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July 13, 2015

VIA HAND DELIVERY
Honorable Tani Cantil-Sakauye, Chief Justice
Associate Justices of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4783

Re: ***Hirst v. City of Oceanside***
Supreme Court Case No. S227054
Court of Appeal Case No. D064549
Letter in Support of Grant of Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amici Curiae the League of California Cities and the California State Association of Counties (collectively, "*Amici*") submit this letter in support of the petition for review of this matter ("Petition") filed by Appellant and Petitioner the City of Oceanside (the "City").

The Court of Appeal in this matter misconstrued California's Fair Employment and Housing Act ("FEHA"), and in doing so increased -- by orders of magnitude – the number of individuals who can sue an individual or entity that is not their employer for harassment. Indeed, *Hirst v. Oceanside* (2015) 236 Cal.App.4th 774 ("*Hirst*"), stands for the proposition that not only can an employer be liable to its own employees for harassment, but can be liable to employees of those companies with whom it does *any* amount of business, large or small, and regularly or only on rare occasions, so long as certain general requirements of Government Code section 12940(j)(5) are met. The Legislature intended the 1999 revisions to the anti-harassment protections of the FEHA, which created the Section 12940(j) language at issue, to protect those in the workforce who happened to be *hired* as "independent contractors" instead of as employees. Such individuals, the Legislature reasoned, should not be deprived of anti-harassment protections simply because they are classified as independent contractors. To remedy this gap in protection, the 1999 amendments provided that the anti-harassment provisions of Section 12940(j) applied to "a person providing services pursuant to a contract" as well as to employees.

But the Court of Appeal in *Hirst* expands an employer's liability not just to independent contractors in its own workforce who -- if not covered by Section 12940(j) -- would have no protection from harassment or remedy under the FEHA to pursue upon its occurrence, but potentially to any individuals who come into contact with the employer in the course of performing any "services" pursuant to any "contract." This includes individuals who are

employed by another entity and already protected under the FEHA's anti-harassment laws. This expansion is vast, has few discernable limits, and is well beyond the Legislature's intent and sound purpose of Section 12940(j) to close a gap and cover independent contractors within an employer's own workforce who would not otherwise be protected under the statute. This expansion could potentially encompass private delivery service workers, the armored truck driver, repair personnel from an outside company, outside computer or technical personnel, outside lawyers, accountants, and trainers, and a host of other individuals who already have an employer and FEHA protection, including individuals working for a company the entity does not even directly contract with -- as was the situation in the *Hirst* case.

The Court of Appeal's error here has profound impacts for California employers and the workforce because of the structure of the FEHA. Not only are employer entities potentially liable to a myriad of third parties that are employed by another individual or entity and already protected under the FEHA, but the entities' individual employees may be *personally liable* if they are determined to be a perpetrator of the harassment against an individual at an outside contracting company. *See* Cal. Gov. Code § 12940(j)(3). There is nothing in the 1999 amendments to the statute or its legislative history to herald this vast expansion of potential organizational and personal liability.

The Court of Appeal's error, as described below and in the City's Petition, was in failing to interpret the phrase "person providing services pursuant to a contract" as applying only to individuals who contract on their own with an entity, and instead interpreting the phrase to apply to all qualifying employees of an entirely separate organization that happens to have a qualifying contract with an entity (such as the plaintiff's company did here with San Diego County). The court not only erred, but rendered a decision that contradicts important public policies and improperly impacts the public sector in particular, as described below.

This case without question presents an "important question of law" to be settled by this Court. *See* Cal. R. Ct. 8.500(b)(1).

A. Interests of *Amici*

The League of California Cities ("League") is an association of 474 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. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation with all of the California's 58 counties as members. 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 affecting all counties.

The Court of Appeal's opinion substantially increases FEHA liability for cities and counties, which routinely interact with persons employed by other employers for a wide variety of goods and services. That increased liability, which is not warranted by FEHA's plain language or legislative intent, presents an important issue in which the members of *Amici* have a significant stake.

B. *Hirst* Erroneously Allows Employers and their Employees to be Sued under the FEHA by Employees of Vendors, Contractors, and Other Companies That Provide Services, However Infrequent or Minimal.

In the instant case, the Court of Appeal erroneously held, first, that the Plaintiff met all the criteria for an independent contractor of the City set forth in Government Code section 12940(j)(5). *Hirst, supra,* 236 Cal.App.4th at 786-87. The Plaintiff did not meet all the criteria, however, among other reasons because the record showed she did not herself have any "contract" with the City. Rather, her employer, American Forensic Nurses ("AFN"), had contracted with San Diego County to provide services to various agencies, including to the City. Second, the Court of Appeal held that, in any event, it did not matter if the Plaintiff herself met the criteria set forth in Section 12940(j)(5), so long as her employer met them. Because a corporation must act "through its agents," the court reasoned, this conferred standing on the Plaintiff. *Id.* at 787. The court found:

> As a business entity, AFN does not personally provide the phlebotomist contractor services; its services are performed by individuals (including Hirst) acting on AFN's behalf. It would be unreasonable to conclude the Legislature would have intended that AFN had standing but those who actually performed the services "pursuant to a contract" were barred from recovery. (*Id.*)

Both holdings are wrong. First, the Plaintiff must be the actual contracting party under the statute. Otherwise, standing to sue under the FEHA is extended to employees of a host of different agencies or private entities whose employees serve in roles far different from the independent contractors who contract directly with an employer and work alongside the employees, as envisioned by the statute's legislative history. Second, the Plaintiff must meet "all" the statutory criteria, as required under the plain terms of section 12940(j)(5). A contrary rule potentially offers standing under the FEHA to every employee of an agency or private entity

that contracts with an employer in a way that satisfies the general terms of Section 12940(j). This would not only contradict the statute's plain terms, it would extend standing under the FEHA far beyond what the Legislature intended.

The structure of the harassment provisions of the FEHA drastically compounds the severity of the court's error. Section 12940(j) imposes personal liability on the perpetrators of harassment. Cal. Gov. Code § 12940(j)(3). This means that individual employees of an employer, under *Hirst*, face the threat of personal liability for harassment of a multitude of persons who do not even work for the same agency or company or appear at the workplace on any regular basis. Further, employers face the threat of strict liability for harassment if any supervisor is involved as to the many non-employees with whom those at the agency or business interact. *See State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal. 4th 1026, 1042. Moreover, the sporadic and transitory interactions with many third party personnel carry increased risk inherent in interactions among strangers: there is substantial opportunity for miscommunication, mistake, and even harsh personality clashes that an employer and its employees may not anticipate, be aware of, or be prepared to avoid or prevent.

The FEHA's anti-harassment provisions raise the stakes yet again for this dramatic increase in the scope of standing because the anti-harassment provisions appear to make virtually any person in California an "employer" potentially liable for harassment of anyone that provides "services" for him or her pursuant to a contract. Section 12940(j) contains a definition of "employer" that is unique to the harassment setting. It specifically includes "any person regularly employing one or more persons *or regularly receiving the services* of *one* or more persons providing services pursuant to a contract . . . ." Cal. Gov. Code § 12940(j)(4)(A) (emphasis added). Therefore, under *Hirst*, a person who pays a gardening company to work on his or her lawn every Sunday faces potential FEHA liability to the individual gardener who arrives. That person could face the same liability to the physician hired by the person's insurance company to provide medical services to him or her. Certainly societal norms and rules should not privilege anyone to harass another in the manner that the FEHA prohibits for the workplace. But the enormous societal costs of litigation, including the threat of personal liability for emotional distress, punitive damages, and attorneys' fees, plus the dire effects of groundless or improper claims, should not extend as far into daily life as the *Hirst* ruling portends.

Indeed, the legislative history of the protections in Section 12940(j) for independent contractors comes nowhere close to such a result. Instead, as pointed out in the Petition, the legislative history's aims for the phrase at issue were much more modest. In fact, the addition of the phrase was an attempt to preserve the status quo in the face of a trend among employers, at that time, of denominating portions of their workforce as independent contractors and therefore outside the scope of laws like the FEHA. (*See* Petition at 18-19.) The Court should therefore grant review in this case to clarify the proper application of the statute.

C. *Hirst* Contravenes Sound Public Policy and Harms Cities, Counties, and other Public Agencies in Particular

Public policy also favors review and reversal of *Hirst*. First, expanding FEHA liability to employees of agencies or private entities with whom the employer contracts does not square with the FEHA's statutory framework. The concept of strict liability for the conduct of supervisors is extremely onerous if supervisors can generate such liability as to, for example, delivery persons and others who perform very limited services for the supervisor's employer.

In addition, *Hirst* will present employers with potential liability in scenarios they cannot effectively address or prevent through training. An employer often cannot reasonably know if a contractor's employees coming on-site had proper harassment training, including training that harassing conduct must never be encouraged or tolerated, and instead should be reported and prevented. Indeed, in *Hirst* itself, the evidence showed the Plaintiff initially thought it best not to report the harassing conduct of the police officer. As a result, the City initially had no knowledge of the harassment that had injured the Plaintiff. Indeed, the ruling in *Hirst* makes it so that employers who fail to provide harassment training to their employees can actually spread the costs of their own neglect, because other agencies or private entities with whom those employers contract to provide services, but who *do* properly train their employees on the duty to report misconduct, may nevertheless have to pay the costs, as in this case. Employers cannot be expected to provide harassment training to the employees of any contractors from whom they receive any services – and bear the burden when the contractors fail to comply with their own training and other legal obligations to their employees.

Indeed, an employer cannot protect itself from liability to a third party's employees in the same way it can protect itself from liability to its own employees. The employer can train its own employees to report any type of sexual or other harassment immediately so that an incident does not develop into a situation difficult or impossible to remedy. The employer can also investigate incidents of alleged harassment more effectively if its own employee is the alleged victim – it loses much of that ability if instead the alleged victim is another company's employee. An employer can require its own employees to review and comply with non-fraternization policies and dating policies. It can also establish workplace rules to help prevent workplace harassment and make it so that employees do not put themselves in positions where they may be the victims of harassment. Finally, an employer can develop sound knowledge of its own employees and their behavior. A third party introduces something new into the scenario that may be impossible to prepare for or train to prevent. The risks of harassment, as far as the FEHA is concerned, should be borne by an individual's own employer, who should be charged with providing effective training to its employees.

The employees of third-party contractors also have other remedies against employees of agencies or private entities at which they may experience harassment when providing services.

Those remedies exist under tort law (to the extent not preempted by the Worker's Compensation laws, *see Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160, and under statutes such as the Unruh Act. *See* Cal. Civ. Code, §§ 51, *et seq.*

It is worth noting that in addition to these legal protections for employees of third-party contractors, there are important additional protections simply based on the principles of the market, and good business and professional practice in general, for both the public and private sector. Any employer has a strong reputational interest not only in insuring that its own employees do not suffer harassment in the workplace, but also in insuring that its employees do not harass individuals working for other companies. Indeed, word will probably spread even more quickly outside the workplace, and within a larger business or professional community, that an employee of a particular company is a harasser. This would egregiously undermine that company's reputation in the community; the company has every incentive to avoid this scenario. This same is true for an employer that places its employees in harm's way, making them potential victims of harassment, when those employees are rendering services. That employer has the same incentives (and can actually be liable under the FEHA as well).

Next, of direct concern to *Amici*, the *Hirst* ruling will have a particularly strong and harsh effect on cities, counties, and other public sector employers. Cities and counties will be more harshly affected by *Hirst* because these organizations frequently share resources and personnel with each other, thus multiplying the risks for contractor claims under *Hirst* among public sector agencies. All of the increased liability would be borne ultimately by the taxpayers. Indeed, in scenarios in which a public agency contracts with a private company for particular services, the *Hirst* ruling allows the private company to shift financial responsibility for harassment away from itself and onto the public sector. This effect of the ruling may be to shield private enterprise from some of the costs of harassment claims, and instead burden the taxpayers in the form of increased liability for public agencies.

Another reason *Hirst* will have an especially harsh effect on public employers is because groundless accusations of harassment directed against public sector employees (and *Hirst* will likely generate groundless claims like any other expansion of standing to sue) result in acute burdens on the public employer, far exceeding those in the private sector. A public employer must typically follow stringent pre-disciplinary procedures outlined in memoranda of understanding, and abide by procedural due process protections that safeguard the property rights public employees typically have in their employment. *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194. Unlike in the private sector, public employers cannot – once a harassment complaint is made – place the alleged harasser on unpaid leave pending the investigation, as such action is typically "disciplinary" and triggers the employer's obligation to provide pre-disciplinary due process. *Bostean v. Los Angeles Unified Sch. Dist.* (1998) 63 Cal.App.4th 95, 110 (leave without pay is tantamount to suspension without pay and triggers property interest considerations). Rather than risking the alleged harasser harassing again by allowing him or her to continue

working, public employers must often shoulder the financial burden (ultimately borne by the public) of placing the employee on *paid* leave pending the investigation. Even if the accused employee is vindicated after the investigation concludes, or at some later point, neither the employer nor taxpayer can recoup these costs.[1]

These public policy considerations, including those unique to the public sector, further demonstrate the potential negative impact of the *Hirst* opinion, and further argue in favor of this Court granting review.

D. *Hirst*'s Interpretation of the FEHA Leads to Absurd Results

Finally, extending liability under the FEHA following *Hirst* could create haphazard patterns of who can assert third-party claims and who cannot. Among other things, it would depend on whether there was a "contract" or not. For example, as noted above, a delivery person who picks up a package from an agency or private entity could state a FEHA claim against that organization if he or she were harassed on site. This is because there would be a contract between the delivery company and the organization. But if that same delivery person suffered harassment at the office where the package is delivered, he or she apparently could not state a claim under *Hirst* because there would be no contract between his or her employer and that organization. This makes no logical sense. A narrower interpretation of the contract provision in FEHA, that the person seeking FEHA protection must be the contracting party, or that at a minimum he or she personally must satisfy each of the Section 12940(j)(5) criteria, will minimize the number of anomalous results that arise.

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[1] The process of disciplining an employee in the public sector involves considerable time and expense. For example, the employer must often prepare a detailed notice of intent, including charges, conduct a pre-disciplinary conference, in many cases conduct an extensive investigation, and in some cases conduct a post-discipline evidentiary hearing, subject to limited judicial review.

For all the foregoing reasons, and as described in the City's Petition, *Amici* respectfully request that this Court grant review of the *Hirst* opinion..

Very truly yours,

LIEBERT CASSIDY WHITMORE

David A. Urban

DAU:cm

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of LOS ANGELES, State of California. I am over the age of 18 and not a party to the within action; my business address is: 6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.

On July 13, 2015, I served the foregoing document(s) described as **AMICUS LETTER IN SUPPORT OF GRANT OF REVIEW** in the manner checked below on all interested parties in this action addressed as follows:

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Fourth Appellate District, Division One
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Case No. D064549

Clerk of the Court
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☐ **(BY FACSIMILE)** I am personally and readily familiar with the business practice of Liebert Cassidy Whitmore for collection and processing of document(s) to be transmitted by facsimile. I arranged for the above-entitled document(s) to be sent by facsimile from facsimile number 310.337.0837 to the facsimile number(s) listed above. The facsimile machine I used complied with the applicable rules of court. Pursuant to the applicable rules, I caused the machine to print a transmission record of the transmission, to the above facsimile number(s) and no error was reported by the machine. A copy of this transmission is attached hereto.

☐ **(BY OVERNIGHT MAIL)** By overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service, FedEx, for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

☐ **(BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Liebert Cassidy Whitmore's electronic mail system from cmorris@lcwlegal.com to the email address(es) set forth above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **(BY PERSONAL DELIVERY)** I delivered the above document(s) by hand to the addressee listed above.

Executed on July 13, 2015, at Los Angeles, California.

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

Cynthia Morris

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