr. Vasilenko to park there,

(CWB at pp. 17, 19-20), California Walks presents no authority for the proposition that an increased risk of harm is tantamount to an unreasonable risk of injury off-site.[4] Despite California Walks' contentions, GFC did not increase a risk of harm or create an unreasonable risk of injury off-site. The necessity of crossing a public street is not an unreasonable risk for providing parking to an invitee. Moreover, it is not enough that GFC "maintained" the swim school lot and that its location, over which GFC had no control, necessitated that people would have to cross Marconi Avenue to reach the church. There was no action or inaction by GFC on its property or on the swim school lot that increased the risk of harm beyond the risks inherent in crossing a public street. In other words, GFC did nothing to increase the risk of harm in crossing a public street. California Walks fails to show that GFC maintained the swim school lot in a manner that exposed invitees to an unreasonable risk of injury off-site.

5. A Landowner is Not An Insurer of the Safety of Invitees

"[T]he owner of property, insofar as an invitee is concerned, is not an insurer of safety. . . ." *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 121-122. "The applicable general principle is that the

[4] California Walks implies that an "increased risk of harm" amounts to an "unreasonable risk of injury." GFC has found no case which has held that the "unreasonable risk of injury" off-site is equivalent to an "increased risk of harm."

owner of the property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed peril. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care." [Citations.]" *Edwards v. Calif. Sports, Inc.* (1988) 206 Cal.App.3d 1284, 1288, quoting *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 27-28.)

6. The Scope of A Duty of Due Care Asserted by California Walks and Vasilenko Has No Relation to the *Rowland* Factors

California Walks asserts new theories of duty or options for GFC, as Vasilenko does, regarding what GFC should have, or could have done instead of directing invitees to park at the overflow lot across the street. California Walks contends that GFC could have (1) directed invitees to its other, safer overflow lot; (2) guided invitees on a safe route of travel; (3) provided some warning to invitees of the danger of crossing Marconi Avenue; or (4) not directed invitees to park in an "unsafe location." (CWB at pp. 11, 19; ABOM at p. 3.) These new theories of duty have no bearing on the duty determination here as they are never alleged in the operative pleading, they do not address the issue for the Court, and are not appropriate for determining the existence of a duty. California Walks'

reliance on *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 224, 226 and *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1252-1258 are misplaced. Neither *Blair* nor *Laabs* involved the situation here, where a plaintiff seeks to expand the issues presented for the first time on appeal. California Walks and Vasilenko are not merely elaborating or adding further details to the duty they pled in the pleadings, but seek to premise liability on different acts or omissions, which were not alleged in the pleadings, and which were not raised or considered in the trial court or the Court of Appeal, and which therefore should not be considered at this juncture.

Not only are these new theories not encompassed by the first amended complaint's allegations (See 1 CT 186-187), but these new theories are unrelated to the scope of the duty which is already presented in the issue before this Court. The duty issue here, and scope of that duty, is whether a landowner has duty to provide safe passage across a public street adjacent to the landowner's premises after having directed an invitee to park in a place located across the public street. California Walks and Vasilenko, (see ABOM at p. 3), seek to change or "narrow the scope of the duty by pointing to certain factors unique to the present case" but these are not "realistic limitations on the scope of the proposed duty [to provide safe passage across a public street after having directed . . .]" (*Garcia v.*

Paramount Citrus Ass'n, Inc. (2008) 164 Cal.App.4th 1448, 1456.) In particular, the first option presented is unique to this case due to the existence of another lot. In addition, this option requires the landowner to make a subjective evaluation of what is a "safer" lot.

These new theories are also not appropriate for determining the existence of a duty. Options (1) and (4) may go the issue of breach of a duty, but not the existence of duty, and do not resolve the issue here as to whether a landowner owes a duty to invitees to provide safe passage across a public street after having directed the invitee to park in an overflow lot across the public street. The question here is whether GFC owed Vasilenko a duty of due care, not whether GFC breached the duty of due care. These considerations are more appropriate in determining whether GFC breached a duty of care, not whether GFC owed a duty to provide safe passage across the public street adjacent to it.

Option (2) is vague and unclear as to what manner GFC could have guided invitees on a "safe route of travel." To the extent this means GFC could have directed invitees as to when and where to cross the Marconi, this is a matter of common knowledge and imposing a duty thereon is inequitable, resulting in undesirable circumstances, as set forth above. Similarly, as to option (3), the dangers of crossing Marconi Avenue are self-evident, and imposing a duty based on a duty to provide some warning

to invitees of the danger of crossing Marconi Avenue is inequitable and a duty has not been imposed on the basis of providing that kind of warning to a pedestrian on the basis that there is little that the landowner can actually do. (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 492 [". . . assuming but not granting there existed a feasible and effective method for the Hotel on its property to warn its guests, its employees and pedestrians in general of the dangerous nature of the crosswalk on its side of the street, we cannot envision anything further the Hotel could do to warn pedestrians approaching the Hotel from the other side of the street, other than by petitioning appropriate governmental authorities to make safe the crosswalk or the adjoining landowners to post adequate warnings on their property."].

The Court of Appeal has rejected an attempt to "expand the principle of 'control' of property to include situations where an adjoining landowner merely has the ability to influence or affect such property." (*Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 720 [no duty where law school provided no parking for students and student who parked in law school's faculty parking lot was assaulted on a public sidewalk adjoining the law school].) "The law of premises liability does not extend so far so as to hold a [landowner] liable merely because its property exists next to adjoining dangerous property and it took no action to

influence or affect the condition of such adjoining property." (*Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 720.)

C. Recognizing a Duty to Provide Safe Passage Across a Public Street Under the Facts Here Would be Unduly Burdensome to Landowners

1. California Walks Misapprehends the Duty Owed By Landowners

Whether or not a defendant has engaged in affirmative conduct, "all persons are required to use ordinary care to prevent others from being injured as a result of their conduct." (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46.) Thus, Civil Code section 1714(a) applies regardless of whether a defendant creates or increases a risk of harm. "California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others." (*Cabral, supra,* 51 Cal.4th at p. 768.) An exception to this general rule is supported by the longstanding principle of premises liability and the *Rowland* factors.

There are two general types of a legal duty: " '(a) the duty of a person to use ordinary care in activities from which harm might reasonably be anticipated[;] (b) [a]n affirmative duty where the person occupies a particular relationship to others.' [citation.]" (*Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1838.) Whether or not a case

involves misfeasance or nonfeasance is of no consequence as it does not determine the existence of a duty, or whether applying the *Rowland* factors justify a departure from the general duty of due care embodied in Civil Code section 1714. That *Seaber* is not factually on all fours with this case does not make the principles therein any less applicable here.

2. The Voluntary Assumption of A Duty Is Not At Issue

The issue is not so broad as to determine whether GFC had a duty to protect Mr. Vasilenko, but whether GFC had a duty to provide safe passage across a public street after having directed him to park at the swim school lot across the street.

The voluntary assumption of a duty involves one who having no initial duty to do so, voluntarily undertakes to provide another with protective services has a duty to exercise due care in performing that undertaking if either (1) the failure to exercise due care increases the risk of harm to the other person, or (2) the other person reasonably relies upon that undertaking and suffer injury as a result. (See, *Delgado v. Trax Bar* (2005) 36 Cal.4th 224, 248-249.)

There is nothing in the record to suggest that GFC voluntarily assumed a duty to assist plaintiff while crossing the street and is not at issue here.

3. The Burden on a Landowner is Onerous

California Walks asserts that recognizing a duty would not create endless liability for landowners; however, California Walks' analysis is incomplete. It is not simply the burden on GFC, it is the burden on all similarly situated landowners. (*Seaber, supra,* 1 Cal.App.4th at p. 493 [finding that "the extent of the burden on the Hotel and like commercial establishments to police and regulate public crosswalks adjacent to the property is onerous"].) Requiring GFC and similarly situated landowners to give warnings and directions in crossing Marconi, or any public street effectively requires GFC and other such landowners to police and regulate public crosswalks when the navigation of such streets is a matter of common knowledge. It is self-evident that crossing a large public street, consisting of five lanes could be dangerous. A warning that crossing such a street is dangerous would not make the act of crossing safer. Accordingly, imposing a duty on landowners under the circumstances here would result in a heavy burden.

D. Consequences to the Community of Imposing a Duty with Resulting Liability for Breach

This is not a "new exception" but an extension of the general principle of premises liability and proper application of the rule set forth in *Kesner*, affirming *Barnes*. The recent case of *Kesner* held that the courts

"have never held that the physical or spatial boundaries of a property define the scope of a landowner's liability," that "[t]he Court of Appeal have repeatedly concluded that ' "[a] landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner," ' [citations]," and that " 'the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site.' [citation.]." (*Kesner, supra*, 1 Cal.5th at p. 1159.)

California Walks asserts that landowners would have no reason to minimize vehicle collisions with pedestrian who visit their premises, but California Walks has provided no support showing that providing directions on where to cross a public street actually reduces vehicle collisions with pedestrians, especially where the crossing of the street is a matter of common sense and knowledge. Indeed, if a duty is imposed in these circumstances the cost of employing persons to stand at street corners to give directions to pedestrian would result in increased costs of doing business, which inevitably would be passed to consumers. Alternatively, landowners could simply refrain from providing any parking and leave consumers and the community to figure out where to park on their own. The medical costs for a pedestrian involved in a vehicle collision are not

appropriately considered under this factor. Nevertheless, the rationale to allocate costs on those who are " 'best situated' " to prevent such injuries is not served here because a landowner like GFC is not in a position to prevent injuries to pedestrian crossing public streets since they have no control over crossings in public streets. (*Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 456, 462 [conc. Opn. of Traynor, J.].) In addition, notably, there has been no showing that there is a correlation between warning a pedestrian about the dangers of crossing a public street, or telling them where to cross, and a decrease in vehicular accidents involving pedestrians.

California Walks proposes that the duty would be limited to situations where a landowner directs invitees to park in a place that requires invitees to cross public streets that the landowner knows are unreasonably dangerous. This is wholly unworkable. What is unreasonably dangerous? A street consisting of five lanes? A street with only an unmarked crosswalk?

Ultimately, the duty that California Walks seeks to impose will result in only negative consequences to the community.

III.

CONCLUSION

For all the foregoing reasons, the laudable goal of California Walks to create healthy, safe and walkable communities will not be benefited should this Court impose a duty on GFC and all similarly situated landowners. If directing persons to park across a public street, in and of itself, creates a duty of care of an adjacent landowner, landowners will simply stop giving directions on where to park. For this and for the other reasons set forth above, the amicus brief lacks merit.

Dated: February 22, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d) of the California Rules of Court, the enclosed ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA WALKS has been produced using 13-point type including footnotes and contains 5,674 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 22, 2017

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PROOF OF SERVICE BY MAIL

In Re: ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA WALKS; No. S235412
Caption: ALEKSANDR VASILENKO, et al. v. GRACE FAMILY CHURCH
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
(Constructively filed on this date pursuant to CRC R. 8.25(b)(3)(B).)

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 200 Del Mar Blvd., Suite 216, Pasadena, California 91105. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Pasadena, California, addressed as follows:

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