Case No. A165726

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION FIVE

MARILYN CLARK, MANJARI KANT, AND ELIZABETH SUE PETERSEN, on behalf of themselves and all others similarly situated,
Plaintiffs and Appellants,
v.
ORACLE AMERICA, INC.,
Defendant and Respondent.

Superior Court of California, County of San Mateo
Trial Court Case No. 17CIV02669
Honorable V. Raymond Swope, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA CIVIL RIGHTS DEPARTMENT
and
PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF MARILYN CLARK, MANJARI KANT, AND ELIZABETH SUE PETERSEN

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rule of Court 8.200, subdivision (c), the California Civil Rights Department (CRD) requests leave to file an amicus brief in support of Appellants Marilyn Clark, Manjari Kant, and Elizabeth Sue Petersen.

Interest of Amicus

CRD is a state agency tasked with investigating and prosecuting civil rights actions. It enforces, among others, the California Fair Employment and Housing Act's (FEHA, Gov. Code, § 12900 et seq.) prohibition against unlawful employment practices, including sex-based discrimination in compensation, and the California Equal Pay Act's (Lab. Code, § 1197.5) prohibition against sex-based wage disparities (Gov. Code, § 12930, subd. (f)(1) & (5)), in both individual and group or class investigations and civil actions. (See generally Gov. Code, §§ 12961, 12965, subd. (a)(5)(A).)

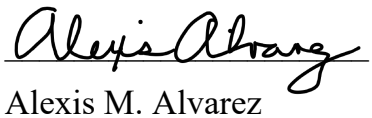
CRD represents the state's interest and "effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination[.]" (Gov. Code, § 12930, subd. (o).) CRD recognizes that private attorneys general, through individual and class actions, play a critical role in supplementing public prosecutor efforts by CRD and other government enforcement agencies. The Court's resolution of this appeal will be highly relevant to CRD's enforcement authority in group or class actions under FEHA and the Equal Pay Act. CRD therefore submits the proposed amicus brief to provide its perspective on the nature and scope of claims brought under the laws that it enforces. CRD's proposed amicus brief illustrates the breadth of authority supporting the continued viability of collective private and public enforcement actions to safeguard civil rights, including the protections from

employment discrimination and unequal pay at issue here. The proposed amicus brief also clarifies doctrinal distinctions, as well as their underlying rationales, relevant to a claim of sex-based pay discrimination under FEHA's disparate impact legal theory as compared to the Equal Pay Act.

Disclosure of Authorship and Monetary Contribution

No party, or counsel for any party, in this case has authored any part of the accompanying proposed Amicus Curiae brief.

In addition, no person or entity has made any monetary contribution to fund the preparation or submission of this brief.

Date: 11/16/2023 

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AMICUS CURIAE BRIEF

I. Introduction

This case raises important questions about the continued viability of collective actions to vindicate the civil rights of large groups of workers. In enacting both the Fair Employment and Housing Act (FEHA, Gov. Code, § 12900 et seq.) and the Equal Pay Act (EPA, Lab. Code, § 1197.5)[1] the Legislature sought to reduce systemic barriers to equal opportunities in employment. (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 240, quoting Tobriner, *California FEPC* (1965) 16 Hastings L.J. 333, 342 [framers of California Fair Employment Practices Act, what is now part of FEHA, "believed that discrimination on a small scale would prove exceedingly difficult to detect and police" and "were interested primarily in attacking protracted, large-scale discrimination by important employers"]; Leysen, *Laws by Women, Laws About Women: A Retrospective Survey of Laws by California State and Federal Legislators* (2020) 23 Chap. L.Rev. 447, 471–474 [EPA enacted with the purpose of "address[ing] the 'common knowledge that in many fields of employment California women are paid less than men for the same work simply because they are women'"], citation omitted].)

Class actions serve a vital role in bringing to light claims and lawsuits susceptible of being deemed unvaluable, too costly, or too time consuming. (See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 445–446 ["class actions are appropriate 'when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer'"], citations omitted.) Without such a mechanism, redress is often overlooked, if not

[1] All references herein to the Equal Pay Act (EPA) refer to the California Equal Pay Act unless otherwise specified.

entirely ignored. Amicus California Civil Rights Department (CRD) relies on private attorneys general to supplement its role as the state's public prosecutor charged with vindicating the civil rights of all Californians. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1402; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 218–219.) It is therefore critical that courts preserve the class action mechanism to help ensure access to justice. The trial court's ruling here misapplied controlling precedent that, if left uncorrected, would threaten the viability of collective employment discrimination actions by imposing untenable burdens of proof and manageability constraints.

In ruling that Appellants' Unfair Competition Law (UCL, Bus. & Prof Code, § 17200 et seq.) and EPA claims are unmanageable, the trial court failed to see the forest for the trees. The trial court's decision below overlooked the tools available to courts to manage trials of collective actions when there exists common evidence of the parties' claims and defenses. Chief among them is the approach laid out and endorsed in *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324 (*Teamsters*). The *Teamsters* framework would allow the court to preside over this class action trial in phases by beginning with the common evidence the trial court already found credible when it initially certified the class. This framework, which is regularly used in government pattern-or-practice enforcement actions, has its roots in private class actions. It is an essential tool for ensuring the doors of the courthouse remain open to large groups suffering from the same systemic violations of civil and other legal rights.

The trial court's ruling is inconsistent with the Legislature's purpose of authorizing group enforcement actions in discrimination cases, especially where individual employees might not be able to pursue their rights. The trial court's focus on Respondent's conduct with respect to each

individual class member and the decisions made by each manager reflects a failure to recognize that the disparate impact theory, which Appellants rely upon, rests on a showing of group rather than individual harm. Because the trial court misconstrued this aspect of the law, it saw manageability problems where none exists. If allowed to stand, the trial court's reasoning would bar the prosecution of meritorious collective enforcement actions of civil and other legal rights as well as undermine courts' ability to preside over any action in which data sets and statistical analysis are essential.

For example, the trial court's conclusion that Appellants' disparate impact claim is unmanageable would effectively bar litigation of any disparate impact claim, whether brought on behalf of an individual, group, or class, since statistical analysis is almost always essential.

Nor can the trial court's ruling be squared with a core legislative purpose of the EPA: to address systemic wage disparities between women and men. Indeed, the EPA was amended to expressly bar employers from using prior pay to justify current pay decisions in recognition of the pervasiveness of sex-based pay disparities. Here, where Appellants have common evidence of this prohibited practice, there are manageable ways for the class action trial to proceed.

II. Trial Courts Have Flexibility to Ensure Class Actions Can Be Efficiently and Fairly Tried

A. Trial Courts Have a Duty to Use Available Tools to Manage Class Action Trials

"In certifying a class action, the court must [] conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently." (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28–29, citation omitted.) "Representative testimony, surveys, and statistical analysis are all available as tools to render manageable determinations of the extent of liability." (*Brinker Restaurant*

Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1054–1055 (Werdegar, J., concurring) [collecting cases].)

While a class action trial must allow for the manageable presentation and adjudication of affirmative defenses, that right and requirement is neither unfettered nor unlimited. (See *Duran*, *supra*., 59 Cal.4th at p. 34 [noting that while a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, class action defendants do "not have an unfettered right to present individualized evidence in support of a defense"].) Indeed, the California Supreme Court has noted that *no* case "holds that a defendant has a due process right to litigate an affirmative defense as to each individual class member." (*Id.* at p. 38.)

To effectuate these competing principles, the California Supreme Court has "'urged trial courts to be procedurally innovative in managing class actions.'" (*Id*. at p. 33, quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453.) Indeed, "the trial court has an obligation to consider the use of ... innovative procedural tools proposed by a party to certify a manageable class." (*Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339, internal quotation marks and citations omitted.) "By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Id*. at p. 340, internal quotation marks omitted, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.)

B. The *Teamsters* Framework Remains a Viable Way to Manage Trials of Collective Enforcement Actions

Both federal and California courts have recognized that class

actions are a vital collective mechanism for vindicating civil rights. *Teamsters* condoned a two-step framework for litigating government enforcement actions arising under an unlawful pattern or practice. (431 U.S. at pp. 357-362; see, e.g., Fairchild, *Make-Whole or Make-Short? How Courts Have Misread Title VII's Limitations Period to Truncate Relief in EEOC Pattern-or-Practice Cases* (2016) 66 Am. U. L. Rev. 195, 211–213.) Perhaps less well-known is that the framework originated in the private class action context. *Teamsters* relied on *Franks v. Bowman Transportation Co., Inc.* (1976) 424 U.S. 747, a class action alleging discriminatory employment practices. (*Teamsters*, *supra*, 431 U.S. at pp. 358–362.) At trial, the *Franks* plaintiffs proved the defendant employer "'had engaged in a pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees.'" (*Id*. at p. 359, quoting *Franks*, *supra*, 424 U.S. at p. 751].) The *Franks* court recognized that where a plaintiff class proves a pattern, practice, or broad-based policy of discrimination, there "[are] reasonable grounds to infer that individual hiring decisions [in that case] were made in pursuit of the discriminatory policy[.]" (*Ibid*.) As such, the burden shifts to the defendant employer to "dispel[] that inference." (*Ibid*.) "The employer's defense must … be designed to meet the prima facie case of the Government" because "[t]he point is that at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." (*Id*. at p. 360, fn. 46.) The rationale for this framework, what the *Teamsters* Court called the *Franks* model, is that where the plaintiffs have met this initial burden, there is "a greater likelihood that any single decision was a component of the overall pattern." (*Id*. at p. 359, fn. 45, 360.) It also recognizes that "the employer [is] in the best position to show why any individual employee was denied an employment opportunity." (*Ibid*.) Plaintiffs' establishment of an

unlawful pattern or practice does not end the matter. The next step is for the factfinder to determine which class members suffered harm because of the practice.

In *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, the court identified the following "well-established principles" drawn from *Teamsters* for the class action pending before it:

1. A claim of discrimination against a class requires the plaintiffs to establish by a preponderance of the evidence that discrimination was the company's standard operating procedure—the regular rather than the unusual practice.
2. The class plaintiff is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. The plaintiff's burden is to establish a prima facie case that such a policy existed.
3. Plaintiffs normally seek to establish a pattern or practice of discriminatory intent by combining statistical and nonstatistical evidence, the latter most commonly consisting of anecdotal evidence of individual instances of discriminatory treatment.
4. [A] finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class.... Further proceedings usually are required to determine the scope of individual relief for class members.
5. Once a pattern of discrimination has been proved, no per se prohibition precludes relief for nonapplicants.

(*Id*. at pp. 380–381, internal quotation marks and citations omitted.) These principles are instructive for understanding the mechanisms available to a trial court in managing the pending case. (See, e.g., *Ellis v. Costco Wholesale Corp.* (N.D. Cal. 2012) 285 F.R.D. 492, 505 fn. 6 [collecting cases applying the *Teamsters* framework to employment discrimination class actions, including several cases alleging disparate impact].) They also undermine the trial court's determination below that a class action trial would prevent Respondent from having the opportunity to put on a defense. (Cf. July 12, 2022 Order Granting Oracle's Second Motion for Decertification at pp. 7–8 [34-AA-8738-39].)

III. The Trial Court Committed Multiple Errors in Decertifying the UCL Claim Premised on FEHA's Disparate Impact Theory

Appellants' Updated Trial Plan endeavors to prove "that Oracle had a practice of using prior pay or pay expectations to set starting salary and that that practice had a disparate impact on women." (Oct. 22, 2021 Updated Trial Plan of Plaintiffs and the Class 9:7–8 [21-AA-5309–11].) One basis for Appellants' UCL cause of action, under its unlawful prong, is that this practice has had a disparate impact on class members in violation of FEHA. (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1326, fn.17, as modified on denial of reh'g (Apr. 21, 2016); *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1426.)

Appellants have established a prima facie case of disparate impact discrimination and presented substantial common evidence to satisfy class certification requirements.[2] The trial court failed to properly analyze the elements of a prima facie case of disparate impact discrimination on a class basis. Specifically, the court erred in finding that: (1) "in the absence of any evidence of a written policy by Oracle requiring managers to base starting pay on prior pay, Plaintiffs' Updated Trial Plan presents no manageable way to account for the testimony of managers," and (2) Appellants' UCL claim under either theory "requires proof of and explanations about reasons for the pay decisions impacting Class Members and their purported male comparators." (July 12, 2022 Order Granting Oracle's Second Motion for

[2] Importantly, the trial court's decertification order did not alter, disturb, or otherwise modify its April 30, 2020 findings that Appellants satisfied all class certification requirements, including commonality and predominance, with substantial common evidence. (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1422 [plaintiffs have burden of producing only substantial evidence of class action requisites, including predominance].) Therefore, the Court need not reach those issues here.

Decertification at pp. 7-8 [34-AA-8738-39].) Indeed, a writing is not necessary to identify a specific practice to challenge under a disparate impact theory, and requiring individual comparators in the disparate impact context is incorrect. Furthermore, here, the trial court is well-equipped to effectively manage the supporting and rebuttal evidence of each element of the UCL claim premised on a disparate impact theory.

A. Appellants Have Sufficiently Identified a Common Practice of Using Prior Pay to Set Starting Salary, and There Exist Manageable Ways to Present the Supporting and Rebuttal Evidence Regarding the Existence of Such a Practice at Trial

Here, Appellants have identified Respondent's practice of using prior pay to set starting salary as the practice causing a disparate impact on women. Moreover, Appellants have presented *substantial* common evidence of Respondent's practice of using prior pay to set starting salary. The existence of such a practice could be examined in at least three ways: (1) use of prior pay up to and including October 31, 2017 for employees hired through means other than company acquisitions (approximately 47% of the class); (2) use of prior pay throughout the putative class period for employees hired through company acquisitions (approximately 42% of the class); and (3) use of prior pay for employees hired after October 31, 2017, regardless of how they were hired (approximately 12% of the class, of which roughly 9% of those individuals were hired through company acquisitions). (See 33-AA-8503–04, 8505–06 [Leftwich Dep. at 48:25–49:2, 50:9–51:9]; 33-AA-8491 [Edwards 2021 Dep. at 36:16–19]; 33-AA-8511 [Loaiza Dep. at 64:6–22]; 33-AA-8345–46, 8386 [Neumark Tr. Rpt. ¶¶ 46, 110 & fn.66]; 28-AA-7214 [Neumark July 2021 Rpt. at Table 5].)

Based on Appellants' presentation of "substantial common evidence of all the elements of their EPA and FEHA claims," the trial court initially, and correctly, certified the class on Appellants' UCL claim. (See April 30,

2020 Order Granting Representative Plaintiffs' Motion for Class Certification at p. 20 [21-AA-5292].) Its subsequent decertification order was based on at least three misinterpretations of Appellants' disparate impact theory of liability.

First, the trial court erred in requiring a formal written policy. Courts have certified classes alleging a common unlawful employment practice in the absence of a written policy or practice. (See *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 996–97 [reversing denial of certification based on the absence of written policy]; *Jimenez v. Allstate* (9th Cir. 2014) 765 F.3d 1161, 1164–1166 [certification appropriate where plaintiff class representative presented sufficient evidence to establish that "class members generally worked overtime without receiving compensation as a result of Defendant's unofficial policy" and "common questions contained the 'glue' necessary" to examine class members' claims].)

Courts have also recognized the viability of a disparate impact claim in the absence of a written policy in cases where the challenged practice entails a subjective decision-making process, tied to a common mode of exercising discretion. (*Watson v. Fort Worth Bank & Tr.* (1988) 487 U.S. 977, 990–991; see, e.g., *Ellis*, *supra*, 285 F.R.D. at pp. 498–499, 509 [certifying a class of women alleging disparate impact in promotions even though there were no written policies explaining to employees the criteria for promotion and plaintiffs "identif[ied] specific practices and a common mode of guided discretion directed from the top levels of the company"]; *Stender v. Lucky Stores, Inc.* (N.D. Cal. 1992) 803 F.Supp. 259, 335 [finding that "Lucky's highly discretionary and subjective decision making with respect to initial placement, promotion, and selection of employees for additional training" caused a disparate impact on promotional opportunities

for women employees].)[3]

Here, even if Respondent's decisions were largely discretionary and not guided by written policies, Appellants have sufficiently identified common evidence of using prior pay to set starting salary. Contrary to the trial court's assertion, the lack of a written policy does not make the class action trial unmanageable. (Cf. July 12, 2022 Order Granting Oracle's Second Motion for Decertification at p. 6 [34-AA-8737] [suggesting the testimony of the managers of "3,000 women across 125 job codes" is necessary to rebut Appellants' common evidence that the challenged practice exists].) Rather, the evidence of a common practice obviates the need for individual manager testimony. That common practice, regardless of whether it was written down, can be established with classwide evidence.

Second, the trial court erred in presuming Respondent's presentation of testimony regarding the pay decisions for each class member was the only way to rebut Appellants' common evidence of a practice of using prior pay to set starting salary. (Cf. July 12, 2022 Order Granting Oracle's Second Motion for Decertification at p. 7:7-19 [34-AA-8738].) Ultimately, any class claim of discrimination requires the plaintiffs to establish and prove by a preponderance of the evidence that "discrimination was the company's standard operating procedure — the regular rather than the unusual practice." (*Alch, supra,* 122 Cal.App.4th at p. 380 [quoting *Teamsters*, *supra*, 431 U.S. at p. 336].) Proof of universal application of the discriminatory policy or practice to individual class members is not a part

[3] California courts look to federal precedent in interpreting and applying California employment discrimination law, including disparate impact. "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.)

of the class plaintiff's prima facie case or class certification requirements. (*Alch*, *supra*, 122 Cal.App.4th at p. 380.) Importantly, the determination of the scope of individual relief for class members occurs at a later stage. (*Id*. at p. 381 ["Further proceedings usually are required to determine the scope of individual relief for class members."]; *Teamsters*, *supra*, 431 U.S. at p. 360, fn. 46 ["The employer's defense must … be designed to meet the prima facie case" because "[t]he point is that at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision making."].) Thus, a preoccupation with individualized inquiries at class certification is error. (*Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725 [trial court employed improper criteria by focusing on individualized inquiries into nature and extent of the alleged harm]; *Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 941 [same].)

Moreover, at this stage, the class plaintiff "is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." (*Teamsters*, *supra*, 431 U.S. at p. 360; see also *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 407 [finding that the trial court applied an "incorrect standard for certification" in holding that plaintiffs "had to prove class members missed all breaks to which they were entitled"]; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1151 ["[T]he fact that an employee *may* have actually taken a break or was able to eat food during the work day does not show that individual issues will predominate in the litigation."], emphasis original.)

Here, any differential impact or lack of total uniformity in harm experienced by all class members can be addressed and managed through bifurcation or subclasses. (*Alch, supra,* 122 Cal.App.4th at p. 380 ["Once a pattern of discrimination has been proved, no per se prohibition precludes

relief for nonapplicants."], citing *Teamsters*, supra, 431 U.S. at p. 367.) In fact, the trial court never considered or addressed Appellants' trial plan proposal of subclasses, if necessary. (See Respondents' Reply Brief at p. 24, fn.7.) The trial court has "an obligation to consider the use of subclasses and other innovative procedural tools proposed by a party to certify a manageable class." (*Osborne v. Subaru of Am., Inc.* (1988) 198 Cal.App.3d 646, 648.) The trial court erred in decertifying based on manageability concerns without even considering the many tools available for efficiently and fairly trying collective actions.

Third and lastly, the trial court erred because there are manageable ways for Respondent to introduce rebuttal evidence challenging the existence of a common practice. As a threshold matter, the trial court's decertification order did not actually find that Respondent sought to present evidence of individualized decisions as class decertification rebuttal evidence. The trial court's concerns with the manageability of proving individualized injury was therefore speculative at best, and certainly not valid grounds for decertification. Also, even if Respondent *had* sought to rely on such evidence, as a legal matter, class action defendants do not have an "unfettered right" to present individualized evidence in support of a defense. (*Duran*, *supra*, 59 Cal.4th at p. 34.) Rather, they simply must be able to litigate relevant affirmative defenses. (*Ibid*.)

Even if such speculative rebuttal evidence were to be offered at trial, individual manager or decision-maker testimony is anecdotal evidence. The relative unreliability of such evidence weighs against the need for so many witnesses in the face of mounting statistical analyses and other evidence of a common practice. Therefore, the manageability concerns related to such testimony are overstated. Further, such individual manager or decision-maker testimony is cumulative and can be drastically limited by the trial court. (*Peviani v. Arbors at California Oaks Property Owner, LLC* (2021)

62 Cal.App.5th 874, 902 [trial court can "control the presentation of evidence" and "halt the introduction of" any cumulative evidence].)

To the extent individual manager or decision-maker testimony is offered to account for and explore variations in the impact of the common practice on individual class members, that goes to damages during a second phase, after classwide liability is established. As discussed above, if it is necessary at all, that testimony can be effectively managed through the bifurcation of trial. (*Alch, supra,* 122 Cal.App.4th at p. 380 ["Once a pattern of discrimination has been proved, no per se prohibition precludes relief for nonapplicants."], citing *Teamsters*, *supra*, 431 U.S. at p. 367.) Therefore, the trial court's manageability concerns related to identifying the common practices at issue are overstated or can be addressed through other means.[4]

Based on the foregoing, Appellants have sufficiently identified—through written directives, a common mode of exercising managerial discretion, and statistical analyses of significant disparate impact—the existence of a specific, common practice causing a disparate impact on women, the common proof or disproof of which can be sufficiently managed at trial.

B. Appellants May Use Classwide Statistical Analysis, Rather than Individual Comparator Evidence, To Prove Disparate Impact on Women

[4] To the extent the trial court's concerns are rooted in the belief that Appellants will not be able to ultimately prove the existence of the challenged common practices, the appropriate procedural mechanism for that is a motion for summary judgment rather than a motion for decertification. (See, e.g., *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* (2013) 568 U.S. 455, 470; see also *Porter v. Pipefitters Association Local Union 597* (N.D. Ill. 2016) 208 F.Supp.3d 894, 911 [stating that "merits questions should be taken up at the summary judgment stage on a classwide basis"].)

After identifying the specific practice giving rise to a disparate impact, the second element of a plaintiff's prima facie case is to establish that the disproportionate adverse effect on certain employees is *because of* their membership in a protected group. (*Stockwell v. City and County of San Francisco* (9th Cir. 2014) 749 F.3d 1107, 1115 ["Once a specific practice is identified in a disparate impact case, the next—although not the only—question becomes whether that practice had a disproportionate adverse impact."].)

The adverse disparate impact is perceptible only in the aggregate—i.e., through evidence of a disproportionate impact on members of a protected group—which is why comparative statistical analysis is usually critical to disparate impact claims. (*Harris v. Civil Service Comm.* (1998) 65 Cal.App.4th 1356, 1365 [A disparate impact plaintiff "alleges and proves, usually through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected *groups* that they are 'in operation ... functionally equivalent to intentional discrimination.'"]; *Stockwell*, *supra*, 749 F.3d at p. 1115 [a "group-based" disparity applies to a disparate impact claim whether asserted by an individual or a class]; see, e.g., *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 986-987 [finding a promotional exam had a disparate impact on Black compared to White firefighters where expert evidence established that the exam "passage rate for Black firefighters was only 38.8 percent of that for White firefighters—substantially below the 80 percent rate established in the Uniform Guidelines"], disapproved on another ground in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 814, 823; *Freyd v. Univ. of Oregon* (2021) 990 F.3d 1211, 1216, 1224–1226 [reversing summary judgment on plaintiff's disparate impact claim where expert evidence showed female

professors earned an average of $15,000 less than male professors, reasoning it was up to the experts to debate and the jury to resolve the probative value of the data set].)

Here, Appellants proffered common evidence—in the form of statistical evidence comparing the compensation of groups of women employees to groups of male comparators, all of whom were subject to Oracle's practice of using prior pay to set starting salary—to show that a meaningful or statistically significant difference in pay exists. (See 33-AA-8327-28, 8330–34, 8362-75, 8378–87.)

The trial court therefore erred in requiring "proof and explanations about the reasons for pay decisions impacting Class members and their purported male comparators" and in holding that this purported requirement made the UCL claim premised on FEHA's disparate impact theory unmanageable. (July 12, 2022 Order Granting Oracle's Second Motion for Decertification at p. 7:24–27 [34-AA-8738].) This is simply not the case. The case law is clear that a disparate impact analysis relies on comparing group-wide patterns rather than isolated individual experiences. (Compare *Freyd*, *supra*, 990 F.3d 1211 at 1216, 1224 – 1226 [rejecting the district court's finding "as a matter of law that Freyd's statistical evidence was insufficient to sustain a claim of disparate impact" where "Freyd offered two different sets of statistical evidence to support her claim of disparate impact"] with *id*. at pp. 1216, 1219–1222 [analyzing Freyd's federal Equal Pay Act claim and holding "[a] reasonable jury could find that Freyd, Fisher, Allen, and Hall share the same "overall job"]. Given that proof of a disparate impact is about comparing groups, the trial court further erred in assuming Respondent's presentation of rebuttal evidence would require testimony regarding individual comparators.

Whether or not Appellants can meet their prima facie burden with aggregate data (pay for men and women within the same job codes) is a

merits question, not a manageability concern. Indeed, the probative value of statistical analysis that is more or less aggregated is a frequent debate among experts. (Respondent's Brief at pp. 43–44.) However, Appellants "should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies." (*Paige v. California* (9th Cir. 2002) 291 F.3d 1141, 1148–1149, internal quotation marks and citation omitted; *Chen–Oster v. Goldman, Sachs & Co.* (S.D.N.Y. 2015) 114 F.Supp.3d 110, 120 ["Whether aggregation is appropriate necessarily depends on "the structure of the entity being studied in light of the questions sought to be answered."]; see also, e.g., *Ellis*, *supra*, 285 F.R.D. at p. 523 [crediting model that did not break data down by region because "unlike in Dukes, here Plaintiffs' statistical analysis conforms to the level of decision for the challenged practices, including the adoption of the many companywide policies"].) All the court needs to decide here is whether Appellants can present common proof. They clearly can.

And Appellants' use of aggregate data is fully supportable. They have justified its use by presenting common evidence that employees in the same job codes are comparable; as the trial court found in its class certification order, Appellants' evidence demonstrated Respondent's job code system sorts its jobs by skills, responsibilities, and effort constituting substantially similar work. (21-AA-5300.)

C. It is Well-Established that the Factfinder Can Infer Causation From Statistical Evidence

The trial court erred to the extent it found fault with Appellants' ability to rely on common evidence—specifically, expert regression analysis—to show the prior pay practice caused the disparate impact on women or that it is unmanageable for Respondent to put on evidence rebutting causation. (Cf. July 12, 2022 Order Granting Oracle's Second

Motion for Decertification at p. 8:1–7 [34-AA-8739].) "Courts have long recognized that statistical evidence may be used to establish a prima facie case of disparate impact discrimination." (*Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1184.)

Regression analysis is a common, appropriate, and scientifically valid statistical tool that is "designed to isolate the influence of one particular factor—[e.g.,] sex—on a dependent variable—[e.g.] salary." (*Hemmings*, *supra*, 285 F.3d at p. 1183, fn. 9, citing *EEOC v. General Tel. Co. of Nw., Inc.* (9th Cir. 1989) 885 F.2d 575, 577, fn.3, alterations in original.) It has gained general acceptance by the courts and is used frequently, including in cases of sex and race discrimination, to establish causal relationships. (See *Bazemore v. Friday* (1986) 478 U.S. 385, 398–401 [per curiam] [Brennan, J., joined by all members of the Court, concurring in part] [statistical analysis of "average black employee" data in discrimination case supported inference of individual injury]; see also *In re Neurontin Marketing and Sales Practices Litig.* (1st Cir. 2013) 712 F.3d 21, 42 ["regression analysis is a well recognized and scientifically valid approach … and courts have long permitted parties to use statistical data to establish causal relationships" in class actions and many other settings] [collecting cases].)

The fundamental goal of a regression analysis is to convert an observation of correlation into a statement of causation. (*Reed Const. Data Inc. v. McGraw-Hill Companies, Inc.* (S.D.N.Y. 2014) 49 F.Supp.3d 385, 396–397, affd. (2d Cir. 2016) 638 Fed.Appx. 43; see also *In re Neurontin Marketing and Sales Practices Litig.*, *supra*, 712 F.3d at p. 42.)

Contrary to the trial court's conclusion, "an expert does not need to expressly opine on causation to allow such an inference." (*Moussouris v. Microsoft Corporation* (W.D. Wash., July 11, 2018, No. C15-1483JLR) 2018 WL 3584701, at *17.) Rather, "statistical analysis that reveals a

'sufficiently substantial' disparity raises an inference of causation. (See, e.g., *City and County of San Francisco*, *supra*, 191 Cal.App.3d at p. 987 [noting "a variance in the [promotion exam] passage rate of two and one-half times" for White as compared to Black fire fights and concluding "[t]he probability that this disproportionate passage rate is a result of chance is slight"]; *Freyd*, *supra*, 990 F.3d at pp. 1216, 1224–1226 [holding that regression analysis leading expert determining with a 99 percent degree of confidence "that female full professors earned, on average, approximately $15,000 less than their male counterparts, controlling for years in rank and time trends" was sufficient to establish a prima facie case of disparate impact in individual action]; *Hardie v. National Collegiate Athletic Association* (9th Cir. 2017) 876 F.3d 312, 321 [holding in individual disparate impact case that expert statistical analysis was sufficient to establish "significant racial disparity" and "causal connection" between blanket ban and disproportionate effect on African American applicants].)

Here, Appellants showed there was a statistically significant disparity on women's starting pay at Respondent, even after accounting for possible legitimate factors such as performance score, tenure, and experience. Oracle paid women approximately $13,000 less, on average, per year than men in the same job codes. (33-AA-8369–70 [¶ 88], 8381–82 [¶ 105, Ex. 27].) The trial court's rejection of Appellants' use of well-established methods of statistical proof to establish their prima facie case in general, and causation in particular, is therefore erroneous.

Policy considerations also weigh against the trial court's conclusion with respect to using statistical analysis to prove causation. Permitting the trial court's ruling to stand would significantly erode not only the viability of private class actions but also CRD's ability, as a government enforcement agency, to prove disparate impact cases and thus to vindicate

the civil rights of many who otherwise would be without recourse.

Also, the trial court's insistence on a defendant's right to put on testimony for each data point in a data set threatens to undermine the viability of disparate impact claims across a broad range of areas as well as many other types of legal claims for which statistical analysis is key. For example, in *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, the court held that the plaintiffs sufficiently pleaded a disparate impact theory under FEHA where they alleged the city's violations of the Housing Element Law had a disparate impact on people of color (*Id*. at 261.) The court reasoned that the "allegations of statistics about the racially and economic composition of Clovis and Fresno County from a historical perspective are sufficient to adequately allege the City's *practice* of noncompliance with the Housing Element Law during the fourth and fifth planning periods *perpetuated segregated housing patterns* and, thus, stated a segregative effect claim." (*Id*. at p. 262, emphasis original.) Under the trial court's analysis here, this statistical analysis would not be probative of whether the city's noncompliance caused or perpetuated racial segregation in the city.

Also, under the California Racial Justice Act, a criminal defendant may use statistical analysis to show it is plausible that the state is seeking a conviction against him or her based on race, ethnicity, or national origin, and that the defendant is therefore entitled to discovery to prove that defense. (*Young v. Superior Court of Solano County* (2022) 79 Cal.App.5th 138, 143, 163–166.) Under the trial court's analysis here, evidence of racial statistical disparities could never be used to prove that it is plausible that the state pursued a conviction based on race, and such analysis could never be used to prove an ultimate violation of the Racial Justice Act.

Additionally, the trial court's reasoning here would make it impossible for any plaintiff to prove a violation of the California Voting Rights Act under the theory that the use of at-large districts impairs a racial

minority's ability to elect their preferred candidate. (Cf. *Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385, 392, 422, 426 [concluding the "trial court's decision to use 80 percent confidence intervals to ascertain Asian American cohesion behind a preferred candidate fell well within the bounds of its discretion" and "that statistical tools for expressing degrees of certainty should not eclipse the factfinder's ability to weigh the evidence and decide whether it meets the legal standard of proof, as occurred here"].)

Here, the trial court's ruling about the unmanageability of disparate impact claims also has broader implications for individual disparate claims too. "Young argued below that racial profiling in a traffic stop led to his arrest for the offense of possession of Ecstasy for sale. He also pointed to publicly available statistics showing that, statewide, blacks are more likely to be searched during the course of traffic stops than other citizens. On this showing, he brought a motion under the Racial Justice Act seeking discovery relating to charging decisions in cases he claims are comparable to his." (*Young*, *supra*, 79 Cal.App.5th at p. 143.) In this case, the trial court's ruling that that there is no manageable way for Respondent to rebut the existence of a disparate impact or that its prior pay practice caused it would mean that, in *Young*, there also would not be a manageable way for the prosecutor to rebut Young's statistical evidence of racial disparities in traffic stops. Just as Respondent would be entitled to putting on testimony about every pay decision, the prosecution would be entitled to put on evidence about context for traffic stop and the reason the officer conducted or did not conduct a search in an attempt to explain that something other than race caused the racial disparity in traffic stop searches. But that is not what courts do.

Finally, given the importance of large sample sizes in statistical analysis (Bielby & Coukos*, "Statistical Dueling" with Unconventional Weapons: What Courts Should Know About Experts in Employment*

Discrimination Class Actions (2007) 56 Emory L.J. 1563, 1597), the trial court's reasoning would have the perverse effect of undermining the ability to prosecute class actions in cases where the numerosity element is the strongest.

IV. The Trial Court Erred in Finding There was No Manageable Way for Appellants to Bring a Class Claim Under the Equal Pay Act

A. The California Legislature Enacted the Equal Pay Act to Address the Historical and Pervasive Systemic Pay Inequity between California Women and Men

The Equal Pay Act was enacted to address historical and pervasive systemic pay inequity between women and men in California. (Assem. Bill No. 160 (1949 Reg. Sess.) § 1 [adding Lab. Code § 1197.5]; Leysen, *Laws by Women, Laws About Women: A Retrospective Survey of Laws by California State and Federal Legislators* (2020) 23 Chap. L.Rev. 447, 471–474 [describing enactment of Assem. Bill No. 160 in 1949 and noting its purpose of "address[ing] the 'common knowledge that in many fields of employment California women are paid less than men for the same work simply because they are women'"]; Stats. 2015, ch. 546, §§ 1, 3, enacting Sen. Bill No. 358.) In enacting and amending the EPA, the California Legislature intended that the law be used to address systemic patterns of gender wage disparity and intended that those facing wage disparity be able to bring claims to remedy the disparity. (Stats. 2015, ch. 546, §§ 1, 3, enacting Sen. Bill No. 358.)

First enacted in 1949, California's protections predate the federal Equal Pay Act by nearly fourteen years. (*Id*., § 1(c).) While the Equal Pay Act has been effective for over seventy years, women in California continue to face systemic wage disparity, only earning $.84 to each dollar men earn. (*Id*., § 1(a).)

1. The California Legislature intended for state law on equal pay to be more protective than federal law

In 2015, the California Legislature amended the California Fair Pay Act, making it one of the strongest equal pay laws in the country, and more protective than its federal counterpart. (Compare Lab. Code, § 1197.5 [requiring a comparison of "substantially similar" work], with 29 U.S.C. § 206, subd. (d)(1) [requiring a comparison of "equal" work].) As amended in 2015, the California EPA also removed the requirement that work be done at the same establishment and narrowed the factors by which an employer could justify a pay disparity. (Stats. 2015, ch. 546, § 2(a), enacting Sen. Bill No. 358.) The amendments removed a broader provision that allowed for "any bona fide factor" other than sex, and narrowed the reason to a bona fide factor, such as "education, training, or experience," that was applied reasonably. (*Id.* § 2(a)(1)(D).)

California strengthened the EPA because "state provisions are rarely utilized." The then-current statutory language made it difficult to establish a successful claim. (Stats. 2015, ch. 546, §§ 1, 3, enacting Sen. Bill No. 358.) The Legislature amended the law in "order to make it easier for a victim of wage discrimination to identify an unlawful wage disparity and seek remedy." (Sen. Rules Com., Off of Sen. Floor Analysis, Rep. of Assem. Bill No. 168 (2016-2017 Reg. Sess.), September 9, 2017, p. 5.)

Yet the systemic gender pay disparity that the Equal Pay Act is meant to address continues to exist. In 2014, the gender wage gap was 16 cents to the dollar, meaning a woman would earn $0.84 compared to a dollar that a man in a similar position would make. (Stats. 2015, ch. 546, § 1(a).) The gender pay gap starts early in the career of women and follows them through retirement, where women earn lower retirement benefits than men. (Sen. Rules Com., Off. of Sen. Floor Analysis, Rep. of Assem. Bill No. 168 (2016-2017 Reg. Sess.), September 9, 2017, p. 4.) The gender

wage gap cuts across industries and across wage levels. For example, in Silicon Valley, workers with advanced degrees make 70 percent less than their male counterparts with similar degrees; female surgeons only made 71% of their male counterparts' earnings; and female food preparers earned 87% of their male counterparts' earnings. (Assem. Labor and Emp. Comm., Analysis, Rep. of Assem. Bill No. 1676 (2016-2017 Reg. Sess.), April 20, 2016, p. 2.) California women working full time lose approximately $33,650,294,544 each year due to the gender wage gap, which is money that could be used to fuel California's economic growth. (*Id*.)

In examining the persistence of the gender pay gap, the Legislature cited studies finding that even "if women had the same education, experience, demographic characteristics, industrial and occupational distribution, and union coverage as men, the wage ratio would rise to about 91% of men's wages – an 8% unexplained difference that researchers suggest could be influenced by discrimination." (Sen. Rules Com., Off. of Sen. Floor Analysis, Rep. of Assem. Bill No. 168 (2016-2017 Reg. Sess.), September 9, 2017, p. 2, citing Blau & Khan, *The Gender Pay Gap: Have Women Gone as Far as Can?* (Feb. 2007) vol. 21, No. 1, Academy of Management Perspectives 7.) At the rate that the gender pay gap is narrowing, it is estimated women will not reach pay equity until 2152. (Sen. Rules Com., Off. of Sen. Floor Analysis, Rep. of Sen. Bill No. 168 (2016-2017 Reg. Sess.), September 9, 2017, p. 2.)

The wage gap is even starker for women of color. The legislative history of the EPA discusses this impact of the gender wage gap on women of color:

> According to the National Partnership for Women & Families, among women who hold full-time, year-round jobs in the United States, Black women are typically paid 63 cents for every dollar paid to white men, while Latinas are paid just 54 cents for every dollar. Asian women are paid 85

> cents for every dollar paid to white men, although some ethnic subgroups of Asian women fare much worse.

(Sen. Rules Com., Off. of Sen. Floor Analysis, Rep. of Assem. Bill No. 168 (2016-2017 Reg. Sess.), September 9, 2017, p. 4, citing *America's Women and the Wage Gap* (April 2017) National Partnership for Women & Families.)

The gender pay gap will give rise to drastic and severe consequences for Californians as a whole. There is a correlation between the gender pay gap and women's poverty, leading to families having less money to spend on goods and services that drive economic growth. (*Id*. at p. 7.) Ending the gender wage gap could cut the poverty rate for single, working mothers by nearly half, from 28.7% to 15%. (Sen. Labor and Indus. Rel. Comm, Analysis of Sen. Bill No. 358 (2016-2017 Reg. Sess.), as amended April 6, 2015, p. 4.)

2. The California EPA Was Amended to Prohibit an Employer's Reliance on Prior Pay to Address the Historical Pay Disparity Affecting Women

Effective starting in 2017, the EPA was amended to expressly prohibit an employer's reliance on prior to pay to justify sex-based pay disparities due to "historical patterns of gender bias and discrimination." (Lab. Code, §1197.5, subds. (a)(4), (b)(4); Stats. 2016, ch. 856, § 1(g), enacting Assem. Bill No. 1676.) The Legislature eliminated the use of "prior pay" as a basis by which an employer could justify pay disparities. (Stats. 2016, ch. 856, § 1(g), enacting Assem. Bill No. 1676; Legis. Counsel's Dig., Assem. Bill No. 1676 (2015-2016 Reg. Sess.).)

Women have historically been paid less than men, and thus if salaries are negotiated based on prior salaries, the Legislature noted that "women often end up at a sharp disadvantage and historical patterns of gender bias and discrimination repeat themselves," leading women to

continue to earn less. (*Id*., § 1(c).) In enacting the amendment, the Legislature relied on federal studies from the Equal Employment Opportunity Commission (EEOC) and the Office of Personnel Management finding that reliance on prior salary could adversely affect candidates returning to the workplace after time off. (*Id*.) The Legislature also relied on court decisions finding that relying on prior pay could lead to disparity between men and women. (*Id.*, citing to *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 206-207; *Rizo v. Yovino, Fresno County Superintendent of Schools* (2020 9th Cir.) 950 F. 3d 1217, 1228 ["We do not presume that any particular employee's prior wages were depressed as a result of sex discrimination. But the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities."].)

Now, under the EPA, after an employee establishes her prima facie case showing sex-based pay disparities, the employer can defend itself by demonstrating the wage disparity is "based upon one or more" of the enumerated factors in subdivision (a)(1) of Labor Code section 1197.5.

3. Ongoing Private and Public Enforcement of the EPA Is Imperative to Combat Pay Inequity and Correlated Social Harms

The EPA specifically sought to address the harm to workers who are subjected to pay inequity. (Stats. 2015, ch. 546, §§ 1, 3, enacting Sen. Bill No. 358.) Despite the passage of the EPA and its recent amendments, as discussed above, these harms continue to exist, as the wage gap persists.

Indeed, pay equity data collected by CRD shows that pay inequity

continues to exist. (*Id*.) CRD data from 2021 show that women make up the largest share (54%) of workers earning the lowest pay category ($32.239), while men make up 65% of wage-earners in the highest pay category. (*Id*.) Pay inequity is specifically acute for low-wage workers.

In 2020, the Legislature began requiring employers with more than 100 employers to report pay data to the CRD. (Stats. 2020, ch. 363, §2, enacting Sen. Bill No. 973 (2019-2020 Reg. Sess.).) CRD collects and reports that data publicly on its website annually. (California Civil Rights Department, Pay and Demographics of California Workers: From Annual Pay Data Reports, 2021 Pay Data Results, at <https://calcivilrights.ca.gov/paydatareporting/> [as of November 6, 2023].) The data show that systemic pay inequity continues to affect Californians.

B. Appellants Demonstrated the Ability to Present their EPA Claim with Common Proof

1. Appellants Can Establish a Prima Facie Case on a Class Basis by Using Common Statistical Evidence

Plaintiffs in EPA cases have used statistical evidence to establish a prime facie case that women were paid less than men. (*See Siler-Khodr v. Univ of Texas Health Science Center* (2001) 261 F.3d 542, 547; *Lavin-McEleney v. Marist College* (2001) 239 F.3d 476, 480.) In *Siler-Khodr*, *supra,* the court affirmed the use of statistical evidence from experts analyzing the salary of professors to support a federal EPA claim. (261 F.3d at p. 547.) Additionally, in *Lavin-McEleney*, *supra*, the court found that even when the plaintiff could not identify a comparable male professor, the plaintiff's identification of a statistically average male comparator was enough to support her claim under the federal EPA. (239 F.3d at pp. 480–481.) The court affirmed that the plaintiff could establish that her position was substantially equal to male comparators using statistical evidence to

show that the "five variables used by her expert to isolate comparable positions accurately captured equality of skill, effort, and responsibility." (*Id*. at 481.)

Here, Appellants can establish substantial common evidence that women and men in the same job code performed substantially similar work using the statistical analysis of their experts. (Appellants' Opening Brief at p. 24.) Appellants' Updated Trial Plan endeavors to present common evidence through statistics from their expert showing that Respondent paid a class of over 3,100 women on average approximately $8,600 less than men in the same job code. (*Id*. at p. 21.) Appellants' expert found that salary disparities largely existed because of Respondent's practice of using prior pay to determine salary. (*Ibid*.) Appellants' expert found that women working in the same job codes as men, received "less base bay, fewer bonuses and less stock." (*Id.* at p. 25.) The trial court initially granted certification because it agreed that there was common evidence, such as the expert regression analysis showing a statistically significant pay disparity of $8,600. (*Id.* at p. 14.) As explained above, these are the exact types of harm the Legislature sought to address in enacting the EPA.

2. The Trial Court Erred in Ruling There is No Manageable Way for Respondent to Present Its Affirmative Defense that Permissible Factors Explain the Sex-Based Wage Disparity in Its Entirety

At trial, Appellants plan to present common evidence of Respondent's reliance on prior salary when setting its employees' starting salaries. (Appellants' Opening Brief at pp. 15, 21–22, 31.) Under the EPA, this evidence is relevant to rebut Respondent's attempt to show that, if the prohibited sex wage disparity exists, it is entirely based upon one or more of the enumerated factors in subdivision (a)(1) of Labor Code section 1197.5. The trial court erred in finding that there is no manageable way to

certify the class on the basis that individual evidence is required for Respondent to defend itself by showing that the wage disparity was caused by permissible factors. (July 12, 2022 Order Granting Oracle's Second Motion for Decertification, pp. 6:8–7:8 [34-AA-8737-38].)

As discussed above, the trial court had an obligation to consider "innovative procedural tools" as an alternative to decertification based on any perceived unmanageability of the class action. (*Sav–On Drug Stores*, *supra*, 34 Cal.4th at p. 339, internal citation omitted; see *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Therefore, the trial court should have considered other ways for Oracle to present rebuttal evidence in a manageable way such as those proffered by Appellants. This includes allowing for statistical rebuttal evidence, limiting the number of individual managers who would testify, bifurcation of trial, and others. (Appellants' Opening Brief at pp. 55–58.) By rejecting all those potential trial plans by which Respondent could put on its defenses, and essentially accepting Respondent's assertion that individualized evidence was the only way to rebut Appellants' prima facie case, the trial court's decision creates a significant barrier for anyone seeking to bring a class EPA claim. This contravenes the legislative purpose of making it *easier* for the many women harmed by wage inequity to address systemic wage disparity through collective actions that may protect a large number of victims who individually may lack ability or resources to vindicate their rights through direct individual actions.

Also, the trial court's ruling that there is no manageable way for Respondent to present its affirmative defense ignores that the EPA requires that the factors explaining the sex-based pay disparity must be applied reasonably, e.g., consistently, and must explain the entire disparity. (Cf. July 12, 2022 Order Granting Oracle's Second Motion for Decertification at pp. 6:8–7:8 [34-AA-8737-38].) The EPA does not permit an employer to

use one factor, such as education, for one woman, and a different factor such as training for another woman. (*Cooke v. United States* (2008) 85 Fed Cl. 325, 350.) Also, an employer must establish that the "gender neutral factor it identified is actually the factor creating the wage differential in question." (*Id*.) For each factor to be applied reasonably, it must be applied consistently. In assessing what a bona fide factor could be, the California Commission on the Status of Women's guidance states that a factor "would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification." (California Commission on the Status of Women, "Step by Step Evaluation Template for Determine Wages: Step 3(d)," available at <https://women.ca.gov/californiapayequity/employers-resources/step-by-step-job-evaluation-template/> [as of November 6, 2023]; see also *EEOC v. White and Son Enters.* (11th Cir. 1989) 881 F. 2d 1006, 1010.)

According to the trial court, the trial "will require the presentation of individual justification evidence as to each of the 3,000-plus individual class members" "in the form of testimony by managers who made the pay decisions at issue[.]" (July 12, 2022 Order Granting Oracle's Second Motion for Decertification at p. 6:15–16, 6:25–27 [34-AA-8737]; see also Respondent's Brief at pp. 29, 45.) However, if Respondent needs to put on testimony about every pay decision, and all of it is non-cumulative as Respondent suggests (cf. Respondent's Brief at pp. 48–49 [asserting that "[i]ndividual managers' pay decisions are unique to each employee's circumstances"]), it is unclear how the factors Respondent purportedly relied upon would in fact have been applied reasonably or consistently. That is simply not possible if, as Respondent insisted it should be allowed to prove, the rationale for every pay decision were unique. That is, the consistency requirement that forms the basis of an EPA defense presumes the existence of a pattern in how the defendant makes pay decisions.

In fact, Respondent's own brief acknowledges that it did *not* apply a bona fide factor reasonably or consistently. Respondent's brief describes the various factors managers used to set compensation, some using performance, some using education, and other factors. (Respondent's Brief at pp. 45–46.) Therefore, the argument that this type of individualized evidence is required to overcome Appellants' prime facie case once established is an incorrect application of the EPA and is inconsistent with the Legislature's intent that the EPA address wage disparity irrespective of an employer's intent. (See Lab. Code §1197.5, subd. (a)(1)(D).)

Furthermore, Appellants' statistical evidence could show that the factor actually relied upon by Respondent for the wage differential was prior pay, which is prohibited by the EPA. (Appellants' Opening Brief, 14.) Appellants' expert found that even after taking into factors such as tenure, experience, and education, there was a statistically significant gender pay disparity linked to prior pray. (*Id*.)

The trial court's decision to decertify the class should be reversed as there are manageable ways for Appellants to bring a claim under the EPA and for Respondent to assert its defenses.

C. If Left Intact, the Trial Court's Decision to Decertify the Class Would Undermine the Ability for Private Plaintiffs, CRD, and Other Government Enforcement Agencies to Address Systemic Pay Inequity under the Equal Pay Act

The trial court's decision to decertify the class based on manageability undermines the ability for any plaintiff to bring class or systemic claims under the EPA. (Cf. July 12, 2022 Order Granting Oracle's Second Motion for Decertification at p. 9:14–17 [34-AA-8740].)

First, the ruling contradicts the intention of the Legislature to make EPA claims *easier* to bring and therefore address systemic and historical gender pay disparities. (Stats. 2015, ch. 546, §§ 1, 3, enacting Sen. Bill No.

358.) If the trial court's decision stands, very few plaintiffs will be able to bring class EPA claims to remedy the systemic and historic harm that the California Legislature was addressing when it amended the EPA since nearly all defendants will argue that they need to have individualized testimony from every decision-maker, rendering most class action trials unmanageable. Here, despite Appellants' ability to present common evidence of widespread pay disparities, the trial court ruled that their claims are unmanageable, leading to the possibility that over 3,100 women will be unable to bring their claims forward. To be sure, due to the trial court's decertification of the class, Appellants, and other women like them, remain free to bring individual Equal Pay Act cases. However, in practice, that freedom is illusory due to the economic barriers of bringing such individual cases. (See, e.g., Issacharoff, *Class Actions and State Authority* (2012) 44 Loy. U. Chi. L.J. 369 378–379 [explaining how class actions function as public goods by overcoming economic inefficiencies of litigating many individual cases].)

Second, most low-wage workers, the majority of whom continue to be women and those who are most harmed by unequal pay practices, would not be able to afford an attorney, thus relying on legal service providers, who, in 2020, were only able to serve 4% of low-wage workers. (State Bar of California, "The California Justice Gap: Measuring the Unmet Civil Legal Needs of Californians (2019), p. 44, at <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/California-Justice-Gap-Report.pdf> [as of November 6, 2023].) By foreclosing class claims, the trial court's decision limits low-wage workers' access to the private bar since individual low-wage employment claims have lower damages, and therefore yield lower pay. This will likely exacerbate the wage gap for low-wage workers.

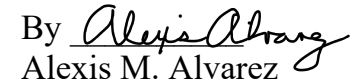
V. Conclusion

The trial court's decertification overlooks the tools readily available to the court to manage the class action trial where there exists substantial common evidence relating to Appellants' claims and Respondent's defenses. Also, the trial court committed multiple errors in construing the disparate impact theory under FEHA as well as the EPA claim. These errors threaten to undermine the enforcement of meritorious collective civil rights actions.

Date:
11/16/2023

Respectfully submitted,

California Civil Rights Department

By 
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CERTIFICATE OF WORD COUNT

Under California Rule of Court 8.204, subdivision (c)(1), I certify that the text in the attached Amicus Curiae Brief was produced on a computer using Microsoft Word, using proportionally spaced font (Times New Roman), and contains 9,615 words, including footnotes but not the caption or the application.

Date: 11/16/2023

Alexis Alvarez

PROOF OF SERVICE

I, Shanna Niroumandzadeh , the undersigned, hereby declare: I am over eighteen years of age and not a party to the within cause. My business address is 2218 Kausen Drive, Suite 100, Elk Grove, California 95758.

On November 16,2023, I served the following document(s):

- **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA CIVIL RIGHTS DEPARTMENT, PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF MARILYN CLARK, MANJARI KANT, AND ELIZABETH SUE PETERSEN**

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

Executed on November, 16, 2023 in Elk Grove, Sacramento.

Shanna Niroumandzadeh
Civil Rights Department

PROOF OF SERVICE

I, Step Newton , the undersigned, hereby declare:
I am over eighteen years of age and not a party to the within cause. My business address is 2218 Kausen Drive, Suite 100, Elk Grove, California 95758.

On November 16,2023, I served the following document(s):

- **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA CIVIL RIGHTS DEPARTMENT, PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF MARILYN CLARK, MANJARI KANT, AND ELIZABETH SUE PETERSEN**

On the parties listed below as follows:

Superior Court of California, County of San Mateo
Attn: V. Raymond Swope, Civil Judge
Department 23, Courtroom 8A
Southern Court
400 County Center
Redwood City, CA 94063

☒ **BY FIRST CLASS MAIL** By placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firms daily mail processing center for mailing in the United States mail at Elk Grove, California.

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

Executed on November, 16, 2023 in Elk Grove, Sacramento.

S.M. Newton

Step Newton
Legal Analyst
Civil Rights Department