

No. S106660  
(Court of Appeal No. B142999)  
(Los Angeles Super. Ct. No. BC 219557)

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

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STEVE SCHIFANDO,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

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**BRIEF OF AMICI CURIAE OF EQUAL RIGHTS ADVOCATES,  
CALIFORNIA FACULTY ASSOCIATION, CALIFORNIA TEACHERS  
ASSOCIATION, CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,  
ASIAN LAW CAUCUS, DISABILITY RIGHTS EDUCATION AND  
DEFENSE FUND, INC., LEGAL AID SOCIETY/EMPLOYMENT LAW  
CENTER, CALIFORNIA WOMEN'S LAW CENTER, AND THE IMPACT  
FUND, IN SUPPORT OF PETITIONER**

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Charlotte E. Fishman (SBN 88345)  
EQUAL RIGHTS ADVOCATES  
1663 Mission Street, Suite 250  
San Francisco, California 94103  
Telephone: 415/621-0672  
Facsimile: 415/621-6744

*Attorneys for Amici Curiae*

[Names and addresses of additional counsel  
for *amici curiae* appear on inside cover.]

**ADDITIONAL COUNSEL FOR THE AMICI:**

Brad Seligman (SBN 083838)  
THE IMPACT FUND  
1604 Solano Avenue  
Berkeley, CA 94707-2109  
Telephone: (510) 528-7344  
Facsimile: (510) 528-0083

Beverly Tucker (SBN 072525)  
CALIFORNIA TEACHERS  
ASSOCIATION  
1705 Murchison Drive  
Burlingame, CA 94011  
Telephone: (650) 552-5425  
Facsimile: (650) 552-5019

Glenn Rothner, Esq. (SBN 067353)  
Rothner, Segall & Greenstone  
510 South Marengo Avenue  
Pasadena, CA 91101  
Telephone: (626) 796-7555  
Facsimile: (626) 577-0124  
For CALIFORNIA FACULTY  
ASSOCIATION

Linda Kilb (SBN 136101)  
DISABILITY RIGHTS EDUCATION  
AND DEFENSE FUND  
2212 Sixth Street  
Berkeley, CA 94710  
Telephone: (510) 644-2555  
Facsimile: (510) 841-8645

Joannie Chang (SBN 187749)  
ASIAN LAW CAUCUS  
939 Market Street, Suite 201  
San Francisco, CA 94103  
Telephone: (415) 896-1701  
Facsimile: (415) 896-1702

Pat Shiu (SBN 104894)  
LEGAL AID SOCIETY/EMPLOYMENT  
LAW CENTER  
1663 Mission St., Suite 400  
San Francisco, CA 94103  
Telephone: (415) 864-8848  
Facsimile: (415) 864-8199q

Madalyn Frazzini (SBN 064090)  
CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION  
2045 Lundy Avenue  
San Jose, CA 95106  
Telephone: (408) 263-8000  
Facsimile: (408) 954-0948

Vicky L. Barker (SBN 119520)  
CALIFORNIA WOMEN'S LAW CENTER  
3460 Wilshire Boulevard, Suite 1102  
Los Angeles 90010  
Telephone: (213) 637-9900  
Facsimile: (213) 637-9909

## INTRODUCTION AND STATEMENT OF INTEREST

This case raises the issue of whether public employees' exercise of rights under the Fair Employment and Housing Act may be constrained by imposing an exhaustion of administrative remedies requirement over and above that required by the statute itself. In *Schifando v. City of Los Angeles* 97 Cal. App. 4th 312, the Second District Court of Appeal held – contrary to its own prior decision and the view of the Fifth District Court of Appeal – that a city employee must exhaust **both** the administrative remedy provided by the FEHA **and** the remedy provided by the city charter before suing in court.

Amici Equal Rights Advocates (ERA), California Faculty Association (CFA), California Teachers Association (CTA), California School Employees Association (CSEA), Asian Law Caucus (ALC), Disability Rights Education and Defense Fund, Inc. (DREDF), Legal Aid Society/Employment Law Center (ELC), California Women's Law Center (CWLC), and The Impact Fund argue that *Schifando* was wrongly decided, because it is contrary to legislative intent, prior judicial interpretation and public policy. Its result is likely to be not judicial economy, but the unnecessary consumption of both administrative and judicial resources. In addition, it will curtail enforcement of the FEHA by unduly restricting public employees' ability to exercise their fundamental right to be free of employment discrimination.

As organizations vitally interested in enforcement of the Fair Employment and Housing Act<sup>1</sup>, Amici respectfully request that the Court

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<sup>1</sup> Amici's statements of interest are set forth in Appendix A to this brief.

reverse the decision below and restore to the FEHA the force and integrity the Legislature meant it to have.

## **ARGUMENT**

### **I. REQUIRING PUBLIC EMPLOYEES TO EXHAUST ADMINISTRATIVE REMEDIES OTHER THAN THOSE REQUIRED BY THE FAIR EMPLOYMENT AND HOUSING ACT OFFENDS THE STATUTE AND IS CONTRARY TO PUBLIC POLICY**

#### **A. As A Remedial Statute Vindicating Fundamental Civil Rights, The Fair Employment and Housing Act Must Be Interpreted Liberally To Fulfill Its Intended Purpose.**

The Fair Employment and Housing Act, Government Code Sections 12900 *et seq.* (hereinafter “FEHA”) is a remedial statute articulating a fundamental civil right – “the opportunity to seek, obtain and hold employment without discrimination.” Gov. Code § 12921. The Legislature has specifically mandated that the statute “shall be construed liberally for the accomplishment of [its] purposes.” Gov. Code § 12993, subd. (a).

The Legislature’s intent in enacting the FEHA has been clear and unambiguous from the beginning:

The FEHA establishes a comprehensive scheme for combating employment discrimination. *Snipes v. City of Bakersfield* (1983) 145 Cal. App. 3d 861, 865; *see Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal. 3d 211. As a matter of public policy, the FEHA recognizes the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. Gov. Code § 12920. This court has declared that policy to be “fundamental.” *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal.3d at p. 220.

Moreover, the opportunity to be free from discriminatory practices in seeking, obtaining, and holding employment is a “civil right.” Gov. Code § 12921. Employment discrimination “foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for

development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.” Gov. Code § 12920. The express purpose of the FEHA is “to provide effective remedies which will eliminate such discriminatory practices.” (*Ibid.*) In addition, the Legislature has directed that the FEHA is to be construed “liberally so as to accomplish its purposes. Gov. Code § 12993.

*Brown v. Superior Court* (1984) 37 Cal. 3d 477, 485-486.

Accordingly, time and again, this Court and the courts below have read the law broadly as the Legislature commanded, and have rejected attempts by employers to limit or constrain employees from exercising their rights under the statute. See, e.g., *Brown, supra*, 37 Cal.3d 477 (employees entitled to choose convenient venue to pursue FEHA claims); *Commodore Home Systems, Inc. v. Superior Court, supra*, 32 Cal. 3d 211 (employee not limited to back pay in FEHA action); *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143 (employee not barred from pursuing FEHA disability discrimination claim by workers’ compensation exclusivity); *State Personnel Bd. v. Fair Employment and Housing Comm’n* (1985) 39 Cal. 3d 422 (State Personnel Board may not prevent employees from pursuing discrimination claims with the Fair Employment and Housing Commission); *Robinson v. Fair Employment and Housing Comm’n* (1992) 2 Cal. 4th 226 (“regularly employing five or more” interpreted to facilitate jurisdiction over employee claims); *Romano v. Rockwell Int’l Inc.* (1996) 14 Cal. 4th 479 (limitation period interpreted to facilitate consideration of employee claims on the merits); *Richards v. CH2M Hill, Inc.* (2001) 26 Cal. 4th 798 (limitations period interpreted so as not to create “serious practical difficulties” on employee’s ability to vindicate rights); *Snipes v. City of Bakersfield* (1983) 145 Cal. App. 3d 861 (public employees not barred from pursuing FEHA claim by Tort Claims Act); *Watson v. Dept. of*

*Rehabilitation* (1989) 212 Cal. App. 3d 1271 (employee not required to exhaust state civil service remedies prior to initiating court action on FEHA claims); *Ruiz v. Dept. of Corrections* (2000) 77 Cal. App. 4th 891 (same).

In *Schifando v. City of Los Angeles*, the Court below has ignored this venerable history of statutory interpretation (and its own prior precedent) to impose on public employees an undue (and potentially fatal) constraint on the exercise of their rights under the FEHA.

**B. Neither The Language Of The Statute Nor Authoritative Precedent Of This Court Provides A Basis For Preventing Public Employees From Exercising The “Full Panoply” Of Rights Granted To All Employees By The FEHA.**

In *State Personnel Bd. v. Fair Employment and Housing Comm’n*, *supra*, 39 Cal. 3d at 422 (“*SPB*”), this Court addressed the question of whether state civil service employees and applicants for state civil service employment were excluded from the protections of the Fair Employment and Housing Act, and it rejected the State Personnel Board’s claim to exclusive jurisdiction over all matters involving state civil service employees. The policy concerns articulated in that decision also apply to the case before the Court today.

Respondents in *SPB* argued that civil service employees were exempt from the protection of the FEHA. Despite the fact that the statutory definition of “employer” (Gov. Code § 12926, subd. (c)) included “the state or any political or civil subdivision thereof and cities,” respondents argued that by “state” the Legislature really intended to cover only workers who are exempt from civil service.

After conducting a comprehensive analysis of the difference between the FEHA and the state Civil Service Act, the Court held that the FEHA covered all state employees. First, it recognized that the purpose of

the Civil Service Act, *i.e.*, to ensure that appointments to state service are made on the basis of merit, not patronage, is different from that of the FEHA, which “is to provide effective remedies for the vindication of constitutionally recognized civil rights, and to eliminate discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex and age.” *SPB* at 432, citations omitted. Next, this Court pointedly observed that the Fair Employment and Housing Commission and the Department had 25 years (now over 40 years) of specialized administrative expertise solely in prevention and remediation of civil rights discrimination. (*Ibid.*)

Finally, comparing (1) the enforcement services provided by the FEHA at no expense to the claimant with the absence of such services under the Civil Service Act; (2) the procedural rights afforded under the FEHA (including, specifically, the private right of action in superior court at issue here) with the limited writ review of Board decisions under a deferential “substantial evidence” standard; (3) the broad remedies available to a successful claimant under the FEHA (including attorneys fees and compensatory damages) with the limited ones available under the Civil Service Act; and (4) the provision of a neutral administrative decision-maker by the FEHA, with a forum in which the Board “occupies the roles of both defendant and judge” (*Id.* at 433-434), this Court concluded that the FEHA offered superior procedures, protections and enforcement services.

Rejecting the SPB’s claim of exclusive jurisdiction, it held that “*there is no basis for depriving these [public] employees of the full panoply of rights available to them ...under the FEHA.*” *Id.* at 434, fn.14, italics added. The Court explained that “[t]he FEHA is a comprehensive scheme for the realization of the state’s public policy “to protect and safeguard the

right and opportunity of all persons to seek, obtain, and hold employment without discrimination . . . .” *SPB, supra*, 39 Cal. 3d at 428. Finding it “inconceivable that the Legislature could have silently excluded 130,000 civil servants” from the protections of the Act (*Id.* at 429), the Court specifically held that the Legislature’s intent was “to give public employees *the same tools in the battle against employment discrimination that are available to private employees.*” *Id.* at 431, italics added.

The Court of Appeal below adopts the very stance – limitation by silence – that was rejected as “inconceivable” by this Court in *SPB*, and appears to reject its controlling analysis, as well:

We cannot assume . . . that either the absence of an express requirement in FEHA that a plaintiff must exhaust an employer’s internal grievance procedures or the provision of an administrative remedy under FEHA indicates a legislative intent to preclude [such a requirement]. If the Legislature intended to relieve a plaintiff alleging a FEHA cause of action from the requirement to exhaust non-FEHA administrative remedies, we trust it would do so explicitly.” *Schifando*, 97 Cal.App. 4th at 323.

By its reasoning, the Court of Appeal would exclude an even larger number of public employees (i.e., virtually every public employee in the state of California) from the “full panoply” of rights under the FEHA because the Legislature did not explicitly disavow a silent “requirement” to exhaust remedies other than those provided for in the Act.<sup>2</sup>

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<sup>2</sup> It is hardly surprising that the Legislature did not explicitly “relieve” plaintiffs from the purported “requirement” of exhausting an employer’s internal grievance procedures, because the notion that there is such a requirement is based on a misunderstanding of the exhaustion of administrative remedies doctrine. See, Section III, below, at 15.

The panel below stands alone in its interpretation of the FEHA. Indeed, another panel of the Second Appellate District summarily rejected the argument adopted below. In *Watson v. Dept. of Rehabilitation, supra*, 212 Cal. App. 3d 1271, the court not only ruled against the public entity's position, it demolished it:

“We fail to understand why the State continues to urge on appeal as it did in the trial court that Watson may not prevail because she has not exhausted her civil service administrative remedies. She need not have done so as the State well knows because *Watson had a choice between her civil service remedies and those provided by the Fair Employment and Housing Act . . . .* Watson complied with the procedures required under the [FEHA], received her “right to sue” letter and timely filed her suit . . . . Because the State Attorney General knows the law in this area, *we can only regard the argument as frivolous.*” *Watson v. Dept. of Rehabilitation, supra*, 212 Cal. App. 3d at 1284, italics added.

*Watson* was the law in the Second Appellate District for almost 15 years.

The Fifth Appellate district agrees with *Watson*. In *Ruiz v. Dept. of Corrections, supra*, 77 Cal. App. 4th 891, respondents claimed that state employees must exhaust their administrative remedy with the State Personnel Board in order to pursue a court action under the FEHA. The appellate court disagreed, taking its lead from this Court's expansive view of employee choice:

[W]e cannot agree all state employees who allege they were terminated for discriminatory reasons must file a claim with the Board. Instead, they may conclude it would be in their best interest to focus their energies on a claim with the DFEH . . . the Supreme Court's attention on the different purposes of the two agencies suggests it would be proper for a potential claimant to consider which forum would be more appropriate for his or her cause of action . . . Thus, aggrieved state employees may determine the facts underlying the complaint better comport with the purpose behind the FEHA

and, accordingly, pursue redress solely with the DFEH. *Ruiz*, *supra*, 77 Cal.App. 4th at 897-898.

In ruling that the state employee need not exhaust internal employer remedies, the *Ruiz* Court considered the “strong public policy to give all employees a choice of forum in which to challenge discriminatory practices, and to pick a process that is “economical, expedient, and straightforward.” *Id.* at 898. See also *City of Moorpark v. Superior Court*, *supra*, 18 Cal. 4th 1143.<sup>3</sup> Amici respectfully submit that *Watson* and *Ruiz* state the better rule – the rule that respects *SPB*’s command to treat public and private employees alike, to give employees the choice of what remedy to seek, and to construe the FEHA liberally to achieve its purpose to eradicate employment discrimination.

In view of the unambiguous legislative intent to construe the statute liberally to accomplish its purposes (Gov. Code § 12993), the comprehensive scheme adopted by the Legislature to combat employment discrimination, and the consistent history of judicial interpretation to expand and protect employee rights, there can be no question but that the decision below violates both the letter and the spirit of the FEHA.

## **II. IMPOSING A DUAL EXHAUSTION REQUIREMENT UNDULY BURDENS PUBLIC EMPLOYEES.**

The new exhaustion requirements imposed by the court below are not required by statute and, in addition to being contrary to firmly

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<sup>3</sup> It is ironic that, while, the State Personnel Board had argued in *SPB* that it was frivolous and wasteful to make *two* forums available to public employees with discrimination complaints when *one* would suffice, the court below insists that since two remedies are provided, they must *both* be used.

established public policy, will have an adverse effect on public employees, public employers and the judicial system.

As noted above, the legislative intent to provide employees with a choice of remedies, and to leave it up to the employee as to which one or ones to pursue has been a consistent theme guiding this Court's interpretation of the FEHA. See also *Rojo v. Kliger* (1990) 52 Cal. 3d 65, *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880. Against this background, the lower court's decision to limit public employees' access to the courts is puzzling. Acknowledging that the civil service remedies are inferior to those provided by the FEHA, that the deadlines are shorter, the forum less neutral, the opportunity to make a factual record more abbreviated, and the cost of pursuing the remedy non-recoverable, the appellate court nonetheless holds that failure to pursue the civil service remedy is fatal to plaintiff's FEHA claim.

**A. The Effort And Expense Inherent In Prosecuting Two Administrative Claims Is An Undue Burden.**

Statutory or constitutional rights may be transgressed as much by the imposition of undue costs as by outright denial. *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal. 4th 83, 109. Ignoring this principle, the court below discounted the effort and expense involved in pursuing administrative remedies in two different forums:

An employee should be excused from exhausting an administrative remedy *only if* the employee shows that to pursue both remedies would prejudice or unduly burden the employee *beyond the effort and expense inherent in prosecuting two administrative claims . . .*

*Schifando*, 97 Cal. App. 4th at 323, italics added.

Given the fundamental rights at stake, however, the additional burden is neither inconsequential for the victim of discrimination, nor

irrelevant to interpretation of legislative intent, because maximizing the ability of a person aggrieved by employment discrimination to obtain judicial relief economically facilitates enforcement of the FEHA.

As this Court recognized in *Brown v. Superior Court*, *supra*, 37 Cal. 3d 477:

Victims of discrimination are frequently unemployed—many times as the result of the alleged discrimination. They often lack financial resources. For such individuals, the costs of litigation pose a formidable barrier to the filing and prosecution of an FEHA action. The Legislature recognized this barrier and sought to alleviate it . . . .

*Id.* at 486.

Cost was also a factor in this Court’s determination in *SPB v. FEHC*, *supra*, 39 Cal. 3d 422, that state employees should have recourse to the protections of the FEHA. Cost factors were included among the “manifold” ways in which the FEHA provided superior protection. *Id.* at 431.

The DFEH provides enforcement services to discrimination complainants that do not have a counterpart in the civil service system. Under the FEHA, the Department bears the expense of investigating, conciliating and, where necessary, prosecuting the action on behalf of the claimant. . . . This includes the services of an attorney from the Department to try the case at no expense to the claimant . . . . Moreover, while complainants may hire an attorney to represent them at a Board hearing, they must bear the cost themselves.

*Id.* at 432, statutory references omitted.

For these reasons alone, a victim of discrimination, having limited financial resources, might reasonably choose to exhaust only the administrative remedies provided by the FEHA, before proceeding with a court action. By insisting that a public employee bear the additional expense of a civil service proceeding not required by the FEHA, or forfeit

the fundamental right to pursue vindication in court, the court below has transgressed 20 years of consistent judicial interpretation of the FEHA.

**B. Allowing Unilaterally Imposed Employer Requirements To Constrain The Exercise Of Fundamental Rights Impedes FEHA Enforcement.**

In addition to forcing public employees to bear the expense of dual administrative proceedings, the effect of the decision below is to permit public employers *unilaterally* to burden public employees by shortened claims filing deadlines, inadequate or unduly complex procedures, and limitation on the production of evidence in support of their claims. These prevent, rather than facilitate, judicial enforcement of the FEHA. In the case before this Court, Appellant had only *five days* to request a hearing and *ninety days* to request reinstatement or compensation under the Los Angeles City Charter. (See Exhibit A to Respondent's Answer to Petition for Review.) His failure to exhaust these proceedings was held fatal to his FEHA claim. A rule that permits a public employer unilaterally to deprive its employees of state-law rights unless they do in days what the state allows them a year to do is totally at odds with legislative intent:

*The Legislature's intent was to give public employees the same tools in the battle against employment discrimination that are available to private employees. The FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination. . . .*

*SPB*, 39 Cal. 3d at 431, italics added. See also *Armendariz v. Foundation Health Psychcare Services*, *supra*, 24 Cal. 4th at 109 (refusing to compel arbitration where employer unilaterally imposed mandatory arbitration agreement curtailing employees' FEHA rights).

Among the most important benefits offered to both public and private employees under the FEHA is a private right of action in superior court. Gov. Code § 12965, subd. (b). *Rojo v. Kliger, supra*, 52 Cal. 3d at 82-88; *Stevenson v. Superior Court, supra*, 16 Cal. 4th at 903-05. As noted above, this private right of action vindicates an important public purpose, *i.e.*, it is the primary mechanism for enforcing the right to be free of discrimination prohibited by the FEHA. A dual exhaustion requirement would impede, and in some cases completely eviscerate, this statutory enforcement mechanism.

As this Court is well aware, exhaustion of administrative remedies is merely a starting point for litigation, not the end of the road. Recently, in *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, this Court held that a public employee who exhausted his employer's quasi-judicial administrative remedy, was nonetheless *completely foreclosed from proceeding with his FEHA cause of action* because he did not bring a timely writ proceeding to set aside the adverse result obtained. In deciding the case, this Court announced a general rule that once an employee has chosen to avail himself of an administrative agency's quasi-judicial procedures, he should not be able to circumvent the established process for judicial review of the resulting decision by pursuing relief under the FEHA:

We conclude that when, as here, a public employee pursues administrative civil service remedies, receives an adverse finding, and fails to have the finding set aside through judicial review procedures, the adverse finding is binding on discrimination claims under the FEHA. *Johnson, supra*, 24 Cal. 4th at 76.

Johnson's failure to seek timely judicial relief from the adverse administrative determination was held to establish its propriety, thus preventing him from later disavowing the result in an FEHA action.

*Johnson, supra*, 24 Cal. 4th at 71. But *Johnson*, at least, freely chose to pursue his internal quasi-judicial remedy before proceeding with his FEHA cause of action. In that context, the Court’s concern that “[r]efusing to give binding effect . . . would . . . undermine the efficacy of such proceedings” is understandable. *Id.* at 72.

Amici respectfully submit, however, that this Court’s *Johnson* decision is incompatible with the compelled dual exhaustion requirement adopted by the court below. If public employees are to be compelled against their will to take part in administrative proceedings that they would otherwise choose to forgo, applying the rule in *Johnson v. Loma Linda* is not only deeply unfair, it contravenes the legislative intent of giving public employees a “maximum opportunity to vindicate their rights against discrimination.”<sup>4</sup>

As this Court held in *Commodore Home Systems v. Superior Court*, “[t]he policy that promotes the right to seek and hold employment free of prejudice is fundamental . . . The statute’s aim is to provide *effective*

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<sup>4</sup> While *Johnson* is a *laches* decision, and not an adjudication on the merits, it did give preclusive effect to the decision of a personnel board that refused to hear some testimony supportive of the plaintiff’s retaliation claim. *Id.* at 71, fn.3. In her concurring opinion at pages 78-81, Justice Werdegar discussed the principles of collateral estoppel set forth in *People v. Sims* (1982) 32 Cal. 3d 468, and expressed concern that “a less than perfectly careful reader” of the majority opinion might believe that “a public employee’s FEHA action is barred *whenever* the employee has neglected to seek judicial review of the employer’s adverse internal administrative decision, whether or not the requirements for collateral estoppel outlined in *Sims* . . . are satisfied.” *Johnson*, 24 Cal. 4th at 81. Among the *Sims* requirements for collateral estoppel is a proceeding in which the parties have had an adequate opportunity to litigate the factual issues. *Id.* at 78. The concern that a court might give preclusive effect to an administrative proceeding that does *not* present a full and fair opportunity to litigate discrimination claims is one of the primary reasons public employees elect to forgo internal review of FEHA claims.

*remedies* against the evil.” 32 Cal. 3d at 220, italics added. A forced and binding employer-controlled administrative proceeding should not be permitted to undermine the “effective remedy” provided by the Legislature.

Accordingly, the decision below should be reversed because it unduly burdens the rights of public employees under the FEHA.

**III. THE DUAL EXHAUSTION REQUIREMENT IS THE ANTITHESIS OF JUDICIAL ECONOMY AND ITS PURPORTED BENEFITS ARE REALIZED SIMPLY BY EXHAUSTING THE SINGLE ADMINISTRATIVE REMEDY PROVIDED BY THE FEHA.**

The only rationale offered by the court below for its arrogation of the Legislature’s power to create FEHA remedies and procedures, appears to be, if one dose of medicine is good, then two are better.

We find that the exhaustion of *either* administrative remedy would promote judicial economy and afford due respect to the administrative agency . . . We therefore conclude that a city employee must exhaust *both* administrative remedies.

*Schifando*, 97 Cal.App. 4th at 320, italics added. This is bad medicine, and bad law.

All the benefits that could be derived from dual exhaustion – notice and an opportunity to redress the alleged wrong without judicial intervention, a more economical forum to resolve disputes, an opportunity to mitigate damages, the development of a factual record, and the opportunity for an agency to apply its expertise to the facts – may be obtained by exhausting the FEHA administrative remedy alone. In fact, this very point was made in *Snipes v. City of Bakersfield*, *supra*, 145 Cal. App. 3d 861, holding that actions seeking redress for employment discrimination pursuant to the FEHA are not subject to the claim presentation requirements of the Tort Claims Act:

The purposes of the general claims presentation requirement are to give the governmental entity an opportunity to settle claims before suit is brought, to permit early investigation of the facts, to facilitate fiscal planning for potential liabilities, and to avoid similar liabilities in the future . . . The provisions of the FEHA for filing of a complaint with the department, administrative investigation, and service of the complaint on the employer serve a similar function.

*Snipes*, 145 Cal.App. 3d at 869.

Furthermore, and contrary to the lower court's view, nothing in the exhaustion of administrative remedies doctrine itself requires exhaustion of remedies "in the abstract." The Court below misstated and misapplied the exhaustion of administrative remedies doctrine, first set forth in *Abelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280, 292.

In *Rojo v. Kliger, supra*, 52 Cal. 3d 65, 82-88, this Court considered whether exhaustion of FEHA administrative remedies was required to bring a common law claim for injuries relating to sexual harassment by an employer. Defendants argued that the policy considerations underlying the exhaustion doctrine justified its extension to related constitutional and common law claims not specifically within the agency's jurisdiction. This Court agreed that exhaustion of the FEHA administrative remedy is a precondition to bringing a civil suit under the FEHA; however, it specifically rejected the extension urged by the defendant. In so doing, it also rejected an expansive construction of the *Abelleira* rule:

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. [*Abelleira*] at 292: [t]his oft-quoted rule speaks *only* to the need to exhaust administrative remedies *provided for a statutory right* and *does not govern rights and remedies outside the legislative scheme*.

*Rojo, supra*, 52 Cal. 3d at 84, italics added. Thus, the lower court's expansive reading of *Abelleira* has already been rejected by this Court.

Finally, we come to the judicial economy argument. The court below claims that its dual exhaustion requirement "increases the potential for judicial economy." *Schifando, supra*, 97 Cal.App. 4th at 320. But the decision requires *every* public employee to present his or her discrimination claim for internal public agency review, not just those employees who choose to do so. This places an additional burden not just on the reluctant employee, but also on the administrative process and on the courts. Both the public employer and any public employee organizations face potentially vast increases in cost to accommodate the increased caseload.

Nor do the increased costs end in the administrative forum. To the extent that less than full relief is available, we can expect *both* victorious and losing employees to pursue their FEHA claims in court, not to mention those employees who have failed to timely file or who have chosen to forgo the administrative process because of their belief in its futility. Thus, the court system will be faced with *more*, not less litigation. There will be writs to set aside adverse results, motions to determine whether exceptions to the exhaustion requirement apply, motions to determine whether the procedures provided were sufficient to permit *res judicata* or collateral estoppel effect and, finally, proceedings (as yet undescribed) to deal with the inevitable conflicting agency findings.

*The Oxford Dictionary and Thesaurus (American Edition)* defines the transitive verb "to exhaust" as follows: "[1] consume or use up the whole of; [2] use up the strength or resources of (a person); tire out." As synonyms, it lists consume, use (up), expend, finish, deplete, spend, run through, fritter away, squander, and waste. This new "exhaustion of

administrative remedies” doctrine will indeed “deplete, spend, run through, fritter away, squander and waste” the resources of the plaintiff, the agency, and the courts. It will not prevent public employees from bringing claims under the FEHA, but it will require additional time consuming judicial proceedings that will delay resolution of their claims.

Furthermore it will condemn the courts to (1) sifting through the immense array of detailed internal appeal proceedings adopted by myriad public and quasi-public entities to determine whether or not they meet the standard for preclusive effect under *People v. Sims, supra*, and (2) assessing complicated factual scenarios to determine whether an exception to the exhaustion requirement should apply in particular cases. This is hardly the stuff of judicial economy.

By contrast, the holdings of *Watson* and *Ruiz, supra*, square perfectly with the legislative and judicial history of the FEHA. Provision of an administrative remedy that is simple, straightforward, and economical facilitates employee access to the courts, in accordance with legislative intent. It does not place any special constraints on public employees relative to private employees, and thus raises no question of equal protection. Public employees, like their non-public counterparts, have one year to file an administrative claim with the DFEH, and then one year after the issuance of a right to sue letter to pursue a civil action. Once in court, the focus is on proof of the claim, not on the adequacy of the employer’s internal procedures. *Cf. Castillo v. City of Los Angeles* (2001) 92 Cal.App. 4th 477.

When determining which version of the exhaustion of administrative remedy doctrine best comports with the purpose of the statute, the question is easily resolved in the public employee’s favor. Since the individual

employee is the primary engine of enforcement of the right to hold employment free of discrimination, and since there is a firmly established public policy in favor of a “liberal interpretation” of the FEHA to accomplish its intended purpose, it is plain that the legislative intent is to leave the choice of forum to the good sense and self interest of the person most affected. Accordingly, this Court should reverse the decision of the court below.

### CONCLUSION

The FEHA should not be interpreted to impose new exhaustion requirements, outside the FEHA’s own statutory framework, on public employees seeking to exercise their fundamental right to be free of employment discrimination. The Court of Appeal decision should therefore be reversed.

DATED: December 18, 2002

Respectfully submitted,

By \_\_\_\_\_  
CHARLOTTE E. FISHMAN  
EQUAL RIGHTS ADVOCATES  
1663 Mission Street, Suite 250  
San Francisco, California 94103  
Telephone: (415) 621-0672

*Attorneys for Amici Curiae*

PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

Today I served the attached:

BRIEF OF AMICI CURIAE OF EQUAL RIGHTS  
ADVOCATES, CALIFORNIA FACULTY  
ASSOCIATION, CALIFORNIA TEACHERS  
ASSOCIATION, CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION, ASIAN LAW CAUCUS, DISABILITY  
RIGHTS EDUCATION AND DEFENSE FUND, INC.,  
LEGAL AID SOCIETY/EMPLOYMENT LAW CENTER,  
CALIFORNIA WOMEN'S LAW CENTER, AND THE  
IMPACT FUND, IN SUPPORT OF PETITIONER

by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as follows:

Robert M. Ball, Esq.  
Loyst P. Fletcher, Esq.  
Law Offices of Robert M. Ball  
5757 Wilshire Boulevard, Suite 500  
Los Angeles, CA 90036-3628

Judith D. Thompson, Esq.  
Deputy City Attorney  
Office of the City Attorney  
200 North Main Street  
1800 City Hall East  
Los Angeles, CA 90012

Clerk of the Court  
California Court of Appeal  
Second Appellate District  
300 South Spring Street, Second Floor  
North Tower  
Los Angeles, CA 90013

Hon. Morris B. Jones  
Los Angeles County Superior Court  
111 North Hill Street  
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 18, 2002.

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Marina Wilson

## APPENDIX A

### STATEMENTS OF INTEREST

Equal Rights Advocates (“ERA”) is a San Francisco-based human and civil rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has litigated some of the most important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), two of the first pregnancy discrimination cases heard by the U.S. Supreme Court, and *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991). ERA has also appeared as amicus curiae in numerous United States Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 U.S. Dist. LEXIS 19928; 66 Fair Empl. Prac. Cas. (BNA) 1886 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, 522 U.S. 1105 (1998); and *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). ERA’s Higher Education Legal Advocacy Project is dedicated to eliminating employment discrimination and ensuring equal opportunity for women employed in institutions of higher learning, including public colleges and universities in the State of California.

The California Faculty Association (“CFA”) is the exclusive collective bargaining representative of the faculty bargaining unit of the California State University (“CSU”), representing over 20,000 faculty members, including librarians, counselors, and coaches, at 22 CSU campuses systemwide. Faculty members employed by the CSU who seek to resolve employment-related disputes, including claims of employment

discrimination, face a daunting array of administrative procedures, from the State Personnel Board (for contest of disciplinary actions), to the grievance procedure of the CFA-CSU collective bargaining agreement, to the grievance-arbitration mechanism provided for at Education Code § 89452.5, to campus-promulgated policies implemented under the authority of an Executive Order issued by the CSU's Chancellor.

California Teachers Association, as the exclusive collective bargaining representative of more than 900 units of California public school teachers, represents more than 300,000 teachers, librarians, counselors, and other certificated employees. Public school faculty members who seek to resolve employment disputes, including claims of unlawful employment discrimination, face various administrative procedures including administrative hearings in suspension and dismissal proceedings, grievance procedures pursuant to collective bargaining agreements, and school board personnel policies.

The California School Employees Association ("CSEA") is the exclusive representative of approximately 700 bargaining units of non-teaching employees working for public school and community college districts throughout the state, a bargaining unit of police employed by the California State University, and approximately five bargaining units of workers employed by special districts. It represents approximately 213,000 employees, including school bus drivers, custodians, secretaries, food service and maintenance personnel. If these workers are subject to discrimination in employment they may be faced with filing a claim in several administrative forums in addition to DFEH. Among such multiple forums are the grievance procedure of the collective bargaining agreement, the public employer's adopted policies (see, e.g., Education Code §§ 45113

and 88013), and the adopted policies of a Personnel Commission established in merit system school and community college districts (see Education Code §§ 45220, *et seq.* and 88060, *et seq.*)

Established in 1972, the Asian Law Caucus, Inc. (“ALC”) is the country’s oldest civil rights and public interest legal organization serving the Asian Pacific American community. The ALC represents primarily low-income, monolingual or limited English proficient Asian Pacific Americans in the areas of employment/labor, immigration, housing/community development, and civil rights. ALC has represented Asian Pacific American workers in numerous employment discrimination cases, including EEOC and *Castrejon v. Tortilleria “La Mejor,”* 758 F. Supp. 585 (E.D. Cal. 1991) (Title VII case holding that undocumented workers are protected against sex discrimination in employment, notwithstanding the passage of the Immigration Reform and Control Act of 1986) and *Ramirez v. General Services Administration, et al.,* Case No. C93-0539 VRW (N.D. Cal. 1993) (accent discrimination case involving five Filipino security guards who were removed from their posts at the Department of Treasury building by American Mutual per a request from GSA).

Based in Berkeley, California, with expertise in both federal and California law, the Disability Rights Education and Defense Fund, Inc. (DREDF) is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities, and is the California Legal Services Trust Fund Support Center for disability civil rights.

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is also a California State Bar Legal Service Trust Fund Support Center,

providing services to legal services projects across the state. In its funding role, the Impact Fund reviews requests for grants to cover expenses of complex litigation, including employment discrimination cases, and is frequently called upon to assist firms in finding financing, co-counsel, or other resources necessary to bring significant litigation. It offers training programs, advice and counseling, and amicus representation to nonprofit organizations regarding class action and related issues.

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination, Women's Health, Race and Gender, Women's Economic Security, Exploitation of Women and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue.

The Legal Aid Society – Employment Law Center (“LAS-ELC”) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in California workplaces, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor. The LAS-ELC has appeared before this Court on numerous occasions, both as counsel for plaintiffs as well as in an *amicus curiae* capacity, to advocate for the interests of those individuals and

communities.<sup>5</sup> The LAS-ELC's interest in preserving the protections afforded California employees by this state's antidiscrimination laws is longstanding. The LAS-ELC has litigated issues which are similar to the specific issue before the Court in the instant case. The LAS-ELC was counsel of record for the real parties in interest in *State Personnel Bd. v. FEHC*, 39 Cal. 3d 422 (1985); and was *amicus curiae* in *Commodore Home Sys., Inc. v. Superior Court* 32 Cal. 3d 211 (1982), *Robinson v. FEHC*, 2 Cal. 4th 226 (1992) and *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998).

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<sup>5</sup> See, e.g., *Lolley v. Campbell* (2002) 28 Cal. 4th 367; *Hi-Voltage Wire Works, Inc v. City of San Jose* (2000) 24 Cal. 4th 537; *Post v. Palo/Haklar & Assocs.* (2000) 23 Cal. 4th 942; *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal. 4th 368; *Cortez v. Purolator Air Filtration Prods Co.* (2000) 23 Cal. 4th 163; *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575; *Aguilar v. Avis Rent A Car Sys.* (1999) 21 Cal. 4th 121; *Henning v. Indus. Welfare Comm'n* (1998) 46 Cal. 3d 1262; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992; *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1; *Wells Fargo v. Superior Court* (1991) 53 Cal. 3d 1082; *Shoemaker v. Myers* (1990) 52 Cal.3d 1; *Johnson Controls, Inc. v. FEHC* (1990) 218 Cal. App. 3d 517, review denied, May 17, 1990; *Hall v. Nomura Sec. Int'l, Inc.* (1990) 219 Cal. App. 3d 43, review denied, June 20, 1990; *Hall v. Nomura Sec. Int'l, Inc.* (1990) 219 Cal. App. 3d 43, review denied, June 20, 1990; *S.G. Borello & Sons, Inc. v. DIR* (1989) 48 Cal. 3d 341; *Pickrel v. Gen. Tel. Co.* (1988) 205 Cal. App. 3d 1058, review denied, 1989 Cal. LEXIS 92; *Dyna-Med, Inc. v. FEHC* (1987) 43 Cal. 3d 1379; *Vinson v. Superior Court* (1987) 43 Cal. 3d 833; *MacPhail v. Court of Appeal* (1985) 39 Cal. 3d 454.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND STATEMENT OF INTEREST .....	1
ARGUMENT .....	2
I.    REQUIRING PUBLIC EMPLOYEES TO EXHAUST ADMINISTRATIVE REMEDIES OTHER THAN THOSE REQUIRED BY THE FAIR EMPLOYMENT AND HOUSING ACT OFFENDS THE STATUTE AND IS CONTRARY TO PUBLIC POLICY .....	2
A.    As A Remedial Statute Vindicating Fundamental Civil Rights, The Fair Employment and Housing Act Must Be Interpreted Liberally To Fulfill Its Intended Purpose .....	2
B.    Neither The Language Of The Statute Nor Authoritative Precedent Of This Court Provides A Basis For Preventing Public Employees From Exercising The “Full Panoply” Of Rights Granted To All Employees By The FEHA .....	4
II.   IMPOSING A DUAL EXHAUSTION REQUIREMENT UNDULY BURDENS PUBLIC EMPLOYEES .....	8
A.    The Effort And Expense Inherent In Prosecuting Two Administrative Claims Is An Undue Burden.....	9
B.    Allowing Unilaterally Imposed Employer Requirements To Constrain The Exercise Of Fundamental Rights Impedes FEHA Enforcement .....	11
III.  THE DUAL EXHAUSTION REQUIREMENT IS THE ANTITHESIS OF JUDICIAL ECONOMY AND ITS PURPORTED BENEFITS ARE REALIZED SIMPLY BY EXHAUSTING THE SINGLE ADMINISTRATIVE REMEDY PROVIDED BY THE FEHA .....	14
CONCLUSION.....	18

TABLE OF AUTHORITIES

Page

**CASES**

<i>Abelleira v. District Court of Appeal</i> (1941) 17 Cal. 2d 280 .....	15
<i>Armendariz v. Foundation Health Psychcare Services</i> (2000) 24 Cal. 4th 83 .....	9, 11
<i>Brown v. Superior Court</i> (1984) 37 Cal. 3d 477 .....	3, 10
<i>Castillo v. City of Los Angeles</i> (2001) 92 Cal.App. 4th 477 .....	17
<i>City of Moorpark v. Superior Court</i> (1998) 18 Cal. 4th 1143 .....	3, 8
<i>Commodore Home Systems, Inc. v. Superior Court</i> (1982) 32 Cal. 3d 211 .....	2, 3, 13
<i>Johnson v. City of Loma Linda</i> (2000) 24 Cal. 4th 61 .....	12, 13, 5
<i>People v. Sims</i> (1982) 32 Cal. 3d 468 .....	17
<i>Richards v. CH2M Hill, Inc.</i> (2001) 26 Cal. 4th 798 .....	3
<i>Robinson v. Fair Employment and Housing Comm'n</i> (1992) 2 Cal. 4th 226 .....	3
<i>Rojo v. Kliger</i> (1990) 52 Cal. 3d 65 .....	9, 12, 15
<i>Romano v. Rockwell Int'l Inc.</i> (1996) 14 Cal. 4th 479 .....	3
<i>Ruiz v. Dept. of Corrections</i> (2000) 77 Cal. App. 4th 891 .....	4, 7, 8, 17
<i>Snipes v. City of Bakersfield</i> (1983) 145 Cal. App. 3d 861 .....	2, 3, 14, 15
<i>State Personnel Bd. v. Fair Employment and Housing Comm'n</i> (1985) 39 Cal. 3d 422 .....	passim
<i>Stevenson v. Superior Court</i> (1997) 16 Cal. 4th 880 .....	9, 12
<i>Watson v. Dept. of Rehabilitation</i> (1989) 212 Cal. App. 3d 1271 .....	4, 7, 8, 17

**STATUTES**

Gov. Code § 12920 .....	2, 3
Gov. Code § 12921 .....	2
Gov. Code § 12926, subd. (c) .....	4
Gov. Code § 12965, subd. (b) .....	12
Gov. Code § 12993, subd. (a) .....	2, 3, 8
Gov. Code §§ 12900, <i>et seq.</i> .....	2