MEMORANDUM 2024-17

Equal Rights Amendment
Update and Next Steps: Work to Identify and Remedy Specific Defects

In 2022, the Legislature adopted a resolution assigning the Commission[1] to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]"[2] More specifically:

> [The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission's report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination….[3]

The Commission commenced work on this topic in 2022, considering a proposed approach for the study.[4] The proposed approach has two stages: first, the Commission will examine the possibility of enacting a provision in state law to achieve the effect of the Equal Rights Amendment ("ERA") (such a provision is referred to hereafter as a "sex equality provision"); and second, the Commission will use the sex equality provision to evaluate existing California law and identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).[5]

This memorandum provides updates on related cases and begins stage two of this study, providing background information and discussion of possible next steps.

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1 Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2 2022 Cal. Stat. res. ch. 150 (SCR 92 (Leyva)).

3 *Id.*

4 Memorandum 2022-51; see also Minutes (Nov. 2022), pp. 3-4.

5 See Memorandum 2022-51, p. 2.

THE EQUAL RIGHTS AMENDMENT

The ERA provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[6]

UPDATE ON RELATED CASES

Below are brief updates on three notable cases related to sex discrimination and religious freedom. The first update reports the U.S. Supreme Court's decision on a sex discrimination case described in a prior memo[7] in which an individual's claim was rejected because she couldn't prove that the discriminatory action "imposed 'significant disadvantage' sufficient to qualify as an 'adverse employment action.'"[8] The second update discusses a pending petition for certiorari to the U.S Supreme Court for a capitol murder case where the prosecution presented evidence of "a woman's plainly irrelevant sexual history, gender presentation, and role as a mother and wife"[9] during the trial. The third update describes a decision from the Indiana Court of Appeals supporting an injunction against a restrictive abortion law because it violated the plaintiffs' rights under the state's Religious Freedom Restoration Act.

The staff notes that there are many pending cases in the California, federal, and other state court systems that relate to sex equality broadly.[10] The staff is not monitoring such case law exhaustively, nor does the staff intend to provide updates on all such developments. Absent Commission direction otherwise, the staff will continue to provide updates of selected related case law.

Sex Discrimination – U.S. Supreme Court

The U.S. Supreme Court recently issued a decision in *Muldrow v. City of St. Louis*,[11] in which the Court was asked:

> Does Title VII prohibit discrimination as to all "terms, conditions, or privileges

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[6] H.J. Res. 208 (1972), 86 Stat. 1523.

[7] Memorandum 2024-6, pp. 2-3.

[8] Brief of Petitioner at 2, Muldrow v. City of St. Louis, No. 22-193 (U.S. Aug. 28, 2023), *available at* https://www.supremecourt.gov/DocketPDF/22/22-193/278337/20230828212608509_Petitioner%20opening%20merits%20brief%20-%208.28.2023.pdf.

[9] See petition for cert in Andrew v. White (filed Jan. 25, 2024), *available at* https://www.supremecourt.gov/DocketPDF/23/23-6573/298371/20240122174311161_1%202024.01.22%20AndrewPWCvfinal.pdf (hereafter, "Andrew Petition").

[10] See, e.g., Food & Drug Admin. v. All. for Hippocratic Med. (2023) 78 F.4th 210, *cert. granted* 2023 WL 8605744 (Dec. 13, 2023).

[11] (2024) 601 U.S. __, No. 22-193. Text of the opinion is available online at https://www.supremecourt.gov/opinions/23pdf/22-193_q86b.pdf (hereafter, "Muldrow Opinion").

> of employment," or is its reach limited to discriminatory employer conduct that courts determine causes materially significant disadvantages for employees?[12]

The case was brought by Sergeant Muldrow, who claimed her employer transferred her out of a preferred position at the St. Louis Police Department because of her sex. The Eighth Circuit rejected her suit because they did not believe this employment action caused sufficiently "materially significant disadvantages" to qualify as an "adverse employment action."[13]

The Supreme Court disagreed that the law demanded a qualifying discrimination action "meet a heightened threshold of harm."[14] Delivering the opinion for the court, Justice Kagan wrote "[a]lthough an employee must show some harm from a forced transfer to prevail in a title VII suit, she need not show that the injury satisfies a significance test."[15] The Court further determined that Sergeant Muldrow's allegations that her new position's irregular hours, diminished responsibility, and lost benefits clearly met the threshold.[16]

Sex Stereotyping – U.S. Supreme Court Petition for Writ of Certiorari

Representatives for Brenda Evers Andrew asked the U.S. Supreme Court to resolve whether federal law "forbids the prosecution's use of a woman's plainly irrelevant sexual history, gender presentation, and role as a mother and wife to assess guilt and punishment"[17] in *Andrew v. White.*[18]

Brenda Evers Andrew was sentenced to execution for the death of her estranged husband in 2004. A jury convicted Andrew based on circumstantial evidence, although her co-defendant confessed to planning and carrying out the murder himself.[19] Included in the record was extensive use of irrelevant and potentially prejudicial information relating to her departure from traditional sex-based stereotypes.[20] On appeal, the 10th Circuit noted

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[12] Petition for cert in Muldrow v. City of St. Louis, p. 2 (filed Aug. 29, 2022), *available at* https://www.supremecourt.gov/DocketPDF/22/22-193/236627/20220829210804358_Muldrow%20cert.%20petition%20-%20okay%20to%20print%20final%20-%208.29.2022.pdf.

[13] *Id.*

[14] Muldrow Opinion, *supra* note 29, at 4-5, https://www.supremecourt.gov/opinions/23pdf/22-193_q86b.pdf.

[15] *Id.* at 1.

[16] *Id.* at 10.

[17] Andrew Petition, *supra* note 7, at i.

[18] Andrew v. White (10th Cir. 2023) 62 F.4th 1299. The petition also asks "[w]hether this Court should summarily reverse in light of cumulative effect of the errors in this case at guilt and sentencing, including the introduction of a custodial statement made without the warnings *Miranda v. Arizona*, 384 U.S. 436 (1966) requires." Andrew Petition, *supra* note 7, at i.

[19] Andrew Petition, *supra* note 7.

[20] See, e.g., references to Ms. Andrew's "short skirt, low-cut tops, just sexy outfits" and a witness testifying that Ms. Andrew "'had rolled her hair and it was really, really big,' which was 'the opposite' of what 'other mothers' look like." *Id.* at 10-11.

that the State's "sexual and sexualizing" evidence was "concerning."[21]

This petition requests that the Court address a split in the circuit courts as to whether the 14th Amendment's Due Process Clause prohibits the admission of prejudicial and irrelevant evidence.[22] The Court was asked to reverse the decision as a result of cumulative prejudicial effects of the inclusion of this evidence, as well as a number of other alleged errors.[23]

Abortion and Religious Freedom – Indiana State Court of Appeals

On April 4, the Indiana Court of Appeals found unanimously in favor of plaintiffs contesting a restrictive abortion law in *Individual Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiff 1, et al.*[24] The plaintiffs, five anonymous individuals and an association, the Hoosier Jews for Choice,[25] alleged that Indiana's abortion law ("Law")[26] violated their rights under the state's Religious Freedom Restoration Act ("RFRA").[27] The trial court granted the plaintiffs a preliminary injunction and the State appealed.

In upholding a partial injunction, the state Court of Appeals affirmed that the plaintiffs showed a reasonable likelihood of success on their RFRA claim.[28] The Court confirmed that abortion is a "religious exercise" within the meaning of RFRA,[29] analogizing to *Burwell v. Hobby Lobby Stores*[30] and cases enjoining military COVID-19 vaccine mandates.[31]

> Although *Burwell* and these military cases were decided under federal RFRA, both the federal version of RFRA and Indiana RFRA specify that "exercise of religion" does not require that the exercise be "compelled by, or central to, a system

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[21] *Id.* at 18.

[22] *Id.* at 28.

[23] *Id*. The other alleged errors included improperly barred witnesses and the admission of un-*Mirandized* statements.

[24] (2024) __ N.E.3d __, 2024 WL 1452489.

[25] Four of the individual plaintiffs identified as Jewish and the fifth was not affiliated with any religious organizations and did not believe in a single, theistic god. The Hoosier Jews for Choice stated their members believe that "under Jewish law and religious doctrine, life does not begin at conception, and that a fetus is considered a physical part of the woman's body, not having a life of its own or independent rights." *Id.* at *3-4.

[26] Ind. Code § 16-34-2-1. This law makes abortion a crime except under certain circumstances, including to prevent the serious health risk or death of the pregnant woman, rape or incest, or if the fetus has a lethal anomaly.

[27] *Id.* §§ 34-13-9-0.7 – 34-13-9-11. The law states in relevant part, "[a] governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 34-13-9-8(b).

[28] 2024 WL 1452489 at *20.

[29] "Exercise of religion" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. Ind. Code § 34-13-9-5.

[30] (2014) 573 U.S. 682.

[31] See U.S. Navy SEALs 1-26 v. Biden (5th Cir. 2022) 27 F.4th 336 and Air Force Officer v. Austin (M.D. Ga. 2022) 588 F.Supp.3d 1338.

> of religious belief." This plain language, together with its interpretation in *Burwell* and the military cases, leads us to conclude that Plaintiffs' exercise of religion need not be ritualistic to be protected by RFRA.
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> Plaintiffs' claims, in fact, seem to be the other side of the *Burwell* coin. If a corporation can engage in a religious exercise by refusing to provide abortifacients – contraceptives that essentially abort a pregnancy after fertilization – it stands to reason that a pregnant person can engage in a religious exercise by pursuing an abortion. In both situations, the claimant is required to take or abstain from action that the claimant's sincere religious beliefs direct. And in both situations, the claimant's objection to the challenged law or regulation is rooted in the claimant's sincere religious beliefs.[32]

The Court also found the State did not establish a compelling interest for the Law and even if they had, the Law was not the least restrictive means of furthering that interest.[33] The Court remanded to the trial court to create more narrowly tailored preliminary injunction.[34]

SCOPE OF THIS MEMORANDUM

Prior memoranda have explored how California law prohibits sex discrimination,[35] and multiple outlets have documented California's comprehensive laws and policies protecting sex equality.[36] This memorandum will explore how the Commission may correct discriminatory gendered language and identify laws with disparate impact because there appears to be limited language that expressly impedes sex equality in statute. In addition to the staff's research, this phase of the study will be aided by the input of individuals and organizations active in gender and equity law.

IDENTIFYING AND REMEDYING DEFECTS

Discriminatory Language

SCR 92 directs the Commission to address "defects … related to the inclusion of discriminatory language" in California law. The staff understands "discriminatory

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[32] 2024 WL 1452489 at *22 (citations omitted), 23.

[33] *Id.* at *27.

[34] The Court remanded for the injunction to apply only to those acts that violate RFRA. The State argued that the current injunction "would bar the State from preventing Plaintiffs from obtaining abortions that are outlawed by the Abortion Law but that are not directed by Plaintiffs' sincere religious beliefs." *Id.* at *30.

[35] Memorandum 2023-21, pp. 4-5 (discussion of the Gender Nondiscrimination Act).

[36] See, e.g., https://www.hrc.org/resources/state-scorecards/california-4 (Human Rights Campaign 2023 State Equality Index for California); https://www.lgbtmap.org/equality_maps/profile_state/CA (Movement Advancement Project's Equality Maps/State Profile for California); and https://reproductiverights.org/maps/state-constitutions-sex-discrimination/ (Center for Reproductive Rights, State Constitutions and Sex Discrimination).

language" as words and phrases that foster stereotypes of individuals or groups of people, predominately in ways that demean or ignore them.[37] Gender biased language is a type of discriminatory language which "either implicitly or explicitly favors one gender over another."[38] Examples of gender biased language are terms such as "he" or "she" or "husband" and "wife."[39]

The Legislature is continually making efforts to remove gender biased language through specific legislation[40] and general bill drafting policies,[41] but some vestiges remain.[42] The staff identified the following terms in California statutes that could be evaluated for possible replacement with neutral analogs:

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[37] https://eige.europa.eu/publications-resources/toolkits-guides/gender-sensitive-communication/first-steps-towards-more-inclusive-language/terms-you-need-know?language_content_entity=en (European Institute for Gender Equality, Gender-sensitive communication).

[38] *Id.*

[39] See, e.g., Fam. Code § 11 ("A reference to 'husband' and 'wife,' 'spouses,' or 'married persons,' or a comparable term, includes persons who are lawfully married to each other and persons who were previously lawfully married to each other, as appropriate under the circumstances of the particular case.").

When proposing a new Family Code, the Commission recommended to the Legislature adding the terms "spouses" and "married persons" to this code section, but the terms "husband" and "wife" remain. *1994 Family Code*, 23 Cal. L. Revision Comm'n Reports 1 (1993).

[40] See, e.g., 2016 Cal. Stat. ch. 50 (SB 1005 (Jackson 2016)) (replacing references to a "husband" or "wife" with references to a "spouse") and 2013 Cal. Stat. ch. 510 (AB 1403 (Committee on Judiciary 2013)), (updating statutory terms within the Uniform Parentage Act to replace "father" and "mother" with "parent," among other amendments).

The Legislature also placed Proposition 11, Miscellaneous Language Changes Regarding Gender, on the ballot in 1974. This proposition amended the California Constitution to recast masculine gendered terms to instead refer to the "person" or individual referred to. It passed successfully with 50.43% of the vote. https://ballotpedia.org/California_Proposition_11,_Gender-Neutral_Language_in_State_Constitution_Amendment_(1974).

[41] Bills with content not otherwise related to sex and gender typically contain technical amendments to update terms such as "he or she." See e.g., AB 2582 (Pellerin), the Elections Omnibus Bill of 2024, which changes references to "he or she" with "the voter," among other amendments.

[42] See, e.g., Gov't Code § 21629, Fam. Code §§ 803, 7540, Unemp. Ins. Code § 631.

Gender biased term	Possible Replacement[43]	Occurrences in code	Number of code sections
Mother	Parent	252	21
Father	Parent	150	19
He or she	They (or individual referred to, i.e. "the voter")	4,688	30
His or her	Their (or individual referred to, i.e. "the voter's")	8,904	30
Husband	Spouse	26	7
Wife	Spouse	24	7
Grandmother	Grandparent	7	4
Grandfather	Grandparent/exempt[44]	14	6
Daughter	Child	33	13
Son	Child	38	14
Fireman	Firefighter[45]	84	11
Chairman	Chair	465	25
Policeman	Police officer	46	5
Salesman	Salesperson	39	10

The staff notes that any amendments must be made with care to ensure changes do not impact the implementation of federal programs, such as the Special Supplemental Nutrition Program for Women, Infants, and Children,[46] and they make sense in context. The staff will be alert to these possibilities and welcomes any suggestions or feedback on

[43] The staff consulted several sources in searching for gender-neutral terms, such as Grammarly.com and Dictionary.com. The terms and replacements listed above represent options that seem to staff to be broadly understood. Staff did not find widely used substitutes for other common terms such as "aunt/uncle" and "niece/nephew."

[44] The term "grandfather" is sometimes used to denote exemptions from a new law. See, e.g., Gov't Code § 31899.8, which uses the term "grandfather" to describe an election from the federal Internal Revenue Code. However, "grandfather" in this context is differently problematic. The term derives from laws that conditioned voting eligibility on whether an individual was a lineal descendant of someone who was able to vote before the 15th Amendment to the U.S. Constitution was passed. The 15th Amendment prohibited racial discrimination in voting, but these "grandfather clauses" effectively excluded Black individuals from voting without reference to race. These clauses were ruled unconstitutional in 1915 by *Guinn & Beal v. United States*, 238 U.S. 347. See https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause. In these contexts, the term "exempt" could perhaps serve as a substitute.

[45] See Health & Safety Code § 1799.2, which refers to the California State Firemen's Association, a union. While this would otherwise be a circumstance where a proper name should not be amended, the Association changed its name to the California State Firefighters' Association in 1990 to recognize and support women firefighters. "Many Faces, One Purpose," U.S. Fire Administration, FA-196, September 1999 at 100.

[46] Health & Safety Code §§ 123275-123355.

words.

The staff welcomes comment identifying additional gender-biased terms and possible replacements.

Disparate Impact Theory

SCR 92 also directs the Commission to address "defects related to … disparate impacts" in California law.

Disparate impact theory is primarily used to challenge practices based on state and federal employment and housing discrimination laws. Generally, a "disparate impact" occurs when a facially neutral law disproportionately adversely affects members of a protected class. A law fails the disparate impact legal test when there is no legitimate business reason for the law or policy and no less discriminatory means are available to achieve the law's purpose.

State and Federal Employment Laws on Disparate Impact

California's Fair Employment and Housing Act ("FEHA")[47] declares it a civil right for an individual to seek, obtain, and hold employment without discrimination because of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status."[48]

Title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin.[49]

FEHA regulations describe the process to prove unlawful employment discrimination based on disparate impact. First, the policy being challenged must be facially neutral.[50] Following an allegation of disparate impact based on that policy, an employer can provide an affirmative defense that the policy is necessary for the safe and efficient operation of the business and the policy effectively fulfills its intended business purpose.[51] This is known as the "business necessity" defense. However, the policy may still be impermissible if an alternative practice is shown to exist that would accomplish the business purpose

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47 Gov't Code §§ 12900 - 12999.

48 Gov't Code § 12921(a). The characteristics noted above includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. *Id.* § 12926(*o*).

49 42 U.S.C.A. § 2000e-2.

50 2 Cal. Code Regs. § 11010(b).

51 *Id.*

equally well with a less discriminatory impact.[52] Both state and federal law follow similar disparate impact tests.

Griggs v. Duke Power Company

Disparate impact theory was developed by the U.S. Supreme Court in *Griggs v. Duke Power Company*,[53] an employment discrimination case. This was a class action by Black individuals who alleged that Duke Power Company ("Duke") violated their civil rights by requiring irrelevant preconditions to employment. The requirements, completing high school and passing an aptitude test, disproportionately impeded Black individuals' employment opportunities.[54] The Court of Appeals considered Duke's subjective intent in establishing the requirements and found no discriminatory purpose. The Appeals Court thus determined that there was no civil rights violation.

In its decision, the Supreme Court noted that Duke did not study whether the requirements were positively related to job performance prior to imposing them. A company executive testified that the requirements were instituted with the idea that they "generally would improve the overall quality of the work force."[55] In fact, the education and testing requirements were shown to have no relation to successful job performance.[56] Individuals who lacked these credentials and held their jobs prior to the requirements continued to perform well. The Supreme Court acknowledged that Duke Power Company seemed to lack intent to discriminate but decided that their mindset was irrelevant. Instead, it was the impact of the requirements that mattered.

> … Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[57]

The Court found Duke in violation of the Civil Rights Act for imposing requirements that were unnecessary and did not fulfill their intended purpose, disproportionately harming a protected class. Disparate impact theory was born.

Mahler v. Judicial Council of California

Employment law cases under FEHA follow this approach. A recent disparate impact

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52 *Id.*
53 Griggs v. Duke Power Company (1971) 401 U.S. 424.
54 *Id.* at 425-426.
55 *Id.* at 431.
56 *Id.*
57 *Id.* at 432.

case, *Mahler v. Judicial Council of California*,[58] highlights the importance of providing evidence that the policy at issue caused a statistically significant adverse effect on a protected group. This case was brought by retired superior court judges alleging age discrimination in the Temporary Assigned Judges Program ("TAJP"). In their complaint, the plaintiffs claimed that changes to the case assignment policy based on numbers of days worked (the "1320 limit")[59] disproportionately impacted judges over age 70, resulting in fewer assigned cases. Although the policy allowed for exceptions, the plaintiffs alleged that younger, more recently retired judges would not have to get an exception to participate in the TAJP program and the assignments given to individuals granted an exception were less desirable.[60] However, the Appeals Court found the plaintiffs failed to present sufficient data to establish a prima facie case.

> [T]he complaint must allege facts or statistical evidence demonstrating a causal connection between the challenged policy and a significant disparate impact on the allegedly protected group…. There are, for example, no specifics as to the total number of participants in the TAJP, or the number of participants allegedly adversely impacted by the challenged changes to the program, or even the age "group" allegedly adversely impacted. Nor are there any "basic allegations" of statistical methods and comparison, or even any anecdotal information of a significant *age*-based disparity.[61]

The Appeals Court remanded the case and allowed the plaintiffs to amend their complaint.

The plaintiffs' amended claim presented an expert report to bolster their allegations. However, the Court found the report deficient in several ways. First, it failed to include the impact of another aspect of the case assignment policy that resulted in the plaintiffs rejecting offered assignments.

> The reallocation policy [also] changed the geography of the TAJP by reducing or halting assignments to counties with well-staffed courts, which formerly used a high share of the TAJP resources, and increased assignments to counties with a deficit of active judges…. Notably, when Plaintiffs were offered assignments in understaffed courts, including San Bernardino and Riverside, they declined to serve, reducing their days worked. [The expert report] did not control for the geographic assignment differences after 2019. Given this analytical gap, it cannot be said that but for the 1320 limit, participants over age 70 would necessarily have enjoyed more opportunities to serve and would have worked more days.[62]

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58 Mahler v. Judicial Council of California (2021) 67 Cal.App.5th 82.

59 Individuals with more than 1,320 days' experience in the TAJP will not get assignments unless they receive an 'exception' to the policy. *Id.* at 114.

60 *Id.* at 113-114.

61 *Id.* at 115.

62 Mahler v. Judicial Council of California (2024) No. CGC-19-575842 (Super. Ct. San Francisco Cty., Cal.),

Second, it failed to establish a case for the plaintiffs' age-discrimination claim. While the report showed the 1320 limit's impact on TAJP participants over 70 who met the limit, it did not show the limit's impact on participants under 70, or those over 70 who had not met the limit. The Court noted that the analysis "does not allow an inference of discrimination based on age, i.e., that Defendants' enforcement of the 1320 limit has a significate disparate impact on TAJP participants over 70 as compared to participating judges under 70."[63] When the Court analyzed the figures, it found "the 1320 limit had no effect on a supermajority of participants over age 70."[64]

The Superior Court dismissed the case, granting summary judgment to the defendants.[65] Thus, although allegations may facially appear to present a disparate impact case, it is vital to assess the full picture.

State and Federal Housing Laws on Disparate Impact

FEHA[66] declares it a civil right for an individual to seek, obtain, and hold housing without discrimination because of race, religion, color, national origin, ancestry, disability, medical condition, genetic information, source of income, marital status, sex,[67] veteran or military status, primary language, citizenship, or immigration status.[68]

FEHA prohibits housing practices that have a discriminatory effect without a legally sufficient justification.[69] "Practices" are defined to include written and unwritten policies, acts, or failures to act.[70]

> A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of individuals, or creates, increases, reinforces, or perpetuates segregated housing patterns, based on membership in a protected class. A practice predictably results in a disparate impact when there is evidence that the practice will result in a disparate impact even through the practice has not yet been implemented.[71]

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at 5-6.

63 *Id.* at 6.

64 *Id.* at 7.

65 *Id.*

66 Gov't Code §§ 12900 -12999.

67 For the purposes of this section, "sex" includes gender, gender identity, gender expression, sexual orientation, and reproductive decisionmaking. Gov't Code § 12921(b).

68 *Id.* Any of the characteristics mentioned above also includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Gov't Code § 12955(m) and Civil Code § 51(e)(6).

69 2 Cal. Code Regs. § 12060. "Discriminatory effect" has the same meaning as disparate impact and the codes use the terms interchangeably. California law permits exemptions for certain circumstances, such as an individual sharing living areas in a single dwelling unit expressing a sex preference for a roommate, or a person stating an age-based preference for senior housing. See 2 Cal. Code Regs. § 12051.

70 2 Cal. Code Regs. § 12005(x).

71 2 Cal. Code Regs. § 12060(b).

FEHA regulations establish the burdens of proof in disparate impact cases.[72] First, the complainant has the burden of proving a challenged practice caused or predictably will cause a discriminatory effect.[73] The burden then shifts to the defendant to show the practice is justified despite the discriminatory effect. This justification must show that the practice is necessary to achieve one or more substantial, legitimate, and nondiscriminatory business interests. Second, the defendant must show the practice effectively carries out the identified business interest. Finally, the defendant must prove there is no feasible alternative that would equally or better accomplish the identified purpose with less discriminatory effect.[74] This is similar to the structure of disparate impact in employment claims.

The federal Fair Housing Act ("FHA") prohibits housing providers from discriminating based on race, color, religion, sex, national origin, familial status, or disability,[75] similar to FEHA.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project

The U.S. Supreme Court affirmed that disparate impact claims may be brought under the federal FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.[76] In this case, a Texas nonprofit that helps low-income individuals obtain housing sued the Texas Department of Housing and Community Affairs ("TDHCA") for perpetuating housing segregation by allocating a disproportionate number of federal housing credits in predominantly Black inner-city areas. Relying on *Griggs*, the Supreme Court held that disparate impact claims are cognizable under the FHA:

> Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a 'reasonable measure[ment] of job performance,' [citations omitted] so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the [Civil Rights Act] Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.[77]

On remand to the Northern District of Texas,[78] however, the Court found that Inclusive Communities Project ("ICP") failed to prove a prima facie case for disparate impact.

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72 2 Cal. Code Regs. §§ 12061 - 12062.
73 2 Cal. Code Regs. § 12061.
74 2 Cal. Code Regs. § 12062.
75 42 U.S.C. §§ 3601 - 3619.
76 Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project (2015) 576 U.S. 519.
77 *Id.* at 541.
78 Inclusive Cmtys. Project v. Tex. Dep't of Hous. And Cmty. Affairs, et al. (N.D. Tex. 2016) No. 3:2008cv00546 - Document 271, *available at* https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2008cv00546/175622/271/.

Through a detailed analysis of the TDHCA's point system for awarding tax credits, the Court found that ICP was arguing that TDHCA was abusing its discretion in awarding the federal tax credits. However, exercising discretion is not a specific, facially neutral policy for purposes of a disparate impact claim.[79]

> …regardless of the label ICP places on its claim, it is actually complaining about disparate treatment, not disparate impact. The purpose of disparate impact liability is to root out a facially neutral policy that has an unintended discriminatory result. But a claim for intentional discrimination is evaluated under the disparate treatment framework, which requires a showing of targeted discrimination. Where the plaintiff establishes that a subjective policy, such as the use of discretion, has been used to achieve a racial disparity, the plaintiff has shown disparate treatment.
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> If ICP were challenging the existence of TDHCA's discretion rather than how the discretion is used, ICP would seek to enjoin that discretion and to mandate a points-only system or another wholly objective method of awarding tax credits. Instead, ICP maintains that TDHCA's exercise of discretion should be the means to achieve a specific end: to provide increased opportunities for desegretated low-income housing.[80]

The Court also determined that ICP failed to prove it was TDHCA's exercise of discretion, and not other factors such as local zoning rules, community preferences, or developers' choices, caused the statistical disparity.[81] The Court dismissed the case.

Martinez v. City of Clovis

A California appellate decision under FEHA, *Martinez v. City of Clovis*, provides an example of a successful case for disparate impact theory under FEHA.[82] In this case, a resident sued the City of Clovis for failing to zone for low-income housing, resulting in disparate impacts for people of color.[83] The Appeals Court noted that FEHA makes it unlawful for the city "to discriminate through public ... land use practices, decisions, and authorizations"[84] because of protected characteristics including race. The law further states that discrimination includes zoning laws "that make housing opportunities unavailable." Previously, the trial court determined that "[f]ailing to meet the [Regional Housing Needs Allocation] obligation for zoning does not make a housing opportunity 'unavailable' in any material sense."[85] The Appeals Court disagreed and determined that the City's failure to

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79 *Id.* at 16.
80 *Id.* at 16-17 (citations omitted), 18.
81 *Id.* at 20.
82 Martinez v. City of Clovis (5th Dist. 2019) 90 Cal.App.5th 193.
83 *Id.* at 253.
84 Gov't Code § 12955*(l)*.
85 90 Cal.App.5th at 271.

zone for low-income housing did make housing opportunities unavailable for purposes of the law.[86] The Appeals Court remanded for further action and the parties eventually settled out of court.[87]

Demonstrating Disparate Impact Requires a Fact-Intensive Inquiry

As noted in the cases above, the analysis for disparate impact is a heavily fact-based inquiry. The Commission does not have the staffing resources to conduct data-intensive inquiries for each law that may be identified as having a disparate impact. Going forward, the Commission will need to consider how it will determine whether a law should be deemed to have a disparate impact for the purposes of this work. The staff can research whether the case law identifies California laws that have been determined to have a disparate impact, as such laws may be appropriate for reform.

NEXT STEPS: OUTREACH

The staff emailed individuals from the attached stakeholder list on April 9, 2024, soliciting assistance in identifying California law with discriminatory language or disparate impacts. Staff will keep the Commission apprised on any comments received.

In the meantime, would the Commissioners like staff to explore amending the statutes for all, or a subset, of the gender-biased terms above?

Respectfully submitted,

Sarah Huchel
Staff Counsel

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[86] *Id.* at 271.

[87] The City of Clovis and the plaintiff, Desiree Martinez, came to a settlement agreement on Feb. 20, 2024. The City agreed to comprehensively plan for affordable housing options and, among other items, would establish a Local Housing Trust Fund, dedicate city-owned lots for the development of affordable housing, and require that up to 10% of units in new housing projects will be affordable to low-income families. https://cityofclovis.com/settlement-agreement-desiree-martinez-v-city-of-clovis/.

ORGANIZATIONS FOR STAKEHOLDER OUTREACH

- California Legislature
    - California Women's Legislative Caucus
    - California Legislative LGBTQ Caucus
- State Entities
    - California Commission on the Status of Women and Girls
    - California Civil Rights Department
    - California Department of Justice Civil Rights Enforcement Section
    - CA Department of Public Health
    - California Commission on Aging
    - California Department of Insurance
    - California Department of Managed Health Care
- Local Commissions
    - Commissions on the Status of Women and Girls, Berkeley, Los Angeles, Sacramento, and San Francisco
    - Commission on the Status of Women, City of Los Angeles, Pasadena, and Santa Monica
    - Glendale and Stanislaus County Commission for Women
    - City of Carson Women's Issues Commission
    - West Hollywood Women's Advisory Board
    - Santa Barbara Women's Political Committee
- 9 to 5 National Office
- American Association of University Women
- American Bar Association Civil Rights & Social Justice Section
- American Civil Liberties Union (California)
- Black Women for Wellness Action Project
- Bet Tzedek
- California Black Women's Health Project
- Center for WorkLife Law
- California Employment Lawyers Association

- California Lawyers Association
- California Pan-Ethnic Health Network
- California Women's Law Center
- Center on Gender Equity and Health
- Columbia Law School Center for Gender & Sexuality
- Consumer Attorneys of California
- Consumer Federation of California
- Democratic Party of Contra Costa County
- ERA Coalition
- ERA Project
- Equality California
- Equal Rights Advocates
- Feminist Campus
- Feminist Majority Foundation
- Gender Justice LA
- GLAAD
- Human Rights Campaign
- Institute of Women's Leadership, Rutgers University
- Lambda Legal
- League of Women Voters of California
- Los Angeles LGBT Center
- Movement Advancement Project
- National Center for Lesbian Rights
- National Employment Law Project
- National Women's Law Center
- NYC Commission on Gender Equity
- Opportunity Institute
- Parent Voices
- Planned Parenthood Affiliates of California
- Public Advocates

- Public Counsel
- Public Health Advocates
- Study of Women and Gender at Smith College
- Transgender Law Center
- WEAVE
- Women’s Foundation California