No. S181004

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WYNONA HARRIS,
Plaintiff and Respondent,

vs.

CITY OF SANTA MONICA,
Defendant and Appellant.

Court of Appeal, Second Appellate District, Case No. B199571
Los Angeles Superior Court Case No. BC 341569

REPLY TO ANSWER TO PETITION FOR REVIEW

Michael Nourmand, Esq. (SBN #198439)
KOKOZIAN & NOURMAND LLP
5900 Wilshire Boulevard, Suite 1730
Los Angeles, California 90036
Telephone: (323) 935-6677
Facsimile: (323) 935-4919
Email: mnourmand@knlawyers.com

David M. deRubertis (SBN #208709)
Michael H. Leb (SBN #123042)
The deRubertis Law Firm
21800 Oxnard Street, Suite 1180
Woodland Hills, California 91367
Telephone: (818) 227-8605
Facsimile: (818) 227-8616
Email: David@deRubertisLaw.com

Attorneys for Plaintiff, Respondent & Petitioner
Wynona Harris

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21800 Oxnard Street, Suite 1180
Woodland Hills, California 91367
Telephone: (818) 227-8605
Facsimile: (818) 227-8616
Email: David@deRubertisLaw.com

Attorneys for Plaintiff, Respondent & Petitioner
Wynona Harris

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont.)

INTRODUCTION

We believe our Petition submitted a compelling case for why this Court should grant review to settle questions of overriding importance to literally almost all FEHA discrimination and retaliation claims.

The City's Answer fails to rebut the compelling need for review. If anything, it reinforces our point that review must be granted because only this Court can ultimately decide the threshold question of whether the "mixed motive" defense applies at all to FEHA claims. The need to grant review is underscored by the fact that even the City cannot muster any justification for applying the "mixed motive" defense to FEHA claims beyond simply pointing to the statutorily different federal law under Title VII and then noting that some California appellate courts have - in dicta - assumed it may apply to the FEHA.

The City's first claimed justification falls flat. Our Petition forcefully demonstrated why mere reference to Title VII law cannot justify creating a non-statutory FEHA defense - especially one which exceeds the scope of the defense under Title VII.

The City's second justification backfires. The fact that the only claimed decisional authority the City can muster is snippets of dicta from appellate decisions proves that this area of FEHA jurisprudence is far from

"settled." The need to secure a uniform answer to these important questions not only warrants review by this Court, it screams out for it.

Moreover, independent of the threshold question of whether any form of "mixed motive" defense exists under the FEHA, our Petition offered *other* compelling grounds on which review should be granted.

First, we noted that even assuming *arguendo* that the "mixed motive" analysis applies to FEHA claims, review should still be granted to decide the threshold factual predicates necessary to a "mixed motive" instruction. (Petition, pp. 29-36.) The City's Answer not only fails to rebut this important point, but it confirms that the Opinion can be read as supporting a "mixed motive" instruction in virtually every FEHA discrimination or retaliation case. This, alone, requires review so that this Court can carefully consider the necessary *factual predicates* to a "mixed motive" instruction.

Second, we noted the striking incongruity between the Opinion's creation of a complete defense under the FEHA when the analogous federal defense merely limits certain remedies. This result cannot be squared with the FEHA's far more expansive protection compared to Title VII, nor with Title VII's preemption of less-protective state laws. To these points, the City has no response.

In the text below we address the City's argument sections in reverse order. We first explain why the appellate court did not "simply appl[y] decisional law" in engrafting a "mixed motive" defense onto FEHA claims. We next respond to the City's attempted rebuttal to our point that any recognition of a "mixed motive" defense must carefully consider the factual predicates to a "mixed motive" analysis so that every conceivable FEHA case does not become a "mixed motive" case.

We conclude this Introduction by reiterating the widespread importance of these issues. If, as we contend, the Opinion misstates *either* the *existence*, *applicability or scope* of the "mixed motive" defense and review is not granted in this case, countless FEHA cases will be tried to verdict with the erroneous instructions now required by this Opinion. Review now can stop the otherwise inevitable floodgates of appellate challenges to virtually every FEHA discrimination or retaliation case that will be tried under the instructions commanded by the Opinion. Because the essence of the basis to grant review is to ensure predictability of law for lower courts, this case demands review.

ARGUMENT

I. THE OPINION DID NOT "APPL[Y] EXISTING DECISIONAL LAW." IT BORROWED STATUTORILY DISTINCT FEDERAL LAW TO CREATE A NON-STATUTORY FEHA DEFENSE THAT EXCEEDS THE SCOPE OF THE FEDERAL DEFENSE.

A. The City's Claim that the Existence of a "Mixed Motive" Defense Is a "Well Settled" Part of FEHA Jurisprudence Is Wrong.

The City tries to defend the Opinion's engrafting of a "mixed motive" defense into FEHA jurisprudence - and, therefore, downplay the critical importance of review by this Court - with the *ipse dixit* contention that this "mixed motive" complete defense is "well settled law" under the FEHA. (Answer, p. 3.) This assertion cannot withstand scrutiny. In fact, the City's alleged support for this proposition does not support it at all.

Contradicting its core premise that the "mixed motive" defense is a "well settled" part of FEHA law, the City actually admits that the "mixed motive" instruction now required by the Opinion in FEHA cases is "derived from the United States Supreme Court decision in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228." (Answer, p. 2.) The City then acknowledges that, in *Price Waterhouse*, the United States Supreme Court "surveyed the legislative history of Title VII to conclude Congress intended to preserve an employer's remaining discretion and free choice; therefore,

Price Waterhouse held that an employer can avoid liability under Title VII if it can prove that, even had it not taken sex into account, it would have come to the same decision regarding a particular person." (Answer, p. 13.)

Obviously, a decision that "surveyed the legislative history of Title VII" to determine Congress' intentions does *not* answer the distinct statutory construction question of what the California Legislature intended when it enacted the FEHA. As our Petition made clear, and the City simply ignores, California courts routinely depart from federal anti-discrimination law when either the statutory text or the purposes behind the statutes differ. (Petition, pp. 20 & 22-23.) And, here, there are many legitimate reasons why California courts should depart from federal law (*see* Petition, pp. 19-28 & 37-41) - most of which the City's Answer ignores.[1]

Thus, the City's claim that "the mixed-motive affirmative defense adopted by the U.S. Supreme Court provides precedent for analyzing employment discrimination cases brought under FEHA" is wrong. The

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[1] The City also claims that because federal law has a "mixed motive" defense, "[a]nything less" than applying a "mixed motive" defense to the FEHA "would set California apart...." (City's Answer, p. 3.) But there is nothing novel about this concept. Our Petition demonstrated numerous instances in which California's Legislature has deliberately chosen to exceed the scope of federal law in the discrimination context. (Petition, pp. pp. 19-28 & 37-41.) To this settled fact, the City has no retort.

mere fact that Title VII recognizes a "mixed motive" defense does not in any way compel California courts to do the same.[2]

The City's claim of this "well settled" law suffers from a great irony. While the City asserts that the BAJI "mixed motive" instruction must be given as a matter of "settled" California law, even the BAJI drafters themselves emphasized the uncertainty about this very proposition. (Petition, p. 12.) As we noted in our Petition, and the City again chooses to ignore, in the "Comment" section of the "mixed motive" instruction, the BAJI drafters explicitly cautioned that: "No California appellate decision has dealt with these issues." (*B.A.J.I. California Jury Instructions, Civil* (Fall 2009 Edition), Instr. No. 12.26 "Comment".) Again, a "settled" proposition this is not.

We make these points now not to argue the merits of this issue at the review stage. Instead, our purpose is to demonstrate that the City's claim that the "mixed motive" defense is "well settled" under California law - and, therefore, there is no basis for review - is not even close to accurate. The mere reference to federal law cannot justify the blanket, reflexive

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[2] Indeed, the City's argument that this non-statutory defense is "well settled" is contradicted by another key point made in our Petition, which the City also ignores. The Legislature's creation of numerous statutory defenses to FEHA claims - without creating a "mixed motive" defense - precludes the judicial creation of this defense. (Petition, p. 20-22.)

adoption of this federal defense under California's unique and independent statutory scheme. Yet, this blanket, reflexive adoption of a federal defense is precisely what the Opinion did in this case.

The City's only other claimed support for the assertion that the "mixed motive" defense is "well settled" under the FEHA is reliance on dicta from various published California appellate decisions. (Answer, p. 15.) In making this claim, the City reads our Petition with blinders.

First, the City ignores the citations in our Petition where courts have consistently acknowledged the uncertainty surrounding "mixed motive" analysis under the FEHA. We wrote in our Petition, and the City ignores, the following:

> Likewise, federal courts within California have consistently observed that no published California appellate authority had - before the Opinion - actually held that the "mixed motive" defense applied to FEHA claims. (*See e.g., Metoyer v. Chassman* (9th Cir. 2007) 504 F.3d 919, 955 fn. 25 ["no California court has explicitly adopted the mixed-motive defense as a bar to liability under FEHA"]; *Behne v. Microtouch Systems, Inc.* (N.D. Cal. 1999) 58 F.Supp.2d 1096, 1100 ["the California Supreme Court has not yet determined whether to adopt *Price Waterhouse* and establish a similar affirmative defense under state law for a mixed-motive defendant"].) (Petition, p. 14.)

Second, the City similarly ignores that our Petition cited most of the same cases the City cites and then explained how each of them merely made passing dicta references to the "mixed motive" analysis. None of these

decisions *held* that "mixed motive" analysis actually applies to the FEHA.[3] (Petition, p. 13.)

The City's citation to dicta from other decisions does not undermine the need for review by this Court. In fact, the very opposite is true. If anything, the fact that, before the Opinion, nothing more than passing dicta references to the "mixed motive" defense existed in California decisional law demonstrates why review should be granted so that this Court squarely answers this important question. Lower appellate and trial courts should not be left to struggle with these issues on their own, guided by nothing more than passing dicta or the Opinion's cursory analysis of this issue - an analysis which overlooks without scrutiny many of the fundamental points raised in our Petition.

In short, nothing in the City's Answer supports its core premise that the issues raised by our Petition are "well settled" under California law.

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[3] The only decisions the City cites which our Petition did not already address are *O'Mary v. Mitsubishi Electronics* (1997) 59 Cal.App.4th 563 and *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138. Neither are instructive. *O'Mary* did not involve a "mixed motive" analysis; in fact, the phrase "mixed motive" does not even appear in the decision. (*O'Mary*, 59 Cal.App.4th at 582-584.) *Sada* did nothing more than cite *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748-1749 and paraphrase *Heard* as "discussing direct evidence cases, including 'mixed motive' cases." (*Sada*, 56 Cal.App.4th at 151 fn. 7.) But our Petition established that *Heard* did not analyze or hold whether "mixed motive" applied to FEHA. (Petition, p. 13.)

Instead, the City's Answer makes clear that the only bases upon which to incorporate a "mixed motive" defense into the FEHA are blind reliance on stale Title VII case law - ignoring the 1991 amendments - and uncritical acceptance of dicta within California appellate decisions. The fact that this is all the City can muster to support the conclusion that this issue is "well settled" proves that this issue is ripe and ready for review.[4]

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[4] The City's complaint of supposed unfairness that the law forbids an employer's reliance on any illegal factor in employee decision-making is wrong - both as a matter of settled law and sound policy. (Answer, pp. 17-19.) Legally, the "a motivating reason" causal nexus standard has long been accepted in FEHA jurisprudence. (*See generally* Amicus Letter of The Legal Aide Society | Employment Law Center, pp. 2-4; Amicus Letter of California Employment Lawyers Association, pp. 1-2.) At a policy level, this standard is both fair and consistent with the FEHA's twin purposes of preventing discrimination and providing effective remedies for those who are discriminated against. (*Government Code* §12920.) Indeed, *any* employer's negative reliance on an employee's protected trait is a barrier to true workplace equality. Thus, sound policy should - and does - properly place consequence on an employer's illegal reliance on a protected trait. Moreover, the applicable jury instruction is carefully tailored to ensure that the employer's reliance on the prohibited trait "contributed to the decision to take" adverse action, thus ensuring that the law does not merely punish thought but actual behavior motivated by impermissible thought. (*California Approved Jury Instructions, Civil* (Spring 2010 Ed.), Instr. 2507.)

B. The City Cannot Defend the Creation of a Complete Defense Under FEHA When the Analogous Title VII Defense Merely Limits Some Remedies.

Whether any "mixed motive" defense applies to FEHA claims was not the only issue raised in our Petition. Another key issue we identified is the *effect* of a proven "mixed motive" defense (if the defense exists at all). (Petition, pp. 37-41.) Does it merely limit certain remedies? If so, what remedies does it limit? Or, contrary to federal law, does it provide a complete defense as the Opinion here concluded? On these additional key questions - questions which alone fully support review - the City's Answer's simply glosses over the point, burying the entire issue into a few brief paragraphs of discussion. (Answer, pp. 14-16.)

The City's brief argument boils down to this: Because Congress amended Title VII to provide that the "mixed motive" defense merely limits remedies, but California's Legislature did not similarly amend the FEHA, then the "mixed motive" defense under the FEHA must be a complete defense. (Answer, pp. 14-16.) This reasoning is flawed on multiple levels.

First, this entire argument presupposes that the Legislature believes that the FEHA contains a "mixed motive" defense, despite the absence of any statutory text evidencing the defense. After all, if the Legislature does not believe that the FEHA contains any such defense, then it would have

had no reason to amend the FEHA to conform this non-existent defense to the amended federal version.

Second, even if one assumes *arguendo* that a "mixed motive" defense does exist under the FEHA, this defense is not found in the statutory text. It was not created by the Legislature. Instead, the defense could only exist as a matter of judicial adoption of it.[5] But if this is a judicially-created defense, then one would expect any interpretation or construction of its scope to come from the courts, not necessarily the Legislature. This leads to another important point. If this defense is a matter of judicial creation - not commanded by the statutory text but instead derived from some policy rationale - then the policy arguments for why the FEHA is more protective than federal law command the conclusion that the defense cannot be a complete defense under the FEHA while only a partial defense under Title VII.

Third, the City's justification of this complete defense cannot be reconciled with the fact that - as pointed out by amicus curiae Legal Aide Society | Employment Law Center - Title VII preempts state laws that actually conflict with its provisions. (*California Federal Savings & Loan*

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[5] We do not mean to imply that this judicial creation of a non-statutory defense is appropriate. We simply assume it for present purposes for sake of argument.

Association v. Guerra (1987) 479 U.S. 272, 281 ["Congress has indicated that state laws will be pre-empted ... if they actually conflict with federal law."].) Title VII expressly provides for preemption of any state law that "purports to ... permit doing of any act which would be an unlawful employment practice under this subchapter." (42 U.S.C. §2000e-7.) Using *Price Waterhouse* to create a state law "mixed motive" defense, but then not applying Title VII's statutory limitations to the state law variant, would create a serious issue of conflict preemption. In the same exact case, a proven "mixed motive" defense under FEHA would insulate the employer from any liability when the same identical facts under Title VII would establish a legal violation (with limited remedies). This result would lead to a serious preemption problem: conduct made illegal by Title VII would be legal under the FEHA.

There are many more reasons why any "mixed motive" defense under the FEHA should not be broader than federal law. In fact, if the defense exists at all under the FEHA it should limit fewer remedies than the comparable defense under federal law given the FEHA's much more vigorous emphasis on remedies compared to Title VII. For present purposes, however, these observations underscore the importance and

seriousness of the issues this Petition presents, which is precisely why review must be granted for definitive guidance from this Court.

A final observation on the remedy question. Because this case reaches this Court following a jury verdict where these remedy issues are a ripe and necessary part of the analysis, this case presents an ideal vehicle to address these issues compared to other procedural contexts where the remedy debate would be premature - such as a summary judgment case. This, too, supports review in this particular case.

II. THE CITY'S RESPONSE TO OUR "PRETEXT" DISCUSSION PROVES THE POINT: THE OPINION WOULD REQUIRE A "MIXED MOTIVE" INSTRUCTION IN VIRTUALLY EVERY FEHA DISCRIMINATION OR RETALIATION CASE.

Wholly apart from the threshold question of the existence of a "mixed motive" defense and the separate question of its effect if proven, our Petition raised another, distinct question:

> If the "mixed motive" defense does apply to FEHA claims, when does it apply? Is a "mixed motive" instruction warranted in *every* FEHA discrimination or retaliation case, or must certain *factual predicates* be present - for example, evidence that the employer actually considered *both* proper *and* improper factors - to justify a "mixed motive" instruction? (Petition, p. 5.)

As part of our discussion of this issue, we reviewed the traditional distinctions between "pretext" and "mixed motive" cases, and then made

the unremarkable observation that many cases are not actually "mixed motive" cases. Instead, there are plenty of cases where the issue is really which reason (illegal or legal) motivated the employer's decision-making because the evidence does not support that the employer actually simultaneously harbored *both* permissible *and* impermissible motives.[6] (Petition, pp. 29-36.) We concluded that another reason to grant review is that - even if this Court determines the "mixed motive" analysis does apply under the FEHA - the Court should still settle the important question of what *factual predicates* support a "mixed motive" instruction in any given case. Otherwise, if the Opinion stands, a "mixed motive" instruction will be required in virtually every FEHA discrimination or retaliation case.

The City's Answer proves our point. The City, too, reads the Opinion as requiring a "mixed motive" instruction in virtually every FEHA discrimination or retaliation case. As the City puts it: "[A]n employer may defend itself against a claim of pregnancy discrimination through evidence that it did not discriminate on the basis of pregnancy. But if the jury

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[6] *See Arteaga v. Brinks Incorporated* (2008) 163 Cal.App.4th 327, 357 ["because the evidence does not support Arteaga's contention that Brink's had legitimate *and illegitimate* reasons for his termination, we do not decide whether a mixed-motive analysis applies under the FEHA or in this case"] [original italics]; *Huffman v. Interstate Brands Companies* (2004) 121 Cal.App.4th 679, 702 ["mixed motive" analysis not applicable where the "case was plead and tried as a pretext case"].)

somehow believes it did, presumptively or otherwise, the employer may ask the jury to decide whether the employer would have made the same decision in any event." (Answer, p. 11.) Thus, according to the City, the Opinion establishes that all cases are now "mixed motive" cases. This, alone, shows how far-reaching and sweeping the Opinion truly is.

This also leads to another irony. The City's Answer defends the Opinion's requirement that the BAJI "mixed motive" instruction be given. However, the BAJI drafters emphasized that the instruction "should only be used in a true mixed-motive situation. It does not apply to the circumstances where it is claimed that a legitimate reason was in fact a pretext for unlawful action." (BAJI, Instr. No. 12.26 "Use Note".) But here, both parties tried and treated this case as a typical "pretext" case where the City either acted out of pregnancy animus or legitimate performance considerations, but not both. Never did the City acknowledge - or Harris assert - that multiple motivations (proper and improper) were at play. Thus, on these facts, even according to the drafters of the pertinent BAJI instruction, the instruction "does not apply" in this case.[7]

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[7] Parenthetically, we note that the City's Answer ignores an express limitation stated in our Petition. The City states: "To this Court Harris claims that before an employer-defendant can offer the jury a mixed-motive instruction, the employer must admit that it had mixed motives in making its decision. In other words, Harris argues that an employer must actually state

At bottom, the City's Answer confirms that the Opinion's formulation of the "mixed motive" defense is limitless and can be stretched to apply to virtually any conceivable FEHA discrimination or retaliation fact pattern. Even if we assume *arguendo* that the "mixed motive" analysis applies under the FEHA, every case cannot be automatically transformed into a "mixed motive" case. Review should thus be granted to determine what *factual predicates* justify a "mixed motive" instruction - something the Opinion below did not adequately consider.[8]

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that it discriminated in order to avail itself of the settled mixed-motive defense." (Answer, p. 3.) In fact, however, we carefully stated: "We do not articulate now a comprehensive rule for what factual predicate (or predicates) must be present for 'mixed motive' analysis to apply in a given case." (Petition, p. 32.) Thereafter, we did note that one "necessary factual predicate must be that there is some actual factual support (not just after-the-fact speculation or theorizing) for the threshold proposition that the employer was, in fact, motivated by *both* lawful *and* unlawful considerations." (Petition, p. 32 at fn. 10.)

[8] The City devotes nearly half of its Answer to an irrelevant factual attack on the jury's conclusion that it discriminated coupled with the City's musings about its assumption that the jury's verdict was based on nothing more than the "timing" of Harris' pregnancy disclosure. (Answer, pp. 1-2; 4-10.) First, we note that the City has drastically misstated the actual record evidence - a point we will establish in our merits briefing if review is granted. Second, we note that the City's begrudging rant is flatly contradicted by the appellate court's conclusion that JNOV was properly denied because much evidence of pretext (beyond just the "timing") supported the jury's verdict of discrimination. (Opinion, pp. 12-14.) In any event, these factual debates are simply irrelevant to the core legal issues raised by this Petition. Thus, we reserve our response for the merits stage.

CONCLUSION

This case raises multiple questions of far-reaching and widespread importance to day-to-day FEHA litigation. The appellate court's Opinion will now require a jury instruction of a non-statutory affirmative defense in virtually every FEHA discrimination and retaliation case. This non-statutory defense far exceeds the reach of the federal Title VII defense from which it is derived. That, alone, compels review because of the FEHA's avowed purpose to exceed federal law and federal law's avowed purpose to preempt less-protective state laws. These issues are simply too important and too far-reaching to allow more time to pass - and more cases to be tried under the instructions now commanded by the Opinion - without review by this Court to definitively settle these important questions of FEHA jurisprudence.

DATED: April 15, 2010

Respectfully submitted,

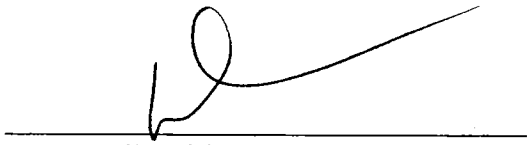
Kokozian & Nourmand, LLP
The deRubertis Law Firm

By _____
David M. deRubertis, Esq.
Michael Nourmand, Esq.
Attorneys for Plaintiff and Respondent, Wynona Harris

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word Perfect software used to prepare this document, I certify that this Reply to Answer to Petition for Review contains 3,883 words, excluding those items identified in Rule 8.520(c)(3).

DATED: April 15, 2010



David M. deRubertis, Esq.

PROOF OF SERVICE

Case Name: Harris vs. City of Santa Monica
Supreme Court Case Number: S181004
Los Angeles County Superior Court Case Number: BC341269
Court of Appeals Case Number: B199571

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 21800 Oxnard Street, Suite 1180, Woodland Hills, California 91367. On the below executed date, I served upon the interested parties in this action the following described document(s): **REPLY TO ANSWER TO PETITION FOR REVIEW.**

/____/ MAIL: by placing a true copy thereof enclosed in a sealed envelope with First Class prepaid postage thereon in the United States mail at Woodland Hills, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013a(1):

/**XXX**/ OVERNIGHT DELIVERY: by causing it to be mailed by a method of overnight delivery with instructions for delivery the next business day with delivery fees paid or provided for in the United States mail at Woodland Hills, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013(c):

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 2010 at Woodland Hills, California.

Mollie Elicker

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Case Name: Harris vs. City of Santa Monica
Supreme Court Case Number: S181004
Los Angeles County Superior Court Case Number: BC341269
Court of Appeals Case Number: B199571

Michael Nourmand, Esq.
KOKOZIAN & NOURMAND LLP
5900 Wilshire Boulevard, Suite 1730
Los Angeles, CA 90036

(Attorneys for Plaintiff and Respondant Wynona Harris)

Carol Ann Rohr, Esq.
DEPUTY CITY ATTORNEY
1685 Main Street, Third Floor
Santa Monica, CA 90401

(Attorneys for Defendant and Appellant City of Santa Monica)

Jeffrey K. Winikow, Esq.
LAW OFFICES OF JEFFREY K. WINIKOW
11377 Olympic Boulevard, Fifth Floor
Los Angeles, CA 90064

(On Behalf of Amicus Curiae California Employment Lawyers Association)

Linda D. Kilb, Esq.
DISABILITY RIGHTS EDUCATION & DEFENSE FUND
2212 Sixth Street
Berkely, CA 94710

(On Behalf of Amicus Curiae Disability Rights Education & Defense Fund)

Claudia Center, Esq.
THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER
600 Harrison Street, Suite 120
San Francisco, CA 94107

(On Behalf of Amicus Curiae The Legal Aid Society - Employment Law Center)

Erwin Chemerinsky
UNIVERSITY OF CALIFORNIA SCHOOL OF LAW
401 E. Peltason Drive, Suite 1000
Irvine, CA 92697

(On Behalf of Amicus Curiae)

PROOF OF SERVICE (CONT.)

Case Name: Harris vs. City of Santa Monica
Supreme Court Case Number: S181004
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Court of Appeals Case Number: B199571

Clerk of the Court
COURT OF APPEAL, SECOND APPELLATE DISTRICT
Ronald Reagan State Building, Division 8
300 South Spring Street, Second Floor
Los Angeles, CA 90013

Clerk of the Court
LOS ANGELES COUNTY SUPERIOR COURT, DEPARTMENT 71
111 North Hill Street
Los Angeles, CA 90012