

No. D062970

Court of Appeal Fourth District  
**FILED**  
JUL 30 2013  
Kevin J. Lane, Clerk  
DEPUTY

**IN THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT, DIVISION ONE**

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CATHY LEXIN, RONALD L. SAATHOFF, JOHN A. TORRES,  
MARY VATTIMO, TERRI A. WEBSTER, and SHARON K.  
WILKINSON,  
Plaintiffs and Respondents,

vs.

CITY OF SAN DIEGO,  
Defendant and Appellant.

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**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF AND *AMICUS CURIAE* BRIEF OF  
LEAGUE OF CALIFORNIA CITIES  
IN SUPPORT OF DEFENDANT AND APPELLANT**

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Appeal from a Judgment of the Superior Court  
County of San Diego County  
Case No.: 37-2011-00084354-CU-MC-CTL  
The Honorable William S. Dato, Judge

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Attorneys for League of California Cities

Pursuant to California Rule of Court 8.200, the League of California Cities (the "League") seeks this Court's permission to file the attached *amicus curiae* brief in support of Defendant and Appellant, City of San Diego.

The League is an association of 467 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 being of such significance.

The League limits the scope of this application to address the issue of whether the trial court erred in entering judgment in this action based on its interpretation of Government Code section 995.8. The League urges this Court to reverse the judgment entered on that ground, and instead follow the well-settled authorities that have held that public entities have the right under section 995.8 to refuse the

employee a criminal defense *arbitrarily*, with only a permissive right to compensate employees for attorney's fees and costs.

All public entities in California are embroiled in an unprecedented fiscal crisis. Requiring public entities to provide criminal defense costs, including substantial attorney's fees as in the case at bar, would impose an extreme burden on cities and other public entities, and would constitute a gift of public funds.

Moreover, by endorsing a cause of action under section 995.8, the trial court has potentially exposed all public entities to litigation by employees refused a defense in criminal actions. Under the language of the statute and its legislative history, such employees should have no recourse against the public entity that refuses to provide a criminal defense.

Dated: July 29, 2013

Respectfully submitted,

GOLDFARB & LIPMAN LLP

By:



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Attorneys for *Amicus Curiae*,  
LEAGUE OF CALIFORNIA CITIES

No. D062970

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Since its enactment as part of the California Tort Claims Act in 1963, only two appellate decisions have directly construed the provisions of Government Code section 995.8 in suits brought by government employees seeking payment of attorney's fees and costs for criminal actions brought against them, namely *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168 ("*City of Los Angeles*"), and *County of Sacramento v. Superior Court* (1971) 20 Cal.App.3d 469. The court in *City of Los Angeles* followed the *County of Sacramento* court in holding that under section 995.8, a public entity has the right to refuse the employee a defense *arbitrarily*, and has only a *permissive* right to compensate the employee if the determinations under subdivision (b) of section 995.8 are made. *City of Los Angeles*, 27 Cal.App.4th at 173-177; *County of Sacramento*, 20 Cal.App.3d at 472-473. Therefore, the decision by the City of San Diego (the "City") to reject the criminal defense of its employees was proper, and not reviewable by any court, even if it was arbitrary.

Moreover, the City could not in fact provide a criminal defense to the Respondents unless it made the required determinations at the

time the requests were made. No such determinations were made here.

Amicus League of California Cities (the "League") urges this Court to follow the well-settled appellate authorities of *City of Los Angeles* and *County of Sacramento* in this case.

As discussed in the Argument section below, the *City of Los Angeles* and *County of Sacramento* holdings are fully supported by the statutory language and legislative history of section 995.8. The League respectfully submits that the trial court's ruling is contrary to both the statutory language and legislative history of this statute.

#### **INTEREST OF AMICUS CURIAE**

The League is an association of 467 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 being of such significance.

The League limits the scope of this application to address only the legal issues raised in the trial court's interpretation of section 995.8. The League does not address the factual and legal issues addressed by the Appellant and Respondents concerning Resolution R-297335, nor the potential application of section 996.6 to this action.

The League urges this Court to follow well-settled authorities that hold that under section 995.8, public entities are given the right to refuse the employee a criminal defense *arbitrarily*, with only a permissive right to compensate employees for attorney's fees and costs. All public entities in California are embroiled in an unprecedented fiscal crisis. Requiring public entities to provide criminal defense costs, including substantial attorney's fees as in the case at bar, would impose an extreme burden on all cities and other public entities. Moreover, by endorsing a cause of action under Section 995.8, the trial court has potentially exposed all public entities to litigation by employees refused a defense in criminal actions, when under the language of the statute and its legislative history those employees should have no recourse against the public entity that refuses to provide a criminal defense.

## ARGUMENT

**THE CITY OF LOS ANGELES/COUNTY OF SACRAMENTO AUTHORITIES ARE FULLY CONSISTENT WITH THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 995.8; THE TRIAL COURT SHOULD HAVE FOLLOWED THOSE CASES IN THIS ACTION.**

Government Code section 995.8 provides that a public entity employer is not required to provide for the defense of a criminal action brought against its employees. Under section 995.8, the public entity *may* provide for such defense, but only if (a) the criminal action is brought on account of an act in the scope of employment, *and* (b) the public entity makes determinations "that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity."

Section 995.8 "is not a solitary statute standing alone, but an important part of an overall statutory scheme governing the relations between public entities and their employees when the employees have been charged with wrongdoing." *City of Los Angeles*, 27 Cal.App.4th at 174. It was enacted in 1963 as part of the California Tort Claims Act. *Id.*

Prior to the enactment of section 995.8, former Government Code section 2001 specifically prohibited public entities from providing for the defense of a criminal action brought against its employees. *County of Sacramento*, 20 Cal.App.3d at 472-473. Former section 2001 was repealed by the enactment of section 995.8. *Id.* at 473.

In 1963, the Law Review Commission (the "Commission") issued its Recommendations Relating to Sovereign Immunity, No. 4, Defense of Public Employees (Jan. 1963) 4 Cal. Law Revision Com. Rep. (1963) pp. 1306-1309 (hereinafter referred to as the "Commission Report"). *City of Los Angeles*, 27 Cal.App.4th at 175. The Commission recommended that public entities be required to provide a defense to their employees as to civil actions, and a legislative scheme of "comprehensive provisions relating to the public defense of civil actions" was enacted. *City of Los Angeles*, 27 Cal.App.4th at 577-578 and fn. 11.

In contrast to these comprehensive provisions relating to the mandated defense of civil actions, section 995.8 "affirmatively declares that public entities are not required to provide for the defense of criminal actions, but instead permits the entities to provide defenses

in certain circumstances." *City of Los Angeles*, 27 Cal.App.4th at 578. "[W]here ... criminal action is involved, the entity is given the right to refuse the employee a defense *arbitrarily*, with only a permissive right to compensate him for his attorney's fees and costs in the instances noted." *Id.*, citing *County of Sacramento*, 20 Cal.3d at 473 (emphasis in original).

The Commission's recommendations fully support these rulings. The Commission recognized that prior law prohibited public entities from providing a criminal defense, but that certain situations arose where a "limited discretionary authority to defend criminal actions" was appropriate. Commission Report at p. 1308. Where the public entity declines to furnish a defense in a criminal action, however, the employee "should have no recourse against the public entity..." *Id.* The Commission concluded, in relevant part:

Since it is necessary to weigh a great many factors to determine whether the public interest would be served by providing a public employee a defense against a criminal charge ..., and since those factors will vary in importance from case to case, the Commission has concluded that the decision whether it is in the public interest to provide the defense in any particular case is best left to the sound discretion of the public entity.

*Id.* at 1309.

In spite of the clear language of section 995.8, its legislative history, and the well-settled case law authorities interpreting the provision, the trial court based its ruling, at least in part, on a misapplication of section 995.8. The trial court erroneously held that section 995.8 applied to this case because the City's enactment of Resolution R-297335 constituted a determination, once and for all time, that the City had agreed to provide a defense in criminal actions. Moreover, the City was therefore required to make "findings of wrongdoing" under subdivision (b) of section 995.8 in order to deny providing for the defense of a criminal action brought against the employees in this case.

The trial court's rulings are contrary to the clear language of section 995.8, its legislative history, and the case law authorities interpreting the statute. Contrary to the trial court's rulings, as discussed above, section 995.8:

- Permits a City to arbitrarily deny a criminal defense to its employees, notwithstanding the existence of a resolution purportedly providing for a criminal defense;

- Provides employees no recourse against the public entity that denies a criminal defense;<sup>1</sup>
- And requires that, if the public entity does desire to provide a defense under section 995.8, it must make determinations, on a case-by-case basis, that a specific employee is entitled to a defense because such defense would be in the best interests of the city, *and* that the specific employee acted in good faith without malice and in the apparent interests of the city.

Moreover, payment of a public employee's defense costs without compliance with section 995.8 constitutes an unconstitutional gift of public funds. Cal. Const., art. XVI, § 6. In one of the few other authorities applying section 995.8, the Attorney General concluded that that constitutional provision, Cal. Const., art. XVI, § 6, was not violated where the City Council made the proper findings as to specific conduct of the city's police chief and his assistant. 68 Ops.Cal.Atty.Gen. 46 (1985). Here, no specific findings were made under section 995.8, so payment of Respondents' defense costs would

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<sup>1</sup> The Commission was aware of the potential harshness of this result, but recommended it any way, recognizing that public employees potentially had other civil remedies, including an action for false arrest and malicious prosecution. Commission Report at p. 1309.

## CONCLUSION

For the reasons stated above, the League urges the Court to reverse the trial court's ruling to the extent it purports to rely on section 995.8.

Dated: July 29, 2013

Respectfully submitted,

GOLDFARB & LIPMAN LLP

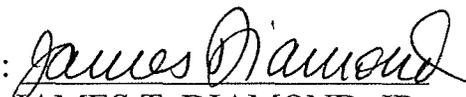
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## **CERTIFICATE OF COMPLIANCE**

I certify that, pursuant to California Rule of Court 8.204(c), the attached Amicus Brief is proportionately spaced, has a typeface of 14 points, and contains 1813 words, according to the word counter of the word processing program with which it was prepared.

Dated: July 29, 2013

GOLDFARB & LIPMAN LLP

By:   
JAMES T. DIAMOND, JR.  
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CITIES

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Council had intended that the Resolution apply to criminal actions, it would have included a reference to section 995.8.

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PROOF OF SERVICE BY MAIL  
*Cathy Lexin, et al. v. City of San Diego*  
*Court of Appeal, 4th Appellate District, Division 1, Case No. D062970*

I, Konni S. Stalica, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

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

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