CITY OF OAKLAND

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Presiding Justice Tricia A. Bigelow and Associate Justices
Second District Court of Appeal, Division Eight
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: Amici Curiae Letter of the City of Oakland, League of California Cities, and the California State Association of Counties In Support of Petition for Peremptory Write of Mandate

City of Los Angeles v. Los Angeles Superior Court
Court of Appeal Court Case No., B296555, Div. 8
McDowell, et al. v. City of Los Angeles, et al.
Los Angeles Superior Court Case No. BC702269

Honorable Justices:

The City of Oakland, League of California Cities, and California State Association of Counties (together, "Amici") respectfully urge this Court to grant the petition for peremptory writ of mandate in this case.

The order at issue—the second of its kind in lower courts—declares a seismic shift in public entity liability, erasing the Legislature's carefully-balanced rules. As it reverberates, the trial court's new law forces cities to fundamentally change the ways they address crime, unsafe buildings, and California's housing crisis. In short, because the trial court's order morphs cities into private property insurers and poses a grave threat to public health and safety, there is an urgent need to address this issue now.

AMICI'S INTERESTS

The League of California Cities ("League") is an association of 475 California cities that work together to enhance the lives of their citizens. A Legal Advocacy Committee—a subgroup comprised of 24 city attorneys from all the state's regions—advises the League. The Committee monitors cases that impact local governments and highlights cases with statewide or nationwide significance. This is such a case, the Committee finds.

The California State Association of Counties ("CSAC") is a non-profit corporation with 58 California county members. CSAC sponsors a Litigation Coordination Program. The County Counsels' Association of California administers the Program and that Association's Litigation Overview Committee (comprised of county counsels throughout the state) oversees it. This Committee finds that this case affects all counties.

The City of Oakland is a diverse city with over 425,000 residents. It is the eighth largest city in the state.

BACKGROUND

This case stems from a fatal fire at a single-family home in June 2017. (Petitioner's Exs. at pp. 5-6, 9-12.) The fire broke out in the home's garage, claiming the life of one person and injuring another. (*Ibid.*) The fire was set on purpose. (*Ibid.*)

Plaintiffs sued the City of Los Angeles and others. (*Id.* at pp. 7-8.) Plaintiffs claim that the City had a mandatory duty to abate unsafe conditions—the windows, for instance, "could not be opened more than an inch or two"—that the City learned of when its police officers and other City workers went to the garage "at least 31 times" before the fire. (*Id.* at p. 10.) None of these visits, Plaintiffs claim, were to inspect the home. (*Ibid.*)

The City demurred to Plaintiffs' First Amended Complaint ("FAC"), on two main grounds. (*Id.* at pp. 64-65.) First, the City showed that the FAC failed to set forth a dangerous condition claim. Second, the City pointed out, it had inspection immunity under Government Code section 818.6. (*Ibid.*)

In response, Plaintiffs cited a recent Alameda County Superior Court order overruling the City of Oakland's demurrer in a case related to the *Ghost Ship* warehouse fire. (*Id.* at pp. 77-90.) That court stunningly held that a city is "under a mandatory duty to act when it knows or is legally charged with knowing, independently from any inspection, that a structure is a danger to health and

safety." (*Id.* at p. 80.) And even though a city would have to inspect such a building to "act" in any way towards abating the dangers, the court brushed aside cities' statutory immunity for failing to inspect in that situation. (*Id.* at p. 87.) Following that court's lead, the trial court in this case overruled the City's demurrer.

DISCUSSION

Contrary to decades of California law and the policy driving it, the trial court's ruling now leaves cities "exposed to the risk of liability for virtually all property defects within [their] jurisdiction." (*Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, 412.)

Cities must choose between turning a blind eye to unsafe conditions and shifting scarce resources to swiftly shutter any building that may have them. While cities are working hard to combat displacement, the ruling could hasten it.

If the trial court's new law is allowed to stand, a police officer who answers a domestic violence call must assess the home for code violations. So, too, must social workers and other city workers who provide safety-net services. Facing the risk of losing their homes, victims and vulnerable communities might think twice about calling in crimes or accepting needed services.

I. CITIES HAVE NO MANDATORY DUTY TO ENFORCE BUILDING CODES

The trial court first erred in overruling the demurrer by finding that the City has a mandatory duty to enforce building codes. (Opp. at p. 13.) Such a ruling misreads California law and ignores the central holding of a nearly 20-year-old case decided by the California Supreme Court.

Since 1963, the mandatory-duty rule—Government Code section 815.6—has been the same:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Whether an enactment creates a mandatory duty is a question of law. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499.)

"First and foremost," for an enactment to create a mandatory duty, it must "be obligatory, rather than merely discretionary or permissive, in its directions to the public entity." (*Haggis*, *supra*, 22 Cal.4th at p. 498.) In other words, the law "must *require*, rather than merely authorize or permit, that a particular action be taken or not taken." (*Ibid.*, emphasis in original.)

Even if a statute uses the word "shall," section 815.6 cannot apply if the "function" needed to fulfill the charge "involves the exercise of discretion." (*Ibid.*, citing *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 631-33.) There is liability only when an entity fails to carry out "ministerial duties." (*Ortega v. Sacramento County Dept. of Health & Human Services* (2008) 161 Cal.App.4th 713, 728.) Those are not duties to investigate or make factual findings, because investigation and making factual findings each "involve a formidable amount of discretion." (*Ibid.*)

All this means that courts must look at "[w]hether a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function." (*Creason*, *supra*, 18 Cal.4th at p. 631; see also *Haggis*, *supra*, 22 Cal.4th at p. 500, fn. 2.) Courts must read "the statutory scheme at issue" and take enactments in context. (*Creason*, *supra*, 18 Cal.4th at p. 631.) The trial court's ruling in this case does not stand up to that scrutiny.

The applicable statutory scheme here—the State Housing Law—does not create a mandatory duty to immediately abate all substandard conditions of which a local government becomes aware. (Health & Saf. Code, §§ 17910-17998.3.) The job of building code enforcement is discretionary by its very nature. And an "obligation to perform a discretionary function" cannot create a mandatory duty. (*Haggis*, *supra*, 22 Cal.4th at p. 499; see also *Creason*, *supra*, 18 Cal.4th at p. 631.)

Simply put, the State Housing Law delegates authority to local governments and defines terms such as "substandard." That is strikingly different from a mandate to immediately abate all non-compliant conditions that any city worker may see or hear about through a citizen complaint portal. The State Housing Law has an entire article listing the different kinds of enforcement actions that may be taken; inherent in this scheme is municipal discretion to work with homeowners to gain compliance with the state building codes. (See, e.g., Health & Saf. Code, §§ 17980, 17980.6, 17980.7.)

Further, courts have repeatedly held that general statutory calls to enforce the law or to bring legal proceedings create no mandatory duty under section 815.6. (See, e.g., *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1245.) Take, for instance, crimes. "[T]here are unquestionably instances in which other factors will indicate that apparent obligatory language was not intended to foreclose a

governmental entity's or officer's exercise of discretion [in prosecuting crimes]," the Supreme Court held. (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 910, fn. 6, citing Gov. Code, § 26501; see also *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757 ["the matters of investigation and prosecution [are] matters in which the district attorney is vested with discretionary power as to which mandamus will not lie"]; *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 974.)

The same is true here. Like cities enforcing building and safety codes, district attorneys enforcing criminal laws do so by investigating and prosecuting violations. Yet courts wisely find that those activities are not mandatory, freeing up the municipal discretion needed to investigate and remedy code violations.

II. EVEN IF THERE WERE A DUTY, CITIES HAVE INSPECTION IMMUNITY

The trial court further erred in failing to apply inspection immunity. Government Code section 818.6 grants broad, absolute immunity for inspections:

> A public entity is not liable for injury caused by its **failure to make an inspection**, or by reason of making an inadequate or negligent inspection, of any property, other than its property (as defined in subdivision (c) of Section 830), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety. (Emphasis added.)

The "immunity provided by the statute is absolute on its face; there is nothing in the language of the section to indicate that it was intended to apply only to discretionary activities." (*Clayton v. City of Sunnyvale* (1976) 62 Cal.App.3d 666, 670.) A city's "immunity for health and safety inspections prevails over its liability under [California Government Code] section 815.6 for failure to discharge a mandatory duty." (*Ibid.*)

And it is broad. Inspection immunity covers "the entire process of inspection and reporting." (*Haggis*, *supra*, 22 Cal.4th at p. 504.) In *Cochran*, for instance, the plaintiffs alleged that before a fatal fire broke out, the fire department never reported or addressed unsafe conditions it found during an inspection. (*Cochran*, *supra*, 155 Cal.App.3d at p. 408.) The court did not decide whether the alleged failures violated mandatory duties. (*Id.* at p. 411.) Instead, it held that assessing what conditions are unsafe and reporting and disclosing them squarely falls within the immunity's scope:

> Appellants would have us interpret the inspection immunity narrowly to include only the actual search for

> hazardous conditions itself. They urge that the statute does not protect a public entity once it obtains any knowledge of hazardous conditions; and that liability may attach for negligent breach of other purported duties, such as a duty to advise and recommend ways to deal with known fire hazards, or to require specific fire suppression devices. But the inspection immunity cannot be so arbitrarily restricted to the mere failure to detect hazards.

(*Ibid.*) The *Cochran* court thus rejected the idea that a city's "knowledge" of an unsafe condition abrogates the immunity. (*Ibid.*)

Section 818.6 manifests an important policy decision by the Legislature, which takes hold even in tragic cases like this one. Given the "extensive nature of the inspection activities of public entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if [inspection] immunity were not granted." (*Cochran*, *supra*, 155 Cal.App.3d at p. 412, quotation omitted.) This is especially true for sprawling cities like Los Angeles, Oakland, and others that face resource limitations to conduct inspections.

Without the Legislature's broad rule, cities would turn into insurers for all private property—yet the Legislature did not create tort liability for dangerous conditions of *private* property. Such liability is too much weight for any city to bear. A narrow read of the inspection immunity would "clearly place a premium on careless fire inspections" and "encourage municipalities not to make any efforts to learn about possible fire hazards." (*Cochran*, *supra*, 155 Cal.App.3d at p. 412.)

III. THE TRIAL COURT'S ORDER CUTS COMMUNITY TIES

The trial court's order clashes with the law and unleashes uncertainty and vast liability for cities throughout the state. And it threatens to harm the broader community.

For example, many cities have 311 call centers to make it easy for people to report all types of issues—including complaints about code violations on private property. The centers then route the calls to the agencies that can assist. Under the trial court's ruling, local governments may be forced to reconsider such call centers lest they create notice-based liability for private conditions.

Likewise, local government employees go to workplaces and homes to provide safety-net services to people in need, workforce help, and conservatorship assessments. The order turns those public servants into code-inspectors, a function for which they often are not trained to provide. Municipal workers enter homes, not

to look for "obvious dangerous conditions," but instead to provide comfort, care, and assistance to those in need.

Local police officers enter homes and buildings to help people in dire need. Their tough job is to stop and investigate crimes like robberies and domestic violence. Their focus should remain there, not on whether the electrical wiring system in a building may not be code-compliant.

Cities and counties must be able to prioritize nuisance abatement in their jurisdictions without becoming the insurer for all private property. Residents should be able to contact their local government for assistance without fear. Cities and counties of California should be able to rely on the well-balanced tort and immunity system set up by the Legislature. The trial court's order takes a wrecking ball to all these important principles and precedent, and immediately forces local governments either to cut services that may afford "notice" of conditions, or to enforce their building and safety codes anytime they enter a home for any purpose.

CONCLUSION

For these important reasons, Amici respectfully urge the Court to grant the City's petition.

Respectfully submitted,

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