Supreme Court No. S243247
Court of Appeal Case No. C077181

In the Supreme Court of the State of California

CITY OF OROVILLE,

Petitioner,

vs.

SUPERIOR COURT OF BUTTE COUNTY,

Respondent,

CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY, et. al.,

Real Parties in Interest.

After an Unpublished Decision of the Court of Appeal Third District Court of Appeal, Case No. C077181 arising from Butte County Superior Court, Case No. 152036, The Honorable Sandra L. McLean, Judge

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PROPOSED AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA JOINT POWERS INSURANCE AUTHORITY, PUBLIC ENTITY RISK MANAGEMENT AUTHORITY, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORIES AND CALIFORNIA SANITATION RISK MANAGEMENT AUTHORITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 8.208, subdivision (d)(1), of the California Rules of Court, attorneys for League of California Cities, California JPIA, CAJPA, CSDA, CSRMA and PERMA hereby certify they are unaware of any other person or entity (aside from those listed below) that has a financial or other interest in the outcome of this proceeding.

Dated: Jan. 19, 2018

MICHAEL N. FEUER, City Attorney
BLITHE S. BOCK, Asst. City Attorney
TIMOTHY McWILLIAMS, Asst. City Attorney

By: _____
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INTRODUCTION

Absent a reversal of the lower court's ruling, a public agency could be held liable for damage caused by instrumentalities over which it exercises no control—instrumentalities that are, in fact, under the exclusive control of the damaged claimant. No public policy is served by imposing liability in such a circumstance. To the contrary, socializing loss incurred due to an individual's failure to comply with the law subverts sound public policy.

Moreover, there is no causal connection between the deliberate planning, design, construction, or maintenance of the City of Oroville's sewer and the damage claimed. The law is established that such a connection must be shown between the public improvement (here, the City's sewer system) and the plaintiff's claimed damages before a city can be liable under an inverse condemnation theory. Here, though, the City's sewer system functioned as intended, Plaintiffs experienced a sewage backup because they failed to install the legally mandated backwater valve. Plaintiffs' code violation – not the City's sewer system – created a risk that, once materialized, represented a superseding cause of Plaintiffs' damage. Therefore, no inverse condemnation liability should result.

Lastly, although Plaintiffs were able to get their building approved without including a backwater valve in their building plans or installing a backwater valve, they were not free to sit idly by while the risk of a sewer backup – a risk resulting from their failure to install the valve –materialized and caused damage, then demand recovery. Rather, existing law required Plaintiffs to mitigate the risk by installing the code-mandated backwater valve. Plaintiffs' failure to do so is a complete bar to recovery.

I. NEITHER THE CONSTITUTION NOR PUBLIC POLICY ARE SERVED BY PERMITTING RECOVERY IN THIS CASE

This case solely concerns the application of *article I section 19 of the Constitution*, which prevents the taking or damaging of private property for public use without the payment of just compensation. This Court's application of these constitutional protections is to be guided by matters of public policy. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 262; *see also, Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 303-04.) Thus, the fundamental question to be answered in this case is does sound public policy support distributing the loss occasioned solely by Plaintiffs' failure to comply with the law across the larger community. The answer is "no."

In describing the competing policies at play in an inverse condemnation case, this Court in *Albers* stated:

> It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.

(*Albers*, 62 Cal.2d 250 at p. 263, citation omitted.)

In *Holtz v. Superior Court* (1970) 3 Cal.3d 296, this Court explained that "'The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' In other words, the underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is

'to distribute throughout the community the loss inflicted upon the individual . . . .'" (*Id* at p. 303.) In *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, the court, in finding no public agency liability in a flood control case, relied on "case law, public policy and common sense." (*Id.* at p. 565.)

As convincingly argued by the City of Oroville, the design of the city sewer system justifiably relied upon Plaintiffs' compliance with the law concerning installation of a backwater valve. (Opening Brief on the Merits ("OBOM"), at pp. 12-13.) More importantly, the trial court expressly found that backwater valves are an integral part of the City's sewer system. (Slip Op. at p.10.)

Sewer backups are inevitable and expected, as evidenced by the very fact that backwater valves exist and are code-required. As such, the valve is a key part of the City's sewer design. Plaintiffs did not challenge the design of the city's sewer system, which provided that backups would flow out of the nearest maintenance hole. (OBOM at p. 13.) Rather, Plaintiffs defeated this design by failing to comply with the law. No public policy supports rewarding this failure.

When an individual receives a permit to hook up to the public sewer system, there is a concomitant obligation to abide by the law and install a backwater valve where required—the system depends on it. There is no public policy served by allowing an individual who suffers damage by virtue of failing to install a required backwater valve to nonetheless obtain a recovery from the other members of the community via inverse condemnation. Such liability would impose a significant burden on local

agencies.[1] Applying, among other things, the "common sense" called for in *Belair, supra*, should lead this Court to reverse the lower court. As argued by the City, and as discussed below, the lack of the legally required backwater valve was a superseding cause of Plaintiffs' damages.

II. THERE IS NO CAUSAL CONNECTION BETWEEN PLAINTIFFS' DAMAGES AND THE DELIBERATE DESIGN, CONSTRUCTION, OR MAINTENANCEOF THE CITY'S SEWER

The lower court incorrectly analyzed the proximate cause element of inverse condemnation liability. This Court has previously held that a public agency is liable for inverse condemnation for "any actual physical injury to real property proximately caused by [an] . . . improvement as deliberately designed and constructed." (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263-63). In *Belair, supra,* this Court refined the rule, holding:

> Thus, in order to establish a causal connection between the public improvement and the plaintiff's damages, there must be a showing of a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury.

(*Belair, supra*, 47 Cal.3d at 559, emphasis in original, internal citations and quotations omitted.)

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1 By way of example, in the City of Los Angeles there are approximately 658,737 properties connected to the City's public sewer system. Roughly 20% of these properties are legally required to have a backwater valve. The lack of these legally required valves could easily generate millions of dollars in damages.

A. Plaintiffs' failure to install a backwater valve constituted a superseding cause of damage.

Where a separate independent force contributes to the injury, proximate cause is still present where the "public improvement constitutes a *substantial concurring cause* of the injury, i.e., where injury occurred in substantial part because the improvement *failed to function as it was intended.*" (*Belair, supra*, 47 Cal.3d at pp. 559-60; emphasis added.) However, the public improvement ceases to be a substantial concurring cause if damage would have occurred even where the public improvement functioned "perfectly." (*Id.* at p. 560.) In such case, the independent force would constitute "an intervening cause which supersedes the public improvement in the chain of causation." (*Ibid.*)

In the case at bar, the sewer functioned perfectly—as designed, the sewer backup flowed out of the lowest opening nearest the blockage. Unfortunately, due to Plaintiffs' failure to comply with the law, that lowest opening was into their property. Plaintiffs' failure was an independent force that constituted an intervening cause that superseded the sewer system in the chain of causation.

B. The requisite "deliberateness" on the part of the City is absent since the risk of damage was created by Plaintiffs' violation of the law.

It is settled that the "deliberateness" required to support an inverse condemnation claim is satisfied if, as designed and constructed, a public improvement presents inherent risks of damage to private property, and the inherent risks materialize to cause injury. (*House v. L.A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 396 [homeowner stated an inverse condemnation claim where County replaced flood control devices adjacent to her property with negligently-designed levees that caused flooding and

damage to her home].) However, here the lower court erred by impliedly finding that damage to private property due to the property owner's failure to install a legally required backwater valve was an inherent risk of the City's sewer system.

The lower court recognized that the City's design relied on backwater valves to prevent damage to private property. (Slip Op. at p. 10.) Furthermore, it was an undisputed fact that had the backwater valve been present, the damage would not have occurred. (Slip Op. at pp. 8-9.) In nonetheless finding the City liable, the lower court impliedly found that the Plaintiffs failure to comply with the law was a risk inherent in the design. The lower court erred.

The lower court's reliance on *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596 is misplaced. There, the court ruled that a "wait until it breaks" system of water line maintenance provides the requisite "deliberateness" required in the inverse context. (*Id.* at pp. 607-08.) It is patent that a "wait until it breaks" maintenance plan will inflict a disproportionate burden on those unfortunate property owners who are damaged by aging water lines that burst. If the maintenance plans at issue in *Pacific Bell* had been found by the court to be adequate, but merely negligently implemented, there would have been no liability under an inverse condemnation theory. (*Id.* at p. 606.) This illustrates that the mere fact of property damage alone was not sufficient in *Pacific Bell* to impose liability on the agency—there needed to be a deliberate plan that resulted in the damage.

Similarly, in the case at bar, contrary to the lower courts' determination, the mere fact that sewage backed up into plaintiffs' property does not constitute an impermissible taking. The only "deliberate" action on the part of the City of Oroville was to design and construct a sewer

system that included – in fact relied upon – a legal requirement on the part of property owners to install backwater valves. This Court should not find that risks inherent in the city's sewer system included the risk that the Plaintiffs would fail to comply with the law. To so find would impose an unworkable burden on public agencies to anticipate, and design around, any number of unforeseeable legal violations. Rather, Plaintiffs' failure was an intervening act that supersedes any causal connection between the city's sewer line and the damage to plaintiffs' property. To reach a contrary result, as has been pointed out, creates a perverse incentive that rewards property owners who fail to comply with the law. (OBOM at pp. 10)

The case at bar should be contrasted with what the *Biron* court (225 Cal.App.4th at p. 1280) called the "quintessential inverse condemnation" found in *Akins* v. *State of California* (1988) 61 Cal.App.4th 1. In *Akins* the flood control improvement at issue was *designed* to flood the plaintiffs' property for the purpose of protecting other properties. (*Id.* at p. 45.) Such a design, and resultant damage, is precisely the scenario under which the Constitution requires compensation – i.e., property owner "A" singled out and asked to bear a unique burden for the purpose of protecting property owners "B" thru "Z." (*See, Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303.) The case at bar stands in stark contrast—the City's sewer was designed to overflow into the City street in the event of a blockage. Plaintiffs' violation of the law defeated that design.

Finally, that the lower courts herein improperly focused on roots in the sewer main as being the cause of the damage, rather than the lack of the legally-required backwater valve, is illustrated by considering the following hypothetical representing a combination of the facts of *California State Automobile Assn. v. City of Palo Alto* ("*CSAA*") (2006) 138 Cal.App.4th 474 and the instant case.

Suppose that roots emanating from a private lateral connection make their way into the City-owned sewer main and cause a blockage, as was the case in the first instance of sewage backup in CSAA, *supra* at 477 & 484 (for which recovery was not available). Suppose further that the blockage causes raw sewage to backup into the same private lateral from whence the roots emanated and flood private property because of the lack of a legally-required backwater valve. Should the private property owner whose roots caused the blockage be entitled to recover on a theory of inverse condemnation? If the rationale of the lower courts herein as well as the *CSAA* court is followed, the answer would be "yes" because it matters not the cause of the root blockage in the City line, but only that the City sewer line failed to convey sewage away from the property. (Slip Op. at pp.17-30, citing *CSAA*.) As the City of Oroville articulates in its brief, this perverse result can be avoided by focusing not on the cause or location of the *blockage*, but on the cause of the *damage*—i.e., the failure to have a backwater valve. (OBOM at pp. 21-24.)

III. EXISTING LAW DICTATES THAT PLAINTIFFS' FAILURE TO MITIGATE THE RISK OF A SEWER BACKUP BARS RECOVERY

At the time the *Albers* decision was rendered, and as acknowledged therein, there was no California case holding that the requirement to mitigate damages applied in condemnation cases. (*Albers, supra*, 62 Cal.2d at p. 270.) However, the *Albers* court noted that "this does not mean that no such principle can apply; it simply means that the matter has not yet been expressly decided by our appellate courts." (*Id.*)

Albers concerned a landslide allegedly caused by roadway construction. (*Albers*, 62 Cal.2d at p. 255.) The plaintiff therein sought to recover, among other things, costs spent attempting to prevent or minimize

further damage. (*Id.* at p. 268.) In finding that the principle of mitigation applied, the *Albers* court upheld the corollary rule that costs reasonably incurred to mitigate are recoverable. (*Id.* at pp. 271-72.) In affirming the policy rational behind requiring mitigation in this context, this Court held:

> [I]t would seem that the public interest would be served by allowing the possibility of such a recovery: the owner, who is ordinarily in the best position to learn of and guard against danger to his property, would thereby be encouraged to attempt to minimize the loss inflicted on him by the condemnation, rather than simply to sit idly by and watch otherwise avoidable damages accumulate.
> (*Id.*)

While *Albers* concerned the obligation to mitigate once damage occurs (*Id.* at pp. 268-69), incurring damage is not a prerequisite to a legal requirement to mitigate. *Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, concerned allegations of damage caused by storm flooding. There the plaintiff sought to hold the City of Redding liable on the theory of inverse condemnation. In applying the six-factor reasonableness test articulated in *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 368-69, specifically the question of the "severity of plaintiffs' damages in relation to risk-bearing capabilities," the *Biron* court agreed with the trial court's conclusion that the plaintiff had failed to mitigate the *risk* of flooding, and denied recovery. (225 Cal.App.4th at pp. 1278-80.) The court found that the plaintiffs could have mitigated the flood risk by installing floodgates or purchasing insurance. Similarly, here, Plaintiffs could have and were legally required to install the backwater valve, and did in fact purchase and benefit from readily-available insurance coverage.

Thus, *Albers* establishes the mitigation requirement in the condemnation context outside of flood control cases, and *Biron* applies the concept within a flood control case so as to require a damaged plaintiff to have taken steps to avoid damage in the first instance. It is, therefore, a reasonable extension of the *Albers* ruling to find herein that Plaintiffs were not entitled to sit idly by and ignore the risk of a sewer backup, but instead were required to mitigate the risk by installing the code-mandated backwater valve. Of course, no such extension of the *Albers* mitigation principle is needed should this Court determine that the rule of reason found in flood control cases is applicable to sewer backups (OBOM at pp. 29-31). If the rule of reason is applied, then Plaintiffs' failure to install the legally-required backwater valve would be manifestly unreasonable and would bar recovery. (*Biron, supra,* 225 Cal.App.4th at pp. 1278-80.)

In fact, the instant case is more egregious than either *Albers* or *Biron* because *Plaintiffs*, not the City of Oroville, created the risk that materialized and caused damage. The design of the City's sewer system did not create a risk of a backup into Plaintiffs' property because the design included a legally-required backwater valve. In failing to install the valve, Plaintiffs failed to mitigate the sewage backup risk and should thus be denied recovery.

IV. JUST AS A CITY IS IMMUNE FOR INJURIES ARISING FROM PROPERTIES IT HAS INSPECTED OR PERMITTED, A CITY CANNOT BE LIABLE FOR INJURY RESULTING FROM CODE VIOLATIONS EXISTING DURING AN INSPECTION

The Court of Appeal twice criticized the City for issuing a permit or a Certificate of Occupancy on Plaintiffs' property even though the backwater valve had not been installed. (Slip Op. at pp. 5, 19.) But

faulting a City for issuing a permit for a code-violating property flies in the face of the most basic principles governing the long-entrenched government immunities protecting government from such liability. (See Cal. Gov. Code, §§ 818.2 [enactments], 818.4 [permits] and 818.6 [inspections].)

Although these immunities do not specifically apply to inverse condemnation, which is rooted in constitutional principles, the principles and purposes underlying these immunities weigh heavily in favor of a finding that the City cannot be liable for issuing a permit for Plaintiffs' property notwithstanding its code violations.

Simply put, and as the City of Oroville urges in its Brief, a public entity cannot be liable for all property defects within its jurisdiction, becoming what the City calls the "de facto insurer of all private property." (OBOM at p. 42.)

The Legislative Comment to California Government Code section 818.6, the permit immunity, expressly recognizes this risk, noting that "[b]ecause 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" without this immunity. (*Ibid.*) In *Morris v. County of Marin* (1977) 18 Cal.3d 901, 915-916 (declined to follow on other grounds by *Caldwell v. Montoya* (1995) 10 Cal.4th 972), the Supreme Court, citing this 818.6 Legislative Comment, explained that this inspection immunity ensures that a public entity is not liable for every property it inspects:

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> In light of this [legislative] purpose, we believe 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,* 18 Cal.3d at p. 916.)

The Court of Appeal has also noted that without the inspection immunity, the public entity would be liable for "virtually all activities going on within the community." (*Wood v. County of San Joaquin* (2003) 111 Cal. App. 4th 960, 972.) The Court further explained:

> There would be potential governmental liability for all building defects, for all crimes, and for all outbreaks of contagious disease. The [Law Revision] Commission believes that it is better public policy to leave the injured person to his remedy against the person actually causing the injury than it is to impose an additional liability on the government for negligently failing to prevent the injury.

(*Ibid.*)

And yet, here, the Court of Appeal criticized the City of Oroville because it "offered no explanation" of why it had issued a permit for Plaintiffs' property without a backwater valve. (Slip. Op. at p. 5.) The Court then noted that the City "should assure compliance before issuing certificates of occupancy." (Slip Op. at p. 19.) The Court of Appeal's criticism of Oroville for permitting Plaintiffs' property without a backwater valve suggests that the Court implicitly blames the City of Oroville for Plaintiffs' code violation since the Oroville inspector did not "catch" it. Yet, consistent with the rationale behind the inspection and permitting immunities, the City of Oroville cannot be liable for ensuring such code compliance.

As the City correctly explains, the governmental immunities are intended to ensure that the government does not become the guarantor or effectively the "insurer" of all private property. (OBOM at pp. 24, 42; *see, also,* Answer Brief on the Merits by CJPRMA at p. 16.) And in this particular circumstance, a municipality *must* rely on the private owners to assess whether a backwater valve is required, as placing this burden on the agency would be cost prohibitive. In the proceedings before the lower courts, Oroville submitted a declaration explaining that the City relies on the owners' architects and engineers to determine whether a backwater valve is required. Though this Declaration was greatly discounted by the appellate court (Slip Op. at p. 5), the City's stated reasons for relying on owners to develop the surveys and other data necessary to make this determination are crucial to maintaining inspection systems in cities across the state. As the City cogently explains, the costs of such analyses for each property would render the cost of any development prohibitive. (OBOM at p. 16.)

In accordance with the same principles that lead Courts to uniformly agree that a municipality is immune for damages arising from property it has permitted, this Court should find that the City of Oroville cannot be held liable for inverse condemnation simply because it issued a permit for Plaintiffs' property without the required backwater valve. Moreover, inverse condemnation liability cannot arise by virtue of an agency's permitting and inspection of a private construction project because in taking such actions, the agency is not advancing a public project. As held by this Court in *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, inverse condemnation does not "'trump' all of the immunity provisions set forth in the Tort Claims Act." (Id. at p. 391 [inverse condemnation does not

override the immunities otherwise governing agency liability for property damage caused by police enforcement action].)

CONCLUSION

Accordingly, Amici urge this Court to reverse the Court of Appeal and to hold that a private property owner's failure to install a legally-required backwater valve precludes that owner from recovering any resultant damage under an inverse condemnation theory.

Dated: Jan. 19, 2018

MICHAEL N. FEUER, City Attorney
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TIMOTHY McWILLIAMS, Asst. City Attorney

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed brief, including footnotes, is produced using 13-point or larger type and that it contains 3,665 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: Jan. 19, 2018

MICHAEL N. FEUER, City Attorney
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TIMOTHY McWILLIAMS, Asst. City Attorney

By: _____
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PROOF OF SERVICE
(By TrueFiling and U.S. Mail)

I, the undersigned, declare that I am over the age of 18 years and not a party to the within action or proceeding. My business address is 200 North Main Street, 7th Floor, Los Angeles, California 90012.

I am familiar with the business practice at the Office of the City attorney for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the City Attorney is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On January 19, 2018, I electronically served the attached:

PROPOSED AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA JOINT POWERS INSURANCE AUTHORITY, PUBLIC ENTITY RISK MANAGEMENT AUTHORITY, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORIES AND CALIFORNIA SANITATION RISK MANAGEMENT AUTHORITY

by transmitting a true copy via this Court's True Filing system.

On January 19, 2018, I served participants in this case who have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, a true copy thereof enclosed in a sealed envelope in the internal mail collection service at the Office of the City Attorney, addressed as follows:

California Supreme Court
350 McAllister St., Room 1295
San Francisco, CA 94102-4797
(one unbound copy – via overnight delivery)

Hon. Sandra L. McLean, Judge
Butte County Superior Court
One Court Street
Oroville, CA 95965

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

Executed this 19th day of January, 2018, at Los Angeles, California.

Maria Cruz