**No. B304821**

**IN THE COURT OF APPEAL**
**FOR THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT, DIVISION SEVEN**

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**CHARLOTTE ESSEX,**
**Plaintiff and Appellant,**

**v.**

**CITY OF PASADENA,**
**Defendant and Respondent.**

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From Decision of the Superior Court for the County of Los Angeles
Honorable Laura A. Seigle, Case No. BC663935

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# APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF PASADENA

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## 1.0. Application for Leave to File Amici Curae Brief

In accordance with Rule 8.200(c) of the California Rules of Court, the League of California Cities and the California Special Districts Association (collectively, "amici")[1] respectfully request permission to file the amici curiae brief included in this application.

The League of California Cities (Cal Cities) is an association of 476 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. Cal Cities 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.

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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 application and brief.

The California Special Districts Association (CSDA) is a California non-profit association consisting of over 900 special district members throughout California. These special districts provide a wide variety of public services to urban, suburban and rural communities, including water supply, treatment and distribution, sewage collection and treatment, fire suppression and emergency medical services, recreation and parks, security and police protection, solid waste collection, transfer, recycling and disposal, library, cemetery, mosquito and vector control, road construction and maintenance, pest control and animal control services, and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of 27 attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA has identified this case as having statewide significance for special districts.

The amici's members have a direct interest in the legal issues presented in this case. Those members collectively own, operate, and maintain numerous walkways and other public improvements throughout California. The members rely on the trivial defect doctrine, codified in Government Code section 830.2, to protect them from liability for property conditions that pose

such a minor, trivial, or insignificant risk that no reasonable person would conclude that they pose a substantial risk of injury when the property is used with due care. They further rely on the line of case decisions interpreting section 830.2 and the trivial defect doctrine, culminating in *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, which outline the parameters of the trivial defect doctrine.

In her opening and reply briefs in this case, plaintiff argues that this Court should depart from the rules established in *Huckey* and the cases on which it is based. The amici have a strong interest in explaining to this Court that it should continue to follow the authority establishing that defects may be "trip hazards" and yet be trivial as a matter of law; that the size of a sidewalk defect is not dispositive of whether the defect is trivial under section 830.2; that a sidewalk displacement that is so open and obvious that it would not pose a danger to a pedestrian using due care may be trivial as a matter of law; and that the question of whether a plaintiff was exercising due care when she tripped must be part of the trivial defect analysis.

The amici also believe that this brief will assist this Court in resolving the issues raised. "[A]micus 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.) The author of this brief has reviewed the Appellant's Opening Brief, the Respondent's Brief, and the Appellant's Reply Brief filed. The amici believe that this brief will provide a useful analysis of and perspective on the plaintiff's arguments, explain to the Court on how the trivial defect doctrine protects the interests of the amici's members, and explain why the doctrine applies to cases like this one.

The amici therefore respectfully request permission to file the attached brief.

Date: June 18, 2021

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## 2.0. Proposed Amici Curiae Brief

### 2.1. Introduction

Plaintiff/appellant Charlotte Essex fell over a sidewalk panel displacement in the City of Pasadena. (AA:8.) The accident took place between 9:30 a.m. and 10:00 a.m. on an April morning. (1AA:8, 106-107.) The elevation difference varied in height between 15/16" and 1.375". (1AA:134; 2AA:225-251.) City logs showed no complaint about the offset. (1AA:65.) When she tripped, Essex was paying attention to another woman she had noticed. (1AA:108-109.)

The trivial defect doctrine codified in Government Code section 830.2 originated to protect municipalities from liability in cases like this one. Cities, special districts, and other public agencies throughout the state are responsible for maintaining many thousands of miles of sidewalk. The courts and legislature have recognized that public entities cannot eliminate every sidewalk defect; and that entities must be protected from liability from those that pose so insignificant a risk that they may be deemed trivial as a matter of law.

On appeal, Essex maintains that only small defects may be deemed trivial as a matter of law. Case law and logic provide otherwise. If a sidewalk displacement is so open and obvious that a pedestrian exercising due care will not trip on it, it does not pose a substantial risk to such pedestrians. It is a trivial defect. A ruling otherwise would subject municipalities statewide to liability for defects that pose no substantial danger to most pedestrians.

Essex also argues that a sidewalk displacement a municipal employee deems a "trip hazard" cannot be ruled a trivial defect as a matter of law. That argument also departs from both law and logic. Under the law, a defect must be more than a "trip hazard" to be non-trivial; it must pose a substantial risk to users with due care. And logically, Essex's argument proves too much: since any sidewalk defect that caused a plaintiff to trip is a "trip hazard," adopting the argument would de facto abolish section 830.2 by making application of the trivial defect doctrine an issue of fact in every trip and fall case.

Finally, Essex argues that whether a pedestrian is exercising due care is irrelevant to the trivial defect doctrine, and pertains only to comparative fault. The plain language of section 830.2 establishes otherwise: a defect is trivial if " no reasonable

person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." Whether the plaintiff was using the property with due care, in a reasonably foreseeable manner, is therefore part of the evaluation of whether the sidewalk displacement was trivial.

The amici respectfully urge the Court to affirm summary judgment, and reject Essex's request that it depart from decades of settled law applying the trivial defect doctrine.

### 2.2. Discussion

#### 2.2.1. History of the Trivial Defect Doctrine

The central issue in this case is whether the sidewalk displacement on which Essex tripped was a dangerous condition of public property for which the City can be held liable under Government Code section 835[2]; or whether, as the trial court

[2] "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a

ruled, the displacement fell under the trivial defect doctrine codified in Government Code sections 830, subdivision (a)[3] and 830.2[4].

*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092 explains and crystallizes the 90-year-old trivial defect doctrine, as

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reasonably foreseeable risk of the kind of injury which was incurred, and that either:
(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code, § 835.)

[3] "As used in this chapter:
(a) "Dangerous condition" means 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) [emphases added].)

[4] "A condition is *not a dangerous condition* within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such *a minor, trivial or insignificant* nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov. Code, § 830.2 [emphases added].)

applied to sidewalk displacements; and as of this brief's writing, *Huckey* is the most recent and comprehensive published decision on the subject. The *Huckey* decision upheld summary judgment for the defendant city in a case in which the plaintiff, carrying several real estate signs, tripped on a sidewalk panel displacement. (*Id*. at pp. 1095-1096, 1098.)

The trivial defect doctrine, the *Huckey* court explained, originated to shield public entities from liability where conditions on public property create a risk of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used. (*Huckey*, *supra*, at p. 1104, citing *Kasparian v. AvalonBay Communities, Inc*. (2007) 156 Cal.App.4th 11, 27.)

The doctrine predates the 1963 passage of the Government Claims Act. Nearly 90 years ago, the California Supreme Court held that a city could not be held liable for a 1.5 inch displacement between panels that caused a pedestrian to trip. (*Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, 367–368.) Although the *Nicholson* court's focus was constructive notice, it

held it "well settled that a municipality is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident." (*Id.* at p. 365.) *Nicholson* further held that, "It is a matter of common knowledge that no sidewalk is perfect, and that certain irregularities and inequalities in the surface of such sidewalks exist. . . in all cities." (*Ibid* [cleaned up].) A year later, the Supreme Court reiterated the *Nicholson* holding, and held:

> "Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise the city could be held liable upon a showing of a trivial defect." (*Whiting v. National City* (1937) 9 Cal.2d 163, 165.)

The Supreme Court later disposed of the notice consideration:

> "Growing out of the difficulty of maintaining heavily traveled surfaces in perfect condition is the practical recognition that minor defects inevitably occur, both

> in construction and maintenance, and that their continued existence is not unreasonable. In such case, *irrespective of the question of notice* of the condition, no liability may result." (*Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 73 [emphasis added].)

In its present form, "The trivial defect doctrine is not an affirmative defense. It is an aspect of duty that a plaintiff must plead and prove." (*Huckey*, *supra*, 37 Cal.App.5th at p. 1104, citing *Cadam v. Somerset Gardens Townhouse HOA (*2011) 200 Cal.App.4th 383, 388.)

As the citation to *Cadam* indicates, although the doctrine originated in public property cases, courts apply it to private landowners' liability for their premises as well. (*Graves v. Roman* (1952) 113 Cal.App.2d 584, 586.) For both private and public landowners, the cases recognize "the impossibility of maintaining heavily travelled surfaces in a perfect condition and that minor defects such as differences in elevation are bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved." (*Ibid.*) Thus, cases involving private landowners may be cited to guide the doctrine's application to municipalities.

"In appropriate cases, the trial court may determine, and the appellate court may determine de novo, whether a given walkway defect was trivial as a matter of law." (*Huckey*, *supra*, 37 Cal.App.5th at p. 1104.) Government Code section 830.2 expressly permits trial and appellate courts to do so.

Where reasonable minds can reach only one conclusion—no substantial risk of injury—the issue becomes one of law, resolvable by summary judgment. (*Huckey*, *supra*, 37 Cal.App.5th at pp. 1104-1105.) This "'provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property.'" (*Huckey*, *supra*, at p. 1105, fn. 3, quoting *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 399.)

"The court's analysis of whether a walkway defect is trivial involves as a matter of law two essential steps." (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105.)

The first step is to review the evidence regarding the type and size of the defect. (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105.) "[T]he defect's size 'may be one of the most relevant factors' to the

court's decision." (*Id.*, quoting *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 725-726.)

In particular, "Sidewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law." (*Huckey*, *supra*, 37 Cal.App.5th at p. 1107.)

Nevertheless, "In determining whether a given walkway defect is trivial as a matter of law, the court should *not* rely solely upon the size of the defect . . . ." (*Huckey*, at p. 1105 [emphasis in original].)

Instead, if the preliminary analysis of the type and size of the defect reveals a trivial defect, a court moves to the second step: considering other factors that might have rendered the defect a dangerous condition at the time of the accident. (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105.) "These other circumstances or factors include whether there were any broken pieces or jagged edges in the area of the defect, whether any dirt, debris or other material obscured a pedestrian's view of the defect, the plaintiff's knowledge of the area, whether the accident occurred at night or in an unlighted area, the weather at the time of the accident, and whether the defect has caused any other accidents." (*Ibid.*) The

question is whether any of the circumstances surrounding the accident might make the defect more dangerous than size alone would suggest. (*Ibid.*)

If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the examining court should deem the defect trivial as a matter of law. (*Huckey*, *supra* 37 Cal.App.5th at p. 1105.)

To survive the trivial defect test, "the height differential, and the area surrounding it, must have posed 'a substantial (as distinguished from a minor, trivial or insignificant) risk of injury' when 'used with due care in a manner in which it is reasonably foreseeable that it will be used.'" (*Huckey*, *supra*, 37 Cal.App.5th at p. 1110, quoting Gov. Code, §§ 830, 830.2.)

*Huckey* also resolved two additional issues that apply here.

First, a court can address the first step—determining the size and nature of the defect—even if a sidewalk displacement is uneven, and it is uncertain where on the displacement the plaintiff tripped. In *Huckey*, the court resolved the height issue by taking into account an accident reconstructionist's measurements of the displacement and opinion on where a

pedestrian "generally" walks, along with witness testimony on where the plaintiff was walking and what the plaintiff was doing at the time the plaintiff tripped. (*Id.* 37 Cal.App.5th at pp. 1106, 1110.)

Second, evidence that the city employees had an informal policy of beveling height differentials of one-half inch or more (as they did with the differential in *Huckey*) might "support a reasonable inference that height differentials higher than *one-half inch* pose a trip hazard to pedestrians." (*Huckey*, *supra*, 37 Cal.App.5th at pp. 1109-1110 [italics in original; footnote omitted].) But that inference did not prevent the court from concluding a displacement larger than that was a trivial defect as a matter of law. (*Ibid.*)

#### 2.2.2. The Importance to Municipalities of Applying the Trivial Defect Doctrine to Sidewalk Displacements

As explained above, the first step in the trivial defect analysis is considering the type and size of defect at issue. (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105.) Here, as in *Huckey*, the defect at issue is a displacement between sidewalk panels. For nearly a hundred years, courts have been applying the trivial

defect doctrine to sidewalk panel displacements. (E.g., *Nicholson*, *supra*, 5 Cal.2d at p. 365; *Whiting*, *supra*, 9 Cal.2d at p. 165; *Huckey*, *supra*, 37 Cal.App.5th at p. 1110.) Case law establishes that, as a matter of public policy and practical necessity, this protection from liability for sidewalk displacements that do not pose a substantial risk to pedestrians is essential to municipalities.

As the Supreme Court wrote in *Nicholson*, *supra*, 5 Cal.2d at p. 365, quoting *Taylor v. Manson* (1908) 9 Cal.App. 382, 392:

> "'It is a matter of common knowledge that no sidewalk is perfect, and that certain irregularities and inequalities in the surface of such sidewalks exist . . . in all cities. . . . In many cases there is, even in paved sidewalks, a drop of a few inches in the surface. . . . While a municipality is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, it is by no means an insurer against accidents, nor can it be expected to keep the surface of its sidewalks free from all irregularities."

And in *Whiting*, *supra*, 9 Cal.2d at p. 165, the Supreme Court wrote:

> "It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise the city could be held liable upon a showing of a trivial defect."

*Whiting* further noted that many people walk over a city's sidewalk daily. Numerous people using a piece of property the same way the plaintiff was using the property, and not sustaining injury, are an indication that the property does not pose a substantial risk to users with due care. (See *id.*, 9 Cal.2d at pp. 165-166.)

Thus, as a matter of public policy, practical necessity, and precedent, cities, special districts, and other municipalities like the amici should not be held liable for sidewalk defects that do not pose a substantial risk to pedestrians using due care. When pedestrians who trip over them (through failure to use due care) sue municipalities, their suits should be summarily resolved. Government Code section 830.2 is a vehicle for courts to resolve them without the need for jury trial. Essex's arguments, if adopted as law, would thwart that goal. Her arguments should be rejected.

#### 2.2.3. Section 830.2 Cannot Be Confined to Small Defects; Open and Obvious Displacements May Also Be Trivial as a Matter of Law

In her opening brief, Essex insists that defects that exceed an inch should not be deemed trivial as a matter of law; and attempts to dismiss cases holding defects of up to 1.5 inches trivial as addressing the constructive notice element of dangerous condition liability rather than the trivial defect doctrine. (AOB:18-19.) In her reply brief, she rejects the City's argument that a sidewalk defect that is

open and obvious can also be trivial. (ARB:5.) Her analysis is incorrect. Small defects are not the only ones that pose no substantial risk to users with due care. Open and obvious ones do too.

As noted above, *Huckey*, *supra*, 37 Cal.App.5th at p. 1107 observed that while the measurement of a sidewalk defect is an important consideration, elevations of up to 1.5" "have generally been held trivial as a matter of law." The *Huckey* court further held that, "In determining whether a given walkway defect is trivial as a matter of law, the court should *not* rely solely upon the size of the defect . . . ." (*Huckey*, at p. 1105 [emphasis in original].)

That holding is solidly grounded in precedent. In *Whiting*, *supra*, 9 Cal.2d at p. 165, the California Supreme Court noted that the three-quarter-inch displacement between panels in that case "was plainly visible. Its existence was common knowledge in the community. The plaintiff herself knew of it." Further, "during five years preceding the accident, four people had stumbled over the defective area, three of whom had fallen, and . . . the mayor and several members of the city council, the street commissioner, and two succeeding superintendents of streets of the city had

walked frequently over that portion of the sidewalk." (*Id.* at p.164.)

That holding comports with the California Supreme Court's holding in *Nicholson*, *supra*, 5 Cal.2d at pp. 367-368 that a city could not be held liable for a 1.5 inch displacement between panels that caused a pedestrian to trip.

In her briefing, Essex argues that *Nicholson*'s holding pertains to constructive notice, not to whether a defect is trivial as a matter of law. (AOB:18.) But as explained above, *Nicholson* focused not only on constructive notice, but also the policies that support the trivial defect doctrine: That municipalities cannot be held public insurers, and that they cannot be required to remedy every imperfection in a sidewalk or prevent every injury from those imperfections. (*Nicholson*, *supra*, 5 Cal.2d at p. 365.)

Further, *Whiting*, *supra*, 9 Cal.2d at p. 165, decided soon after *Nicholson*, reiterated *Nicholson*'s holding on what constitutes a trivial defect.

Later, in *Barrett*, *supra*, 41 Cal.2d at p. 70, the California Supreme Court reiterated *Nicholson*'s holding—not in the context

of constructive notice, but as precedent that a sidewalk imperfection of 1.5" is a "minor on[e]." (*Ibid*.)

More recently, in *Dobbs v. City of Los Angeles* (2019) 41 Cal.App.5th 159, 162, Division 8 ruled there was substantial evidence that the design of a bollard was reasonable (for purposes of Government Code section 830.6 design immunity) because "reasonable minds would agree" that the "big" bollard "was conspicuous and not a danger to pedestrians" and "obvious to pedestrians who looked where they were going."

California case law thus establishes that a sidewalk displacement of 1.5" or less may be trivial, if it does not pose a substantial risk to pedestrians who look where they are going. Both small displacements (that are unlikely to trip most people) and large ones (that pedestrians will see and avoid) may be deemed trivial as a matter of law. There is no reason to change that rule of law, which protects municipalities from liability for sidewalk displacements that do not create a substantial risk.

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### 2.2.4. A City Employee's Opinion That a Displacement Creates a "Trip Hazard" Does Not and Should Not Prevent a Court from Applying Section 830.2 and Deeming a Displacement a Trivial Defect as a Matter of Law

In her briefing, Essex makes much of the evidence that employees of the defendant city deemed the sidewalk displacement at issue a "trip hazard." (AOB:28, 30-31; ARB:5, 6, 8-9, 11.) According to Essex, "the fact that the City's engineer saw and considered the sidewalk defect to create a trip and fall hazard means that it cannot be said as a matter of law that the defect was so minor as to be trivial as that term is meant by Gov't. Code § 830.2." (ARB:11.) Essex bases that conclusion on an analysis of law that predates section 830.2. (ARB:8-9, 11.)

As noted above, *Huckey*, *supra*, 37 Cal.App.5th at pp. 1109-1110 and fn. 5 concluded that under section 830.2 a court *can* rule a sidewalk displacement trivial as a matter of law, even if under a city's policy it would be deemed a "trip hazard." The *Huckey* court recognized that a sidewalk

displacement of the size described in that case (higher than .5") "pose a trip hazard to pedestrians." (*Id.* at p. 1110.) "But to constitute a dangerous condition," the *Huckey* court continued, "the height differential, and the area surrounding it, must have posed 'a substantial (as distinguished from a minor, trivial or insignificant) risk of injury' when 'used with due care in a manner in which it is reasonably foreseeable that it will be used.' (§ 830; see § 830.2.)" (*Ibid.*) A displacement can be a "trip hazard" to *some* users, without posing a substantial risk to users with due care. (See *id.*)

As another recent case interpreting section 830.2 reasoned: "'[A]ny property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use.'" (*Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 754, quoting *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196.)

For that reason, applying section 830.2 as Essex proposes would de facto abolish the statute. Any displacement that could cause a person to trip could be

deemed a "trip hazard." Clever questioning may draw from City personnel an "admission" that a displacement that caused one or more persons to trip was a "trip hazard." (And absent such an admission, a plaintiff will likely find an expert who will so opine.) In any trip-and-fall case caused by a sidewalk defect, at least one person *has* tripped over the defect: the plaintiff.

Therefore, if calling a sidewalk defect a "trip hazard" automatically prevents a court from determining, as a matter of law, that a sidewalk displacement is a trivial defect, section 830.2—expressly designed to permit a court to do just that—will be rendered meaningless.

Moreover, adopting Essex's reasoning would discourage cities and special districts from enacting policies of repairing sidewalk defects of any particular height. A plaintiff may later argue that such a policy is an "admission" that defects of that size or larger are "trip hazards," barring the entity from obtaining a ruling under section 830.2 that the defect is trivial as a matter of law. Any interpretation that would prevent repair of sidewalk defects would harm, rather than serve, public safety.

Essex's argument should be rejected.

### 2.2.5. A Plaintiff's Lack of Due Care Is a Factor in Determining a Defect Trivial

Finally, Essex argues that when a plaintiff such as herself is distracted during a fall, that "alleged lack of attention, if there was such an omission, goes only to her comparative negligence and it plays no role on the issue of whether the condition was a trivial defect as a matter of law." (ARB:7; see further discussion at ARB:7-8.) That is not and should not be the law.

Section 830.2's plain language establishes that a defect is non-trivial only if "the condition created a substantial risk of injury *when such property or adjacent property was used with due* care in a manner in which it was reasonably foreseeable that it would be used." (Emphasis added.)

That qualification is crucial. Courts have recognized that any property can be dangerous when used improperly. (*Thimon*, *supra*, 44 Cal.App.5th at p. 754.) Any sidewalk

displacement that can catch a toe can cause someone to trip if that person is not paying attention. But "a public entity is only required to provide roads that are safe for reasonably foreseeable careful use." (*Id.* at p. 754 [cleaned up].)

Evidence of whether the sidewalk defect creates a danger to users with due care is therefore an important factor in determining whether the defect is trivial.

True, "Reasonably foreseeable use with due care, as an element in defining whether property is in a dangerous condition, refers to use by the public generally, not the contributory negligence of the particular plaintiff who comes before the court; the particular plaintiff's contributory negligence is a matter of defense." (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384.) But "the plaintiff has the burden to establish that the condition is one which creates a hazard to persons who foreseeably would use the property with due care." (*Ibid.*)

Multiple cases have therefore ruled that plaintiffs who were injured while using public property without due care could not establish the property posed a substantial

risk to users with due care, because their accidents showed only that the property was dangerous to those *not* using the property with care. (E.g., *Mathews*, *supra*, 2 Cal.App.4th at p. 1385 [child injured while riding bike down steep, slippery hill could not establish that the hill was a dangerous condition of property]; *Thimon*, *supra*, 44 Cal.App.5th at p. 764 [driver with sun in his eyes, who was not wearing his prescription glasses, hits pedestrian in crosswalk; hazards of drivers with sun in eyes was open and obvious]; *Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 560–561 [child uses bicycle for ladder as he climbs chain link fence, slips and cuts arm on tines of fence; section 830.2 applies because no danger to those using fence with due care]; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 241 [toddler walks into fire ring with hot coals covered by sand; because the property would not pose a substantial risk to users with due care, section 830.2 applies]; *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [man dives into dark, shallow water and hits bottom; property does not pose danger to those using it with due care].)

Further, where, as here, the only person known to have tripped on that defect (or has otherwise been injured

by the defect) is the plaintiff, the plaintiff's own due care becomes the focus. (See, e.g., *Huckey*, *supra*, 37 Cal.App.5th at p. 1110 [court notes plaintiff was carrying multiple real estate signs when he fell].)

That a person while distracted, tripped over a defect that has not caused other reported accidents is evidence that the defect does not pose a substantial risk to users with due care. The Court should not depart from that well-established rule.

### 3.0. Conclusion

The amici respectfully ask this Court to follow *Huckey* and the line of cases behind it, and reject Essex's requests to depart from the established law governing trivial defects of sidewalks and other public property.

Date: June 18, 2021

POLLAK, VIDA & BARER

/s/ Daniel P. Barer

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## 4.0. Certificate of Compliance

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, this Amici Curiae Brief is produced using 13-point Roman type including footnotes and contains approximately 5,250 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Date: June 18, 2021

POLLAK, VIDA & BARER

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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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 11500 West Olympic Boulevard, Suite 400, Los Angeles, California 90064-1839.

On June 18, 2021, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF PASADENA** on the interested parties in this action as follows:

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[X] (BY EMAIL) I hereby certify that I electronically filed the foregoing with the Court of Appeal by using their electronic system on June 18, 2021, and that all participants in the case are registered users and that service will be accomplished by the Court's electronic service system.

Honorable Laura A. Seigle, Department 48
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

[X] (BY MAIL) I deposited such envelopes in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid, as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully

prepaid at Los Angeles, California in the ordinary course of business.

[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 June 18, 2021, at Los Angeles, California.

/s/ Jennifer Sturwold
Jennifer Sturwold