No. 22-15250

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SACRAMENTO,

Plaintiff and Appellant,

vs.

EVEREST NATIONAL INSURANCE COMPANY,

Defendant and Appellee.

[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT COUNTY OF SACRAMENTO

Appeal from the United States District Court
for the Eastern District of California
Honorable Morrison C. England, Jr., Judge Presiding
Docket No. 2:19-cv-00263-MCE-DB

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I.

STATEMENT OF IDENTITY AND INTEREST OF AMICI, AND SOURCE OF AUTHORITY TO FILE THIS BRIEF

The League of California Cities ("Cal Cities") is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a nonprofit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties

statewide and has determined that this case is a matter with the potential to affect all California counties.

The California Special Districts Association ("CSDA") is a not-for-profit association formed to promote good governance and improved core local services through professional development, advocacy, and other services for all types of independent special districts in California. Its 1300 members include irrigation, water, parks and recreation, cemetery, fire, police protection, library, utilities, harbor, healthcare, and community-service districts. The CSDA's Deputy General Counsel has reviewed the brief and given the authority to file it on behalf of the CSDA.

The California Association of Joint Powers Authorities ("CAJPA") was formed in 1981 after the California Legislature amended the Government Code to add the ability of two or more public agencies to join together, under a joint powers authority ("JPA") to provide more effective or efficient services or to solve a service-delivery problem. CAJPA's mission is to provide leadership, education, advocacy, and assistance to public-sector risks pools to enable them to enhance their

effectiveness. Its legal staff has reviewed the brief and given authority to file it.

PRISM, formerly known as CSAC Excess Insurance Authority, is one of the largest property, casualty, and employee benefit-public entity joint powers authorities in the nation. PRISM membership includes over 2,000 public entities located throughout the State of California including 55 of the 58 counties, 70% of the cities, and various educational organizations, special districts, housing authorities, fire districts, and other JPAs. PRISM's Chief Legal Counsel has reviewed the brief and given authority to file it.

The County's Amici respectfully request that this court grant them leave to file this brief as amici curiae to address the serious financial impact that affirmance of the district court's judgment in favor of appellee Everest National Insurance Company would have on the day-to-day operations of public entities throughout California.

II.
STATEMENT ON THE AUTHORSHIP OF THIS BRIEF PURSUANT TO FED. R. APP. PROC. 29(a)(4)(E)

No counsel for a party authored the following amici brief in whole or in part, and no counsel or party made a monetary contribution

intended to fund the preparation or submission of the brief. No persons other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

III.
INTRODUCTION

Employment Practices Liability Insurance (EPLI) coverage first became available in the early 1990s and has become increasingly necessary for both public and private employers as both the number and costs associated with EPLI claims have increased.

Public entities in California are frequent targets of EPLI claims. They generally manage the costs associated with defending and resolving those claims by either purchasing EPLI coverage from private insurers or by entering into risk pools with other public entities. Those risk pools typically purchase insurance to reinsure some level of the pooled risk.

As a result, a rule that brought EPLI claims as a class within the ambit of Cal. Insurance Code section 533, as the district court's ruling below would do, would make such claims largely uninsurable. This, in

turn, would have onerous adverse financial consequences on public entities throughout California.

The opening brief filed by the appellant, County of Sacramento (County) in this appeal ably makes the case for why the district court's ruling against the County in this action should not be affirmed. The County's Amici wholeheartedly join in the County's legal analysis and will not burden this Court by repeating it in this amicus brief.

Rather, the purpose of this brief is to make the Court aware of the financial hardships that affirmance of the district court's ruling would have on the County's Amici and on public entities throughout California.

IV.
STATEMENT OF THE CASE

The County's amici adopt and incorporate by reference the Statement of the Case in the County's appellant's opening brief.

V.

ARGUMENT

A. Public entities make up almost 40 percent of the defendants against whom EPLI verdicts are rendered. The availability of EPLI coverage is vital to California public entities.

According to the 2021 "Insurance Fact Book" published by the Insurance Information Institute,[1] which discusses annual trends in the insurance industry in the United States, since 2017 the "#MeToo" movement has spurred a flood of high-profile sexual-harassment lawsuits. *Id.* at 227. This, in turn, has resulted in a dramatic increase in the purchase of EPLI coverage, either in standalone EPLI policies or as endorsements on general liability policies. *Id.*

[1] The Insurance Information Institute is an organization comprised of more than 60 insurance company members, whose focus is on providing insurance-related information. www.iii.org/about-us (last visited on May 8, 2022). It publishes its Insurance Fact Book annually and makes it available at no cost on its website, www.iii.org. The Fact Book provides a wide variety of information on many insurance-related topics, including world and U.S. catastrophes; property/casualty and life/annuity insurance results and investments; and major types of insurance losses. *Id.* at p. ii.

EPLI coverage is designed to protect employers from the financial consequences of various types of employment lawsuits, such as sexual harassment, job-related discrimination, hostile work environment, wrongful termination and retaliation. *Id.* at 227.

According to the U.S. Equal Opportunity Commission (EEOC), 55.8 percent of all claims filed with the agency in fiscal year 2020 alleged retaliation by an employer.[2] Sexual harassment accounted for 31.7 percent of claims in that period, and racial discrimination was alleged in 32.7 percent of the claims. *Id*.

In 2016, U.S. companies spent an estimated $2.2 billion on EPLI coverage, and this sum was expected to climb to $2.7 billion in 2017. *Id*. at 227-228. According to a 2018 study, 35 percent of U.S. workers reported that they had been harassed at work, and this figure climbed to 41 percent for women respondents. *Id*. at 228.

The median award in EPLI cases rose from $126,000 in 2017 to $209,191 in 2019. *Id*. The "probability range" for such awards during

[2] https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data (last visited May 10, 2022).

the same period climbed from $25,000 to $550,000 in 2017 to $58,038 to $635,500 in 2019.[3] *Id.*

But both the number of EPLI claims and the expense of resolving those claims is significantly higher in California than in other jurisdictions in the United States. According to an article in the June 7, 2021 issue of the Insurance Journal West,[4] the price to settle EPLI lawsuits in California "has just grown at an exponential rate."

The quote comes from a senior vice president for Risk Placement Services, a Los Angeles-based insurance brokerage firm. As she put it, "claims in California are bigger and there are more of them." *Id.* The article explains that it costs about 260 percent more to resolve an EPLI claim in California than in other jurisdictions. *Id.*

This case illustrates the potential high cost of EPLI claims in California, with the County facing a total loss in excess of $8 million in the underlying *Hagadorn* action.

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[3] The "probability range" represents the median value of the awards that are clustered 25 percent above and 25 percent below the median value for all awards. Fact Book at p. 228.

[4] www. https://www.insurancejournal.com/magazines/mag-features/2021/06/07/617418.htm (last visited May 10, 2022).

Critically, public employers are frequent targets of EPLI claims. Between 2013 and 2019, 38 percent of the total EPLI verdicts in the U.S. were in cases against governmental entities. 2021 Insurance Fact Book, p. 228.

In sum, California public entities face significant and increasing exposure to EPLI-related costs.

B. All California public entities would be adversely affected by a rule that makes EPLI claims uninsurable under Cal. Ins. Code § 533

Public entities in California typically seek to protect themselves from the cost of EPLI claims by either purchasing insurance coverage, as the County did in this case, or by self-insurance through risk pools.

The California Government Code authorizes public entities to insure itself against "all or any part of any tort . . . liability." Cal. Gov't Code § 990, subd. (a). Section 990.4 of the Government Code provides that the insurance authorized by section 990 can be provided by self-insurance, by insurance purchased from insurers, or any combination of those approaches. *Id.*, § 990.4, subds. (a)-(c), (e).

The intent of these provisions is to ensure that "a public entity's authority to insure is as broad as its potential liability." See Recommendation Relating to Sovereign Immunity: Number 3—Insurance Coverage for Public Entities and Public Employees, 4 Cal L Revision Comm'n Reports, pp. 1201, 1206 (1963).

This ability to insure against all types of claims is an essential element of the Government Claims Act, which is the carefully drawn statutory scheme designed to waive public-entity sovereign immunity to allow those wronged by a public entity to recover, while at the same time providing some protection to public entities so that they can deliver essential governmental services. "The need for order and predictability is great for efficient and foresighted planning of governmental activities and their fiscal ramifications becomes extremely difficult if not impossible when the threat of possibly immense but unascertainable tort obligations hangs like a dark cloud on the horizon." Calif. Law Rev. Comm., A Study Relating to Sovereign Immunity, p. 268 (1963).

Government Code section 990.8 authorizes two or more local public entities to enter into a joint-powers agreement, which may create

a separate government entity, to provide insurance authorized by section 990 by any of the methods specified in section 990.4. (See California Government Code § 6500, et seq. ["Joint Exercise of Powers Act"]. These joint powers authorities pool the risks of their members, and these risk-pooling arrangements constitute a form of self-insurance authorized by section 990.4. Amicus PRISM is such an entity and amicus California Association of Joint Powers Authorities is a trade association of such entities.

"Because joint powers authority risk pools are ultimately member created and directed, they are not considered insurance in a conventional sense; they are an alternative to commercial insurance." *Southgate Recreation & Park Dist. v. California Assn. for Park & Recreation Ins.*, 106 Cal.App.4th 293, 297 (2003); *Fort Bragg Unified Sch. Dist. v. Colonial Am. Cas. & Sur. Co.*, 194 Cal.App.4th 891, 906 (2011).

For example, PRISM is a joint-powers authority that offers its member public entities two general liability programs, GL1 and GL2. Approximately 846 California public entities, including counties, cities, school districts, and special districts, participate in general-liability risk

pool programs administered by PRISM. Both of PRISM's general-liability programs include EPLI coverage, including for claims of retaliation. In some cases, PRISM purchases excess insurance to protect itself against substantial claims on its pooled resources.

Given the increasing number of EPLI claims and the increasing costs to resolve them, a rule that made EPLI claims uninsurable under Cal. Insurance Code section 533 would impose an onerous financial hardship on California public entities.

Most directly, such a rule would deprive them of the right to insure against the cost of adverse EPLI judgments and of having insurers fund the settlements of EPLI claims. The costs of funding those claims would instead be borne directly by the public entities themselves. It would also, of course, deny the insurance industry a market it is content to serve and from which it presumably derives a profit.

The indirect costs of such a rule would also be substantial. If insurers could not indemnify adverse EPLI judgments, public entities would have little reason to purchase EPLI coverage. As a result, they would not only lose the benefit of shifting the risk of EPLI claims to

insurers, they would also lose the benefit of having those insurers defend EPLI claims.

This would be a significant loss. As the California Supreme Court observed in *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 295–296 (1993), "The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability."

But the burden of extending section 533 to EPLI claims would also deprive public entities that purchased insurance providing EPLI coverage, as well as risk pools that purchased excess insurance, of the benefit of the premiums they have paid for that coverage—premiums that were paid with public resources.

Public entities at all levels typically strain to balance the demands for their services with the taxpayer funds available to them to provide those services. The inescapable reality is that, if EPLI claims become uninsurable, public entities will have to devote increasing portions of their budgets to meeting the costs of defending and resolving those

claims, with a commensurate decrease in the funds available to them to provide public services.

For this reason, the County's Amici join in the County's legal analysis and urge this Court to reverse the district court's finding that Insurance Code section 533 bars insurance coverage for the County's claims against Everest.

VI.
CONCLUSION

For all of the reasons explained in the County's opening brief, and because affirmance of the district court's decision would create significant financial hardships for public entities in California, the County's Amici respectfully urge this Court to reverse the district court's decision and to remand with instructions to the district court to grant summary adjudication on behalf of the County on the issue of section 533.

Should the Court perceive a close question here, Amici join in the County's suggestion that this Court certify the questions raised here to

the California Supreme Court. Should it do so, Amici will also provide amicus assistance to that court.

Dated: May 23, 2022

Respectfully submitted,
SHERNOFF BIDART ECHEVERRIA LLP
THE EHRLICH LAW FIRM

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-15250

I am the attorney or self-represented party.

This brief contains 2,422 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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County of Sacramento v. Everest National Insurance Company
Ninth Circuit No. 22-15250
USDC No.: 2:19-cv-00263-MCE-DB

CERTIFICATE OF SERVICE

I hereby certify that on **May 23, 2022,** I filed the foregoing document entitled **[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT COUNTY OF SACRAMENTO** with the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, as follows:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **May 23, 2022,** at Claremont, California.

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