# CASE NO. S284303

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**TY WHITEHEAD,**
*Plaintiff and Appellant,*

v.

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

Court of Appeal, First District, Division Three, No. A164483;
Alameda County Superior Court
Hon. Richard Seabolt; No. RG18896233

# ANSWER BRIEF ON THE MERITS

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## QUESTION PRESENTED

The City is a third-party beneficiary of a release agreement signed by a bicyclist as a condition of participating in an organized training ride. Under this Court's decision in *Tunkl v. Regents of University of Cal.* (1963) 60 Cal.2d 92, and the uniform body of law *Tunkl* has generated, can the City enforce that release agreement to preclude liability for its purported negligent failure to identify and repair a pothole that injured the cyclist?

## INTRODUCTION

Over the course of the last six decades, a uniform, stable body of law has developed in this State relating to recreational releases. Simply put, courts routinely enforce releases of simple negligence liability agreed to by participants in sporting and other recreational activities. This body of law reflects faithful application of *Tunkl*, in which this Court held that waivers of future ordinary negligence claims are valid and enforceable so long as the "transaction" giving rise to the release does not implicate the public interest. In the more than 20 recreational-release cases decided since *Tunkl*, no court has suggested that *Tunkl* has been incorrectly applied in this context or that it is in need of modification.

It is against this legal backdrop—a mountain of unbroken case law—that Plaintiff-Appellant Ty Whitehead asks this Court to substantially revise the *Tunkl* analysis and invalidate the Release he signed. This Court should decline to tinker with what is not broken.

*Tunkl* correctly emphasized, as have its progeny, that determining whether a negligence release affects the public

interest depends on examining the "transaction" giving rise to it. In other words, courts must consider the subject matter of the release to determine what it is trying to accomplish. As the lower courts have consistently held, if the purpose of the release is to facilitate voluntary participation in a recreational activity—like the bicycle training ride in which Whitehead was injured—the release does not affect the public interest and is valid and enforceable.

Besides emphasizing the "transaction" at issue, *Tunkl* made clear that parties are free to enter into negligence releases where the activity involved is not an "essential" one and where the party who faces the risk of harm is able to internalize it as well as, if not better than, the potential tortfeasor. In only a small number of cases has the subject matter of a release been deemed so important as to implicate the public interest. Those cases have involved things that people generally cannot do without, like housing, daycare, and car maintenance. But voluntary recreational activities, while no doubt enjoyable, are hardly imbued with the same significance. People may choose to engage in them or not. Bicycling might be a personally gratifying pastime for Whitehead, but it is not essential.

What's more, recreational participants are often able to bear the risk of injury as least as well as those who organize and/or contribute to recreational events. Whitehead not only chose to go on the training ride, but he was in control throughout the ride, deciding on everything from his cycling speed to where on the road he biked, to what he did during the ride. The City

had no control over any of these things. Indeed, it had no notice the training ride was even going to take place. Because Whitehead was in the proverbial driver's seat, while the City had no influence over the training ride, Whitehead was in the best position to assume the risk of any negligence he might encounter.

Here, the recreational, non-essential nature of the training ride, combined with Whitehead's ability to assume the risk of injury, means that the Release does not implicate the public interest and is valid and enforceable. Such an outcome is reasonable, fair, and logical. It respects the right of people to knowingly enter into contracts and it helps recreational activities to flourish by allowing those who sponsor or contribute to them to avoid the risk of liability if a participant is negligently injured.

Whitehead urges the Court to abandon *Tunkl*'s "transaction"-based rule in favor of a "service"-based one. He says the correct way to apply *Tunkl* is not to consider the "transaction" the release is meant to facilitate, but instead to focus narrowly on the particular "service" the party seeking the benefit of the release provided. If that "service" implicates the public interest, Whitehead contends the release is void, even if the overall transaction the release facilitates *does not* implicate the public interest. Applied to the facts here, Whitehead argues that the purpose of the Release—to enable him to cycle in an AIDS/LifeCycle ("ALC") training ride—is beside the point and that the only relevant consideration is the particular "service" the City of Oakland provided to the training ride. He reasons that because the "service" the City supplied is the public streets on

which he and his fellow cyclists rode, the release is void as to the City because the public streets implicate the public interest.

Whitehead's "service"-oriented approach has nothing to recommend it. It treats the individual "services" that make up an overall transaction as more important than the transaction itself. In so doing, it complicates the straightforward *Tunkl* analysis by requiring courts to sift through the various services at play and determine whether the service a defendant provided implicates the public interest and whether that particular service injured the plaintiff. Whitehead's proposed rule will lead to odd and undesirable outcomes in which the organizers of recreational activities, like ALC, can enforce releases, but the third-party beneficiaries of releases who provide indispensable services to those recreational activities may not be able to do so.

Revising *Tunkl* as Whitehead urges risks having a chilling effect on the willingness of sponsors of, and contributors to, large recreational events to get involved. If they cannot rely on release agreements to protect them from negligence liability, third-party suppliers of first aid, food and drinks, accommodations, and other things that could be construed as affecting the public interest, may take a pass on lending their support. That in turn jeopardizes the kind and number of recreational activities available to the public.

Whitehead's proposed rule would also have serious repercussions for public-entity law. A holding depriving the City of the ability to enforce the Release would implicitly rewrite Government Code section 815, subdivision (b), which authorizes

public entities to assert the same defenses available to private parties. If ALC could assert the release as a defense to a personal-injury suit brought against it—as Whitehead appears to concede—the City should likewise be able to defend on that same basis. Any other conclusion contravenes section 815, subdivision (b).

Finally, the impact on public entities of Whitehead's interpretation of the law cannot be understated. Public entities are often under-resourced and at pains to limit their liability exposure. If the use of streets and roads for organized bicycle rides, marathons, walkathons, and the like, implicate the public interest, public entities will have to think twice before agreeing to host such events. The risk of liability and large damages awards is just too high. Public entities will also have to consider demanding that all large, organized groups of recreants—like the ALC cyclists on the training ride here—obtain permits in advance so they (i.e., the public entities) can exercise some measure of control over when, where, and how recreants use the public rights of way. And it bears noting that a ruling in favor of Whitehead will presumably not be confined to just the public streets but will render releases involving any public premises void. That too will dampen the willingness of public entities to make public buildings and spaces available for recreational activities.

This Court should not abandon *Tunkl*'s time-tested legal rule that is fair, easy to administer, and strikes a reasonable balance between contract and tort principles in favor of

Whitehead's novel rule that is none of those things. The judgment of the Court of Appeal should be affirmed.

## FACTS

### A. Whitehead was a highly experienced cyclist with years of long-distance cycling under his belt.

ALC sponsors an annual organized bicycle ride—not a race—each June between San Francisco and Los Angeles to raise money for HIV and AIDS services (the "ALC Ride"). 2-AA-212, 232-234; 7-AA-1317. The ride totals 545 miles and takes place over seven days, traveling through numerous cities and counties.[1] 2-AA-212; 7-AA-1317.

To help participants prepare for the ride, ALC organizes weekend training rides. 1-AA-142. These training rides begin with shorter routes in the late fall and gradually become longer through the winter and spring, ending in late May, just before the ALC Ride. 1-AA-142; 2-AA-210-211; 7-AA-1271-1272, 1357.

Whitehead was an avid bicyclist who had completed three prior ALC Rides and was training for his fourth when he suffered the accident that led to this lawsuit. 2-AA-212; 232-236; 7-AA-1269, 1317. Whitehead's fellow cyclists regarded him as a very good rider and among the most experienced ALC participants. 1-AA-157; 7-AA-1290. Indeed, most weekends he cycled in training rides on *both* Saturday and Sunday. 2-AA-236; 7-AA-1270. On Saturdays, he rode in the East Bay and on Sundays, he rode between San Francisco and Marin. 2-AA-210; 7-AA-1270-1271. In

[1] ALC is jointly run by the San Francisco AIDS Foundation and the Los Angeles LGBT Center. 7-AA-1317.

addition, Whitehead completed classroom and "on the bike" instruction to become certified as an ALC Training Ride Leader—a role that was primarily focused on counseling other cyclists about safety issues. 2-AA-214; 7-AA-1273-1274; 1280-1284; 1316; 1330-1331.

### B. Whitehead voluntarily signed the Release prohibiting him from recovering against the City for any injuries he might sustain.

On March 25, 2017, Whitehead participated in an approximately 50-mile ALC training ride that wound its way through several East Bay cities, including Orinda, Oakland, Castro Valley, Danville, and Lafayette. 7-AA-1360, 1362-1363. Whitehead's fellow cyclists described it as a "beautiful" and "sunny" day with "perfect" riding conditions. 1-AA-159; 7-AA-1296. The cyclists—about 42 in all—gathered around 7:30 or 8:00 in the morning at the Orinda BART station. 1-AA-146-147, 149; 7-AA-1317-1326. Consistent with ALC's standard practice, they began with a discussion of safety and best practices while riding. 1-AA-140, 147; 2-AA-215. Before they set off, all participants were required to sign a document entitled "General Information and Release and Waiver of Liability, Assumption of Risk, and Indemnity Agreement" (the "Release"). 7-AA-1299-1300, 1317-1326, 1335. The cyclists were advised to read the Release before signing it. 7-AA-1302.

The Release contains three sections relevant to Whitehead's claims.

*First*, the "Assumption of Risk" provision advised participants that the seven-day Ride between San Francisco and

L.A., as well as the training rides, are potentially "hazardous" activities and that the risks include "broken pavement" and the "negligence or carelessness" of the "owners/lessors of the course . . . which may include state and local government entities." 7-AA-1317. This provision states in full:

> I understand that the Event is potentially a hazardous activity, and that accidents during the Event could lead to serious injury, death and/or property damage, both to me and to others. Risks associated with the Event may include, but are not limited to:[2]
>
> - Using public streets and facilities where hazards such as *broken pavement* and *road debris* may exist;
>
> - Negligence or carelessness of SFAF [i.e., the San Francisco AIDS Foundation], LALGBTC [i.e., the Los Angeles LGBT Center], sponsors, participating clubs, communities, members of the medical team, training ride leaders, and *owners/lessors of the course or facilities owners (which may include state and local governmental entities).*

7-AA-1317 (emphasis added). The express Assumption of Risk provision goes on to state that, "In consideration for being allowed to participate in the Event, I hereby assume all risks associated with the Event, even those risks which are not reasonably foreseeable at this time. 7-AA-1317 (emphasis in the original).

[2] The Release defines the "Event" to cover both the "7-day event" and the "preseason training rides and activities leading up to the 7-day event." 7-AA-1317.

*Second*, the "Waiver and Release" provision releases from liability "the owners/lessors of the course or facilities used in the Event" for all bodily injury that a cyclist may suffer. It states:

> To the maximum extent permitted by law, I hereby release, waive, forever discharge and covenant not to sue the Releasees (as defined in the next sentence) from all liabilities, claims, costs, expenses, damages, losses and obligations, of any kind or nature (whether in law or in equity) (collectively, the "Released Liabilities"), which may arise or result (either directly or indirectly) from my participation in the Event. *"Releasees means . . . (B) the owners/lessors of the course or facilities used in the Event* . . ., and (D) the directors, officers, officials, employees, and agents of the entities listed in (A)-(C).

7-AA-1317 (emphasis added).

*Third*, the Release contains an indemnification clause requiring cyclists "to indemnify and hold harmless" the released entities from all claims and liabilities. It provides:

> I hereby agree to indemnify and hold harmless the Releasees from all liabilities, claims, costs, expenses, damages, losses and obligations, of any kind or nature (whether in law or in equity) (collectively, the "Claims"), which may arise or result (either directly or indirectly) from my participation in the Event.

7-AA-1317. Whitehead signed the Release before embarking on the March 25, 2017 training ride. 7-AA-1326.

### C. Whitehead knew that potholes are a common hazard of long-distance cycling.

ALC participants understand that cycling on city streets is an inherently dangerous activity. In fact, the ride leader for the March 25 ride, Guru Swamy, testified that,

> I go in with the understanding that, hey, this is dangerous. I have to take care of myself, be careful where I'm going and follow the safety rules that are being told to me. So yes, it is, and we say that as part of a training ride. It is dangerous.

7-AA-1305-1306. Moreover, multiple witnesses acknowledged that it's quite common to encounter potholes while cycling. 7-AA-1291, 1332, 1368. Even Whitehead admitted that he encountered them and that he "would probably come across one often." 7-AA-1275-1276. The City's expert, Gerald Bretting, an engineer with extensive experience in bicycling and bicycle-accident analysis, likewise testified that potholes are prevalent on city streets throughout California and they are a well-recognized risk of organized long-distance bicycle rides. 7-AA-1242. He explained that organizers of recreational rides will often inspect the course in advance to mark potholes and pavement defects in an effort to warn the cyclists. 7-AA-1242. ALC does not require ride leaders to do a pre-inspection of a planned training-ride course, but some do. 7-AA-1288-1289, 1292, 1298, 1366-1367. Swamy, the ride leader for the training ride at issue here, did not survey the route in advance, and he was not aware of anyone else having done so. 7-AA-1292, 1298. He also did not notify the City that the training ride would be taking place. 7-AA-1311-1312.

### D. Whitehead hit a pothole while cycling at a high rate of speed and fell off his bike, seriously injuring himself.

The route that Whitehead and his fellow ALC cyclists took included a portion of Skyline Boulevard in Oakland. This is a fairly remote area on the outskirts of the City. 7-AA-1255.

Whitehead was cycling on a straight downhill at about 30 miles per hour on Skyline near its intersection with Grass Valley Road when he hit a pothole. 8-AA-1460. A driver traveling behind Whitehead testified that the section of Skyline where Whitehead fell was "straight and clear." 2-AA-187-188. In addition, there were multiple traffic indicators warning people to slow down, including rumble strips several hundred feet uphill from where Whitehead fell; a right-turn arrow with a 15 MPH sign nearly adjacent to where he fell; and a right-turn arrow sign and blinking yellow lights not far from where he fell. 7-AA-1254.

The pothole that Whitehead hit was approximately one to two inches deep, 18 inches across, and 14 inches in length with a roughly triangular shape. 7-AA-1241-1242. Whitehead's front tire "went down sharp," his bike came to a stop, and he flipped forwards, hitting his head on the ground. 2-AA-195-197.

Potholes can develop at any time. It can take months, weeks, or even just days. 1-AA-78. The pothole in question was never reported to the City and how long it existed is unknown. 1-AA-83-84, 120-121. The risk of potholes forming is most acute during the rainy season, and the winter of 2016-2017 was particularly wet. 1-AA-78; 7-AA-1255. At least two ALC riders testified they knew rainy weather can cause potholes. 1-AA-151-152; 7-AA-1332-1333. It is even part of ALC's standard pre-ride safety instructions to caution cyclists about the degrading effect rain has on pavement. 1-AA-151-152. One witness testified that ALC ride leaders had been "cautioning everybody to ride with

care and that there are a lot of potholes and road conditions." 1-AA-151-152.

### E. The City has a comprehensive policy for repairing potholes as quickly as possible depending on their level of urgency.

Oakland has approximately 830 miles of streets and slightly over 2,000 lane miles. 1-AA-75. As described below, the City endeavors to maximize its limited resources for the upkeep of its pavement. It also prioritizes repairing potholes on those streets where bicyclists are most likely to ride.

The City has a Pavement Management Program overseen by its Department of Transportation, through which it visually inspects its streets every two years consistent with industry standards. 1-AA-75. Further, to plan and manage its preventative maintenance efforts, the City uses an accepted software program that takes account of data obtained through the biennial visual inspection, the budget available for pavement maintenance, and the types of City streets (arterial, collector, and residential) to prioritize re-paving projects. 1-AA-75-76.

Once the software has generated its list of priorities, the City considers a range of other factors to most fairly and efficiently manage re-paving projects. 1-AA-76. For example, the City prioritizes streets with existing bike routes or other bikeways when choosing between streets of otherwise equal priority. 1-AA-76. It also considers: (1) proximity to schools; (2) curb ramp and sidewalk repairs to further compliance with the Americans with Disabilities Act; (3) coordination with AC Transit regarding optimizing bus service; (4) coordination with utilities to

share the cost of repaving after construction work; and (5) social equity concerns to help ensure underserved communities are being fairly treated. 1-AA-76.

The City does not maintain an inventory of all potholes on its streets. 1-AA-86. Given that potholes are constantly forming (and being repaired), no such list could ever be current. What's more, the City cannot realistically know of every single pothole on each of its 830 miles of streets. It would be neither feasible, nor desirable, to devote personnel to constantly canvassing streets in search of potholes. Instead, the City relies primarily on the public, as well as its work crews and employees in other City departments, to alert it to potholes. 7-AA-1252. The lack of a comprehensive pothole index is not unique to Oakland. The City's engineering expert, who specializes in pavement evaluation, rehabilitation, and maintenance, attested that no agency he knows of keeps an inventory of existing potholes or proactively inspects its streets for them. 1-AA-121-122.

The City's budget for maintaining and repairing its pavement is necessarily limited. Its funding for this purpose comes primarily from the federal and state governments, as well as taxes on voters, and is therefore largely out of the City's control. 1-AA-76-77. In November 2016, Oakland voters approved issuance of $350 million in infrastructure maintenance bonds, known as Measure KK, funded through an ad valorem tax. 1-AA-76-77. And in 2017, California's Legislature passed SB 1. 1-AA-76-77. Both of these provide additional funding for maintaining the City's streets. 1-AA-77.

Between fiscal years 2011-2012 and 2015-2016, the City received an average of 12,820 notifications of potholes per year. 1-AA-84. In an average year, its work crews repair approximately 6,000-8,000 potholes and other pavement defects. 1-AA-84. As Measure KK funding became available in 2020, the City performed more than 12,000 repairs of potholes and other pavement defects. 1-AA-84.

Finally, relative to the number of bicyclists on its streets, the City has received a very small number of personal-injury claims relating to cyclists allegedly injured by potholes. Approximately 10,000 bicyclists travel on its streets each weekday, which equates to more than 2.5 million bicycle trips per year. 1-AA-96. But the City's data for the period in question shows that it receives only about 2.24 bicycle-related personal-injury claims per year involving potholes. 1-AA-96. This is likely at least in part due to the City's efforts to quickly repair potholes that may impact cyclists. For example, potholes within *bike lanes* are assigned a priority level of one and potholes within *bike routes*—streets without bike lanes in which cyclists share the road with other vehicles—are assigned priority level two. 7-AA-1252. Priority one potholes are to be repaired within one to five days of the City being notified about them and priority two potholes are to be repaired within a matter of weeks. 7-AA-1252-1253. Further, staff with the City's Department of Transportation meet periodically with Bike East Bay, a local coalition promoting bicycling in Oakland and the East Bay. 1-AA-76. Each month, Bike East Bay submits a list of its top 10 potholes it believes

should be repaired and those are always assigned a priority level one. 1-AA-76; 7-AA-1252.

### F. The trial court granted summary judgment to the City based on the Release Whitehead signed and the Court of Appeal unanimously affirmed.

Whitehead filed this lawsuit on March 9, 2018, alleging one cause of action for a dangerous condition of public property in violation of Government Code section 835, and a second cause of action for public-employee liability under Government Code section 840, *et seq*. 1-AA-12-19.

The City moved for summary judgment in October 2019, arguing, among other things, that Whitehead could not prevail on his claims as a matter of law because he could not establish that the City had actual or constructive notice of the Skyline pothole, and because the doctrine of primary assumption of the risk barred him from recovering. 4-AA-736-743. The trial court found triable issues of fact as to each of these contentions and denied the City's motion as to Whitehead's first cause of action for a dangerous condition of public property. 4-AA-736-743. The court, however, permitted the City to renew its primary-assumption-of-the-risk argument in a subsequent summary-judgment motion. 4-AA-743. The court also dismissed Whitehead's second cause of action for public-employee liability, which Whitehead did not oppose. 4-AA-743.

After it filed its first motion for summary judgment, the City discovered that Whitehead signed the Release the morning of the training ride. In September 2021, the parties cross-moved for summary judgment. The City argued the Release barred

Whitehead's remaining claim, while Whitehead argued the Release was void as a matter of law. 10-AA-1944-1953. The City also renewed its primary-assumption-of-the-risk argument. The trial court sided with the City, concluding that the Release was valid and enforceable and eliminated Whitehead's ability to recover. 10-AA-1949-1953. Having resolved the case on the basis of the Release, the trial court did not reach the primary-assumption-of-the-risk issue.

Whitehead then appealed the judgment. The First District unanimously affirmed the trial court's conclusion that the Release is valid and enforceable "because the cycling event was a nonessential sports activity that did not affect the public interest within the meaning of Civil Code section 1668." (*Whitehead v. City of Oakland* (2024) 99 Cal.App.5th 775, 784.) The Court also rejected Whitehead's arguments concerning how *Tunkl* should be applied as "off the mark and unconvincing." (*Ibid.*) The Court first explained that the relevant focus of the public-interest analysis is the "*transaction* for which the release [is] given." (*Id.* [italics in original].) It went on to hold:

> [P]laintiff cannot escape the *Tunkl* analysis by simply focusing on defendant's allegedly negligent maintenance of a public road and altogether ignoring that he signed the release to participate in a recreational event. Indeed, he is suing defendant for its allegedly negligent maintenance of a public road that was specifically selected as part of the AIDS LifeCycle training system for group training purposes.

(*Id.* at p. 785.)

Having concluded that the Release bars Whitehead's action, the Court of Appeal did not reach the City's primary-assumption-of-the-risk argument.[3]

## ARGUMENT

### A. Standard of review

This Court reviews grants of summary judgment de novo. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.) In addition, the meaning of the Release is a question of law to which this Court also gives independent review. (*Truck Ins. Exch. v. Kaiser Cement* (2024) 16 Cal.5th 67, 91.)

### B. The Release Whitehead signed is valid and enforceable because it facilitated his participation in a voluntary and non-essential sporting activity.

A party may waive the right to recover for negligence provided the "transaction" for which the release is given does not implicate the public interest. Although what constitutes the "public interest" can be difficult to pin down, no lower court has ever held that a release executed as a condition of participating in a recreational activity—like the training ride here—affects the public interest. All such releases have been enforced because recreational activities are not something people have no choice but to engage in. Whitehead could have elected to skip the training ride if he did not want to sign ALC's Release. Further, the City never had any control over the training ride or how

[3] If this Court were to reverse the judgment, the City would continue to press its primary-assumption-of-the-risk argument on remand.

Whitehead cycled. He was fully in charge of himself and his bicycle throughout the ride and he, not the City, was therefore in the best position to assume the risk of negligence. All these issues are discussed in more detail below.

### *1. Under this Court's precedent, if a transaction requires a party to waive ordinary negligence liability, that waiver is enforceable so long as the transaction does not implicate the public interest.*

California prescribes by statute that contracts exempting parties from liability for their own negligence are against the policy of the law. (Civ. Code, § 1668.[4]) It has long been held that consistent with the "policy of the law," contracts releasing future ordinary negligence claims are valid and enforceable provided they do not affect "the public interest." (*Tunkl*, *supra*, 60 Cal.2d at p. 96.)

*Tunkl* involved a medical-malpractice action brought against UCLA Medical Center and the Regents of the University of California. Hugo Tunkl sought medical treatment at the hospital. (*Id.* at p. 94.) As a condition of his admission, he was required to sign a release agreeing to exempt the hospital and the Regents from liability for any negligence committed by the hospital's employees. (*Id.*) The question before this Court was

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[4] Civil Code section 1668 reads in full: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

whether the release was enforceable. The Court held it was not. (*Id.* at p. 101.)

In surveying the case law construing Civil Code section 1668, *Tunkl* deemed the cases "uniform" insofar as they "consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.'" (*Id.* at p. 96.) But "the public interest" is not susceptible to any precise definition and indeed, the Court noted it had long been a "subject of great debate" and its meaning "has ranged over the whole course of the common law." (*Id.* at p. 98.) The Court did not attempt to set forth an exact definition of "the public interest," but merely identified non-exclusive "characteristics," the presence of at least some of which could mean that a given release implicates the public interest and is therefore invalid. (*Id.* at pp. 98-101.) These characteristics include the following:

> (1) "[The contract] concerns a business of a type generally thought suitable for public regulation."
>
> (2) "The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public."
>
> (3) "The party holds himself out as willing to perform this service for any member coming within certain established standards."
>
> (4) "As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services."

(5) "In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence."

(6) "Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

(*Id.* at pp. 98-101.)

*Tunkl* made clear that these public-interest factors apply to the "transaction" at issue, by which it meant the subject matter of the release. (*Id.* at pp. 98-101.) The "transaction" there was "the hospital-patient contract," which the Court held "clearly falls within the category of agreements affecting the public interest." (*Id.* at p. 101.) The hospital was subject to public regulation; its services were crucial to the public; it held itself out as willing to perform services for any members of the public who qualified; the public lacked the ability to bargain with the hospital; and finally, after signing the contract, patients were completely under the hospital's control." (*Id.* at p. 102.)

Besides setting forth the public-interest characteristics, *Tunkl* made two observations critical to determining whether an exculpatory provision is void.

*First*, it expressly held that "private, voluntary transactions" *do not* implicate the public interest:

> While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to

> shoulder a risk which the law would otherwise have placed upon the other party, the above circumstances [referring to contracts that exhibit the identified public-interest characteristics] pose a different situation.

(*Id.* at p. 101.)

*Second*, *Tunkl* explained that the law permits the risk of negligence to shift from the negligent actor to the innocent party who agrees to assume the risk when the latter party is either "better or equally able to bear" that risk. (*Id.*)

To sum up, then, a release executed in the context of a "private, voluntary transaction[]" in which the injured party is at least "equally able to bear" the risk of the tortfeasor's negligence is not contrary to public policy and is therefore valid and enforceable. (*Id.*) The outcome in *Tunkl* makes sense in view of these additional considerations. Hugo Tunkl could not "voluntar[ily]" enter into the release because he needed the medical care offered by the hospital. What's more, he was not "better or equally able to bear" the risk that the hospital would negligently treat him because he could not do anything to reduce or mitigate that risk; he was completely at the mercy of the hospital's doctors.

#### *2. A release does not implicate the public interest unless the transaction at issue is an "essential" one on which the public necessarily must rely.*

In the decades since *Tunkl* was decided, courts have invalidated release agreements only where the transaction giving rise to the release involved a service "essential" to the public—

i.e., something the public necessarily requires access to as part of modern life. So, for example, releases demanded as a condition of obtaining health care, housing, daycare, and escrow and car-repair services have all been held unenforceable under *Tunkl*. (See e.g., *Belshaw v. Feinstein* (1968) 258 Cal.App.2d 711 [medical care]; *Akin v. Business Title Corp.* (1968) 264 Cal.App.2d 153 [escrow services]; *Henrioulle v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512 [rental housing]; *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713 [car-repair services]; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551 [rental of boat berths]; *Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662 [daycare].)[5]

In *Henrioulle*, for example, the plaintiff fractured his wrist when he tripped over a rock on a common stairway in his apartment building. (*Henrioulle*, *supra*, 20 Cal.3d at p. 515.) In the ensuing lawsuit, the landlord defended by pointing to the exculpatory provision in the parties' rental agreement requiring

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[5] The limited circumstances in which *Tunkl* has been applied to invalidate release agreements is consistent with this Court's longstanding rule that contracts should not be voided as contrary to public policy "unless it is entirely plain that a contract" is in fact contrary to public policy. (*Jensen v. Traders & General Ins. Co.* (1959) 52 Cal.2d 786, 794.) "'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and . . . should be exercised only in cases free from doubt.'" (*City of Santa Barbara v. Super. Ct.* (2007) 41 Cal.4th 747, 777 n. 53 [quoting *Jensen*, *supra*, 52 Cal.2d at p. 794]; see also *Moran v. Harris* (1982) 130 Cal.App.3d 872, 919 [explaining that because "public policy" is often defined in a "subjective" and "amorphous" way, "courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts"].)

tenants to release all liability for personal injuries they might sustain in the building's common areas. (*Id.*) This Court invalided the release, reasoning that "lessor[s] of residential property provide[] . . . a basic necessity of life." (*Id.* at p. 518.)

Likewise, in *Gardner*, *supra*, 180 Cal.App.3d at p. 713, the court held that a release exculpating a car-repair shop for liability from the theft of the plaintiff's car while it was at the shop was contrary to public policy and void under *Tunkl*. The court explained that "[t]he modern citizen lives . . . by the automobile" and "[m]embers of the general public need cars" to, among other things, get to work and to go to "the stores where they can purchase the necessities . . . of life." (*Id.* at p. 718.)

And finally, in *Gavin W.*, *supra*, 106 Cal.App.4th at pp. 666-667, the parents of a four-year-old boy sued his daycare provider (the YMCA) for negligently failing to protect their son from the inappropriate sexual touching of another child. The YMCA relied on its release agreement to argue the suit should be dismissed, but the court held the release agreement was invalid under *Tunkl*. (*Id.* at pp. 670-676.) It reasoned that "without question, child care services are of vital importance to the public, and a matter of practical necessity for most working parents in California." (*Id.* at p. 671.)

In each of these cases, the plaintiffs had no choice but to acquiesce to the releases because the subjects of each transaction—housing, auto maintenance, and daycare—are essential to modern living. The releases were thus compulsory, not voluntarily given. (*Tunkl*, *supra*, 60 Cal.2d at p. 101

["[O]bviously no public policy opposes private, voluntary transactions" that shift the risk of negligence from the tortfeasor to the injured party.].) Indeed, the *Gardner* court described the *Tunkl* analysis as boiling down to this central question:

> Is the service merely an optional item consumers can do without if they don't want to waive their rights to recover for negligence or is it something they need enough so they have little choice if the provider attaches a liability disclaimer?

(*Gardner*, *supra*, 180 Cal.App.3d at p. 718.) Housing, car-repair shops, and daycare are not "optional item[s] consumers can do without." (See *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 343 ["When referring to 'essential services' the court in *Tunkl* clearly had in mind medical, legal, housing, transportation or similar services which must *necessarily* be utilized by the general public."].)[6]

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[6] *Pelletier*, *supra*, 188 Cal.App.3d at pp. 1555-1557, relied on by Whitehead and discussed in more detail below, held that a release agreement between a yacht harbor and a boat owner was invalid as against public policy under *Tunkl* because for boat owners, "the availability of berths in harbors is a matter of practical necessity." (*Id.* at p. 1555.) In other words, yacht harbors should not be able to take advantage of boat owners' need for berths by forcing them to sign negligence waivers. A place to anchor one's boat is not on par with housing, daycare, or car-repair shops, but *Pelletier* makes sense if the "essential" nature of a transaction is assessed according to an individual's subjective needs. At least one court, however, has suggested that the *Pelletier* analysis is incorrect, albeit without explicitly referring to *Pelletier*. In *Booth v. Santa Barbara Biplanes Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179-1180, the court explained that whether the public interest is implicated "is tested *objectively*, by

Further, the plaintiffs in these cases could not bear the risk of negligence as well as the tortfeasors. (*Tunkl*, *supra*, 60 Cal.2d at p. 101 [explaining that the risk of negligence may be permitted to shift "to another party better or equally able to bear it."].) Nothing they did would reduce the risk of being harmed. The car owner had no control over his car while it was parked in the repair shop's garage; the parents had no ability to prevent their child from being inappropriately touched at daycare while they were working; the tenant had no choice but to use the common steps of the apartment building to get to and from his unit; and of course, Hugo Tunkl had no control over his body or health once he was admitted to the hospital and sedated.. (*Gardner*, *supra*, 180 Cal.App.3d at p. 715; *Gavin W.*, *supra*, 106 Cal.App.4th at p. 666; *Henrioulle*, *supra*, 20 Cal.3d at p. 515; *Tunkl*, *supra*, 60 Cal.2d at p. 95 n.1.)

In each of the foregoing situations, the plaintiffs were at the mercy of the tortfeasors. Prohibiting tortfeasors from shifting the risk of negligence to injured parties when the latter have no ability to avoid that risk is in keeping with the basic tort principle that those who cause harm should pay for that harm. But anticipatory releases shifting liability from tortfeasors to victims are, and should be, enforced when the injuries occurred not as a result of the victims being thrust into situations that robbed them of all control, but when they instead made a voluntary choice to engage in an elective activity. As described in

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the activity's importance to the *general public*, not by its subjective importance to the particular plaintiff."

more detail below, that is precisely the situation here. Whitehead was free to participate in the training ride (or not) and once he decided to do so, he retained control over his body and his bicycle at all times.

### *3. A consistent, unbroken line of cases holds that releases entered into as a condition of participating in recreational activities do not affect the public interest.*

While invalidating releases that relate to the kinds of "essential" activities described above, courts have *uniformly* upheld releases given to participate in recreational and sporting events. In every one of these cases—at least 20 published cases by the City's count—courts have concluded that the public interest is not implicated when someone signs a release as a condition of participating in a voluntary recreational activity. As one court put it, "California courts have consistently declined to apply the *Tunkl* factors to invalidate exculpatory agreements in the recreational sports context." (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 29; see also *Capri v. L.A. Fitness Internat., LLC* (2006) 136 Cal.App.4th 1078, 1084 [same]; *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, 1259 [same]; *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1376 [same].) Indeed, in 2007, this Court expressly noted that the lower courts routinely uphold release agreements "in the context of sports and recreation programs, on the basis that such agreements do not concern necessary services," and therefore are "purely private matters" that do not "implicate the 'public

interest' under *Tunkl*." (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 759.)[7]

Contractual releases of negligence liability have been deemed *not* to affect the public interest in such diverse recreational activities as motorcycle racing, parachute jumping, dirtbike riding, scuba diving, hypnotism, whitewater rafting, horseback riding, swimming, skiing, marathon running, aerial sightseeing, the use of fitness centers, a senior-citizens social program, high-school football teams, and organized bicycle racing. (See e.g., *McAtee v. Newhall Land & Farming Co.* (1985) 169 Cal.App.3d 1031, 1034-1035 [motorcycle racing]; *Hulsey*, *supra*, 168 Cal.App.3d at pp. 342-343 [parachute jumping]; *Coates*, *supra*, 191 Cal.App.3d at p. 8 [dirtbike riding]; *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606, 610-612 [dirtbike riding]; *Madison v. Super. Ct.* (1988) 203 Cal.App.3d 589, 598-599 [scuba diving]; *Hohe v. San Diego Unified School Dist.* (1990) 224 Cal.App.3d 1559, 1562-1564 [hypnotism]; *Buchan v. United States Cycling Federation* (1991) 277 Cal.App.3d 134, 145-151 [bicycle racing]; *Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 763-764 [whitewater rafting]; *Guido v. Koopman* (1992) 1 Cal.App.4th 837, 841-842

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[7] Granted, *City of Santa Barbara* concerned whether a contractual release of *gross negligence*, not ordinary negligence, is enforceable. That said, the Court of Appeal in *City of Santa Barbara* unanimously concluded the release of the public entity there was enforceable insofar as it exculpated defendants for ordinary negligence. (41 Cal.4th at p. 750.) Nothing this Court said suggested that holding—or the large body of law of which it was (and is) a part—was incorrect.

[horseback riding]; *Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 724-726 [horseback riding]; *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 161-162 [swimming]; *Capri*, *supra*, 136 Cal.App.4th at pp. 1082-1084 [swimming]; *Allan*, *supra*, 51 Cal.App.4th at p. 1376 [skiing]; *Platzer*, *supra*, 104 Cal.App.4th at pp. 1256-1259 [ski chair lift]; *Hass*, *supra*, 26 Cal.App.5th at pp. 29-31 [half marathon]; *YMCA of Metropolitan Los Angeles*, *supra*, 55 Cal.App.4th at pp. 24-28 [senior-citizens recreational program]; *Booth*, *supra*, 158 Cal.App.4th at pp. 1178-1180 [aerial sightseeing]; *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 637-638 [use of rowing machine]; *Brown v. El Dorado Union High School District* (2022) 76 Cal.App.5th 1003, 1023-1027 [high school football team].) After citing just a few of these authorities, one court commented that "[t]he principle [that releases involving recreational activities do not fail under *Tunkl*] is by now too well established to need further citation of authority . . . ." (*Lewis Operating Corp. v. Super. Ct.* (2011) 200 Cal.App.4th 940, 947.)

The reasoning reflected in this mountain of case law is intuitively and logically correct: Recreational pursuits are not activities "of great importance to the public," nor are they "a matter of necessity" to anyone. (*Hulsey*, *supra*, 168 Cal.App.3d at pp. 342-343.) The participants voluntarily choose to undertake the activity at issue; nothing compels their participation. (See e.g., *Madison*, *supra*, 203 Cal.App.3d at p. 599.) And if they do not want to waive their rights to recover for negligence, they easily can forego participating—recreational activities are not

something the participants "need enough so they have little choice if the provider attaches a liability disclaimer[.]" (*Gardner*, *supra*, 180 Cal.App.3d at p. 718.)

In *City of Santa Barbara*, this Court noted that most other States have adopted the same legal rule, i.e., that releases of ordinary negligence in the recreational context are enforceable. (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 759 n.18.) Similarly, one treatise explains that, "There are a large and growing number of jurisdictions upholding exculpatory contracts in sporting event situations . . . ." (2 Modern Tort Law: Liability and Litigation § 21:24 (2d ed.).) [8] As the Utah Supreme Court has stated, "We now join other states in declaring, as a general rule,

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[8] At least all the following States have upheld recreational releases against public-interest challenges: Massachusetts, New Jersey, New Hampshire, Vermont, Utah, Colorado, Ohio, Wyoming, Minnesota, Arkansas, New Mexico, Tennessee, Maryland, Washington, and Florida. (See *Sharon v. City of Newton* (2002) 437 Mass. 99, 105; *Cahalane v. Skydive Cape Cod, Inc.* (2018) 93 Mass.App.Ct. 1118 (Table-Rule 1:28 Decision); *Stelluti v. Casapenn Enterprises, LLC* (2010) 203 N.J. 286; *Ladue v. Pla-Fit Health, LLC* (2020) 173 N.H. 630; *McGrath v. SNH Development, Inc.* (2009) 158 N.H. 540; *Provoncha v. Vermont Motocross Association, Inc.* (2009) 185 Vt. 473; *Pearce v. Utah Athletic Foundation* (2008) 179 P.3d 760; *Chadwick v. Colt Ross Outfitters, Inc.* (2004) 100 P.3d 465; *Jones v. Dressel* (1981) 623 P.2d 370; *Zivich v. Mentor Soccer Club, Inc.* (1998) 82 Ohio St.3d 367; *Milligan v. Big Valley Corp.* (1988) 754 P.2d 1063; *Schlobohm v. Spa Petite, Inc.* (1982) 326 N.W.2d 920; *Plant v. Wilbur* (2001) 345 Ark. 487; *Peck v. G-Force Gymnastics Academy, LLC* (2024) _ P.3d _; 2023 WL 3408223; *Henderson v. Quest Expeditions, Inc.* (2005) 174 S.W.3d 730; *Seigneur v. National Fitness Institute, Inc.* (2000) 132 Md.App. 271; *Boyce v. West* (1993) 71 Wash.App.657; *Banfield v. Louis* (1991) 589 So.2d 441.)

that recreational activities do not constitute a public interest and that therefore, preinjury releases for recreational activities cannot be invalidated under the public interest exception." (*Pearce v. Utah Athletic Foundation* (2008) 179 P.3d 760, 766 [citing cases from Colorado, Connecticut, Minnesota, Tennessee, and Wyoming].)[9]

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[9] In *City of Santa Barbara*, this Court observed that Vermont, Connecticut, West Virginia, Washington, Virginia, and New York have deemed releases of ordinary negligence in certain recreational contexts invalid. (41 Cal.4th at p. 771.) New York, for instance, has a statute prohibiting release agreements between gym operators and places of "amusement or recreation or similar establishment[s]" and their paying members. (*Id.* [citing N.Y. Gen. Oblig. Law, § 5-326].) But that statute is not so broad as to make unenforceable *all* New York releases of ordinary negligence that are executed in the context of recreational activities. In a case decided by one of New York's intermediate court of appeals, for example, the court upheld a negligence release signed by a plaintiff injured during a bicycle race in Central Park. (*Schwartz v. Martin* (2011) 82 A.D.3d 1201.) The court held that the release "clearly and unequivocally expressed the intention of the parties to relieve" the defendants, *including New York City*, from liability for their own negligence. (*Id.* at p. 1203.) It also held that the state statute prohibiting releases between places of recreation and their paying members was inapplicable because the plaintiff did not pay a fee to use Central Park. (*Id.*) In the same vein, a release executed by a runner in a New York City marathon that exculpated the City was enforced because "the public roadway in Brooklyn where the plaintiff alleges he was injured is not a place of amusement or recreation." (*Brookner v. New York Roadrunners Club, Inc.* (2008) 51 A.D.3d 841, 842 [internal quotation marks omitted].)

#### *4. Whitehead chose to take part in the training ride, he remained in control of himself and his bicycle at all times, and he was able to shoulder the risk of negligence at least as well as the City.*

Here, there can be no doubt that when Whitehead signed the Release and embarked on the training ride, he was participating in a purely voluntary recreational activity. No matter how much he may enjoy long-distance cycling, it is a hobby, not something that is essential for him or anyone else. (*Buchan*, *supra*, 227 Cal.App.3d at p. 151; *Booth*, *supra*, 158 Cal.App.4th at pp. 1179-1180.) Cycling with his fellow ALC riders was entirely "optional." (*Gardner*, *supra*, 180 Cal.App.3d at p. 718.) And if Whitehead did not want to waive his right to recover for negligence, he could have said "no thanks" to the Release agreement without experiencing any negative repercussions and then either not cycled that day or cycled by himself. Under *Tunkl* and its progeny, Whitehead's participation in a non-essential and voluntary long-distance bicycle ride did not implicate the public interest. The Release is therefore enforceable.

Moreover, Whitehead was able to shoulder the risk of negligence at least as well as, and arguably better than, the City. (*Tunkl*, *supra*, 60 Cal.2d at p. 101.)

For its part, the City was given no advance notice that the training ride, with its over forty cyclists, was going to take place. It had no opportunity to advise the ride organizers about any potentially hazardous conditions—assuming the City knew about them—or to suggest an alternative route that might have been safer. ALC selected the day and time of the ride, as well as the

route. ALC determined who could participate in the ride and how it would proceed, and ALC was the cyclists' exclusive source of information that day on the nature of the course and the pitfalls they should be vigilant about. The training ride occurred at ALC's sole direction. The City was completely in the dark.[10]

In contrast to the City's lack of knowledge and control over the training ride, Whitehead was never out of control. It was entirely up to him to decide whether to participate in the training ride and once he chose to do so, he was exclusively in charge of himself and his bicycle. He decided how fast or slow to cycle, where to cycle on the street, when to take breaks, etc. When he hit the pothole, he was cycling downhill at approximately 30 miles per hour, despite multiple traffic warnings to slow down. 2-AA-187-188; 7-AA-1254; 8-AA-1460. At most, the City was a passive provider of the public streets with no knowledge of how or when Whitehead and his fellow ALC cyclists used them, and no capacity to influence, let alone control, Whitehead's cycling. As described above, it is only in circumstances in which plaintiffs are forced to rely on others for their most important needs that courts have invalidated negligence waivers. (See e.g. *Gardner*, *supra*, 180 Cal.App.3d at p. 715; *Gavin W.*, *supra*, 106 Cal.App.4th at p. 666; *Henrioulle*, *supra*, 20 Cal.3d at p. 515.)

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[10] The "open" nature of the route here put the City at an acute disadvantage. It meant that ALC was able to select which of the 830 miles of City streets it wanted to take for the training ride. But the City cannot possibly be aware of every pothole on all 830 miles of City streets, especially where pavement, by its very nature, is continuously cracking and degrading. 1-AA-75, 78.

Relatedly, Whitehead was a devoted long-distance cyclist who had participated in three prior ALC rides from San Francisco to Los Angeles, was certified by ALC as a Training Ride Leader, and typically spent every Saturday and Sunday on long rides. 2-AA-212, 214, 232-236; 7-AA-1270, 1273-1274, 1280-1284, 1316, 1330-1331. He knew that cycling was dangerous and that one of those dangers was the risk of being injured by a pothole. 7-AA-1275-1276. He could have surveyed the planned route in advance (as ALC training-ride leaders sometimes did), reduced his speed while cycling, or taken other precautions.

This is not to suggest that Whitehead was reckless or even negligent while cycling. He could have done everything as safely as possible and still been gravely injured. That's because long-distance cycling is a known dangerous activity. Indeed, "organized, long-distance bicycle rides on public highways with large numbers of riders involve . . . risks not generally associated with . . . individual bicycle riding on public streets or on bicycle lanes or paths." (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1221.)

What all this establishes is that Whitehead was in the best position to minimize his risk of injury—especially since the City did not know the training ride was even happening. He therefore was at least as capable as the City of assuming the risk of negligence. (*Tunkl*, *supra*, 60 Cal.2d at p. 101.) For this reason too, the Release is valid and enforceable.

### *5. The well-reasoned decision in Okura is directly on point.*

The Court of Appeal correctly held that "[t]his case is materially indistinguishable from" *Okura v. United States Cycling Federation* (1986) 186 Cal.App.3d 1462. (*Whitehead*, *supra*, 99 Cal.App.5th at p. 784.) There, Okura was injured when his bicycle collided with debris while he was participating in a closed-course race in Hermosa Beach. (*Okura*, *supra*, 186 Cal.App.3d at p. 1464.) As a condition of his participation, Okura was required to release any claims for personal-injury damages he might sustain against Hermosa Beach as a result of the race. (*Id.* at p. 1465.)

Applying the *Tunkl* factors, the court concluded that bicycle racing does not affect the public interest and it therefore upheld the release. It explained that: (1) organized bicycle racing is not the subject of public regulation; (2) "[t]here is no compelling public interest in facilitating sponsorship and organization of the leisure activity of bicycle racing for public participation;" (3) taking part in the race was not "essential," but something people could choose to do; (4) *Tunkl*'s mention of adhesion contracts was inapplicable because the release concerned "a voluntary relationship between the parties;" and (5) the plaintiff maintained "complete control of himself and his bicycle" and he could have dropped out of the race at any time. (*Id.* at pp. 1467-1468.)

Just as in *Okura*, Whitehead's voluntary decision to undertake the ALC training ride was not essential for him or

anyone else, let alone the public at large. Organized long-distance bicycle rides are not a matter of public regulation and "[t]here is no compelling public interest in facilitating" them. (*Id.* at p. 1467.) What's more, Whitehead's decision to participate in the training ride did not place him under the City's control. He remained in charge of himself and his bicycle and was free to cycle as he saw fit and continue with the ride or leave it at any time. Consistent with *Okura*, the court below correctly deemed ALC's Release "valid and enforceable because the cycling event was a nonessential sports activity that did not affect the public interest . . . ." (*Whitehead*, *supra*, 99 Cal.App.5th at p. 784.)

Whitehead attempts to distinguish *Okura* on a number of grounds. None are persuasive.

First, he notes that *Okura* involved a bicycle race, whereas this case involved a long-distance training ride. There is no rational distinction to be drawn between the two. Both are recreational activities, not essential public services, and people are entirely free to participate in them or not.

Next, Whitehead says *Okura* is inapposite because the bicycle race there took place on a closed course that the City of Hermosa Beach allegedly failed to properly prepare and maintain. Here, on the other hand, Oakland did not close any streets and the ALC riders cycled where and as they saw fit. Whitehead reasons that as a result of creating the closed course, Hermosa Beach directly facilitated a recreational activity, and that enforcing the release was therefore appropriate. Because Oakland played no similar role in selecting and supervising the

route the ALC riders took, he contends the City *did not* facilitate a recreational event.

The closed course versus open course distinction does not justify upholding the release in *Okura* but invalidating the Release here. Both situations involve voluntary participation in a non-essential sporting activity. Further, according to Whitehead's analysis, if the City had a hand in selecting or pre-approving the training-ride route—something it never had an opportunity to do because ALC did not inform the City about the ride—it would have facilitated the cycling event similar to how Hermosa Beach did and the Release would therefore have been valid. That's a stick-thin basis on which to determine that one release is enforceable and the other is not, and it has no connection to any of the concerns animating *Tunkl*.

Moreover, the opposite inference from the one Whitehead draws is far more convincing. Hermosa Beach was in a far better position, compared to Oakland, to learn about and remediate any dangerous conditions on a closed course it was responsible for creating. By comparison, Oakland was operating at a significant handicap—it had no advance knowledge of the training ride and all 830 miles of its city streets were fair game for ALC to choose as part of its route. To conclude that Hermosa Beach should be relieved of liability but Oakland should bear it—despite the former city's superior ability (and incentive) to detect potentially dangerous conditions—is illogical.

Finally, Whitehead argues that the pothole he hit was dangerous to all users of the road (a fact Oakland disputes) and

enforcing the Release will disincentivize the City to properly care for the public rights of way. That is not true. Of course Oakland, including its elected leaders, wants its streets to be as safe as possible for all users. State law permitting injured persons to sue for dangerous conditions of public property provides all the incentive any public entities need to maintain their streets as effectively as possible.[11] At the same time, no city, including Oakland, has unlimited resources to devote to this challenging task. Pavement inevitably degrades over time—there is no stopping that. Oakland has a comprehensive plan for repaving streets and repairing potholes that takes account of the needs of different community constituencies, from cyclists to disadvantaged neighborhoods. The City is not a guarantor of the public rights of way, however, and it cannot ensure that all its streets are pothole free at all times. (*Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 518.)

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In sum, this case falls well within the longstanding and uniform body of case law holding that people who choose to participate in recreational activities like organized bicycling are bound by the negligence waivers they sign. Whitehead was free to pursue his cycling hobby but the residents of the City of Oakland

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[11] Owners of private property, such as gyms and racetracks, may extract releases from every person who uses their facilities, and thereby greatly limit their incentives to maintain safe premises in ways public entities cannot. Whitehead posits a strange legal framework where those with less incentive to maintain their property in safe condition can enforce releases, while those with a greater incentive for safety—public entities—cannot.

should not be forced to pay for his injuries. Whitehead was never under the City's thumb; he retained control of his body and his bicycle at all times during the ride and he knew that cycling carries a risk of serious injury. What happened to him is unfortunate, but that does not mean the recreational release he knowingly and voluntarily signed is contrary to the public interest. It is not—as more than five decades of uniform case law establishes. The "delicate" power to declare a contract void as against public policy should not be exercised here. (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 777 n.53 [quoting *Jensen v. Traders & General Ins. Co.* (1959) 52 Cal.2d 786, 794].)

### C. Whitehead's never-before-adopted "service"-oriented approach to applying *Tunkl* is unreasonable and will lead to undesirable results in practice.

As the cases described above show, courts routinely examine the *purpose* of a release in conducting the *Tunkl* public-interest analysis. If the release's purpose is to facilitate a recreational activity, the public interest is not affected and the release is enforceable.

Whitehead insists this is the wrong way to apply *Tunkl*, at least when the entity seeking to enforce the release is a third-party beneficiary—like the City here—and not a direct contracting party. In the third-party-beneficiary context, Whitehead makes the novel argument that courts must disregard the transaction for which the release is given (i.e., the "why" of the release) and focus exclusively on the particular service provided by the third party. If that service implicates the public interest, the release is unenforceable as to that party, even if the

overall transaction the release is intended to facilitate *does not* implicate the public interest. According to this unorthodox approach, the organizer of a marathon is almost certainly exempt from liability, but the providers of the various services indispensable to carrying out the marathon may not be. Here, for instance, Whitehead seizes on the City's provision of the public roads as the "service" it provided to the training ride. Because the public roads are in the public interest, Whitehead contends the City is barred from enforcing the Release.

For the reasons described below, this Court should decline to refashion *Tunkl* in a way that ignores the purpose of the release.

### *1. Courts have consistently held that the Tunkl analysis turns on the subject matter of a recreational release—the general sporting activity at issue—not on the individual services provided to facilitate that sporting activity.*

To begin with, *Tunkl* is framed in terms of the "transaction" for which the release is demanded. As the court below explained, *Tunkl* "couched its analysis in terms of determining whether the *transaction* for which the release was given is one that affects the public interest." (*Whitehead*, *supra*, 99 Cal.App.5th at p. 784 [emphasis in original]; see also *id.* [noting that in *City of Santa Barbara*, this Court also described *Tunkl* as applying to the "'overall transaction"'] [quoting *City of Santa Barbara*, *supra*, 41 Cal.4th at p. 762].)

Likewise, in *Gavin W.*, *supra*, 106 Cal.App.4th at p. 670, the court held that "determining whether a release of liability

affects the public interest, and is thus void as a matter of public policy, requires analysis of the transaction giving rise to the contract—*not* the allegedly negligent conduct by the party invoking the release." In other words, it's not the City's purportedly negligent maintenance of its public streets that is the focus of the public-interest analysis, but the transaction itself, which here is plainly a release to facilitate a recreational activity.

In *McAtee* and *Street Racers*, the plaintiffs sued both the *sponsors* of the recreational activities at issue (motocross racing in *McAtee* and race-car driving in *Street Racers*), as well as the *owners of the land* on which the races took place. (*McAtee*, *supra*, 169 Cal.App.3d at p. 1038; *Street Racers*, *supra*, 215 Cal.App.3d at p. 936.) In assessing the enforceability of the release agreements signed by the plaintiffs, neither court separately considered the landowners' contribution to the races to determine whether it affected the public interest. Rather, they did what every other court has done by focusing on the recreational activities the releases were intended to promote.

*Hass* perhaps best illustrates *Tunkl*'s emphasis on the overall transaction. There, Peter Hass suffered a fatal heart attack just after crossing the finish line of a half marathon. (*Hass*, *supra*, 26 Cal.App.5th at p. 17.) His family filed a wrongful-death action, alleging that RhodyCo, which managed the event, negligently failed to provide adequate emergency medical care. (*Id.* at p. 19.) The court rejected the plaintiffs' argument that the release was void as against public policy. It held that, "Many recreational activities may require the ancillary

provision of first aid or emergency medical services by event organizers, but that fact alone does not change such pursuits into anything other than the voluntary leisure pastimes that they are." (*Id.* at p. 31.) The *Hass* court thus did not center its analysis on the allegedly negligent service at issue, i.e., the deficient medical care, but on the reason the release was given—to participate in a half marathon.

Whitehead sought to distinguish *Hass* in the Court of Appeal on the ground that RhodyCo, the party seeking exculpation, was primarily in the business of providing a recreational opportunity and only procured medical care as an auxiliary service. The Court of Appeal was not persuaded; this Court should not be either.

*Hass* squarely declined to parse the various "services" RhodyCo supplied as part of organizing the half marathon, nor did it then scrutinize each of those services to determine which implicated the public interest and which did not. *Hass* concluded that because the release was entered into as a condition of participating in a sporting event, it was enforceable, irrespective of any negligence that might have occurred as part of that event. That should be the end of the analysis.

In addition, Whitehead's reading of *Hass* would mean that had the City been an actual organizer, like RhodyCo, of the training ride, it would be entitled to the benefit of the release. But having instead merely provided the facility for the training ride (the public streets), the City is out of luck. The enforceability of a recreational release should not hinge on the extent of a

party's contribution to the activity. There is no principled basis for such a distinction. As discussed in more detail below, it would be anomalous and unworkable to conclude that the primary organizer of a recreational event can be entirely exculpated, but individual contributors to the event cannot be.

Whitehead contends that *Lewis Operating Corp. v. Superior Court* (2011) 200 Cal.App.4th 940 serves as precedent for his unique take on the correct way to apply *Tunkl*. Whitehead is once again wrong.

In *Lewis*, a lease between a landlord and his residential tenants required the tenants to waive any claims for injuries they might sustain as a result of using an on-site gym the landlord made available to them. Releases in residential leases have been held invalid under *Tunkl* due to the public interest in housing. (*Henrioulle*, *supra*, 20 Cal.3d at pp. 518-519.) *Lewis* acknowledged this precedent but distinguished it on the grounds that the release before it did not concern the tenants' apartments or common areas of the building, but an exercise facility—an amenity the landlord was under no obligation to offer as part the residential lease agreement. (*Lewis*, *supra*, 200 Cal.App.4th at pp. 946-948.) Because the on-site gym went "well beyond bare habitability," the court reasoned that the landlord was free to "protect itself by requiring the tenant, as a condition of" using the gym, to execute a release in connection with that use. (*Id.* at p. 948.)

Contrary to Whitehead's contention, *Lewis* does not stand for the proposition that the "public interest" must be assessed

according to the *service* provided by the party seeking the benefit of the release—*Lewis* did not so hold, either expressly or impliedly. Rather, *Lewis* did what apparently every other court applying *Tunkl* has done—it examined the *subject matter* of the release, which was tenant use of the on-site gym. As the court below observed, *Lewis* "plainly focused on the subject of the contractual release, noting as we do here that *Tunkl* itself focused on the 'subject transaction' for which the release was given." (*Whitehead*, *supra*, 99 Cal.App.5th at p. 786.)

Other States' law is to the same effect. As noted above, in two New York cases—one arising out of a bicycle race in Central Park and the second arising out of a marathon—the courts dismissed the plaintiffs' claims against New York City owing to the releases they signed in favor of the City. (*Schwartz*, *supra*, 82 A.D.3d at p. 1201; *Brookner*, *supra*, 51 A.D.3d at p. 841.) There was no suggestion in either case that New York's provision of Central Park for the bicycle race or the streets of Brooklyn for the marathon was in any way material to assessing the enforceability of the releases.

Whitehead characterizes the opinion below as announcing an unprecedented "overall transaction" rule. On the contrary, since *Tunkl*, the enforceability of releases has always focused on the subject matter of the contract. Not only is there no authority endorsing Whitehead's proposed service-by-service analysis, case law in this area is uniform and well-settled.

### *2. The legal rule Whitehead asks the Court to endorse will jeopardize the viability of all large-scale recreational activities.*

Next, ignoring the impetus for a recreational release and adopting Whitehead's narrow "service" approach will make it considerably harder for organizers of recreational activities—many of which have a charitable purpose, like ALC—to continue to sponsor them. Such a ruling risks the viability of ALC, in addition to marathons, walkathons, golf tournaments, and every other conceivable organized recreational activity.

Take, for example, just the annual ALC ride from San Francisco to Los Angeles each June. Although it is organized by the San Francisco AIDS Foundation and the Los Angeles LGBT Center, this seven-day, 545-mile ride necessarily relies on numerous providers of goods and services to pull off an event of its magnitude. These include: (1) campgrounds where the cyclists stay each night; (2) drinks and meals during the ride; (3) medical and chiropractic support; and (4) bicycle maintenance.[12] If ALC cannot assure these providers that they will be protected by ALC's Release, the providers are going to think twice about getting involved. They could reasonably conclude that the liability exposure is simply not worth whatever goodwill their participation generates.

Imagine the following kinds of negligence that could occur during the seven-day ride as a result of the acts or omissions of contributors to the race:

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[12] See ALC's website at www.aidslifecycle.org.

- A cyclist is sexually assaulted when the provider of the grounds on which cyclists camp fails to provide adequate security;
- A cyclist is injured when the provider of first aid at a rest stop fails to properly diagnose and treat leg cramping the cyclist experiences;
- A cyclist is hospitalized with severe food poisoning brought on by a contaminated meal supplied by a corporate sponsor.

In each of these scenarios, Whitehead's "service"-oriented approach to *Tunkl* requires ignoring the recreational context of the ALC ride and zeroing in exclusively on the conduct of the third-party beneficiaries—the campground provider, the first-aid provider, and the food-and-drink supplier. ALC's Release is presumably void as to each of these contributors under Whitehead's theory. After all, a safe place to sleep each night, medical care, and nourishment all implicate the public interest. These are "essential" services that people cannot go without and they are all a subject of public regulation. In stand-alone situations, it may well be contrary to the public interest for housing providers, hospitals, and grocery stores to exculpate themselves from their own negligence. But the public-interest is not at play when these same services are subsumed within an organized recreational activity. Any cyclists who suffered injuries in the hypotheticals above would have suffered them *only because they voluntarily chose to participate in the ALC ride*—something they were under no obligation to do and easily could have never

done. An analytical framework that skips over the whole point of a recreational release—to facilitate the sporting event in question—in favor of isolating and assessing each "service" that is part of the event is non-sensical. It cannot be that the constituent services that make the ALC ride viable have a public-interest importance that the ride, writ large, does not.

Finally, it's worth noting that if Whitehead had sued ALC for negligence, the courts below would have enforced the Release in ALC's favor, even under Whitehead's "service"-oriented theory. That's because ALC was the organizer of the training ride and Whitehead concedes that organizers of recreational activities are entitled to the benefit of their releases. Thus, the ride organizer would have no liability for putting the riders on an unsafe course, but the public entities on which the ride happens would be subject to liability, even if—as here—they know nothing about the ride. The equities and incentives of such a legal rule are all out of whack. The City should not be accorded less protection than ALC just because it's a third-party beneficiary of the contract. Put differently, the Release should not be interpreted one way for ALC—with the recreational activity as paramount—and a different way for the City—with its particular service as paramount.

#### *3. If adopted, Whitehead's rule would implicitly amount to judicial amendment of the Government Code.*

Government Code section 815, subdivision (b) says that public entities are entitled to assert "any defenses that would be

available to the public entity if it were a private person."[13] If Whitehead had signed a release to cycle on privately owned streets, the owners of those streets would be able to successfully defend any personal-injury lawsuit by pointing to the release. Section 815, subdivision (b) ensures that the result is not any different just because the defendant is a public entity. (See *Heieck & Moran v. City of Modesto* (1966) 64 Cal.2d 229, 232.) Indeed, that provision means the City is entitled to the benefit of the Release no less than ALC and other third-party beneficiaries.

If this Court were to side with Whitehead, the effect would be to implicitly re-write section 815, subdivision (b). Public entities will no longer be able to rely on release defenses when private parties to those *same* releases will be able to do so. If such a change is to be made to section 815, it should come from the Legislature, not this Court.

#### *4. Whitehead's "service"-oriented analysis would increase the liability of public entities as well as the costs of recreation.*

The rule Whitehead advocates would carry especially dire consequences for public entities, inevitably increasing their

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[13] This provision reads in full:

> Except as otherwise provided by statute: . . . . (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

liability. If the Release agreement here is not enforceable, then presumably no release involving public premises is valid because in many cases, if not all, the public premises will implicate the public interest.[14]

Suppose, for example, that an organization that offers recreational activities to seniors rents space from a public library for them to play bridge each week. Assume a bridge player trips over loose computer cables on the floor and breaks a hip. A release agreement between the sponsoring organization and the bridge player that also names the library as a third-party beneficiary should be enforceable under *Tunkl*'s longstanding and uniform application. Because bridge playing is recreational in nature, the release does not implicate the public interest. (See e.g., *YMCA of Metropolitan Los Angeles*, *supra*, 55 Cal.App.4th at p. 27 [holding that the YMCA's release agreement in connection with its senior-citizen program of games and socializing was enforceable].) But under Whitehead's "service" approach, the release would be void. That the senior was injured as a result of participating in a voluntary recreational activity would be immaterial. Dispositive to the analysis instead would be that the

[14] Significantly, there have been multiple cases involving California public entities in which releases have been enforced. (See *Tunkl*, *supra*, 60 Cal.2d at p. 94; *Santa Barbara*, *supra*, 41 Cal.4th at p. 750; *Brown*, *supra*, 76 Cal.App.5th at p.1008; *Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267, 279.) None of these cases suggested *Tunkl* should apply to public entities differently from how it applies to private parties.

senior was injured at the *public library*—and libraries implicate the public interest.[15]

Similarly, consider an organization that offers crew lessons on Oakland's Lake Merritt. To take the lessons, participants are required to execute a release waiving liability for injuries against both the organization that provides the instruction and the City of Oakland. If a participant fell into the lake and drowned, the City could successfully avoid liability under the standard *Tunkl* analysis because crew is a classic recreational activity. But under Whitehead's approach, the release would be void since the City's provision of Lake Merritt as a public recreational space affects the public interest.[16]

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[15] The "service" of public libraries satisfies most, and likely all, of the *Tunkl* factors. Libraries are a subject of public regulation; they are "a service of great importance to the public," and even a necessity for those with no other access to books, computers, and the Internet; libraries are open to all members of the public; they have an advantage in bargaining strength against members of the public; the contract signed by the bridge players in the example above would almost certainly be a standard adhesion contract; and patrons are subject to the risk of negligence by libraries.

[16] Just as with the library, the "service" of providing Lake Merritt satisfies all the *Tunkl* public-interest factors. Lake Merritt is subject to public regulation; providing public spaces for recreational activities is a "service of great importance to the public;" Lake Merritt is open to everyone to enjoy and to use for appropriate activities; crew participants likely would have been faced with a standard adhesion contract; and they would have been subject to the risk of carelessness by the City in maintaining the lake.

Besides the library and Lake Merritt examples, others are easy to imagine—for example, an elementary school that rents out its

If *Tunkl* is applied in the extraordinary way Whitehead urges—without any regard for the fact the plaintiffs were injured as a result of the subject of the release, i.e. voluntary participation in recreational activities—public entities will have every incentive to restrict the use of their premises to avoid potentially exorbitant liabilities. Spaces that would ordinarily be open to the public for desirable recreational pursuits will be closed to them.

Here, the City would likely have to consider requiring permits for large training rides like the one in which Whitehead was injured. (See e.g., Oakland Municipal Code §§ 12.44.030 et seq.) That would ensure the City had the ability to regulate the days, times, and routes of any such rides, and thereby minimize to the greatest extent possible its liability exposure. As part of the permitting process, the City would also have to consider demanding insurance and indemnification from the sponsors of recreational activities to ensure that the City's residents are not required to compensate recreants for injuries they sustain as a result of their hobbies or adventuring. In the case of the ALC, or even its training rides, the organizers may have to obtain permits and pay for insurance from a half dozen to several dozen jurisdictions – a significant challenge for a non-profit organizing a *fundraiser*.

Either alternative—closing the public premises to recreational activities or imposing regulatory and

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gym on weekends to a karate club or a city that rents its public pool after-hours for corporate events.

indemnification requirements—will necessarily make recreational events harder to come by and more expensive. Indeed, courts and commentators alike have expressed concerns about the risk of driving up recreational costs if release agreements are deemed invalid under *Tunkl*. In the YMCA senior-citizen program mentioned above, for instance, the court declined to void the YMCA's release on the grounds that "[t]he [p]rogram's simple recreational offerings of games, socializing, shopping, and eating lunch, were not so essential as to rob plaintiff of her free will in deciding whether to sign the release." (*YMCA of Metropolitan Los Angeles*, *supra*, 55 Cal.App.4th at p. 27.) The court further held that voiding the release would undermine (not advance) the public interest by preventing "providers such as the YMCA from shifting the risk of premises liability to their participants. If we were to invalidate the release form, the YMCA's rational response would be to terminate the [s]enior [p]rogram or increase the admission price to reflect its true cost." (*Id.* at p. 28.)

The same rationale prevailed in a case in which a high-school student sued the school district and the parent-teacher association when she was injured in a hypnotism show sponsored by the PTA. (*Hohe*, *supra*, 224 Cal.App.3d at pp. 1562-1563.) In declining to invalidate the release agreement, the court reasoned in part that "[t]he public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of

litigation." (*Id.* at p. 1564; see also *Randas*, *supra*, 17 Cal.App.4th at p. 162 [same]; see also Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. Miami Ent. & Sports L. Rev. 1 (1997); Robert Heidt, *The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should Be Enforced*, 38 U. Rich. L. Rev. 381 (2004).)

***5. There is no risk the longstanding Tunkl analysis will exculpate parties who should not be exculpated while failing to exculpate those who should.***

Whitehead insists that continuing to apply *Tunkl* to recreational activities the way it has been uniformly applied for sixty years will yield "anomalous results" and contravene "the policies underlying that analysis." Yet in the years since *Tunkl* there are no reported cases with anomalous results, leaving Whitehead to wrestle only with unlikely hypotheticals. According to him, centering the public-interest analysis on the subject of the release means that occasionally, parties whose services *do not* affect the public interest will be precluded from getting the benefit of a release, whereas parties whose services *do* affect the public interest *will* be released. In support, he gives two examples.

First, Whitehead says that a recreational release "could validly exempt from liability any hospital to which the consumer might be taken for treatment of an injury sustained while participating in the activity." This is far-fetched. As the *Hass* case shows, a release could validly exempt *on-site* medical providers,

there to respond to any medical issues that arise *during* a marathon, bicycle race, swim competition, or some other recreational activity. (*Hass*, *supra*, 26 Cal.App.5th at p. 31.) But the notion that a release of the risks of recreational activities could also release any hospital at which an injured participant is treated would run afoul of *Tunkl*'s holding that hospitals cannot demand a waiver of their own negligence as a condition of treating someone in need. In addition, medical providers *at* a recreational event are part of the event, whereas off-site medical providers are downstream from the recreational activity itself and have no connection to it. A recreational event organizer has no reason to include a release of claims against a hospital. Whitehead's hypothetical fails because it attempts to sweep into a recreational release an unrelated transaction, i.e., the post-activity provision of medical care.

What's more, in many, and perhaps most, cases, the organizers of recreational activities likely have no duty to ensure medical personnel and equipment is at the ready. If they choose to provide that service, they ought out of fairness to be able to compel participants to release liability in connection with that on-site care.[17] Whitehead's medical-care hypothetical thus does not establish that providers who ordinarily cannot be released for

[17] Even if an organizer is *required* to provide medical staff at a recreational event (through a public regulation, for instance), a release in favor of the medical provider should still be enforceable because the injured person's need for care is caused by their participation in the sporting activity and is part of the transaction for which the release was given.

their negligence suddenly can be if *Tunkl* is applied as it always has been.

As a second example, Whitehead relies on *Pelletier*, the case holding that the rental of boat berths affects the public interest and that a yacht harbor was therefore precluded from conditioning berth rentals on boat owners' execution of negligence waivers. (*Pelletier*, *supra*, 188 Cal.App.3d at p. 1556.) Whitehead notes that a regatta organizer would ordinarily be entitled to demand a release from regatta participants. But he argues that if a yacht-harbor release covered not just berth rentals, but also sought to exculpate regatta organizers, the release would be void as to the latter because it is void as to the former.

This hypothetical is even less on point than Whitehead's medical-care one. What he is actually postulating is two separate releases rolled into a single contractual provision. Insofar as the provision sought to release the harbor owner for its negligence associated with rental of the berth, that clause would be invalid under *Pelletier*. But insofar as the provision also sought to release a third-party regatta organizer for its negligence, that portion of the provision would be entirely enforceable. It's hard to imagine why any yacht harbor would have an interest in bundling these two separate and distinct subjects together into a multi-purpose release, but the enforceability of each strand would have to be separately analyzed. And it would be entirely reasonable to exculpate the regatta organizer while declining to exculpate the yacht harbor.

In sum, Whitehead's examples of "anomalous results" are no such thing. Nor is there any evidence of a problem for this Court to address that is actual and not hypothetical. Continuing to apply *Tunkl* in the reasonable way it has always been applied will yield appropriate and predictable outcomes: Negligence releases entered into as a condition of participating in recreational activities will be enforceable, irrespective of whether a recreant is injured by the acts or omissions of the event organizer or the acts or omissions of participating service providers. *Tunkl* addressed what was then viewed as a "troubled" and "diverse" set of precedent, and subsequently generated a remarkably consistent and stable body of law. The lower courts have not expressed any uncertainty about how to apply it, and the Legislature has felt no need to modify it. Whitehead is asking this Court for a solution to a problem that does not exist.

* * *

This Court should decline to apply *Tunkl* in a way it has never been applied before—indeed, in a way no one has apparently ever asked for it to be applied before. Whitehead's "service" approach will wreak havoc on what has been a smoothly performing doctrine for decades, ushering in a multitude of adverse consequences for recreational event organizers, public entities, and the public at large. *Tunkl* is not broken; it is not in need of any fixing or re-fashioning by this Court.

## CONCLUSION

The four judges on the trial court and Court of Appeal who have already presided over this case got it right: The Release is enforceable because its purpose was to facilitate Whitehead's

participation in a purely voluntary recreational event. He was free to assume the risks of his long-distance cycling hobby—risks he was aware of and well-positioned to assume. This Court should affirm the decision below and the unbroken body of law holding that negligence releases executed in the context of recreational activities do not implicate the public interest and are therefore valid and enforceable.

Dated: September 13, 2024

Barbara J. Parker,
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*/s/ Allison L. Ehlert*
Allison L. Ehlert
Deputy City Attorney

## CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that pursuant to California Rule of Court 8.204(c)(4), this brief has been produced using 13-point Roman type, including footnotes, and contains 12,838 words, as calculated by the Microsoft Word software application in which it was written.

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

Executed on September 13, 2024, at Richmond, California.

*/s/ Allison L. Ehlert*
Allison L. Ehlert

## CERTIFICATE OF SERVICE

State of California, County of Alameda:

I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to this action. My business address is One Frank H. Ogawa Plaza, 6th Floor, Oakland, California 94612.

On September 13, 2024, I served true and correct copies of the City of Oakland's Answer Brief on the parties to this action, as follows:

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

Executed on September 13, 2024, at Richmond, California.

*/s/ Allison L. Ehlert*
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