S162313

IN THE SUPREME COURT OF CALIFORNIA

ROBERT CHAVEZ,
Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B192375

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE ASIAN PACIFIC AMERICAN LEGAL CENTER, BET TZEDEK LEGAL SERVICES, THE IMPACT FUND, PUBLIC COUNSEL, AND THE WESTERN CENTER ON LAW AND POVERTY IN SUPPORT OF PLAINTIFF AND APPELLANT ROBERT CHAVEZ

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IN THE SUPREME COURT OF CALIFORNIA

ROBERT CHAVEZ,
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CITY OF LOS ANGELES,
Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Pursuant to California Rules of Court, rule 8.520(f), The Asian Pacific American Legal Center, Bet Tzedek Legal Services, The Impact Fund, Public Counsel, and The Western Center On Law And Poverty (collectively, Amici Curiae) request permission to file the attached amicus curiae brief in support of plaintiff and respondent Robert Chavez.

The Asian Pacific American Legal Center of Southern California (APALC) was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact

litigation, public advocacy and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work include workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. As part of its civil rights work, APALC has served hundreds of workers and aided them in bringing claims for unpaid wages and employment discrimination.

Since its founding in 1974, Bet Tzedek, Hebrew for "House of Justice," has provided free legal services to the elderly, poor and disabled throughout Los Angeles County. Bet Tzedek serves 12,000 clients every year in the areas of employment, housing, public benefits, and consumer fraud, among others. Bet Tzedek's Employment Rights Project assists low-wage workers through a combination of legislative advocacy, community education, individual representation before the Labor Commissioner, and litigation. The Employment Rights Project represents workers who have been illegally denied earned wages, workers who have suffered illegal retaliation for asserting their rights under the law, and individuals who have been trafficked for forced labor. Clients include day laborers, domestic workers, and those working in the garment, construction, car wash, restaurant and janitorial industries.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across

the country, assisting in civil rights cases. It offers training programs, advice and counseling, and amicus and direct representation. It has appeared in numerous cases before the California Supreme Court, including, *Frye v. Tenderloin Housing Clinic* (2006) 38 Cal.4th 23 and *Sav-On Drug Stores, Inc. v. Superior Court*, (2004) 34 Cal.4th 319 . It is a California State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across the state.

Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations, and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal services to indigent and underrepresented children, adults, and families throughout Los Angeles County, ensuring that other community-based organizations serving this population have legal support, and mobilizing the pro bono resources of the community's attorneys and law students. In 2006, with the help of over 3,700 volunteers, Public Counsel assisted more than 25,000 people, including senior citizens, battered women, homeless veterans, victims of consumer fraud, and refugees fleeing persecution and torture.

The Western Center on Law and Poverty is a nonprofit public interest law firm that provides support to California's legal services programs, and litigates cases of importance to low income people throughout the state. (See, e.g., *Hunt v. Superior Court* (1999) 21 Cal.4th 984 [counties have duty to provide health care to persons

who cannot afford care].) A major source of the Western Center's income is court-awarded attorneys' fees. The Center's attorneys litigated *Serrano v. Priest* (1977) 20 Cal.3d 25, which established California's equitable private attorney general fee doctrine; and *Serrano v. Unruh*, 32 Cal.3d 621 (1982), which held that attorneys' fees for public interest law firms should be based on market rates rather than on the salaries of plaintiffs' counsel; and was a primary sponsor of California's private attorney general statute, Code of Civil Procedure section 1021.5.

Amici Curiae each have an interest in ensuring that the poor and underrepresented have access to the court system to redress claims of discrimination under California's Fair Employment and Housing Act (FEHA). A rule denying attorney fees to the prevailing parties in FEHA actions because they ultimately obtain an amount that could have been provided in a limited-jurisdiction court would have a disproportionate effect on the poor and underrepresented clients served by Amici Curiae.

As counsel for Amici Curiae, we have reviewed the briefs filed in this action, and we believe that this Court would benefit from additional briefing on the legal issues, as well as a discussion of the impact the rule proposed by petitioners would have on poor and underrepresented persons seeking redress under FEHA.

December ___, 2008

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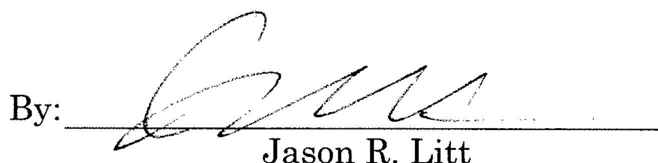

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AMICI CURIAE BRIEF

INTRODUCTION

This case raises a question of critical importance to California's working poor: Did the Legislature intend to limit the ability of victims of discrimination with low-value suits under FEHA from hiring competent counsel to vindicate their fundamental civil rights by giving a court discretion to deny attorney fees when a damage award falls below the amount that could be obtained in a court of limited jurisdiction? The short answer is no.

FEHA advances the constitutional and legislative mandate to eradicate discrimination in the workplace. Given limited governmental resources available to combat discrimination, FEHA's effectiveness depends on the initiation of private lawsuits to combat discrimination. A private lawsuit remedy, however, is illusory if a victim of discrimination is unable to afford an attorney to prosecute his or her case.

FEHA solves that problem by providing attorney fees to the prevailing party. Although FEHA's language gives a court "discretion" to award such fees, in fact, it is well-settled that to serve FEHA's mandate a trial court may deny fees only where special circumstances would render a fee award unjust. Fees may not be denied simply because the plaintiff's recovery is low.

The City contends that Code of Civil Procedure section 1033, which generally gives a court discretion to deny "costs" to a

prevailing party if the damage award is an amount that could have been obtained in a court of limited jurisdiction, overrides FEHA's attorney fee standard and permits a trial court discretion to deny fees simply because the damage award is low. The City is wrong.

When the Legislature enacted section 1033 as part of a comprehensive cost-recovery scheme that defined costs to include attorney fees, it did not intend to override the standards that govern the criteria for awarding fees under a particular attorney fee statute. Attorney fees, unlike other costs, must be authorized by a statute or agreement *independent* of the statute authorizing costs. Thus, when determining whether attorney fees should be awarded in a particular case, the courts should first look to the statute authorizing the fee award, not the statute generally authorizing an award of costs, particularly where the fee award serves to encourage attorneys take cases to vindicate fundamental rights.

Under FEHA, attorney fees may be denied only where special circumstances would render an award unjust and may not be denied simply because the amount of the award is low. The City points to no evidence (and there is none) to suggest the Legislature intended section 1033 to modify the substantive rules governing the award of attorney fees under FEHA. Thus, as the Court of Appeal correctly held, a trial court may not deny a prevailing party fees in a FEHA action unless the trial court finds such special circumstances.

The rule advocated by the City in this case would undermine the constitutional and legislative mandate to eradicate discrimination in the workplace. The only effect of such a rule would be to close the courthouse doors to employees in low-wage

industries who suffer discrimination or retaliation but whose immediate economic damages are low. For example, Amici represent low-wage workers who, when they are the victims of illegal discrimination or retaliation in the workplace, often cannot show calculable economic damages in amounts that would automatically meet the requirement for filing suit in a court of unlimited jurisdiction. This is, in part, because these workers earn extremely low wages. Also, in order to survive, these workers must immediately mitigate any damages they suffer from termination or other adverse employment actions by seeking new employment, as the loss of wages for even one day or one week can itself render a low-wage employee unable to feed, clothe, and house herself and her family. Finally, low-wage workers do not have the luxury of seeking professional treatment for the emotional distress that often accompanies discriminatory and retaliatory employment practices.

The City's proposed rule thus disproportionately affects those the FEHA's attorney fees provision was designed to protect: the indigent victims of discrimination and retaliation, who are wholly dependent on attorney fees to entice competent counsel to take their cases. Without the same prospect for obtaining fees as any other attorney prevailing in a FEHA matter, an attorney presented with a clear case of discrimination against a low-income employee would face an untenable choice: file the claim in a court of limited jurisdiction, thereby guaranteeing attorney fees but limiting the client's potential recovery of noneconomic and punitive damages; or file the claim in superior court and risk obtaining no fees if the client's award is limited to low economic damages. An attorney

faced with such a dilemma may simply decline to take the case. As one employment law treatise notes, the rule advocated by the City in this case, if adopted, "may discourage low-value FEHA claims because the employees' attorneys will not be assured of recovering the full measure of reasonable fees." (3 Ming Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2008) ¶ 17:648.10, p. 17-100.)

This Court should ensure that FEHA's remedial provisions remain available for all California citizens and affirm the holding of the Court of Appeal requiring a trial court to apply the criteria for awarding fees under FEHA, even where section 1033 might otherwise apply.

LEGAL ARGUMENT

AS A GENERAL COST SHIFTING STATUTE, CODE OF CIVIL PROCEDURE SECTION 1033 LEAVES INTACT FEHA'S MANDATE TO AWARD ATTORNEY FEES TO *ALL* PREVAILING PLAINTIFFS, EVEN THOSE WHO RECOVER LOW DAMAGES.

A. FEHA encourages private enforcement of the fundamental right to be free from discrimination by guaranteeing an award of attorney fees to a prevailing plaintiff unless special circumstances compel a finding that such a fee is unjust.

FEHA is a comprehensive legislative enactment advancing "the fundamental public policy of eliminating discrimination in the workplace." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054, fn. 14; see also Gov. Code, §§ 12920 ["the public policy of this state" is to "protect and safeguard the right of all persons to seek, obtain, and hold employment without discrimination"]; 12921 [the opportunity to hold "employment without discrimination" is "declared to be a civil right"].)

"The express purpose of the FEHA is 'to provide effective remedies which will eliminate such discriminatory practices.'" (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 486; see also Gov. Code, § 12920.5 ["[i]n order to eliminate discrimination, it is

necessary to provide effective remedies that will both prevent and deter unlawful employment practices"].) Given limited governmental resources available to combat discrimination, "[t]here is no doubt that '"privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in"' statutes such as FEHA. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 (*Flannery*).) FEHA thus authorizes private lawsuits as one of its remedies to eliminate discrimination. (See Gov. Code, § 12965, subd. (b).)

Given the prohibitive cost of litigation, however, FEHA's private lawsuit remedy would be illusory without an award of attorney fees to a prevailing plaintiff. "[W]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such an important public policy would, as a practical matter frequently be infeasible." (*Flannery*, *supra*, 26 Cal.4th at p. 572.) Therefore, to encourage the bringing of private lawsuits, FEHA provides that a court "in its discretion, may award to the prevailing party reasonable attorney's fees and costs." (Gov. Code, § 12965, subd. (b).)

Although FEHA's language authorizes fees based on the "discretion" of the trial court, the trial court, in fact, has little to no discretion to deny fees in a particular case. Instead, consistent with their mandate to liberally construe FEHA to serve its remedial purpose and with federal law, trial court judges are *obligated* to award attorney fees, despite FEHA's discretionary language, "'"'unless special circumstances would render such an award unjust."'"' (*Cummings v. Benco Building Services* (1992) 11

Cal.App.4th 1383, 1387 (*Cummings*), quoting *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412, 416-417 [98 S.Ct. 694, 54 L.Ed.2d 648] (*Christiansburg*); *Young v. Exxon Mobil Corp.* (Dec. 11, 2008, B189263) __ Cal.App.4th __ [08 D.A.R. 18177, 18183] ["California courts have followed federal law, and hold that, in exercising its discretion, a trial court should ordinarily award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust"]; accord *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 864 (*Rosenman*); *Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 331 (*Steele*); *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1405.)

Under FEHA, moreover, courts, have no discretion to deny fees simply because the damage award is low. (See generally Los Angeles County Bar Association (LACBA)/California Women Lawyers ACB 13-21.) A court's discretion is limited to determining the *amount* of fees based on a "lodestar," i.e., multiplying a reasonable number of hours worked by a reasonable hourly rate and adjusting that amount if necessary to account for the degree of success obtained by the plaintiff or other factors. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 [in applying lodestar method, trial court should consider "'a number of factors, including "'the success or failure'" in the case'"].) Indeed, a rule denying fees where the damage award is low would be inconsistent with FEHA's purpose and would disproportionally punish the poor. (See pp. 18-22, *post*.)

A prevailing defendant, on the other hand, is entitled to fees only where the plaintiff's lawsuit is frivolous: "Despite its discretionary language, however, [FEHA's attorney fee provision] applies only if the plaintiff's lawsuit is deemed unreasonable, frivolous, meritless, or vexatious." (*Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 948-949 (*Mangano*); see also *Rosenman, supra* 91 Cal.App.4th at p. 864; *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 830-832; *Cummings, supra,* 11 Cal.App.4th 1387.)

As we now explain, in enacting generally applicable cost statutes that define attorney fees to be an element of costs, and which permit courts to limit the amount of costs that can be awarded where the damage award is low, the Legislature did not intend to alter a plaintiff's *substantive* entitlement to attorney fees under FEHA, even where the plaintiff's damage award is an amount that could be obtained in court of limited jurisdiction.

B. By altering the procedural framework for awarding costs, the Legislature did not intend to override the substantive entitlement to attorney fees under FEHA.

1. The Legislature's inclusion of attorney fees as an element of costs in the comprehensive cost scheme enacted in 1987 was merely procedural, and did nothing to impact the substantive right to attorney fees.

The City and the various amici curiae supporting it assert that Code of Civil Procedure section 1033, in effect, overrides the attorney fee provisions of FEHA and grants trial courts unfettered discretion to deny attorney fees when the amount obtained by the prevailing plaintiff in a FEHA action is an amount that could have been obtained in a court of limited jurisdiction. The City and its amici, however, are wrong to suggest that the Legislature intended to override the substantive criteria for awarding fees under FEHA simply by including attorney fees as an element of costs when it amended the cost scheme in 1987.

As a general matter, "[t]he 'costs' of a civil action consist of the expenses of litigation, usually excluding attorney fees." (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439 (*Davis*).) "The right to recover any of such costs is determined entirely by statute." (*Ibid.*) Though many statutes authorized costs to a prevailing party, before 1986, no statute defined each of the specific items of costs that were

or were not recoverable. (*Id.* at p. 440; *Rabinowitch v. California Western Gas Co.* (1967) 257 Cal.App.2d 150, 161.) Generally, however, courts considered costs to "mean those fees and charges which are required by law to be paid to the courts, or some of their officers or an amount which is expressly fixed by law as recoverable as costs." (*Davis*, at pp. 439-440, internal quotation marks omitted.)

In 1986, the Legislature enacted a comprehensive cost recovery scheme to replace the myriad of disparate statutes and case law that then existed to govern the recovery of costs. (Code Civ. Proc., § 1032 et seq.) As part of that scheme, the "Legislature enacted Code of Civil Procedure section 1033.5, to expressly define the term 'costs' as used in Code of Civil Procedure section 1032." (*Davis, supra*, 17 Cal.4th at p. 441.) The new cost recovery scheme was enacted "not to alter existing law but, instead, to eliminate confusion by specifying for general purposes 'which costs are and which costs are not allowable.'" (*Ibid.* [the authors of the bill noted that "'the list is not intended to substantively change existing law but rather to, as nearly as possible, merely restate it in a central statutory location'"].)

The Legislature included attorney fees in the statutory definition of costs upon the enactment of section 1033.5. (Code Civ. Proc., § 1033.5, subd. (a)(10), (c)(5).)[1] The Legislature, however, added attorney fees to the definition of costs not to substantively

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[1] The initial version of section 1033.5 only applied to statutory fees. Contract-based fees were added to the definition of costs in 1990.

change when fees were or were not to be provided in a particular case, but simply to clarify the *procedures* for obtaining fees when authorized by contract or statute. As has always been the case both before and after 1986, parties are entitled to attorney fees only where there is a legal basis independent of the cost statutes and grounded in a separate agreement or statute: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided." (Code Civ. Proc., § 1021; see also *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*).)

Although the substantive entitlement to attorney fees has always been governed by the terms of the statute or contract authorizing the fee award, the *procedures* for obtaining attorney fees has caused significant confusion to litigants and the courts over the years. That is because prior to the current version of section 1033.5, the procedure for obtaining the fees depended on whether the attorney fees were considered to be akin to costs, and therefore sought post-judgment in a cost bill or by noticed motion, or were considered to be akin to damages that had to be pleaded and proved at trial. (See, e.g., *T.E.D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 Cal.App.3d 59, 61-62 (*T.E.D.*).)

Statutory attorney fees were generally considered to be akin to costs and obtained post-judgment regardless whether the statute expressly labeled the attorney fees an element of costs. (See *System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 162 [listing

examples of statutes defining attorney fees as costs].) On the other hand, attorney fees authorized by contract were considered to be damages, and had to be pleaded and proved at trial. (*T.E.D.*, *supra*, 38 Cal.App.3d at pp. 61-62 ["The rule is that where attorneys' fees are allowable *solely* "'by virtue of contract they *cannot*'" be recovered by merely including them in the memorandum of costs" (internal quotation marks omitted)].)

The difference between statute and contract, however, became muddled by Civil Code section 1717, which provided a statutory basis for attorney fees to parties to a contract even if the contract unilaterally gave fees only to a single party. (Code Civ. Proc., § 1717.) Although it was clear that under section 1717, attorney fees were to be considered costs, it was not always clear whether the underlying contract was covered by section 1717 and considered a cost or governed by the general rules governing contractual fees as damages. (See *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 370.) The confusion, however, was cleared up when "[i]n 1990, the Legislature amended Code of Civil Procedure section 1033.5 to allow attorney fees as costs to a prevailing party when authorized by either statute or contract." (*Ibid.*) In doing so, the Legislature clarified that its inclusion of fees as an element of costs was merely procedural, not substantive, by noting that prior to the enactment of section 1033.5 there had been "great uncertainty as to the procedure to be followed in awarding attorney's fees where entitlement thereto is provided by contract to the prevailing party." (*Id.* at p. 377 quoting Stats. 1990, ch. 804, § 2; see also *Id.* at p. 370, fn. 3 [applying the amendment retroactively because "[t]he amendment is remedial, intended only

to clarify the procedural aspects for claiming attorney fees as costs"]; *Sears v. Baccaglio* (1991) 60 Cal.App.4th 1136, 1150 (*Sears*) [same].)

In sum, by defining attorney fees as an element of costs, the Legislature did nothing to change the existing rule that the entitlement to attorney fees was to be determined as "specifically provided for by statute [or by] the agreement, express or implied, of the parties." (Code Civ. Proc., § 1021 [the current language].) The Legislature only unified the *procedures* for obtaining attorney fees as costs through a memorandum of costs or post-judgment motion. Thus, as we now explain, in determining the substantive entitlement to attorney fees, if there is any conflict between a statute authorizing attorney fees and the generally applicable cost statutes, the substantive attorney fee provisions prevails.

2. FEHA, not section 1033, governs the substantive entitlement to fees when the plaintiff's award is an amount that could have been obtained in a court of limited jurisdiction.

Where the entitlement to fees is governed by a specific statutory scheme, the criteria for awarding fees to the prevailing party under that statute should prevail over the general cost shifting provisions. (See, e.g., *Sears*, *supra*, 60 Cal.App.4th at p. 1158 [Civil Code section 1717 authorizing attorney fees in certain contracts, not Code of Civil Procedure section 1032, is "the

fundamental statute to be applied to fees and costs claimed under a contract"]; *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456 [same]; *Mangano, supra,* 167 Cal.App.4th at pp. 948-949 [same].)

In *Sears*, the court considered who should be considered the "prevailing party" for purposes of obtaining fees under Code of Civil Procedure section 1717 where one of the parties obtains a net recovery, but the other party prevails under the terms of the contract. Following the language of section 1717, the trial court awarded the fees to the party that prevailed on the contract instead of the party that obtained the net recovery. The party who obtained the net recovery appealed, and argued that he should be considered the true prevailing party under the plain language of Code of Civil Procedure section 1032, subdivision (a), which provides costs to the party obtaining a net recovery. (*Sears, supra,* 60 Cal.App.4th at pp. 1141-1142.)

The Court of Appeal rejected that argument. After examining the legislative histories of the two statutes, the court concluded that where section 1717 "is the statute that expressly deals with attorney's fees under a contract," it is the "the applicable statute when determining whether and how attorney's fees should be awarded." (*Sears, supra,* 60 Cal.App.4th at p. 1157.) Although a trial court deciding the fee issue could not necessarily ignore the language of section 1032, section 1717 as the statute substantively authorizing the fee award was "the fundamental statute to be applied to fees and costs claimed under a contract." (*Id.* at p. 1158.)

The result in *Sears* is fully supported by this Court's decision that same year in *Santisas v. Goodin*. There, this Court considered whether the defendant can be considered a prevailing party for purposes of fees under section 1717 where the plaintiff voluntarily dismisses his claim. (*Santisas, supra,* 17 Cal.4th at pp. 602-623.) In answering that question, this Court looked solely to the language of section 1717 and the language of the contract in light of the requirements of section 1717; it did not look to section 1032 for guidance.

That the underlying fee statute provides the *substantive* basis for fees is also consistent with this Court's holding in *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103 (*Scott*). There, the plaintiff obtained an award that was less than the offer provided by the defendant under Code of Civil Procedure section 998. Under section 998, the defendant, who did better at trial than the earlier pre-trial offer provided to the plaintiff, was entitled to its post-offer costs.

The plaintiff, however, argued that even though the defendant was entitled to post-offer costs, it was not entitled to attorney fees because the defendant was not the prevailing party under the statute authorizing the fees—Code of Civil Procedure section 1717. This Court rejected that argument because the Legislature specifically intended in enacting section 998 that "a losing defendant whose settlement offer exceeds the judgment is treated for purposes of post offer costs as *if* it were the prevailing party." (*Scott, supra,* 20 Cal.4th at p. 1114.) Thus, unlike in *Sears* where the court found the Legislature did not intend to alter the definition of prevailing party under section 1717 by enacting the

general cost recovery provisions of section 1032, this Court found the Legislature did intend to alter the definition of a prevailing party in enacting section 998. (*Id.*)

Recently, the Sixth District Court of Appeal in *Mangano* v. *Verity*, applied this Court's decision in *Scott* to a suit brought under FEHA. There, the defendants argued they were "entitled to attorney's fees as part of their section 998 costs despite the restrictions generally imposed in awarding a prevailing defendant fees in a FEHA action." (*Mangano*, *supra*, 167 Cal.App.4th at p. 949.) The Court of Appeal rejected that argument noting that "section 998 does not eliminate the *substantive* requirements for awarding attorney's fees to a prevailing FEHA defendant." (*Id.* at p. 951, emphasis added.) The court also noted that despite the laudatory goals of section 998 to encourage settlement and deter frivolous lawsuits, the generally applicable provisions of section 998 and section 1032 did not override FEHA-specific criteria for awarding attorney fees to a prevailing defendant. (*Id.* at pp. 949-951.)

Just as the court in *Sears* and *Mangano* looked primarily to the statute authorizing the fee award over statutes of general application to determine the substantive entitlement to fees, the Court of Appeal here properly looked to FEHA to define the contours of the court's "discretion" to award fees in an action under FEHA in which the prevailing plaintiff obtains damages in an amount that could have been obtained in a court of limited jurisdiction. Though section 1033 provides a court "discretion" to deny costs under such circumstances, FEHA permits no "discretion"

to deny fees absent special circumstances that would render a fee award unjust. (*Cummings, supra,* 11 Cal.App.4th at p. 1387; *Christiansburg, supra,* 434 U.S. at p. 421; see also *ante*, p. 7.) The City can point to no specific legislative intent under sections 1032, 1033 or 1033.5 to override FEHA's definition of "discretion." Therefore, courts should look to FEHA, not section 1033, to define the parameters of the court's "discretion" to award fees in a particular case brought under FEHA.[2]

3. Even if this Court were to conclude section 1033 generally grants courts "discretion" to deny attorney fees when authorized by statute, such discretion must comport with the well-established rules governing the "discretion" afforded to courts deciding whether to award fees in civil rights cases.

In the prior section, we argued that FEHA, as the statute substantively authorizing the fee award, applies over the procedural rule generally applying to costs under section 1033. But even if this court were to conclude section 1033 generally applies to grant courts discretion to deny substantively authorized attorney fee awards

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[2] This Court should apply FEHA's attorney fee provisions over section 1033 for the additional reason stated in the LACBA/California Women Lawyers Amici Curiae Brief, i.e., because FEHA as the later-enacted and more specific statute authorizing fees takes precedence over the general statute authorizing costs.

where the damage award could have been rendered in a court of limited jurisdiction, courts should have no such discretion where the fees are sought under a civil rights statute such as FEHA.

As already explained, it is well settled under both federal and state law that where the Legislature grants courts "discretion" to award attorney fees to a prevailing party under a civil rights statute, that discretion is limited only to special circumstances that would render an attorney fee award unjust. (*Cummings, supra,* 11 Cal.App.4th at p. 1387, citing *Christiansburg, supra,* 434 U.S.at p. 421 [applying the federal *Christiansburg* attorney fee standard to FEHA cases]; see also *ante,* p. 6-7.) The reason for that well-settled rule is—as more fully explored in the next section—that "the purpose behind the fee provision[s]" in civil rights statutes is "to make it easier for a plaintiff of limited means to bring a meritorious suit to vindicate a policy the Congress [and the Legislature] considered of the greatest importance." (*Ibid.*) Because the importance of awarding attorney fees to encourage the bringing of meritorious civil rights lawsuits is not diminished just because the damage award is low, the court's "discretion" to award attorney fees under section 1033 in a civil rights action—even if such discretion exists—must be limited to denying fees only where special circumstances would render the award unjust.

C. Denying fees to those plaintiffs who obtain low damage awards would frustrate the fundamental policies underlying FEHA and disproportionately harm the poor and underrepresented clients of Amici.

That FEHA embodies a fundamental policy of the state to eradicate discrimination is beyond dispute. (See generally LACBA/California Women Lawyers ACB 7-11.) Indeed, the Legislature has specifically mandated that FEHA's provisions "be construed liberally for the accomplishment of the purposes of this part." (Gov. Code, § 12993, subd. (a).) A critical component of FEHA's comprehensive scheme to eradicate discrimination is an award of attorney fees to parties who prevail in their private discrimination lawsuits. (Gov. Code, § 12965, subd. (b); *ante*, p. 6.)

Given the exorbitant costs of litigation, the typical plaintiff in an employment discrimination case—even one with a high paying job—lacks the resources to retain an attorney, and must instead rely on attorneys willing to take on matters on a contingency fee basis. (See Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization* (1976) 38 Cath. U. L.Rev. 795, 818.)

Most victims of discrimination, however, "will not be able to use a contingency-fee attorney, because the matter will be too small for a private attorney to take on." (Bindra & Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants* (2003) 10 Geo. J. on Poverty L. & Pol'y 1, 8; see also Rulli,

Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade (2000) 9 Temp. Pol. & Civ. Rights L.Rev. 345, 378 ["[w]hen the poor seek legal help, they face difficulty in obtaining it because the primary providers of civil legal representation to the poor—publically funded legal services programs—have suffered deep funding cuts"]; LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards* (2005) 16 Stan. L. & Pol'y Rev. 573, 585-586 (hereafter *Getting Nothing for Something*) [absent an award of attorney fees, the poor will be "shut out of public and private forums for the adjudication of their legal complaints"].)

Attorney fees are thus critical to the ability of all victims of discrimination to vindicate their rights through private lawsuits. (See *ante*, p. 6; *Flannery*, *supra*, 26 Cal.4th at pp. 584-585.) Indeed, the purpose of awarding fees in employment discrimination cases (as opposed to limiting such plaintiffs to contingency fee arrangements) is to encourage lawyers to take such cases. (See *Getting Nothing for Something,* at pp. 585-586.). In short, the purpose behind such fee provisions "is to encourage skilled private attorneys to take public interest cases by guaranteeing them competitive compensation." (Bagenstos, *The Perversity of Limited Civil Rights Remedies* (2006) 54 UCLA L.Rev. 1, 31; see also Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs* (1990) 17 N.Y.U. Rev. L. & Soc. Change 535, 538 [during period when U.S. Supreme Court limited ability for civil rights plaintiffs to recover attorney fees

"attorneys receive far less than is necessary to compensate them reasonably for the hours they expended on the litigation. [¶] As a result, numerous attorneys have been forced to withdraw from civil rights practice for financial reasons. Consequently, many civil rights plaintiffs with colorable claims cannot find attorneys willing to represent them"].)

Such attorney fees are particularly necessary to encourage attorneys to bring suits on behalf of low-wage workers who are victims of discrimination or retaliation. Those workers are unlikely to be able to establish economic damages sufficient for an attorney to take their cases on a contingency fee basis. In addition to the fact that employees in such low-wage industries have an extremely low base rate of pay, they also must immediately mitigate any damages they suffer from termination or other adverse employment actions, and they can ill-afford professional treatment for any emotional distress or other forms of suffering that often accompany illegal employment practices. Therefore, absent the promise of attorney fees, low-wage workers would have little chance of finding an attorney willing and able to help them vindicate their rights.

Denying fees to discrimination victims who obtain small damage awards thus denies access to the courts precisely to those people FEHA's attorney fee provision is designed to protect. Under the City's proposed rule, an attorney taking the case of a low income employee who suffered discrimination would have to decide whether to file the claim in a court of limited jurisdiction—thereby guaranteeing his fees but limiting his client's potential for noneconomic and punitive damages—or file in superior court and

risk obtaining no fees at all even if his low-income client prevails. As one scholar notes, "Not surprisingly, the litigants most adversely affected by such economic disincentives to attorney compensation are those who are most vulnerable. The poor and under-employed lose out because their low earnings yield damages that are too meager to offer adequate attorney compensation in settlements. Over time, attorneys stop taking their cases, leaving 'the promise of civil rights legislation more and more illusory.'" (Rulli, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and its Impact on the Poor* (2005) 8 J. Gender Race & Just. 595, 637-638.)

There is thus little doubt the rule advocated by the City will have the effect of denying access to the poorest victims of discrimination. As a leading employment law treatise prophetically notes with regard to this very case, if this Court holds that section 1033 applies to deny attorney fees in cases with damage awards that could have been obtained in a court of limited jurisdiction, "it may discourage low-value FEHA claims because the employees' attorneys will not be assured of recovering the full measure of reasonable fees." (3 Ming Chin et al., Cal. Practice Guide, *supra,* ¶ 17:648.10, p. 17-100.)

And it is the category of clients served by Amici that will be the most likely to have such "low-value FEHA claims." Unfortunately, Amici do not have the resources to represent every low income Californian who is the victim of employment discrimination. The fundamental policies underlying FEHA nonetheless encourages private lawyers to take on such clients with

the promise of full attorney fees to a prevailing party. Absent the promise of such fees should they prevail, private lawyers have no incentive to represent low-wage victims of discrimination and retaliation and consequently, an entire class of persons will have difficulty in vindicating their rights in the workplace.

For these reasons, absent clear legislative intent to override the fundamental right of employees to vindicate their rights in low-value cases—and there is none here—this Court should affirm the ruling of the Court of Appeal holding that FEHA's, not section 1033's, standard for awarding attorney fees to a prevailing plaintiff applies here.

D. The cases and arguments cited by the City and its amici curiae to support the proposition that section 1033 takes precedence over FEHA's attorney fee provisions are either inapplicable or should not be followed by this Court.

The City and its amici cite a host of cases and arguments to contend that section 1033's provisions takes precedence over FEHA. None of the argument has merit.

- The City relies heavily on *Steele*, *supra*, 59 Cal.App.4th at pp. 329-330, which holds that section 1033 may be used to deny a prevailing plaintiff fees in a FEHA action. (OBOM 14-16.) Though the *Steele* court acknowledges that a court must award fees in a FEHA action absent "special circumstances" and acknowledges that the "interplay of [section 1033 and FEHA] is complex," the court

without analysis simply declared that the trial court properly exercised its discretion to deny fees without *even considering* whether special circumstances existed in that action or whether FEHA's policies limited in any way the court's discretion to deny fees. (*Steele, supra,* 59 Cal.App.4th at pp. 330-331.) Given the lack of analysis of legislative intent or the fundamental policies underlying FEHA, this Court should decline to follow *Steele.*

- The League of Cities in its amicus brief contends that the holding in *Caldwell v. Montoya* (1995) 10 Cal.4th 972 that FEHA's fundamental policies do not negate the express discretionary immunity afforded to government officials by Government Code section 820.2 means that FEHA's fundamental policies cannot negate the effects of section 1033. (League of Cities ACB 4-6.) As already explained, there was no express legislative intent to apply section 1033 to override a statutory right to attorney fees. Moreover, the fundamental policies at stake in *Caldwell* were equal: the state's sovereign immunity versus the goals of eradicating discrimination. There is no merit, however, to any suggestion that a state's interest in encouraging litigants to file their claims in the proper forum is equal to or greater than the fundamental statutory and constitutional right of California workers to be free from discrimination.

- The League of Cities argues that because costs are purely a creature of statute and section 1032 is the "'fundamental authority for awarding costs in civil actions'" section 1033's limitations on cost awards must prevail over FEHA. (League of Cities ACB 13.) But the League of Cities has it backwards. Section

1032 cannot and does not authorize attorney fees to a prevailing party. Attorney fees can *only* be authorized by a statute independent from section 1032 or by an agreement among the parties. (Code Civ. Proc., § 1021.) It is thus the authorizing statute or the agreement that is the "fundamental authority" for providing the substantive right to an award of *attorney fees*, as opposed to costs. (See *Sears*, *supra*, 60 Cal.App.4th at p. 1158.)

- Similarly, the League of Cities says it would be an "oddity" to permit fees under section 1032 and 1033.5 but deny the applicability of section 1033. (League of Cities ACB 17.) But it is FEHA, not section 1032 or 1033.5, that *expressly* provides the basis for the award of attorney fees. Well before sections 1032 and 1033.5 existed, prevailing parties were entitled to attorney fees under FEHA's express grant of attorney fees to the prevailing party. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 216 [FEHA's fee provision was enacted in 1978]; *Flannery*, *supra*, 61 Cal.App.4th at p. 638 [same].) And if sections 1032, 1033 and 1033.5 were repealed tomorrow, Chavez would undisputedly be entitled to recover his attorney fees under FEHA. (See Gov. Code, § 12965, subd. (b).) Therefore, it would not be odd at all to credit FEHA for determining the entitlement to fees instead of section 1033.

- The League of Cities contends that in *Leaper v. Gandy* the court held that the predecessor to section 1033 applied to preclude an award of attorney fees well before the current statutory scheme was enacted. (League of Cities ACB 17-18.) *Leaper*, however, considered only whether the predecessor to section 1033

was constitutional in that it applied only to a plaintiff and not a defendant. (*Leaper v. Gandy* (1937) 22 Cal.App.2d 475, 478.) That *constitutional* claim was easily rebutted by the court. But nowhere does the *Leaper* court analyze the underlying statute authorizing fees to determine whether its provisions should apply over the predecessor to section 1033. Nor does the *Leaper* court suggest section 1033's rule should apply to deny fees under a civil rights statute promising fees to attorney so they will bring meritorious claims even where the damages are low. (See *ante*, pp. 6-7, 17-18.) As an opinion cannot be authority for a proposition it did not consider, the case has no applicability here. (See *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.)

- Finally, the City and the League of Cities cite *Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1813-1815 (*Dorman*) for the proposition that section 1033, subdivision (a) prevails over section 1717 in granting a trial court discretion to deny fees where the plaintiff obtains an amount that could have been obtained from a court of limited jurisdiction under section 1033. That decision is wrongly decided and should not be followed, but even if it applies, it should not apply to this case involving FEHA.

As explained in section B the *Dorman* court is wrong in concluding that the Legislature specifically intended that an award of attorney fees pursuant to section 1717 should be governed by the general cost shifting provisions of Code of Civil Procedure, section 1032 et seq. (Compare *Dorman, supra,* at pp. 1814-1815 with *Sears, supra,* 60 Cal.App.4th at pp. 1157-1158.) The *Dorman* court ignores

the fact that the Legislature added attorney fees as costs for purely procedural, not substantive, reasons. And as the court in *Sears* properly found, section 1717, not section 1032, should be the "fundamental statute" examined by the court for determining the substantive entitlement to fees.

But even if *Dorman*, is correct in its conclusion that section 1033 would generally apply to deny fees in a typical statutory attorney fee case, it should not apply to FEHA cases. The fundamental policies underlying FEHA demand that the court's "discretion" in awarding attorney fees be strictly limited to circumstances in which there are special circumstances that would render an award of fees unjust. Moreover, as already explained, applying section 1033 to deny fees to those who obtain small damage awards would disproportionately impact precisely those poor and underrepresented parties FEHA's attorney fee provision was enacted to protect.

CONCLUSION

For all of these reasons, this Court should affirm the decision of the Court of Appeal.

December 17, 2008

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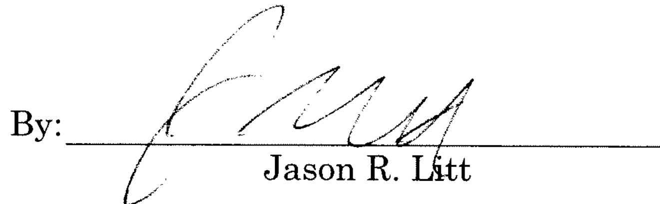

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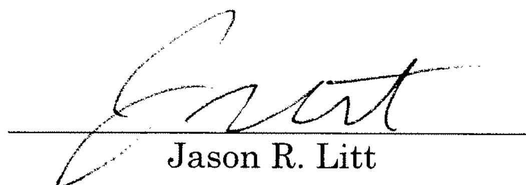

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On December 17, 2008, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE ASIAN PACIFIC AMERICAN LEGAL CENTER, BET TZEDEK LEGAL SERVICES, THE IMPACT FUND, PUBLIC COUNSEL, AND THE WESTERN CENTER ON LAW AND POVERTY IN SUPPORT OF PLAINTIFF AND APPELLANT ROBERT CHAVEZ** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on December 17, 2008, at Encino, California.

Robin Steiner

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