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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Database Printout	[Lexis Nexis - Hi-Voltage Wire Works Inc. v. City of San Jose] [25 PAGES RELEASED IN WHOLE ON PRA REVIEW 05/20/2025 JLS]	25	N.D.	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Binder - [Brown, Janice LexisNexis Reports] [Binder 5] [1]

FRC ID:

9119

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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**LORNE CURRIE, Petitioner, v. WORKERS' COMPENSATION APPEALS
BOARD and LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION
AUTHORITY, Respondents.**

S085652

SUPREME COURT OF CALIFORNIA

2001 Cal. LEXIS 917

February 26, 2001, Filed

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

Court of Appeal of California, Second Appellate District, Division Four. B136767. W.C.A.B. Nos. LAO0691162, LAO0669068.

DISPOSITION:

The matter is remanded to the WCAB for further proceedings consistent with our opinion.

COUNSEL:

Attorneys for Appellant:

William A. Herreras; Drasin & Singer and Lawrence Drasin, for Petitioner.

Farrell, Fraulob, Brown & Gant and Paul R. Gant for California Applicants' Attorneys Association, as Amicus Curiae on behalf of Petitioner.

Attorneys for Respondent:

Tobin Lucks, Benjamin R. Herschbein, Dan Tobin and Alan J. Beardsley for Respondent Los Angeles County Metropolitan Transportation Authority.

No appearance for Respondent Workers' Compensation Appeals Board.

JUDGES:

WERDEGAR, J. WE CONCUR: GEORGE, C.J., MOSK, J., KENNARD, J., BAXTER, J., CHIN, J. **DISSENTING OPINION BY BROWN, J.**

OPINIONBY:

WERDEGAR

OPINION:

In making an award of backpay under Labor Code section 132a n1 to an employee wrongfully denied reinstatement because of an industrial injury, may the Workers' Compensation Appeals Board (WCAB) include [*2] prejudgment interest on the lost wages so awarded? Harmonizing the Civil Code's mandate of entitlement to prejudgment interest on damages due on a particular day (Civ. Code, § 3287, subd. (a)) with the provisions of the Labor Code governing WCAB awards, we conclude such an award is permitted, and indeed required, when the criteria of Civil Code section 3287 are met.

n1 Unless otherwise specified, all further statutory references are to the Labor Code.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Lorne Currie, a bus driver employed by respondent Los Angeles County Metropolitan Transportation Authority (LACMTA), suffered industrial injuries in 1990 and 1991. He was on medical leave from September 25, 1991, to September 25, 1992, on which date his employment was terminated for exceeding the leave permitted under his union contract. Although he had been medically unable to return to his regular work before his termination, his treating physician [*3]

reported him cleared for regular work without any restrictions on December 10, 1992.

In a decision dated June 25, 1997, the WCAB found that petitioner's termination did not violate section 132a, but that LACMTA's refusal to reinstate him after December 10, 1992, did violate that statute. n2 Petitioner was awarded, inter alia, "lost wages and work benefits." On October 14, 1998, the WCAB awarded petitioner backpay of around \$ 200,000, with interest from the date of the June 25, 1997, decision. In a later decision, the workers' compensation judge also awarded prejudgment interest, payable from the dates of accrual of the lost wages, noting that "defendant has had the use of applicant's unpaid wages for a period of between 1 and 6 years." On reconsideration, however, the WCAB found, relying on section 5800, that only *postjudgment* interest was allowable on section 132a awards.

n2 The WCAB, citing a dictum regarding reinstatement rights in *Jordan v. Workers' Comp. Appeals Bd.* (1985) 175 Cal. App. 3d 162, 166, 220 Cal. Rptr. 554, found the refusal to reinstate violated section 132a because LACMTA "failed to show a business necessity for its refusal to reinstate applicant in December 1992." LACMTA did not seek judicial review of this finding, the correctness of which is therefore not before us.

[*4]

On Currie's petition for writ of review (see § 5950), the Court of Appeal agreed with the WCAB that the board could not award prejudgment interest. The appellate court denied the petition summarily, but briefly stated its reasons: "Section 132a provides for a comprehensive remedy, which does not include interest. ... Interest is specifically governed by section 5800, and alleged equitable powers cannot override the expressed intent of the Legislature. [P] Furthermore, the Civil Code, civil law and damages are distinguishable from workers' compensation."

We granted Currie's petition for review and issued a writ of review returnable before this court.

DISCUSSION

Section 132a, paragraph (1) states: "Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an

application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand [*5] dollars (\$ 10,000), together with costs and expenses not in excess of two hundred fifty dollars (\$ 250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer." Section 132a is located in division 1 of the Labor Code, titled "Department of Industrial Relations."

Section 5800 provides in pertinent part: "All awards of the appeals board either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award." Section 5800 is located in division 4 of the Labor Code, titled "Workers' Compensation and Insurance."

Section 3207, also located in division 4 of the Labor Code, states: " 'Compensation' means compensation under Division 4 and includes every benefit or payment conferred by Division 4 upon an injured employee, including vocational rehabilitation, or in the event of his death, upon his dependents, without regard to negligence."

The question is whether these and/or other statutory provisions authorize [*6] or prohibit the WCAB's award of prejudgment interest on backpay awards.

Section 5800

The WCAB and the Court of Appeal relied on section 5800's specification of *postjudgment* interest as an implied exclusion of the authority to award *prejudgment* interest. Their reliance was misplaced, however, because section 5800 does not apply to awards of backpay under section 132a. The "reimbursement for lost wages" provided for under section 132a is not "payment of compensation or ... payment of death benefits" governed by section 5800.

In *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 959 P.2d 752, we held section 132a did not provide the exclusive remedy for employment discrimination based on a disability arising from an industrial injury. We observed that sections 3600 and 3602, which set forth the exclusivity of the workers' compensation remedy as against an employer, apply only to "liability for the compensation provided by this division" (§ 3600, subd. (a)), i.e., division 4 of the Labor Code, and that "compensation" was further

defined in section 3207 as "compensation under Division 4," while section 132a is in division 1 of the [*7] code. (*City of Moorpark v. Superior Court*, 18 Cal. 4th at pp. 1154-1155.) "Thus, the plain language of the exclusive remedy provisions of the workers' compensation law apparently limits those provisions to division 4 remedies. Remedies that the Legislature placed in other divisions of the Labor Code are simply not subject to the workers' compensation exclusive remedy provisions." (*Id.* at p. 1155.)

The same reasoning dictates the conclusion that section 132a backpay is not subject to any limitation on interest implicit in section 5800. The subject matter of section 5800 is "awards of the appeals board either for the payment of compensation or for the payment of death benefits." Obviously, an award of backpay under section 132a is not a death benefit. Nor is it "compensation" within the meaning of section 5800, because that term, according to section 3207, "means compensation under Division 4." Section 132a's authorization of "reimbursement for lost wages and work benefits" to a victim of discriminatory action appears in division 1 of the Labor Code and is separate and distinct from the compensation for industrial injuries provided for in division [*8] 4. Section 5800 simply does not apply here.

The WCAB's contrary interpretation of sections 132a and 5800 "is entitled to consideration and respect by the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 7, 960 P.2d 1031.) As we further explained in that case, however, "courts must ... independently judge the text of the statute," (*ibid.*) and "agency interpretations are not binding or necessarily even authoritative" (*id.* at p. 8). Here the WCAB reasoned that "Labor Code section 5800 clearly and explicitly sets forth the interest that is allowable on compensation payments. Interest runs from the date of making and filing an award." Thus, the board read section 5800 as disallowing prejudgment interest on payments of "compensation," a category the board took to include section 132a backpay awards. In categorizing section 132a as a "compensation" provision, however, the WCAB failed to consider either section 3207, which defines "compensation" as the benefits available under division 4 of the Labor Code, a division *not* including section 132a, or this court's decision in *City of Moorpark v. Superior Court*, *supra*, 18 Cal. 4th 1143, [*9] in which we held the remedies provided in section 132a for employment discrimination and retaliation were not "compensation" as defined in section 3207 and as that term is used in division 4 of the code. On independent review, therefore, the WCAB's interpretation of section

5800 is seen to be erroneous, despite the judicial respect and consideration it commanded.

The dissent takes the view that the reference to division 4 of the Labor Code in section 3207's definition of compensation "was clearly not meant to be restrictive" because section 3207 also includes as compensation a type of benefits, vocational rehabilitation, that is not authorized by division 4. (Dis. opn., *post*, 2001 Cal. LEXIS 917 at p. *26.) Interpreting section 3207 according to its terms, however, we must disagree. That the Legislature *expressly* included vocational rehabilitation benefits within the definition of compensation does not indicate an intent to *impliedly* include any other type of non-division 4 payments, such as backpay ordered under section 132a. Moreover, vocational rehabilitation and backpay ordered under section 132a are not functionally comparable. The former, like division 4's permanent and temporary [*10] disability benefits, compensates the employee for an industrial injury; the latter remedies discriminatory or retaliatory termination. " 'Compensation' of an employee in the form of wages or salary for services performed, does not have the same meaning as the word 'compensation' in the Workmen's Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained." (*Hawthorn v. City of Beverly Hills* (1952) 111 Cal. App. 2d 723, 728, 245 P.2d 352, fn. omitted; accord, *Mannetter v. County of Marin* (1976) 62 Cal. App. 3d 518, 521-522, 133 Cal. Rptr. 119.)

Civil Code section 3287

Petitioner and an amicus curiae, the California Applicants Attorneys Association, rely on Civil Code section 3287, subdivision (a) as authority for the award of prejudgment interest. That statute provides, in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day" For reasons [*11] given below, we agree that Civil Code section 3287, subdivision (a) applies to backpay awards made under Labor Code section 132a.

"Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of [Civil Code section 3287, subdivision (a)]. [Citations.] Interest is recoverable on each salary or pension payment from the date it fell due. [Citation.]" (*Olson v. Cory* (1983) 35 Cal. 3d 390, 402, 197 Cal. Rptr. 843, 673 P.2d 720; see also *Sanders v. City of Los Angeles* (1970) 3 Cal. 3d 252, 262, 90 Cal. Rptr. 169, 475 P.2d 201

["action to recover retroactive pay increases is an action for damages within the meaning of section 3287 of the Civil Code"].) As we explained in *Mass v. Board of Education* (1964) 61 Cal. 2d 612, 39 Cal. Rptr. 739, 394 P.2d 579, involving a wrongfully suspended public school teacher, once the obligation to pay retroactive wages is established, interest under Civil Code section 3287 properly accompanies reinstatement and a backpay award in order to make [*12] the employee whole: "Each salary payment in the instant case accrued on a date certain. Unless the suspension itself can be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest." (*Mass v. Board of Education, supra*, at p. 625.) Awards of backpay generally, then, are damages for purposes of Civil Code section 3287. We still must ask, however, whether the statute applies to an award made by an administrative agency, here the WCAB, and whether anything in Labor Code section 132a was intended to preclude such interest.

Civil Code section 3287 has frequently been applied to administrative agencies' retroactive awards of government assistance, wages, or retirement benefits, whether the awards were made initially by the agency or ordered by writ of mandate by a court. (See, e.g., *Tripp v. Swoap* (1976) 17 Cal. 3d 671, 675, 678-685, 131 Cal. Rptr. 789, 552 P.2d 749 [*13] [state agency properly ordered to pay applicant wrongfully denied welfare benefits retroactively, with interest from date they should have begun]; *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 Cal. App. 4th 1084, 1086 [under Civ. Code, § 3287, "when an administrative agency determines an employee's employment was wrongfully terminated, and reinstates the employee's employment with backpay, the agency must include interest in the award of wrongfully withheld backpay"]; *Goldfarb v. Civil Service Com.* (1990) 225 Cal. App. 3d 633, 635-637, 275 Cal. Rptr. 284 [civil service commission must pay interest, under Civ. Code, § 3287, on backpay awarded to wrongfully demoted county employee]; *Austin v. Board of Retirement* (1989) 209 Cal. App. 3d 1528, 1531-1534, 258 Cal. Rptr. 106 [county retirement board was properly ordered to award retroactive retirement benefits with interest from last day of service].) n3 Backpay awarded by an administrative agency, therefore, may be considered damages for purposes of Civil Code section 3287 [*14] 's mandate of interest.

n3 As these cases indicate, and contrary to the dissent's apparent assumption (see dis. opn., post, 2001 Cal. LEXIS 917 at p. *24-25), the terms "benefits" and "damages" are not mutually exclusive. Welfare and retirement payments, for example, can be referred to as benefits or, when awarded in relief of a legal claim, as damages. "Damages," for purposes of Civil Code section 3287, are simply the monetary relief a person is entitled to recover in "compensation" for "detriment from the unlawful act or omission of another." (Civ. Code, § 3281.)

WCAB awards of prejudgment interest under Civil Code section 3287 are consistent with both the letter and the spirit of Labor Code section 132a. Nothing in section 132a expressly or impliedly precludes such an award. Indeed, the statute's authorization of "reimbursement for lost wages" could reasonably be understood as impliedly authorizing accompanying interest, since [*15] without such interest the employee will not be fully reimbursed for the value of the lost wages. (*Mass v. Board of Education, supra*, 61 Cal. 2d at p. 625.) The lack of express authorization for interest in section 132a is not significant. "Such a provision would be redundant, as the Legislature provided elsewhere, and generally, in Civil Code section 3287 ...,for the recovery of interest ...,the right to recover which is vested in the claimant on a particular day." (*Austin v. Board of Retirement, supra*, 209 Cal. App. 3d at p. 1532; accord, *Goldfarb v. Civil Service Com., supra*, 225 Cal. App. 3d at p. 637.)

As to spirit, we observe that Labor Code section 132a itself declares it is the "policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." Adhering to that statement of legislative policy, we have construed the statute as serving, in part, "a remedial function, by providing some compensation to the aggrieved worker for discrimination incurred as the result of his injury." (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal. 3d 658, 668, 150 Cal. Rptr. 250, 586 P.2d 564; [*16] see also *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal. App. 4th 1376, 1385 [concluding § 132a's "provision for reimbursement is remedial in character"].) The Legislature clearly intended that employee victims of discrimination would be made whole at least to the extent of their lost wages. Within that limit, "the Legislature left application of the provision for reimbursement to the broad equitable discretion of the WCAB." (*Dyer v. Workers' Comp. Appeals Bd., supra*, at p. 1385.) An award of interest under Civil Code section 3287 is consistent with this remedial purpose. Indeed, as we have already noted, without prejudgment interest the backpay remedy may

lose a significant portion of its value, and the employee left less than fully "reimbursed" (§ 132a, par. (1)) for his or her lost wages.

Because the WCAB is expressly authorized to award "reimbursement for lost wages" under Labor Code section 132a, and because the inclusion of prejudgment interest in such a backpay award is mandated by Civil Code section 3287, inclusion of interest in the backpay award does not violate [*17] the principle that an administrative agency cannot create a remedy the Legislature has withheld. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1389, 241 Cal. Rptr. 67, 743 P.2d 1323.) Contrary to the warning LACMTA tries to sound, our decision here, recognizing that the WCAB must sometimes include prejudgment interest in its backpay awards under section 132a, will not open the door to WCAB awards of punitive damages or damages for emotional distress. That prejudgment interest may be awarded to ensure the employee victimized by discrimination receives full "reimbursement" for backpay, undiminished in value by the employer's failure to pay the wages at the times due, does not suggest the WCAB has the authority to award damages of types not mentioned in section 132a and generally reserved to the judicial power. (See *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245, 262, 284 Cal. Rptr. 718, 814 P.2d 704 [distinguishing between " 'restitutive' " damages such as backpay, which are commonly and permissibly placed within the statutory authority of administrative agencies, and "nonquantifiable compensatory" [*18] and punitive damages, which are ordinarily and traditionally reserved to the courts]; see also *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal. 4th 163, 177, 999 P.2d 706 [although included as damages under the Civil Code, backpay is also an authorized equitable remedy for illegal withholding of wages under the unfair competition law].)

Finally, respondent LACMTA contends this court's decision in *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal. 4th 1017, 920 P.2d 1314 (AFL) indicates the WCAB may not award prejudgment interest on backpay awards. We disagree. AFL did not decide or discuss any question regarding the statutory authority of the WCAB; it decided only the "narrow question" (*id.* at p. 1021) of whether an administrative law judge acting on behalf of the Unemployment Insurance Appeals Board may award interest on unemployment benefits previously denied by the Employment Development Department. As we have just seen, inclusion of Civil Code section 3287 interest in backpay awards under Labor Code section 132a is within the WCAB's [*19] statutory authority to ensure full

reimbursement of lost wages to employees discriminatorily denied payment at the time the wages were due. AFL, concerned as it was with the very different statutory scheme governing unemployment insurance benefits, is not apposite on this central point.

In holding interest was not authorized either under the unemployment insurance laws or under Civil Code section 3287, the AFL majority emphasized that certain delays were inherent in the administrative process, but concluded these delays "are not ... tantamount to a 'wrongful withholding' of benefits giving rise to a right to section 3287(a) prejudgment interest once the Board rules in favor of the claimant." (AFL, *supra*, 13 Cal. 4th at p. 1026.) Thus, "the central theme of AFL ... is that interest is not available absent an agency decision or action which has resulted in wrongful withholding of, and corresponding delay in receiving, benefits to which the claimant is entitled. (See *Weber v. Board of Retirement* (1998) 62 Cal. App. 4th 1440, 1450 [73 Cal. Rptr. 2d 769].) The AFL court extensively explained that the unemployment [*20] insurance scheme contemplates several steps and inherently involves some minimal delay before there is a determination of eligibility for the benefit. ... Accordingly, when a claimant is found entitled to benefits at one of the administrative levels, there has been no wrongful delay or action in receiving benefits on which to predicate an award of prejudgment interest by the agency. (AFL, *supra*, 13 Cal. 4th at p. 1037.)" (*San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.*, *supra*, 68 Cal. App. 4th at pp. 1094-1095, fn. omitted.)

Here we are concerned not with an inherent administrative delay in providing government benefits, but with wages withheld from an employee in violation of Labor Code section 132a. The WCAB determined this legal violation began in December 1992, when petitioner should have been, but was not, reinstated to his previous position. The wages wrongfully withheld from that point on, until reinstatement and backpay were ordered in June 1997, came due on the dates they would have been paid had petitioner been reinstated. (*Mass v. Board of Education*, *supra*, 61 Cal. 2d at p. 625.) [*21] Petitioner seeks interest under Civil Code section 3287, not to make up for the delay inherent in an administrative process, as in AFL, but to make up for the lost use of his wages wrongfully withheld between 1992 and 1997.

In summary, although Labor Code section 132a does not itself expressly authorize the addition of prejudgment interest to an award of backpay to a victim of discrimination, Civil Code section 3287 requires such interest on damages due on a particular date, including awards of backpay, when they are certain or capable of

being made certain by calculation. Neither section 5800 nor any other provision of the Labor Code cited to us or discovered in our research precludes addition of interest to a backpay award, and addition of interest would serve the remedial purpose of section 132a. Harmonizing the provisions of the Labor and Civil Codes to further the overall legislative goals, therefore, we conclude the WCAB may and must, when the criteria of Civil Code section 3287 are met, add to its awards reimbursing employees for lost wages and work benefits interest from the [*22] dates such wages and benefits would have become due had the employer not acted in violation of section 132a. Because the WCAB denied petitioner interest in the belief such an award was unauthorized, it must reconsider its award in this case. **n4**

n4 In its answer brief in the Court of Appeal and its answer to the petition for review, LACMTA argued, in the alternative, that even if prejudgment interest could be included in Labor Code section 132a awards, it would not properly be awarded in this case under Civil Code section 3287 because factual disputes concerning the date upon which Currie was entitled to reinstatement made vesting of the damages too uncertain. That issue was not discussed by the Court of Appeal, nor has LACMTA raised the issue in its sole brief on the merits filed herein, an answer brief to an amicus curiae brief. We decline to address the issue in the first instance, but our decision does not preclude the WCAB from doing so on remand.

[*23]

DISPOSITION

The matter is remanded to the WCAB for further proceedings consistent with our opinion. (See § 5953.)

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

KENNARD, J.

BAXTER, J.

CHIN, J.

DISSENTING OPINION BY BROWN, J.

DISSENTBY:
BROWN

DISSENT:

DISSENTING OPINION BY BROWN, J.

I respectfully dissent.

"An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts" (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal. 4th 1, 7, 960 P.2d 1031 (*Yamaha*).) Here, the Workers' Compensation Appeals Board (WCAB) has interpreted Labor Code section 132a **n1** as creating a right to workers' compensation *benefits*, not civil damages, even if the award at issue is for backpay. The WCAB found "no authority" allowing it to award prejudgment interest on workers' compensation benefits, and neither do I.

n1 Further statutory references are to the Labor Code unless otherwise indicated.

[*24]

Civil Code section 3287, subdivision (a), on which the majority relies, applies only to "persons ... entitled to recover *damages*" (italics added), and the Civil Code defines damages much more broadly than the benefits available under Labor Code section 132a. For example, Civil Code section 3333 provides that "the measure of damages ... is the amount that will compensate for all the detriment proximately caused ... whether it could have been anticipated or not." Labor Code section 132a, by comparison, only permits an award of backpay and a 50 percent increase in compensation benefits otherwise payable on account of the worker's injury. In short, nothing in Civil Code section 3287 permits an award of prejudgment interest on workers' compensation *benefits*, and nothing in Labor Code section 132a suggests that the Civil Code provisions relating to damages apply.

Moreover, the WCAB's interpretation of Labor Code section 132a is confirmed by several Court of Appeal decisions that describe section 132a as creating [*25] a right to a " 'class of benefits.' " (E.g., *Burton v. Workers' Comp. Appeals Bd.* (1980) 112 Cal. App. 3d 85, 91, 169 Cal. Rptr. 72.) I can find no case that makes reference to "section 132a damages." Of course, the same discriminatory act that is the subject of a section 132a petition may, in some cases, also give rise to a claim for

damages under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) or the common law (*City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1148, 959 P.2d 752), but under section 132a, damages are simply not available. Because this case involves an administrative agency's award of benefits, not civil damages, I see no basis for distinguishing our decision in *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal. 4th 1017, 920 P.2d 1314, which precluded an award of interest in an analogous context.

In addition, section 5800 implicitly precludes prejudgment interest on WCAB awards by explicitly authorizing postjudgment interest only. Section 5800 provides in pertinent part: "All awards of the appeals board either for the payment [*26] of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award." The majority stresses that section 5800 applies only to awards "for the payment of compensation or ... death benefits," and argues that section 3207 defines "compensation" as

" 'compensation under Division 4' "; whereas, section 132a falls in division 1 of the Labor Code. (Maj. opn., ante, at p. 5.) But section 3207 expressly states that "compensation under Division 4" includes "vocational rehabilitation," which, like backpay under section 132a, is a benefit conferred by division 1 of the Labor Code. (See § 139.5.) Therefore, section 3207's reference to division 4 was clearly not meant to be restrictive.

Furthermore, as noted, the WCAB's interpretation of sections 132a, 3207, and 5800 is entitled to "consideration and respect" (*Yamaha, supra*, 19 Cal. 4th at p. 7), and a fair application of the factors we articulated in *Yamaha* militates our deference to the WCAB in this instance. While we acknowledged in *Yamaha* that deference to administrative interpretations [*27] is always "situational" (19 Cal. 4th at p. 12, italics omitted) and depends on "a complex of factors" (*ibid.*), we also emphasized that where the agency has special expertise (*ibid.*) and its decision is "carefully considered by senior agency officials" (19 Cal. 4th at p. 13), it is entitled to correspondingly greater weight. (19 Cal. 4th at pp. 12-15.) I believe the WCAB's familiarity with sections 132a, 3207, and 5800, as well as the entire scheme of the workers' compensation law it enforces, renders its interpretation of those provisions presumptively correct, and in this case the interpretation comes from the highest policymaking level of the agency. Accordingly, I consider this case to be one in which deference is appropriate.

As this case involves an administrative agency's award of benefits, not civil damages, I see no basis for applying Civil Code section 3287, subdivision (a), or for distinguishing our decision in *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal. 4th 1017, 920 P.2d 1314. Moreover, I would interpret Labor Code section 5800 as applying to awards of backpay under Labor Code [*28] section 132a and precluding prejudgment interest. Accordingly, I would uphold the decision of the WCAB.

BROWN, J.

**VENTURA GROUP VENTURES, INC., Plaintiff and Appellant, v. VENTURA
PORT DISTRICT et al., Defendants and Respondents.**

S080112

SUPREME COURT OF CALIFORNIA

2001 Cal. LEXIS 910

February 15, 2001, Filed

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

Ninth Cir.Ct.App. No. 97-55269. U.S. Dist Ct. No. CV-94-03262-HLH.

DISPOSITION:

We answered the second of the questions certified by the Ninth Circuit as follows: A port district created pursuant to Harbors and Navigation Code section 6210 does have independent authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it, so long as the assessments satisfy the applicable statutory and constitutional requirements. However, this port district may not impose an assessment to raise the funds to satisfy the judgment in question here because the assessment would not specially benefit the parcels upon which it would be imposed.

COUNSEL:

Attorneys for Appellant:

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Attorneys for Respondent:

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for Defendant and Respondent Board of Supervisors of
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Lagerlof, Senecal, [*2] Bradley, Gosney & Kruse, H.
Jess Senecal and Thomas S. Bunn III, for Defendant and
Respondent Ventura Port District.

Robert G. Boehm, City Attorney (San Buenaventura), for
28 California Cities as Amici Curiae on behalf of
Defendants and Respondents.

Trevor A. Grimm, Jonathan M. Coupal and Timothy A.
Bittle for Howard Jarvis Taxpayers Association, as
Amicus Curiae on behalf of Defendants and
Respondents.

JUDGES:

BROWN, J. WE CONCUR: GEORGE, C.J., MOSK, J.,
KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN,
J.

**OPINIONBY:
BROWN**

OPINION:

We granted the request of the United States Ninth
Circuit Court of Appeals for the answers to the following
certified questions of law under rule 29.5 of the
California Rules of Court: n1

"1. Does article XIII A of the California Constitution
(adopted in 1978 by statewide initiative as Proposition
13) prohibit a county from levying property taxes, in
excess of the one percent limit, pursuant to California
Harbors and Navigation Code [section] 6361 to pay a
money judgment as required by California Government
Code [sections] 970-971?

"2. Does a port district created pursuant to California
Harbors and Navigation Code [section] 6210 have

independent authority [*3] to impose assessments under California Harbors and Navigation Code [section] 6365[, subdivision] (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?" (*Ventura Group Ventures v. Ventura Port Dist.* (1999) 179 F.3d 840, 841 (*Ventura Group Ventures*).)

n1 All further references to rules are to the California Rules of Court unless otherwise indicated.

I. BACKGROUND

A. Certification

Rule 29.5(a) provides that we may answer questions of law certified to us by a federal court of appeals (or the court of last resort of any state), provided the certifying court requests the answer, the question may be determinative of a cause pending in the certifying court, and the decisions of the California Courts of Appeal or this court provide no controlling precedent concerning the certified question. The factors set forth in rule 29.5(a) are met here. The Ninth Circuit has requested that we answer the questions it posed; our answer to the questions will [*4] be determinative of part of the appeal pending before it, and there is no controlling California precedent. Another factor weighing in favor of accepting the request, one that we "ordinarily consider[]" in deciding whether to grant review of a decision of the California Court of Appeal or to issue an alternative writ or other order in an original matter" (rule 29), is that answering the questions certified will help settle important questions of law. (Rule 29.5(f).)

B. Facts and Procedural History n2

n2 The entire factual and procedural history is adopted from the certification request, *Ventura Group Ventures*, *supra*, 179 F.3d at pages 841-843.

Ventura Port District (District) was organized by the County of Ventura in 1952 as a local governmental entity to operate and develop the Ventura harbor. The District was created pursuant to Harbors and Navigation Code section 6210. The District is governed by a board of port commissioners pursuant to Harbors and Navigation Code section 6240. [*5]

In 1979, the District leased real property along the harbor to Ocean Services Corporation (Ocean), a corporation that had agreed to develop a commercial

marina on the harborfront property. The District, however, failed to disclose a restrictive covenant on the property that prohibited the commercial development of part of the property for 10 years. Once Ocean learned of the covenant, the District provided repeated assurances that the covenant would be removed quickly and at the District's expense. Ocean continued to plan the project, obtained the necessary licensing, preleased the property, guaranteed the loan payments for the necessary financing, and expended a large amount of money and effort to complete the development project.

Meanwhile, the landowners benefitting from the restrictive covenant filed a lawsuit against the District and Ocean to enjoin the project. In 1981, the owners successfully obtained a preliminary injunction. In 1982, Ocean informed the District that its losses on the project had reached \$ 1.8 million due to the injunction. In 1983, the parties settled the restrictive covenant lawsuit, but the District refused to renegotiate Ocean's lease or cover any of Ocean's [*6] losses.

In January 1984, Ocean filed a lawsuit in the Superior Court of Ventura County against the District for breach of contract, deceit, and promissory estoppel. The parties continued to have difficulties with the terms of the lease and with the development of the property. In 1987, Ocean filed for reorganization under chapter 11 of the United States Bankruptcy Code

(11 U.S.C.). The District secured an order from the federal bankruptcy court declaring that the lease between the District and Ocean had been rejected, and then evicted Ocean from the property and took control of the marina facilities. In 1988, Ocean converted the chapter 11 bankruptcy proceeding to a chapter 7 bankruptcy proceeding, but the court permitted Ocean and its creditors to continue to pursue the lawsuit against the District.

At trial, Ocean argued that the District had breached the implied covenant of quiet enjoyment and the implied covenant of good faith and fair dealing. On September 25, 1990, a jury awarded Ocean \$ 31,352,595, which the trial judge later reduced to \$ 16,971,767.

In 1991, Ocean recorded an abstract of judgment against the District. Ocean believed that its abstract of judgment created [*7] a judgment lien against the District and secured creditor status for itself. At the same time, the District recorded an "Extinguishment of Lien." The District then encumbered a portion of its real property in a series of transactions, one of which resulted in the District's giving a deed of trust against some of its property to Merchants Bank of Kansas City.

In April 1990 and pursuant to Ocean's chapter 7 proceeding, Ocean sold and assigned its cause of action against the District to a new corporation formed by Ocean's former shareholders, Ventura Group Ventures (VGV), appellant herein. In May 1993, the Second District Court of Appeal affirmed VGV's verdict (*Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal. App. 4th 1762, 1782), but in an unpublished portion of the decision reduced the award to \$ 15,560,169, plus costs and interest.

On August 20, 1997, VGV filed the instant action in the Superior Court of Ventura County to enforce the judgment. VGV sued the District, the County of Ventura (County), Merchants Bank of Kansas City, and other parties that VGV believed would contest the priority of VGV's judgment against the District. First, VGV sought a declaratory [*8] judgment that the District and the County were required under state law to pay the judgment either by selling property or levying additional taxes or assessments, or that in the alternative, VGV could execute against the District's property. Second, VGV asked for a writ of mandate against the District and the County in the amount of the judgment. VGV included a claim for slander of title against the individual attorneys for filing the extinguishment of lien. VGV also sought a determination that its abstract of judgment gave it priority over the District's other creditors.

Immediately thereafter, the District filed a chapter 9 bankruptcy petition, and VGV's claims against the District were automatically stayed. The federal bankruptcy court granted VGV relief from the automatic stay, permitting VGV to go forward solely with its claim for a declaratory judgment to determine if VGV could force the District or the County to levy a property tax in order to pay the judgment.

After VGV's complaint was filed, the Federal Deposit Insurance Corporation became the receiver for Merchants Bank of Kansas City and, as a party defendant, removed the case to the United States District Court for the [*9] Central District of California. The federal district court then remanded the slander of title claims to the Ventura County Superior Court. All that remained in the federal case was the claim for a declaratory judgment determining the rights and obligations of VGV, the District, and the County regarding the payment of VGV's state court judgment, and a determination of whether an abstract of judgment against a public entity could create a judgment lien giving VGV priority over the District's other creditors.

In January 1997, pursuant to its grant of summary judgment to the County and its final judgment after a bench trial, the federal district court held that: (1) article XIII A of the California Constitution (Proposition 13)

prohibited the County from levying an additional property tax to satisfy VGV's judgment; (2) Proposition 13 and Revenue and Taxation Code section 95 prohibited the County from reallocating revenue generated from permissible property taxes to satisfy the judgment; (3) the District could not levy a special assessment to satisfy VGV's judgment; (4) VGV could not proceed with a writ of execution against the District's property; (5) VGV's abstract of judgment did not [*10] create a judgment lien for the purpose of establishing VGV's priority; and (6) the other creditors had liens superior to VGV.

The federal district court did hold that VGV could obtain a writ of mandate against the District for the purpose of satisfying the judgment, and that a court considering the issuance of the writ could order the District to sell some of its property to satisfy the judgment. The District did not appeal this determination. VGV limited its Ninth Circuit appeal to the consideration of the first three issues listed in the preceding paragraph, along with federal constitutional claims, and agreed to dismiss its appeal as to all defendants except the District and the County.

In April 1998, the federal bankruptcy court approved the District's modified chapter 9 plan of debt adjustment. As part of the plan, VGV received \$ 7,739,821.23 as an unsecured creditor. Although the bankruptcy court noted the federal district court's determination against VGV, the modified plan provided that VGV retained the right to pursue its appeal of the district court's judgment in the Ninth Circuit. If the appeal is successful, the bankruptcy court stated: "The District will levy the tax [*11] as directed by the Ninth Circuit, or, if the subject proceedings are remanded, by the District Court so that the tax will be included in the real property tax bills issued by the Ventura County Tax Collector. If and when such taxes are collected by the County of Ventura and remitted to the District, the District shall distribute the funds as required by applicable law or order of court."

On December 10, 1998, the chapter 9 bankruptcy proceeding was closed.

II. DISCUSSION

A. Question No. 1

Again, the first question is: "Does article XIII A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the one percent limit, pursuant to California Harbors and Navigation Code [section] 6361 to pay a money judgment as required by California Government Code [sections] 970-971?" (*Ventura Group Ventures, supra*, 179 F.3d at p. 841.)

California Constitution, article XIII A, section 1 n3 provides: "(a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected [*12] by the counties and apportioned according to law to the districts within the counties. [P] (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) any bonded indebtedness approved by the voters prior to July 1, 1978, or (2) any bonded indebtedness for the acquisition of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition."

n3 All article references are to the California Constitution unless otherwise indicated.

Government Code section 970.8, subdivision (a) provides that a district shall include in its budget each fiscal year sufficient funds to pay all judgments rendered against it. Harbors and Navigation Code section 6361 provides that a port district shall annually furnish the county board of supervisors with a written estimate of the amount of money the district will need "for all purposes" in the ensuing fiscal year, and "thereupon, [*13] it is the duty of the board of supervisors to levy a special tax, on all taxable property of the county lying within the district, sufficient in amount to raise that sum."

1. Exception for Prior Indebtedness

In its opening brief, VGV argued that this judgment constitutes an "indebtedness approved by the voters prior to July 1, 1978," and is thus not subject to the 1 percent limit set out in article XIII A because it comes within the exception stated in section 1, subdivision (b)(1) of that article. "Here, the local voters themselves approved the creation of the District in 1952 knowing that state law (i.e., Harb. & Nav. Code, § 6361) mandated that the County of Ventura would levy a special property tax each year up to the maximum tax rate specified in Harbors and Navigation Code [section] 6362 to cover the District's outstanding liabilities." An amicus curiae brief filed by Twenty-Eight California Cities in support of the District correctly observed that this argument was a "stretch of logic [that] would gut Proposition 13," and VGV has abandoned it. In any event, VGV's argument was meritless because the District's debt occurred no earlier than 1979 when the lease with [*14] Ocean was executed, and so it did *not* arise prior to 1978 when Proposition 13 was adopted.

2. Harbors and Navigation Code Section 6361

VGV next contends Proposition 13 was not intended to repeal Harbors and Navigation Code section 6361. "The State Legislature is understandably concerned as much now as it was in 1937 that any port district formed in this state be financially sound. This concern is clearly one reason why the Legislature has left these statutes intact. If that key piece of this legislation, i.e., the pledge of taxing support, were impliedly deleted by Proposition 13, it would destroy the statutory framework the Legislature adopted in 1937 governing the formation and operation of local port districts that is essentially unchanged to the present. For this reason alone, it is not reasonable to conclude that Proposition 13 was intended to repeal Harbors and Navigation Code section 6361."

The District aptly characterizes pre-Proposition 13 practice under Harbors and Navigation Code section 6361 as "budgeting first, taxing later." That is, as we have explained above, a port district was required to furnish the county board of supervisors with a written estimate [*15] of the amount of money the district would need in the coming fiscal year, and it was then the duty of the board "to levy a special tax, on all taxable property of the county lying within the district, sufficient in amount to raise that sum." (Harb. & Nav. Code, § 6361.) If VGV is contending that in adopting Proposition 13, the voters intended to permit counties, on behalf of port districts, to continue to levy property taxes without regard to the 1 percent limit, VGV is plainly wrong. Moreover, VGV's argument appears to reveal a fundamental misunderstanding as to whose intent controls here. We may assume for the sake of argument that, as VGV contends, "the State Legislature is understandably concerned as much now as it was in 1937 that any port district formed in this state be financially sound." However, the question is what the *voters* intended when they adopted Proposition 13, and it is clear that, as far as they were concerned, the practice of "budgeting first, taxing later" was no longer acceptable. Harbors and Navigation Code section 6361 has been superseded by the statutes implementing article XIII A insofar as, where applicable, they are inconsistent. Article XIII A, section [*16] 1, subdivision (a) provides that the 1 percent tax collected by the counties is to be "apportioned according to law" to the districts within the counties. The Legislature read this language as conferring authority to legislate on the subject and to apportion the tax funds to local agencies and districts. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 246, 149 Cal. Rptr. 239, 583 P.2d 1281 (*Amador*).) Formulae for the distribution of tax funds to local agencies and districts have been enacted by the Legislature. (See Rev. & Tax.

Code, § 93 et seq.) Therefore, a district can no longer expect a county to levy taxes to raise whatever sum the district budget calls for. That those days are long gone should come as no surprise to VGV or anyone else.

3. *Judgments Resulting from Discretionary/Nondiscretionary Acts*

VGV's fallback position is that, even if article XIII A otherwise limits a county's taxing authority under Harbors and Navigation Code section 6361, it was not intended to apply to a judgment like this one, which VGV characterizes as a *judgment resulting from a nondiscretionary act*. "Proposition 13," [*17] VGV asserts, "was not intended to repeal the carefully crafted statutes the Legislature had adopted just five years earlier to govern the payment of judgments of this nature." The statutes upon which VGV relies are sections 2205 and 2271 of the Revenue and Taxation Code and sections 970.8 and 971 of the Government Code. We will first set out the statutes and then consider whether they support VGV's position.

Section 2271 of the Revenue and Taxation Code provides in pertinent part: "A local agency may levy, or have levied on its behalf, a rate in addition to the maximum property rate established pursuant to this chapter (commencing with Section 2201) to pay costs mandated by the federal government or *costs mandated by the courts* or costs mandated by initiative enactment, which are not funded by federal or state government." (Italics added.)

Section 2205 of the Revenue and Taxation Code provides in pertinent part: " 'Costs mandated by the courts' do not include (i) costs incurred as a result of a judgment in an eminent domain or condemnation proceeding, (ii) costs incurred in order to comply with a final court order mandating the specific performance, or awarding damages as a result [*18] of nonperformance, of any contract or agreement entered into after January 1, 1973, and (iii) costs incurred as a result of a final court order which requires a local agency or school district to comply with a state-mandated program or service enacted after January 1, 1973, which the court has determined that the local agency or school district has failed to comply with prior to such order."

Section 970.8, subdivision (a) of the Government Code provides: "Each local public entity shall in each fiscal year include in its budget a provision to provide funds in an amount sufficient to pay all judgments in accordance with this article."

Section 971, subdivision (c) of the Government Code provides: "For the purposes of Section 2271 of the Revenue and Taxation Code, taxes levied to pay pursuant

to this article a judgment resulting from a nondiscretionary act are levied to pay costs mandated by the courts." Section 971, subdivision (a)(1) of the Government Code provides: " 'Judgment resulting from a discretionary act' means a judgment arising from a liability which the local public entity has discretion to incur or not to incur and includes a judgment rendered in an eminent domain proceeding [*19] and a judgment requiring specific performance of a contractual obligation or awarding damages for failure to perform a contractual obligation."

As the statutes make clear, even before Proposition 13, the *nondiscretionary* obligations for which an agency was permitted to tax over the limit did not include all court judgments, on the theory that the duty to pay a judgment is mandatory rather than discretionary. Instead, the discretionary/nondiscretionary distinction focused on the voluntary or involuntary nature of the *original liability* that *resulted* in the court judgment. Judgments founded in contract and eminent domain were discretionary, while judgments founded in tort and inverse condemnation were nondiscretionary.

This judgment was founded in contract. It resulted from two discretionary acts: The District's decision to enter into a ground lease with Ocean, and the District's subsequent decision to violate the implied covenant of good faith and fair dealing. (*Ocean Services Corp. v. Ventura Port Dist.*, *supra*, 15 Cal. App. 4th at pp. 1780-1781.) Therefore, the judgment is not covered by the statutory exemption for " 'costs mandated by the courts.' [*20] " (Rev. & Tax. Code, §§ 2205, 2271; Gov. Code, §§ 970.8, 971.) Because VGV's argument does not withstand statutory analysis, we need not reach the question whether an exception for judgments resulting from nondiscretionary acts should be read into article XIII A. (See *Amador*, *supra*, 22 Cal. 3d at p. 233 ["As a general rule, courts will not reach constitutional questions 'unless absolutely necessary to a disposition' of the case before them"].)

4. *Constitutional Questions*

VGV contends article XIII A is inconsistent with the United States Constitution's guarantee clause, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." (U.S. Const., art. IV, § 4.) In most of the cases in which the United States Supreme Court has been asked to apply the guarantee clause, the high court has found the claims presented to be nonjusticiable under the political question doctrine. (*New York v. United States* (1992) 505 U.S. 144, 184, 120 L. Ed. 2d 120, 112 S. Ct. 2408.) However, in *Amador*, *supra*, 22 Cal. 3d at page 227, we squarely rejected the claim that article XIII A would

"result [*21] in a change from a 'republican' form of government (i.e., lawmaking by elected representatives) to a 'democratic' governmental plan (i.e., lawmaking directly by the people)." "Contrary to petitioners' assertion ... we are convinced that article XIII A ... does not change our basic governmental plan. Following the adoption of article XIII A both local and state government will continue to function through the traditional system of elected representation. Other than in the limited area of taxation, the authority of local government to enact appropriate laws and regulations remains wholly unimpaired." (*Amador*, at p. 227.) VGV's efforts to distinguish *Amador* are unavailing. At bottom, what VGV is complaining of is not that article XIII A undermines this state's republican form of government, but that it permits local voters to deny VGV recovery on its judgment in violation of due process of law and the takings clause.

VGV's due process argument is itself a makeweight, consisting solely of an analogy to criminal law, in which VGV compares its situation to that of a criminal defendant who has been acquitted by a jury only to find that the voters can override the jury's verdict. [*22] The analogy is not helpful. Article XIII A does not nullify the judgment against the District. It simply restricts the ability of the District to raise taxes in order to pay the judgment. VGV is not thereby denied all means of satisfying its judgment. Indeed, the bankruptcy court awarded VGV almost \$ 8 million for assigned rights it purchased from Ocean in 1990, long after Proposition 13 was adopted. Ironically, in the name of due process, VGV would deny districts the protections afforded them under chapter 9 of the federal Bankruptcy Code.

Finally, VGV contends that an exception for judgments must be read into article XIII A in order to avoid a construction that would permit takings in violation of the Fifth Amendment to the United States Constitution.

VGV's argument rests entirely upon a recent decision of the Court of Appeal-- *F & L Farm Co. v. City Council* (1998) 65 Cal. App. 4th 1345 (*F & L Farm Co.*). *F & L Farm Co.* arose from an inverse condemnation action brought by several farmers against the City of Lindsay. The city had for years accepted saline industrial wastewater from an olive processing facility, holding the wastewater first in percolation ponds [*23] and later in lined evaporation ponds. Eventually much of the salt from the wastewater percolated into the groundwater through the percolation ponds and through holes in the liners of the evaporation ponds, causing injury (lost profits from crops and permanent reduction in land value) to farms in the vicinity of the ponds. The farmers obtained judgments totaling \$ 3 million, and the city appealed, claiming that articles XIII A, XIII B, XIII C,

and XVI so limited its ability to tax and spend as to override its statutory duty to pay the judgments. The Court of Appeal framed the issue before it as follows: "When a city in California has deprived California residents of constitutionally protected property interests and a judgment has been entered against it to compensate the residents for the wrongs committed, may the city simply refuse to pay the judgment on the basis that it has no spare money? We think not." (*F & L Farm Co.*, at p. 1347.)

F & L Farm Co. is distinguishable on two grounds. First, *F & L Farm Co.* involved a judgment founded in inverse condemnation, and as we have explained above, judgments founded in tort and inverse condemnation, unlike judgments founded in [*24] contract and eminent domain, are covered by the statutory exemption for "costs mandated by the courts." (Rev. & Tax. Code, § § 2205, 2271; Gov. Code, § § 970.8, 971.) Second, unlike the City of Lindsay, the District here has not been permitted to avoid satisfaction of VGV's judgment on the ground it "has no spare money." (*F & L Farm Co.*, *supra*, 65 Cal. App. 4th at p. 1347.) To the contrary, as a result of the bankruptcy proceeding, VGV has received nearly \$ 8 million, half of the sum awarded it. The discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment to the United States Constitution.

The analysis of article XIII A in *F & L Farm Co.* got off on the wrong track because the case focused on *whether*, rather than *how*, the City was required to satisfy the judgment. *F & L Farm Co.* got the *whether* right, but it got the *how* wrong. That is, article XIII A is most assuredly not a license to "stiff" judgment creditors with impunity. The bankruptcy award of almost \$ 8 million against the District here is proof of that. However, the fact that article XIII A does not absolutely [*25] shield a local public entity from a judgment creditor does not mean that a court can compel a county to levy property taxes in excess of article XIII A's 1 percent limit in order to satisfy the judgment.

In concluding that the judicially created nondiscretionary debt exception should be imported from article XVI, section 18 to article XIII A, the Court of Appeal in *F & L Farm Co.* relied principally upon the canon that a statute (or constitutional provision) susceptible of several interpretations should be construed so as to avoid serious constitutional problems. (*F & L Farm Co.*, *supra*, 65 Cal. App. 4th at p. 1353.) This canon is beside the point here, though, for as we have just concluded, the constitutional challenges raised by VGV are meritless.

Also beside the point, and for the same reason, is the analysis in *F & L Farm Co.* of voter intent in adopting Proposition 13. On the one hand, the Court of Appeal conceded that neither the language nor the history of Proposition 13 gave "any indication whatsoever that there was any thought or consideration given to the potential impact ... on the subject matter at hand," that is, payment of inverse condemnation [*26] judgments." (*F & L Farm Co.*, *supra*, 65 Cal. App. 4th at p. 1354.) On the other hand, the Court of Appeal found the general tenor of the ballot arguments in favor of the proposition, which the court characterized as having a "populist" flavor, inconsistent with denying relief to the judgment creditors because "the entire context of modern 'takings' theory shares this same populist, antigovernment philosophical base." (*Ibid.*) "We cannot rationally conclude that the voters, in enacting the initiative limitations on 'big government,' intended to empower these same governments to damage private property with impunity and without effective means of compelling the payment of just compensation to injured citizens." (*Ibid.*) The flaw in the court's reasoning, as we have explained, lies in its assumption that a city will be free to damage private property with impunity unless judgment creditors can compel the county to satisfy the judgment by levying taxes in excess of article XIII A's 1 percent limit.

To attack the same point from a different angle: Proposition 13 put local government on a strict budget and thus required it to make painful choices. In

F & L Farm Co., [*27] *supra*, 65 Cal. App. 4th at page 1348, the Court of Appeal was unwilling to excuse payment of the judgments on the ground the City of Lindsay would suffer "undue hardship." However, the court did apparently accept the underlying premise of the city's argument--that it should not be forced to make tough decisions. Thus, to permit the city to pay the judgments without making painful choices, the court held article XIII A inapplicable to judgments. In fact, the options before the court were not restricted to letting the city walk away from the judgments or letting it raise extra money by levying property taxes in excess of the 1 percent limit established by article XIII A. The city could not, consistent with Proposition 13, avoid making painful choices, but it could have mitigated the pain if it had accepted the offer of the farmers to pay the judgments in installments pursuant to Government Code section 970.6. (*F & L Farm Co.*, at p. 1349, fn. 3.) Another option, not addressed in *F & L Farm Co.*, is that the City of Lindsay might have qualified for bankruptcy protection, as did the District here. Therefore, we disapprove *F & L Farm Co.*, *supra*, 65 Cal. App. 4th 1345, [*28] insofar as it conflicts with the views expressed herein.

In summary, we answer the first of the certified questions by advising the Ninth Circuit that, under the facts of this case, article XIII A does prohibit a county from levying property taxes in excess of 1 percent to pay a money judgment under Harbors and Navigation Code section 6361 and Government Code sections 970 to 971.

B. Question No. 2

To repeat, the second question certified to us by the Ninth Circuit is: "Does a port district created pursuant to California Harbors and Navigation Code [section] 6210 have independent authority to impose assessments under California Harbors and Navigation Code [section] 6365[, subdivision] (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?" (*Ventura Group Ventures*, *supra*, 179 F.3d at p. 841.)

The Ninth Circuit emphasized that its phrasing of the issues should not restrict our consideration (*Ventura Group Ventures*, *supra*, 179 F.3d at p. 841) and it is helpful to unpack the general and specific questions embedded in this query. The first question is a general one: Does a port district have such authority? [*29] The second question is specific: Does *this* port district have such authority under the circumstances shown here?

The answer to the first question is *yes*. Generally speaking, a port district created pursuant to Harbors and Navigation Code section 6210 does have independent authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it, *so long as the assessments satisfy the applicable statutory and constitutional requirements*.

However, the answer to the second question is *no*. Under the circumstances of this case, the statutory and constitutional requirements for an assessment are not met. The principal requirement that is unsatisfied, as we explain below, is that an assessment *specialy benefit* the parcels upon which it is levied.

1. The Statutory Framework

Section 6365, subdivision (d)(2) of the Harbors and Navigation Code provides: "Notwithstanding any other provision of law, the district may levy and collect assessments and reassessments in the same manner as provided in Article 3 (commencing with Section 51320) of Chapter 2 of Part 7 of [*30] Division 15 of the Water Code, to pay any or all of the following: [P] ... [P] (2) For the satisfaction of liabilities arising from projects."

Section 51323 of the Water Code provides: "The commissioners shall view and fix upon the district land an assessment valuation per acre for each parcel which is

in proportion to the benefits to be derived from the continuance in operation of the district reclamation works." (Italics added.)

Sections 51329 to 51334 of the Water Code establish procedures for an aggrieved person to file with the county board of supervisors a written objection to the assessment valuations, for the board of supervisors to conduct a hearing on objections and to modify or amend the assessment valuations, and for an aggrieved person to file an action in superior court to have the assessment valuations corrected, modified, or annulled.

2. The Constitutional Framework

In 1996, Proposition 218 was approved by the voters in a statewide initiative. It added two articles to the California Constitution that govern the procedures to be followed by local governments wishing to adopt or increase taxes, assessments, fees, or charges. Article XIII C deals [*31] with taxes, and article XIII D deals with assessments, fees, and charges.

Section 3, subdivision (a) of article XIII D provides that all assessments must conform to the requirements of that article. Section 4 of article XIII D provides that no assessment is to be imposed on a parcel which exceeds the reasonable cost of the proportional special benefit conferred upon the parcel, that only special benefits are assessable, and that the agency which proposes to levy the assessment must separate the general benefits from the special benefits to be conferred on the parcel. Section 2, subdivision (i) of article XIII D defines

" 'special benefit' " as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute 'special benefit.' "

Section 4 of article XIII D sets out the procedures to be followed by an agency proposing to levy an assessment. All assessments are to be supported by a detailed engineer's report. (*Id.*, § 4, subd. (b).) Notice of the amount of the proposed assessment for each identified parcel is to be mailed to the record owner [*32] (*id.*, subd. (c)), the notice is to include a ballot on which the owner may indicate support or opposition for the proposed assessment (*id.*, subd. (d)), and, not less than 45 days after the mailing, a public hearing is to be held at which the agency proposing to levy the assessment shall consider any protests against it and tabulate the ballots (*id.*, subd. (e)). The agency may not impose an assessment if there is a majority protest (*ibid.*), and in a legal action contesting the validity of an assessment, the agency has the burden of demonstrating

that the property in question would receive a special benefit and that the amount of the contested assessment is proportional to, and no greater than, the benefit conferred (*id.*, subd. (f)).

Our decisions prior to its adoption were consistent with Proposition 218 in requiring that an improvement that was the subject of a special assessment had to *specialy benefit* the assessed property. That distinguished a special assessment from a special tax. A special assessment was levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement, while a special [*33] tax was not required to specially benefit the taxed property. (*Knox v. City of Orland* (1992) 4 Cal. 4th 132, 142, 841 P.2d 144.) Because the rationale of a special assessment was that the assessed property had received or would receive a special benefit over and above that received by the general public (*ibid.*), the amount of the assessment could not exceed the benefit to the property (*County of Fresno v. Malmstrom* (1979) 94 Cal. App. 3d 974, 984, 156 Cal. Rptr. 777).

3. Special Benefit Lacking Here

VGV contends that, under the circumstances of this case, the linkage between special assessments and special benefits should be reconsidered. "The line between special assessments and special taxes articulated by the courts [citation] becomes blurred when considering assessments levied by a local port district which was created to bestow a benefit on all property within its boundaries. A port district formed under Harbors and Navigation Code section 6200 et seq. can only include, within its boundaries, '*land which will be benefitted by the creation and operation of the district.*'" (Italics added.) (See Harb. & Nav. Code, § 6217.) The [*34] local voters themselves declared in 1952, when the District was formed, that *all* real property within the District's taxing boundaries would be benefitted by the '*creation and operation*' of the Ventura Harbor. In light of this indisputable fact, the Legislature was completely justified in concluding that *all* lands within a port district would be benefitted by the *continued operation* of a public improvement of this nature."

VGV's argument proves too much. If everything is special, then nothing is special. That is, the presumption that every project undertaken by a port district is equally beneficial to all of the properties within the district would effectively nullify the requirement that an assessment valuation be fixed "per acre for each parcel which is in proportion to the benefits to be derived from" the project. (Wat. Code, § 51323; see Harb. & Nav. Code, § 6365, subd. (d)(2).) Moreover, because of the

failure of the commercial marina project, there is no means of fixing an assessment valuation per acre for each parcel in proportion to the benefits to be derived from the "continuance in operation" of the project as required by Water Code section 51323.

Finally, [*35] VGV repudiates a bedrock requirement of article XIII D--that the owners of property upon which an agency proposes to levy an assessment be given a right to vote on it. (Art. XIII D, § 4.) The reason VGV cannot concede the voter approval requirement is not far to seek. "One thing on which the District, the County and VGV agree is that if Proposition 13 and Proposition 218 are interpreted to require [voter approval] before taxes or assessments can be levied to pay the judgment, it will not be paid. As VGV acknowledged in petitioner's brief on the merits'All those entitled to vote on whether the judgment will be paid will benefit by lower taxes if they vote to deprive the judgment creditor of recovery on his judgment.' "

VGV argues that, by providing in Harbors and Navigations Code section 6365, subdivision (d)(2) that assessments may be levied for the "satisfaction of liabilities arising from projects," the Legislature "must have thought that prompt payment of debts does in fact confer a special benefit on the lands within the district." VGV's argument misses the point. Under article XIII D, that a proposed improvement would confer special benefits upon the landowners within [*36] a district is a necessary condition for the levying of a special assessment, but it is not a sufficient one. That is, even if the payment of the district's debt would confer special benefits on the properties within the district, the property owners would still have the right to vote on the question whether they wished to obtain the special benefits by

paying the debt. Proposition 218 was quite clear about the fact that its provisions were to be "liberally construed to effectuate its purposes of limiting local government revenue and *enhancing taxpayer consent*." (Ballot Pamp., General Elec. (Nov. 5, 1996) text of Prop. 218, § 5, p. 109, and reprinted in Historical Notes, 2A West's Ann. Cal. Const. (2001 supp.) foll. art. XIII C, p. 33.)

In conclusion, we answer the second of the questions certified by the Ninth Circuit as follows: A port district created pursuant to Harbors and Navigation Code section 6210 does have independent authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it, *so long as the assessments satisfy the applicable statutory and constitutional* [*37] *requirements*. However, this port district may not impose an assessment to raise the funds to satisfy the judgment in question here because the assessment would not *specialy benefit* the parcels upon which it would be imposed.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

**ROGER GALLAND et al., Plaintiffs and Respondents, v. CITY OF CLOVIS et al.,
Defendants and Appellants.**

S080670

SUPREME COURT OF CALIFORNIA

**2001 Cal. LEXIS 530; 2001 Cal. Daily Op. Service 1034; 2001 Daily Journal
DAR 1313**

February 5, 2001, Filed

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

Superior Court of California, Fresno County. Court of Appeal of California, Fifth Appellate District. F025257. Super. Ct. No. 418831-4. Gary Ray Kerkorian, Judge.

DISPOSITION:

The judgment of the Court of Appeal is reversed with directions to remand the cause to the trial court for proceedings consistent with this opinion, including remand to the City of Clovis if appropriate.

COUNSEL:

Attorneys for Appellant:

Lozano Smith Smith Woliver & Behrens, Lozano Smith, Thomas J. Riggs, Jerome M. Behrens and David J. Wolfe for Defendants and Appellants.

Endeman, Lincoln, Turek & Heater, Donald R. Lincoln and Linda B. Reich for 76 California Cities and California State Association of Counties as Amici Curiae on behalf of Defendants and Appellants.

Pollak, Vida & Fisher, Girard Fisher and Daniel P. Barer for City of Chino as Amicus Curiae on behalf of Defendants and Appellants.

Attorneys for Respondent:

Worthington & Worthington and Jaquelynn C. Pope for Plaintiffs and Respondents.

Law Offices of Rosario Perry and Rosario Perry for Action In Santa Monica as Amicus Curiae [*2] on behalf of Plaintiffs and Respondents.

Berger & Norton, Michael M. Berger and Gideon Kanner for Western Manufactured Housing Communities Association as Amicus Curiae on behalf of Plaintiffs and Respondents.

Pahl & Gosselin, Stephen D. Pahl and Karen M. Kubala for California Apartment Association as Amicus Curiae on behalf of Plaintiffs and Respondents.

James S. Burling and Meriem L. Hubbard for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiffs and Respondents.

June Babiracki Barlow, Neil D. Kalin and Sonia M. Younglove for California Association of Realtors as Amicus Curiae on behalf of Plaintiffs and Respondents.

JUDGES:

MOSK, J. WE CONCUR: GEORGE, C. J. KENNARD, J. WERDEGAR, J. CHIN, J. CONCURRING AND DISSENTING OPINION BY JONES, J. * DISSENTING OPINION BY BROWN, J.

* Presiding Justice, Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINIONBY:

MOSK

OPINION:

In *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal. 4th 761, 782-786, 941 P.2d 851 (*Kavanau*), we decided that under rent control, adjustment of future rents [*3] was generally sufficient to compensate for prior rent ceilings that were set so low as to be confiscatory, and that such adjustments precluded a claim for inverse condemnation. We left open the question, however, whether a future rent adjustment, which we will refer to as a *Kavanau* adjustment, also forecloses a suit for damages for violation of a right to constitutional due process (U.S. Const., 5th & 14th Amends.) under 42 United States Code section 1983 (hereafter section 1983). n1 We address that question here and conclude that a *Kavanau* adjustment would preclude section 1983 damages if it is adequate to prevent constitutional injury by compensating for previous excessively low rent ceilings. As in *Kavanau*, we further conclude that this matter must be remanded to the government agency responsible for setting rent ceilings to attempt to formulate an adequate *Kavanau* adjustment, subject to judicial review. In the present case, the trial court did not have the benefit of our *Kavanau* decision, and the Court of Appeal misapplied that decision in concluding that a *Kavanau* adjustment was not available as a matter of law. We further [*4] explain that the trial court appears to have made some fundamental errors in determining whether and to what extent the rent ceilings imposed in this case were confiscatory.

n1 Section 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"

We further consider whether unreasonable costs, in the form of administrative and attorney fees, imposed on landlords seeking rent increases, may themselves be the basis of a section 1983 claim. We conclude that they may if either of two conditions is present: (1) the costs imposed are part of a government effort to deliberately flout established [*5] law, e.g., deliberately obstruct legitimate rent increases; or (2) the landlord suffers

confiscation as a result of the imposition of such costs. Because the trial court's method of determining and calculating damages for this type of injury, affirmed by the Court of Appeal, was incorrect, the matter should be remanded to the trial court for reconsideration.

**BACKGROUND: THE MOBILEHOME
OWNER/MOBILEHOME PARK OWNER
RELATIONSHIP**

This case concerns the application of a mobilehome rent control ordinance, and some background on the unique situation of the mobilehome owner in his or her relationship to the mobilehome park owner may be useful. "The term 'mobile home' is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved. [Citation.] A mobile home owner typically rents a plot of land, called a 'pad,' from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines [*6] or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located." (*Yee v. Escondido* (1992) 503 U.S. 519, 523, 118 L. Ed. 2d 153, 112 S. Ct. 1522.)

Thus, unlike the usual tenant, the mobilehome owner generally makes a substantial investment in the home and its appurtenances typically a greater investment in his or her space than the mobilehome park owner. (See Baar, *The Right to Sell the "Im"mobile Manufactured Home in Its Rent-controlled Space in the "Im"mobile Home Park: Valid Regulation or Unconstitutional Taking?* (1992) 24 Urb. Law. 157, 158, fn. 13.) The immobility of the mobilehome, the investment of the mobilehome owner, and restriction on mobilehome spaces, has sometimes led to what has been perceived as an economic imbalance of power in favor of mobilehome park owners (*id.* at pp. 170-182) that has in turn led many California cities to adopt mobilehome rent [*7] control ordinances (see *id.* at p. 182 [some 70 cities in California had adopted rent control as of 1992]).

I. STATEMENT OF FACTS

Because facts in their complexity are integral to an understanding of this case, we recite those facts in considerable detail. n2 Clovis's Mobile Home Rent

Review and Stabilization Ordinance (Clovis Mun. Code, ch. 13, § 5-13.01 et seq. enacted in 1978 and repealed in 1993 (Ordinance)), was one such ordinance. Its intended purpose was to protect mobilehome owners from unreasonable rent increases while recognizing the need of mobilehome park owners to receive rent increases sufficient to cover increased costs and to generate a fair return on their investment (ROI). (Ord., § 5-13.01.) The Ordinance provided that on the filing of a petition signed by more than 50 percent of the mobilehome owners within a mobilehome park, the Clovis Mobile Home Rent Review Commission (Commission) would review the rent increase and determine whether it was "so great as to be an unreasonable increase." (Ord., § 5-13.06(b).) The park owner had the burden to prove by a preponderance of the evidence that the rent increase was reasonable [*8] in light of the nonexclusive cost factors enumerated in Ordinance section 5-13.06(i). Those factors included utility rates, property taxes, insurance, advertising, cost-of-living increases attributable to incidental services, repairs and maintenance, capital improvements, amenity and service upgrades, fair rate of ROI, and increased property values. The Ordinance provided that Commission decisions could be appealed to the Clovis City Council within 15 days after the final written decision was mailed to the parties.

n2 Much of the material in this part of the opinion is taken from the Court of Appeal's statement of facts.

The Gallands purchased the Woods Mobile Country Club (the Woods or park), a 260-space park, in 1978. The Gallands hired Planned Management Services (PMS), a Utah corporation in which they owned an interest, and which manages mobilehome parks in a number of states, to manage the Woods. John Chamberlain, the president of PMS, has managed the Woods and acted as the Gallands' representative [*9] in the rent review proceedings since 1978.

In 1983, the Gallands challenged the constitutionality of the Ordinance and a decision by the Commission permitting only a portion of a noticed rent increase. The Court of Appeal upheld the constitutionality of the Ordinance and the Commission's rent decision.

In 1985, the Gallands (by PMS and Chamberlain) challenged a Commission decision permitting less than the noticed rent increase. The trial court rejected their challenge, and the Court of Appeal affirmed in an unpublished opinion, in which the court faulted PMS for failing to present any factual evidence in support of its

requested rent increase. The court also sanctioned PMS for a frivolous appeal.

A. The Challenged Rent Review Proceedings

1. 1988 Rent Increase

The Gallands noticed a \$ 6 a space rent increase effective April 1, 1988, which raised the monthly rent to \$ 275. The mobilehome owners petitioned the Commission to review the matter. Chamberlain asked what materials and information the Commission would like produced and submitted a letter stating that the rent increase was less than half the increase in the consumer price index (CPI). Park expenses [*10] had increased \$ 46,000 in the preceding year, and cash flow in constant dollars had fallen \$ 10,275 since 1986 and \$ 30,000 since 1984. Ray Wyland, the president of the Woods tenant association, responded that the CPI included increases for items other than housing, Mr. Chamberlain had not specified which expenses had increased, and the Woods rent had increased from \$ 143 in 1979 to \$ 269 in 1987.

In response, the Commission requested that Mr. Chamberlain provide a copy of the CPI and documentation demonstrating their increased expenses and decreased cash flow.

Mr. Chamberlain submitted several applicable CPI's and prepared tables that provided a breakdown of expenses and set forth the Woods' receipts, disbursements and pre-tax cash flows for 1984 through 1987. The tables showed that expenses had increased more than income, resulting in a diminution of cash flows by \$ 30,000 to \$ 35,000, measured in constant 1978 dollars. Mr. Chamberlain also prepared a table showing the Gallands' ROI for 1984 through 1987.

The Commission heard the matter on April 13, 1988. In addition to hearing from Chamberlain, the Gallands' certified public accountant, Richard Miranda, testified [*11] that regardless of the CPI used, cash flows had decreased over the last four years. During that period, income had increased 10.8 percent while expenses had increased 18.3 percent. The mobilehome owner representative argued the rent should not be increased because the Woods rent was already one of the highest in Fresno County . He submitted the result of a random survey of 12 mobilehome parks in the area that showed the Woods to be charging \$ 75-\$ 100 above every other park surveyed except one, and \$ 50 above that park. He also challenged the Woods' operating expenses as inflated.

The matter was continued with the consent of the parties to April 29, 1988, to provide the commissioners additional time to digest the materials presented. In the interim, the Commission asked the Gallands to provide substantial additional information by April 26, 1988. That information included further breakdowns and explanations for various expenditures, information on vacancies and cash flow for the prior nine years, and additional information and calculations related to ROI including the value of the park when purchased. Mr. Chamberlain provided much but not all of the information requested. He felt [*12] that some of the requested information was irrelevant and that other materials could not be gathered in the short amount of time provided.

At the completion of the continued hearing on April 29, 1988, the Commission voted three to two against the requested increase. In its draft findings, the Commission determined that as "a matter of common knowledge and experience," certificates of deposit were earning a pretax return of between 7 and 8 percent, whereas the Woods, according to documents provided by PMS, was earning between 11.2 percent and 14.62 percent, depending on which CPI was used. The Commission determined that PMS had presented "no credible evidence, by opinion or otherwise, that this difference in yield is unacceptable, ... unfair or insufficient to attract capital investment for this type of property."

The Gallands objected to the decision on various grounds, including that the Commission had relied on information not presented at the hearing. On May 20, the commissioners reiterated their decision that no increase was warranted. They justified the decision, in part, on a portion of Chamberlain's testimony in the 1985 rent review proceedings regarding fair ROI, [*13] which they interpreted to support their conclusion that the current rent provided a fair ROI. The Commission had not notified the parties it would consider evidence from earlier proceedings. The Commission issued its final decision on June 3, 1988, finding three to two that the Gallands had not demonstrated by a preponderance of the evidence that any rent increase was justified.

The Gallands appealed the decision to the city council, which set the matter for hearing on July 18, 1988. The Gallands challenged the Commission's findings and decision, in particular its determination of a fair ROI, as well as the fairness of the proceedings. After hearing from both parties, the city council decided the Gallands had not provided sufficient information to enable the council or the Commission to make an intelligent decision regarding a fair ROI for the Woods. The council remanded the matter to the Commission for further

proceedings and ordered the Gallands to provide extensive accounting materials and financial documents which the Commission would consider in determining a fair rate of return.

The information requested included audited financial statements for the preceding 10 years [*14] showing assets, liabilities, the Gallands' equity, the ratio of debt to equity and the results of operations; and highs, lows, averages and ranges of the rates of ROI for each of the other mobilehome parks managed by PMS since 1978. The council also instructed the parties that any adjustment for inflation should be based on the U.S. Shelter Index.

The Gallands objected to producing some of the information requested because of the time and expense involved. A 10-year audit would cost approximately \$ 75,000 and would take two to three months to complete. Chamberlain and the mobilehome owners' attorney met with Clovis officials and reached a compromise regarding the additional materials to be presented, no longer requiring audits, but instead permitting PMS to submit data from "the best available existing financial records."

On October 17, 1988, the Gallands submitted extensive materials in response to the council's order. The submissions included information in narrative and table format from 16 other mobilehome parks that PMS managed. The data indicated that the average ROI in constant dollars for the parks was 21.7 percent compared to the Woods' average of 11.9 percent. Regarding [*15] vacancy rates over the past 10 years, the Woods averaged a 2.1 percent vacancy rate while other mobilehome parks in Fresno and Clovis averaged a 5.03 percent rate. Regarding fair ROI on the Woods and similar investments, the Gallands submitted a 19-page discussion of various types of investments, their attendant risks and their expected return.

The Gallands also submitted a declaration from Chapman Findlay, Ph.D., former chairman of the Department of Finance and Business Economics at the University of Southern California, providing an opinion regarding the fair ROI for the Woods. He compared the expected return for various types of investments and, based on the comparisons, opined that a fair ROI for the Woods measured before tax on equity was 25 percent.

The mobilehome owners submitted a declaration from their expert, Richard Nordstrom, Ph.D., a professor at California State University, Fresno. Dr. Nordstrom stated that the Woods' rents and profits since 1978 had increased at a greater rate than the CPI. His calculations,

which compared the Gallands' return after debt service with their actual investment not adjusted for inflation, indicated the Gallands received a 24.9 [*16] percent ROI in 1987. He also criticized Dr. Findlay for comparing actual returns to average returns and returns from regulated investments to unregulated ones.

At the Commission hearing on December 16, 1988, the commissioners grappled with defining "investment" for purposes of calculating fair ROI. Dr. Nordstrom testified that return should be calculated on actual dollars invested with no adjustment for inflation. Dr. Findlay stated, albeit in a garbled fashion, that investment dollars must be adjusted for inflation.

The Commission, essentially accepting Dr. Nordstrom's opinion, concluded the Gallands were receiving a fair ROI and had not justified the rent increase. The commissioners reasoned that Dr. Findlay was of the opinion that a 25 percent ROI was fair. By Dr. Nordstrom's calculations (using figures not adjusted for inflation), the Gallands received a 24.9 percent ROI in 1987. The Commission also found that both experts had calculated ROI without adjusting the initial investment for inflation, apparently misinterpreting Dr. Findlay's testimony that the ROI must be measured in "today's dollars" as meaning there was no need to adjust the initial investment for inflation. [*17]

The Gallands appealed the decision to the city council, criticizing the Commission's lack of inflation adjustment. The council heard the appeal on March 3, 1989. It affirmed the Commission's decision and adopted its findings. On March 29, 1989, the Gallands requested that Clovis prepare a record of the 1988 rent review proceedings pursuant to Code of Civil Procedure section 1094.6.

2. 1989 Rent Increase

On June 29, 1989, the Gallands noticed a \$ 25 a month rent increase effective September 1, 1989, which raised the per space rent to \$ 294 a month. The mobilehome owners challenged the increase and the matter was set for hearing on September 29, 1989.

The Gallands supported the rent increase with updated figures noting that no rent increase had been permitted for two and a half years. Based on the CPI, the purchasing power of the current \$ 269 rent (worth \$ 119 in 1978 dollars) was less than the \$ 144 rent charged in 1978. The increased rent of \$ 294 would have been worth only \$ 127.89 in 1978 dollars. The increased rent remained below market levels. In the past six months, four new mobilehome owners had rented spaces at the

Woods [*18] for \$ 315. The Gallands contended they were not receiving a fair ROI. They renewed their argument that ROI calculations must be adjusted for inflation to prevent confiscatory results. The projected ROI for the Woods in 1989 was 9 percent, the same return realized in 1988.

The mobilehome owners responded that the low ROI appeared to be due to unusually high operating expenses. They opined that the increase reflected the Gallands' attempt to pass their unsuccessful rent review litigation costs on to the mobilehome owners.

The Commission, in its draft findings, relying on a misinterpretation of a CPI table presented in an unrelated rent proceeding, concluded that 60 percent of the items reflected in the CPI were not relevant to a mobilehome park. Therefore, the rent should be increased by an amount equal to 40 percent of the increase in the CPI. Under this formula, a \$ 14 increase was justified. The Commission also concluded that legal and expert fees incurred in 1988 during the rent adjustment process should not be considered operating costs under the ordinance.

The Commission reviewed the draft findings with the parties at a hearing on November 3, 1989. Clovis's city [*19] attorney acknowledged the Commission should not have relied on the ex parte information without notice to the parties. The hearing was continued to give the parties an opportunity to review and respond to that information.

Despite the fact that the Gallands pointed out the fallacy of the Commission's method -- misinterpreting the statistic that 42 percent of household income on average was spent on housing as signifying that increases in housing prices equaled only 42 percent of the rate of inflation the Commission readopted its earlier findings with minor modifications. As further explained below, the Commission did not issue a final decision until January 29, 1992. After the final decision issued, the Gallands appealed to the city council in February 1992.

Under the Ordinance, the Gallands could continue to collect the full \$ 25 increase until an appeal before the city council was final. However, beginning February 1, 1990, they opted not to collect the disputed \$ 11 portion of the noticed increase.

The appeal was eventually heard by the city council in May 1992. The council upheld the Commission's decision, finding it reasonable and supported by a preponderance of [*20] the evidence.

3. 1990 Rent Proceedings

In January 1990, the Gallands noticed a rent increase of \$ 15 a month for mobilehome owners of double-wide mobilehome coaches, and \$ 9 a month increase for mobilehome owners of single-wide coaches, effective April 1, 1990. The mobilehome owners petitioned for review of the increases, and a hearing on the matter was set for May 18, 1990.

The Gallands' submission included current financial figures showing an 8.1 percent return for the Woods in 1989, approximately the same return generated by certificates of deposit at local institutions. They also reiterated that standard accounting principles required the investment be adjusted for inflation in calculating ROI.

The mobilehome owners contended that the Gallands' stated expenses were inflated and further claimed that because the Woods' rent was the second highest in the Fresno/Clovis area, the Gallands were receiving more than a fair ROI. On May 8, 1990, 10 days before the scheduled hearing, the Commission asked the Gallands to provide additional information including an auditor's statement supporting the Gallands' reported expenses, further breakdown of a number of the income [*21] and expense categories, details regarding the Woods purchase, and copies of the Consumer Price Shelter Index for Pacific cities and the United States cities average categories for 1986 through 1989. The Gallands submitted the requested information. They also objected to a request by the mobilehome owners for further detailed financial and accounting information.

The Commission further requested that Chamberlain provide a sworn declaration setting forth details of the park's operation since 1978, including purchase, ownership, and day-to-day operations; daily, monthly, and annual business and accounting practices; the same information as to PMS; and auditing practices and procedures for the Woods, for other parks managed by PMS, and for the Gallands with regard to this investment. The Commission also requested additional information regarding utilities, water and sewer payments, interest income, management fees, lease payments and legal and accounting expenses. The Gallands complied, providing through Chamberlain a detailed 22-page declaration and 18 pages of additional information.

On August 2, 1990, the city attorney notified the Gallands that a Commission member had contacted [*22] the mobilehome owners' representative and provided him with copies of public records relating to the case. The

Commission provided copies of those materials to the Gallands and requested clarification of various matters including the Woods' purchase, and financing and lease payments, as well as Mr. Galland's status as a PMS shareholder.

Chamberlain submitted another declaration and supporting documents which explained the purchase/leaseback agreements. In May 1978, the Margaret G. Rose Testamentary Trust had agreed to provide the Gallands with \$ 600,000 to purchase the Woods in exchange for title to the land and a 50-year leaseback. On June 9, 1978, the Gallands purchased the Woods from a third party for \$ 4,158,625 (land, \$ 500,000; improvements, \$ 3,613,625; personal property, \$ 45,000). The Gallands made a \$ 600,000 down payment and the sellers took two notes. On August 1, 1978, the Gallands executed a grant deed to the trust as required by the terms of the May agreement.

Margaret G. Rose was Mrs. Galland's mother. She died in 1969 and the trust was created pursuant to her will. Mrs. Galland's father has a life estate in the trust. Income from the trust estate and, if [*23] necessary, principal, are used for his benefit. On his death, any remaining assets will be distributed to Mrs. Galland.

Mr. Galland was a 50 percent shareholder in PMS from 1978 until 1985 but received no compensation or dividends after he resigned as president in 1980. In 1985, Chamberlain purchased Mr. Galland's shares of stock in PMS.

The Commission, minus the member who had contacted the mobilehome owners, heard the matter on August 13, 1990. The Gallands presented evidence supporting the \$ 15 and \$ 9 rent increases. Their current ROI in the Woods (adjusted for inflation) was 8.1 percent, whereas what they claimed to be equally risky investments enjoyed a 20 to 25 percent rate of return.

Dr. Nordstrom testified for the mobilehome owners. He reversed his earlier position that the investment need not be adjusted for inflation and claimed that had been his position all along. He now believed the requested rent increase was not justified because the Gallands had misstated their investment in past years. He opined that the purchase/leaseback transaction had resulted in a down payment of zero rather than \$ 600,000. Thus, the Gallands' investment consisted of principal [*24] payments on the mortgage only. By his calculations, the Gallands received a 140.63 percent ROI in 1989. Dr. Nordstrom also believed that management fees, lease payments and various extraordinary operating expenses should not be included in operating expenses in

calculating cash flow. He further opined that a 14 percent ROI was fair, based in part on a similar average return for cable television franchises which, like mobilehomes, were regulated investments.

At the conclusion of the hearing, the Commission approved increases of \$ 7.50 and \$ 4.50, half of the increases requested. The Commission found the Woods was jointly owned by the Gallands and the Rose Trust. Therefore, the lease payments were ROI rather than expenses. In addition, the Commission disallowed attorney and expert fees incurred in the rent review proceedings. With these adjustments, the Gallands' return on the inflation-adjusted investment was 11.8 percent. However, contrary to the opinion of both experts, the Commission concluded, based on "common sense," that the ROI calculation should be based on historic investment. Using the unadjusted figures, the approved rent increases yielded a 23.5 percent ROI, which the [*25] Commission deemed fair.

The Commission's final decision was not issued until January 29, 1992. Both parties appealed. The city council heard the appeals in May 1992, along with the Gallands' appeal of the Commission's decisions on the 1989 rent increase. The city council upheld the decision of the Commission.

The Gallands requested and Clovis granted the Woods rent increases in subsequent years and those proceedings are not before us. In 1993, Clovis amended its mobilehome rent control ordinance to permit automatic, across-the-board annual rent increases tied to the CPI.

B. Judicial Proceedings

In May 1990, the Gallands sued Clovis for damages for inverse condemnation, denial of substantive and procedural due process under the state and federal Constitutions, and for violations of civil rights under section 1983. They contended that Clovis's application of the Ordinance constituted a regulatory taking because it decreased the value of the property. They also claimed that Clovis's actions denied them a fair return on their investment. They filed concomitant petitions for writ of administrative mandate challenging the process employed and the denial or modification [*26] of the 1988 and 1989 rent increases. The matters were consolidated for trial. The Gallands filed a first amended complaint in January 1993, adding allegations stemming from the 1990 rent review proceedings.

The Gallands alleged that Clovis denied them procedural due process by failing to provide adequate notice as to what they must prove to establish that a rent increase is

not an "unreasonably high rent increase" under the Ordinance. Despite the Gallands' request for some standards, Clovis issued no written guidelines and the Commission's decisions were so inconsistent that they provided no de facto notice as to the owner's burden. In addition, Clovis's application of the rent review scheme denied the Gallands a fair hearing. The Commission relied on ex parte information without notice to the Gallands, it imposed costly and onerous information demands only to ignore the information when it was produced, it disallowed the Gallands' costs of complying with those requests as increased operating expenses to support a rent increase, it ignored uncontroverted expert evidence, and it made arbitrary and inconsistent findings to justify its decisions. Further, Clovis failed to issue final [*27] Commission decisions and to prepare the administrative record, thus preventing the Gallands from obtaining judicial review of the administrative proceedings and decisions.

The Gallands alleged that the same acts also denied them substantive due process. Clovis's actions in implementing rent control were arbitrary and unfair and placed an impermissibly onerous and costly burden on the park owner. As a result, the Gallands were denied a fair return on their property. Clovis's actions, which were taken in accordance with the custom of the municipality, deprived the Gallands of the right to due process in violation of section 1983.

The Gallands also challenged the Commission decisions pursuant to a writ of mandate action under Code of Civil Procedure section 1094.5 on a number of grounds, alleging essentially the same procedural and substantive due process violations as set forth in their complaint.

Clovis answered the complaint, essentially denying the allegations of wrongdoing. It did not assert any affirmative defenses. The case was set for trial on August 19, 1991.

Trial on the consolidated suit and writ proceeding was postponed repeatedly [*28] because of Clovis's delay in making a final decision regarding the 1989 and 1990 increases and in preparing the administrative record. Clovis contends that part of this delay was due to the fact that PMS and the mobilehome owners were involved in settlement discussions until April 1991 and the parties had requested that the final decision not be issued during that period. In August of 1991, the trial court ordered that final written decisions be prepared in all proceedings by October 1, 1991, and that the administrative record be lodged by November 1, 1991. Due to further delays on Clovis's part, however, final Commission decisions were not issued until June 1, 1992, and the administrative

record was not lodged with the trial court until June 3, 1993.

In August 1994, the court issued a statement of decision. It found that the manner in which the Commission and council applied and administered the Ordinance during the 1988, 1989, and 1990 rent review proceedings violated the Gallands' procedural and substantive due process rights. However, the violations did not effect a taking under the Fifth Amendment sufficient to support an inverse condemnation claim.

Based on the due [*29] process violations, the court granted the petitions for writ of administrative mandate, vacated the Commission decisions and dismissed the administrative proceedings that had denied the 1988, 1989, and 1990 rent increases. The court further determined that the expense and delay caused by the due process violations rendered the rehearing remedy provided by Code of Civil Procedure section 1094.5 "patently inadequate." The court concluded the Gallands were entitled to damages under section 1983 for their loss of a fair ROI and for the expenses, costs, and reasonable attorney fees incurred as a result of Clovis's arbitrary and unreasonable actions.

After hearings on the issue of liability and damages, the court awarded the Gallands damages pursuant to section 1983 as follows: (1) \$ 247,885 for costs incurred as a result of the arbitrary and unreasonable administrative proceedings (\$ 254,860 actually spent minus \$ 6,975, what the Gallands would have spent absent the constitutional violations); (2) \$ 236,806 for lost rents from 1988 through March 31, 1995, based on the methodology stipulated to by the parties for calculating a fair ROI; (3) prejudgment [*30] interest on items (1) and (2); (4) attorney fees of \$ 378,955; (5) costs of suit pursuant to Code of Civil Procedure section 1033.5; and (6) postjudgment interest from October 10, 1995.

The Court of Appeal affirmed. It found as to the first item of damage that Clovis's actions during the rent-setting process were indeed arbitrary and irrational and sufficient to sustain the award of damages for substantive due process violations. The Court of Appeal also concluded, for reasons explained more fully below, that our conclusion in *Kavanau*, *supra*, 16 Cal. 4th 761, that lost rents can be compensated by adjustment of future rents did not apply to section 1983 actions, and that in any event, a *Kavanau* adjustment was inadequate in the present case.

II. DISCUSSION

The Gallands bring two distinct due process claims under section 1983, corresponding to two different types

of economic injury. The first injury stems from Clovis's failure to fully grant the requested rent increases, resulting in confiscatorily low rents. The second claimed injury is that they were compelled to pay excessive costs in order to obtain a rent increase. As we shall [*31] see, each of these injuries may be designated a violation of substantive due process rights. But the two types of injuries are distinct and require different analyses. For the sake of clarity, we will refer to the first type of injury, for the most part, as confiscation, and the second type of injury as a substantive due process violation. We discuss each of these injuries in turn below.

A. Confiscation through Denial of Fair Rate of Return

The trial court awarded the Gallands \$ 236,806 in damages from lost rents under section 1983. Clovis contends that insofar as the rent ceilings imposed on the Gallands was confiscatory, it should have the opportunity to cure this situation by adjusting future rent, as discussed in our decision in *Kavanau*, *supra*, 16 Cal. 4th at pages 782-786. The Gallands, on the other hand, point out that *Kavanau* did not involve a section 1983 claim, and the law is well established that, except in the limited area of procedural due process violations, the existence of an alternative state remedy does not preclude the pursuit of a section 1983 remedy. (See, e.g., *Zinerman v. Burch* (1990) 494 U.S. 113, 125-126, 108 L. Ed. 2d 100, 110 S. Ct. 975 [*32] (*Zinerman*) .) Alternatively, the Gallands contends that a *Kavanau* adjustment does not apply in the present case because it is inadequate to compensate for the losses they were forced to incur. We will address each of these arguments in turn.

1. Does a *Kavanau* Adjustment Apply When Section 1983 Damages Are Sought?

In order to answer the above question, we must first clarify the precise nature of the constitutional injury that Galland is purported to have suffered the denial of a fair return on their rent-controlled property.

As we recognized in *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 165, 130 Cal. Rptr. 465, 550 P.2d 1001 (*Birkenfeld*), and later in *Kavanau*, price control regulation, including rent control, involves a distinct branch of constitutional inquiry under the due process clause. Such regulations are generally found to pass constitutional muster "so long as the law does not deprive investors of a 'fair return' and thereby become 'confiscatory.'" [Citations.] Determining prices that will provide a fair return 'involves a balancing of the investor and the consumer interests.' [Citation.] 'It is the product of expert judgment [*33] which carries a presumption of

validity.' [Citation.] A reviewing court focuses on whether the regulatory agency took relevant investor interests into account. [Citations.] ... It is not theory but the impact of the [price regulation] which counts.' [Citation.] In sum, when considering whether a price regulation violates due process, a 'court must determine whether the [regulation] may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection for the heart of relevant public interests, both existing and foreseeable.' " (Kavanau, *supra*, 16 Cal. 4th at pp. 771-772.) In other words, rent regulation must not prevent an efficient enterprise from " ' 'operating successfully," ' ' but rent regulators are permitted to adjust prices "within a 'broad zone of reasonableness,' " balancing the interests of landlords and tenants. (*Id.* at pp. 778-779.)

In *Kavanau*, we further held that a landlord may not obtain inverse condemnation damages against a government agency for temporarily imposing rent ceilings that a court had deemed confiscatory so [*34] long as the landlord was able to obtain an adequate adjustment of prospective rents that would compensate for past losses. (*Kavanau, supra*, 16 Cal. 4th at pp. 783-784.) As we explained:

"An adjustment of future rents that takes into consideration past confiscatory rents is the converse of the refund that producers in price-regulated industries may have to pay if, during litigation over price levels, they charge prices that a court later determines to be excessive. [Citation.] Moreover, this remedy, as opposed to an award of damages against the Rent Board, places the cost of compensating [the landlord] roughly on those tenants who benefited from unconstitutionally low rents. [Citations.] ...

"Finally, the remedy of future rent adjustments avoids putting a reviewing court in the position of declaring the appropriate regulated rent ceiling for a particular apartment in order to measure damages. [Citation.] Setting rent ceilings is essentially a legislative task, and agencies, not courts, choose which administrative formula to apply. [Citation.] The state and federal Constitutions require only a fair process that reasonably takes into consideration the landlord's interests, [*35] and a landlord's return need only fall within a 'broad zone of reasonableness.' [Citation.] Accordingly, courts are in no position to determine the appropriate rent ceiling for an apartment as a means of assessing damages. We strongly resist any rule that would impose on a reviewing court the impossible task of finding somewhere in the penumbra of the Constitution a stipulation that a particular apartment in a particular building should rent for \$ 746 per month rather

than \$ 745." (*Kavanau, supra*, 16 Cal. 4th at pp. 783-784.)

As we made clear in *Kavanau* and elsewhere, a landlord under rent control who is permitted no or excessively low rent increases has the means, via a writ of mandate, to judicially challenge a rent board's actions. (See, e.g., *Kavanau, supra*, 16 Cal. 4th at p. 767; *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal. App. 4th 281, 287.) As we also made clear, a landlord is charged with the duty to take advantage of such a remedy before seeking damages against a municipality: "A landlord who unnecessarily permits large losses to accumulate cannot complain if the market prevents [*36] him from recouping those losses." (*Kavanau, supra*, 16 Cal. 4th at p. 785.)

Of course, the fact that overlapping state remedies are available is generally irrelevant to the question whether a cause of action exists under section 1983. (*Zinerman, supra*, 494 U.S. at pp. 124-125.) We expressly left undecided the question whether the availability of an adequate *Kavanau* adjustment precludes a section 1983 claim. (*Kavanau, supra*, 16 Cal. 4th at pp. 768, 783.) The answer to this question depends upon whether a *Kavanau* adjustment is most appropriately characterized as preventing a substantive due process injury from occurring, or if it is better characterized as compensating for a substantive due process injury that has already occurred. If the former, then there would be no substantive due process injury, and no section 1983 claim. If the latter, then the contrary would be true.

The answer to this question in turn lies in the peculiar nature of the constitutional injury inflicted by a confiscatory rate regulation, as suggested by the above discussion. The term "confiscatory" is often used in the context of price regulation to describe a [*37] rate ceiling or ordinance that potentially or eventually will cause confiscation. (See *Birkenfeld, supra*, 17 Cal. 3d at p. 169.) But this is not to say that a delay in the upward adjustment of rents to nonconfiscatory levels works substantive due process injury. Indeed, in the field of public utility regulation, the proper remedy for delay in the upward adjustment of rents, or "regulatory lag," has been equitable relief to enforce the proper rates, not monetary damages against the regulator. (Priest, *Principles of Public Utility Regulation* (1969) pp. 204-206; see, e.g., *Smith v. Ill. Bell Tel. Co.* (1926) 270 U.S. 587, 591-592, 70 L. Ed. 747, 46 S. Ct. 408.) Thus, a rent control regime that permits landlords to challenge confiscatory regulations in state court via a writ of mandate, and which permits the timely adjustment of future rents to compensate for any regulatory lags that

may have occurred, is one that passes constitutional muster.

We suggested as much in *Kavanau* when rejecting the landlord's takings argument in that case. "Just as a reviewing court averages the effects of subsidiary aspects of a price-setting scheme by looking at [*38] 'net effect' [citation], a reviewing court can also average the effects of a price-setting scheme over time. Thus, a fair return over the course of several years will offset a confiscatory return during a particular year. Recognizing that [the landlord] has a continuing right under the due process clause to future rent adjustments that will enable him to earn a fair return, we believe he has not suffered a taking. Put another way, the ongoing process of setting rent ceilings dispels the due process violation, which in this case is the sole basis for a potential takings clause violation." (*Kavanau*, *supra*, 16 Cal. 4th at pp. 785-786; see also *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal. App. 4th 1409, 1423-1427 [because of available *Kavanau* adjustment, no damages available under section 1983 for lost rents due to excessively low rent ceilings].) *Kavanau* therefore implies that a system of rent regulation sufficiently flexible to adjust rates upward to compensate for delay inflicts no constitutional injury.

To be sure, *Kavanau* involved a takings claim, and this case is concerned with what is labeled substantive due process. But [*39] we have recognized that a price regulation that causes confiscation may be designated interchangeably as either a taking of property under the Fifth and Fourteenth Amendments of the United States Constitution or a violation of due process. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 967, 968 P.2d 993; *Kavanau*, *supra*, 16 Cal. 4th at pp. 776-777; see also *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 307-308, 102 L. Ed. 2d 646, 109 S. Ct. 609.) It would be incongruous for us to conclude, on the one hand, as we did in *Kavanau*, that a landlord permitted adequate rent adjustments has not suffered a constitutional injury under the takings clause, but, on the other hand, that he or she has suffered such an injury under the due process clause. n3

n3 The dissent asserts, contrary to authority, that substantive due process provides a more exacting standard for determining whether a regulation is confiscatory than does the takings clause at issue in *Kavanau*. *Kavanau*'s holding was not based on such a distinction, but on the well-established principle that the Constitution permits government regulators great flexibility in making price control decisions and that,

accordingly, delays in lawful price adjustment are not per se constitutional violations.

For a similar reason, the dissent is off the mark when it analogizes this case to cases of racial discrimination and claims that no *Kavanau*-like remedy would be permitted for such discrimination. Of course, discrimination based on a suspect class such as race will receive the strictest judicial scrutiny and not be permitted absent the most compelling interest. (*Hunter v. Erickson* (1969) 393 U.S. 385, 391-392, 21 L. Ed. 2d 616, 89 S. Ct. 557.) Governmental acts of deliberate racial discrimination are almost invariably constitutional violations cognizable under section 1983. (See *Washington v. Davis* (1976) 426 U.S. 229, 239-241, 48 L. Ed. 2d 597, 96 S. Ct. 2040.) On the other hand, given the discretion permitted the government in regulating prices, delays in price adjustments cannot be considered the constitutional equivalent of intentional racial discrimination.

The dissent, as well as the concurring and dissenting opinion, are also incorrect that *Kavanau*'s holding should be interpreted as a requirement for landlords to exhaust administrative remedies before seeking constitutional damages, contrary to established law. (See *Patsy v. Florida Board of Regents* (1982) 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172; *Felder v. Casey* (1987) 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302.) Rather, as explained above, a prospective rent remedy prevents a taking, and implicitly a substantive due process violation, from occurring. In fact, neither the dissent nor the concurring and dissenting opinion cite authority for the proposition that a regulatory delay in a lawful price adjustment gives rise to an actionable substantive due process violation under section 1983. Perhaps cognizant of this lack of authority, the dissent "wonders if we took the wrong turn long ago when we began treating rent control like any other price-regulated industry." (Dis. opn., *post*, at p. 10.) It offers no persuasive reason, however, for reevaluating precedent on this point. (See *Pennell v. City of San Jose* (1988) 485 U.S. 1, 11-12, 99 L. Ed. 2d 1, 108 S. Ct. 849.)

[*40]

This conclusion is also consistent with the recognition that mobilehome rental property is a long-term capital asset, the value of which is determined by a stream of income expected over a number of years. (See

Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?* (1992) 21 Sw.U. L.Rev. 1019, 1035; see also Brealy & Stewart, *Principles of Corporate Finance* (4th ed. 1991) p. 30.) An excessively low rate of return followed by an adequate adjustment of future rents will allow a reasonable average return over the life of the investment and therefore avoid confiscation.

Of course, an excessively low rent sustained over a long duration may well inflict losses that no rent adjustment can cure. But as noted, we emphasized in *Kavanau* that a landlord generally has the capacity to prevent large losses through resort to available state remedies: "If a landlord acts promptly to challenge a confiscatory regulation, and seeks a stay of that regulation during litigation, his losses, and thus any future rent adjustments, are likely to be relatively small. A landlord who unnecessarily permits large losses to accumulate cannot complain if the market prevents him from recouping [*41] those losses." (*Kavanau, supra*, 16 Cal. 4th at p. 785.) A section 1983 remedy is available for constitutional injury inflicted by those acting under color of state law. When the state makes available a judicial procedure that can feasibly prevent a constitutional injury from occurring, no section 1983 remedy will lie when a plaintiff fails to avail himself or herself of that procedure.

It may be, of course, that even if the landlord acts reasonably to prevent large losses from accumulating, a *Kavanau* adjustment would be inadequate. In *Kavanau*, we stated that we did not need to "decide what alternative remedy might be appropriate if a landlord can establish that the remedy of future rent adjustments is for some reason unavailable. ... Before [a landlord] can allege the unavailability of future rent adjustments, he must petition for those adjustments, the Rent Board must determine, subject to judicial review, their appropriate amount, and he must attempt to impose them." (*Kavanau, supra*, 16 Cal. 4th at p. 785.) Accordingly, when landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) [*42] that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate.

Applying this test to the present case, we first consider whether the rent ceilings imposed from 1988 to 1990 were confiscatory. Although the trial court concluded that they were, that conclusion was based at least in part on the questionable assumption that the Gallands were constitutionally entitled to an ROI of between 20 and 25 percent. Because there appears to have been considerable confusion in the courts below as to what constitutes a confiscatory rate of return, we offer the following guidance on remand:

Although the term "fair rate of return" borrows from the terminology of economics and finance, it is as used in this context a legal, constitutional term. It refers to a constitutional *minimum* within a broad zone of reasonableness. As explained above, within this broad zone, the rate regulator is balancing the interests of investors, i.e., landlords, with the interests of consumers, i.e., mobilehome owners, in order to achieve a rent level that will on the one hand maintain the affordability of the mobilehome park [*43] and on the other hand allow the landlord to continue to operate successfully. (*Kavanau, supra*, 16 Cal. 4th at pp. 778-779.) For those price-regulated investments that fall above the constitutional minimum, but are nonetheless disappointing to investor expectations, the solution is not constitutional litigation but, as with nonregulated investments, the liquidation of the investments and the transfer of capital to more lucrative enterprises.

Of course, a valid price control scheme must permit an efficiently run company, subject to market constraints, to earn a "return ... commensurate with returns on investments in other enterprises having corresponding risks." (*Kavanau, supra*, 16 Cal. 4th at p. 772.) The Gallands correctly cite our opinion in *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 683, 209 Cal. Rptr. 682, 693 P.2d 261, for the proposition that rent regulators must generally permit profits to be adjusted over time for inflation so that the real value of that profit does not shrink toward the vanishing point. But as we also held in *Fisher*, it is obviously not the case that a rent controlled investment must earn the same [*44] as a non-rent-controlled one: "Some lessening of appreciation is a necessary consequence of any rent control, since future appreciation is to a significant extent a function of increased rental income. [Citation.] It is one of the very sources of long-term appreciation inflated rents that rent control measures are intended to restrict." [Citation.] [P] ... Any price-setting regulation, like most other police power regulations of property rights, has the inevitable effect of reducing the value of regulated properties. But it has long been held that such reduction in property value does not by itself render a regulation unconstitutional. Police power legislation results in a confiscatory 'taking' only when the owner has been deprived of substantially all reasonable use of the property. [Citation.] Even a significant diminution in value is insufficient to establish a confiscatory taking." (*Fisher v. City of Berkeley, supra*, 37 Cal. 3d at pp. 685-686, fn. omitted.) Thus, comparison of the rate of return of rent controlled mobilehome parks with those of non-rent-controlled parks, as the Gallands made and the trial court accepted in the present case, is of [*45] limited utility in establishing the constitutional minimum rate of return. Moreover, there is nothing in the record to indicate that the average rate of return of the 16 PMS

parks surveyed, which were not randomly chosen, was the same as or similar to the average return on mobilehome parks nationally, or, more to the point, the average return on mobilehome parks in the Clovis area.

Furthermore, PMS's own data indicates that market forces, rather than rent control, were primarily responsible for the Woods' relatively poor performance in relationship to other PMS mobilehome parks surveyed. This data shows, for example, that in 1987, the year before the present controversy commenced, the ROI for the Woods was 11.8 percent, whereas the average for ROI for the 16 other parks was 22.6 percent. But the data also reveals that in 1987, the base monthly rent charged at the Woods, \$ 269, was *equal* to the market rate rents. Thus, although the Woods had only a 9 percent ROI in 1988 and 1989, according to its own data, the same data also indicate that this rate of return for rent controlled property was only slightly below the return the market afforded, and that the wide gap between the Woods [*46] and other PMS parks was largely due to factors other than Clovis's rent control. (See *Yee v. Mobilehome Park Rental Review Bd.*, *supra*, 62 Cal. App. 4th at pp. 1414-1415 [10 percent return on equity in 1994 considered fair by both parties].) n4

n4 At oral argument, the Gallands' counsel argued that a *Kavanau* adjustment would be ineffective because the record showed that there had never been more than a \$ 20 difference between the regulated rent and the market rent, and therefore there would be a severe practical limit on the upward adjustment of rents called for under *Kavanau*. Yet the fact that there was such a small margin between regulated rent and market rent calls into question whether confiscation did indeed take place and, in any case, suggests that the confiscation, if any, was correspondingly limited.

Moreover, as explained above, one measure of whether a regulated enterprise is allowed to operate successfully is whether it continues to attract necessary capital. [*47] (*Kavanau*, *supra*, 16 Cal. 4th at p. 772.) We note that in 1993, during the period that the Gallands were subject to supposedly confiscatory rent ceilings, they were able to obtain a \$ 3 million refinancing loan on the Woods on standard terms for commercial property.

Thus, on remand, the trial court must consider not whether the return on the Woods measured up to some benchmark established by nonregulated investments, but rather whether the 1988 to 1990 rent ceilings were within

the constitutionally permitted broad zone of reasonableness.

On the other hand, the Gallands are correct that the substantial legal and administrative costs attributable to the rent review process, discussed at greater length in the next part of this opinion, should be properly included as expenses when calculating the proper rent readjustment. Under the fair ROI method used in practice by Clovis, it may not arbitrarily exclude the reasonable expenses of seeking legitimate rent increases.

Clovis argues that *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside* (1984) 157 Cal. App. 3d 887, 204 Cal. Rptr. 239 stands for the proposition that a city may not be constitutionally required [*48] to include the landlords' costs of obtaining rent increases as operating expenses when calculating the proper rent levels. Clovis is correct, but only up to a point. In *City of Oceanside*, the court considered a facial challenge to an ordinance, including a challenge to a provision excluding attorney fees from operating expenses. The court correctly rejected this facial challenge. As explained above, it is the overall result of the rent-setting process, not the method employed or any particular exemption legislated, that determines whether a rent control regime is confiscatory. (*Kavanau*, *supra*, 16 Cal. 4th at pp. 771-772.) Thus, the exclusion of costs associated with obtaining rent increases is not per se confiscatory. On the other hand, if a rent control ordinance as applied operates to impose large and unnecessary costs on landlords, and if as a result of that imposition a landlord is only able to garner a rate of return that is deemed confiscatory, we may not ignore the confiscation simply because these costs have been classified as exempt expenses. Accordingly, these expenses must also be considered on remand when determining whether and to what extent Clovis's rent regulation [*49] has been confiscatory and whether remand for a determination of *Kavanau* adjustment is appropriate.

2. Was a *Kavanau* Adjustment Inadequate as a Matter of Law?

If the trial court reaffirms that the rent ceilings were confiscatory to some extent, then the matter would generally be remanded to the Clovis City Council to attempt a *Kavanau* adjustment. The Court of Appeal held that a *Kavanau* adjustment would be inadequate as a matter of law. Its conclusion was based primarily on the substantial sum of damages accruing from lost rents--\$ 236,806--in part because of Clovis's long delay in reaching a final decision and preparing the administrative record, which postponed the Gallands' mandamus remedy.

As discussed, we generally presume that a landlord has the means to obtain judicial intervention to prevent large financial losses. But in the present case, although the parties argue over the length of Clovis's unjustifiable delay in preparing the administrative record, even Clovis concedes that there was some period of unnecessary delay that may have retarded the Gallands' ability, through judicial intervention, to prevent their losses from accumulating. Although the trial [*50] court did not address this question precisely, it found, in the context of rejecting Clovis's statute of limitations defense, a "delay in providing the administrative record for 1988, 1989 and 1990, and the co-extensive delay in issuing final decisions for the 1989 and 1990 administrative proceedings" On the other hand, the Ordinance allowed the Woods rent increases to go into effect and did not require the Gallands to rescind them until the city council's decision was final in 1992. The Gallands voluntarily rescinded at least a portion of their rent increases after the Commission's decision. The trial court must determine on remand whether, under the circumstances, the Gallands reasonably used the available legal machinery to prevent a constitutional injury from occurring.

Even if it is concluded that the Gallands suffered undue delay, the question whether a *Kavanau* adjustment is adequate is in large part a factual one, and not for the speculation of an appellate court. Here, we note that although the amount of the alleged lost rent is fairly substantial, the Woods has 260 units, and it is therefore within the realm of possibility that lost rents could be recouped over [*51] a relatively short period of time with realistic rent increases. In any case, both Clovis's decisions and those of the trial court predated our decision in *Kavanau*. Assuming that the Gallands are able to demonstrate the rent ceilings were confiscatory, as discussed above, it is for Clovis to attempt on remand to adjust rent ceilings to compensate for lost rents, and for the trial court to review whether such adjustments are adequate to meet the constitutional standard for a fair return. This remand "avoids putting a reviewing court in the position of declaring the appropriate regulated rent ceiling for a particular apartment in order to measure damages" (*Kavanau*, *supra*, 16 Cal. 4th at p. 784), and places the rate-setting function first and foremost in the hands of the government agency (*ibid.*). If, however, a *Kavanau* adjustment proves to be inadequate in this case to reestablish an average reasonable rate of return, then the Gallands would be free to file a section 1983 action on the grounds that state equitable remedies have failed to prevent the constitutional injury from occurring. n5

n5 The Court of Appeal briefly mentioned two other reasons for not resorting to a *Kavanau*

adjustment. The first is that many of the Woods mobile home owners are elderly and therefore a "*Kavanau* remedy [is] less likely to place the cost of compensating the Gallands on those [mobilehome owners] who benefited from the confiscatory rents. ..." This reason is speculative and ill founded. Although future rent adjustments may not fall with mathematical exactitude on those who have benefited from an excessively low rent ceiling, such adjustments nonetheless place the burden of compensating the landlord on the group that has, as a whole, most benefited, as well as on new tenants freely transacting to pay higher rents. (See *Kavanau*, *supra*, 16 Cal. 4th at p. 784.)

The Court of Appeal also stated that "the long and tortured path this case has taken to date militates against sending the matter back for further administrative proceedings addressing these ancient clams." But remand to the city is what *Kavanau* prescribes. It might be a different matter if there were evidence that a government agency had proven to be unwilling or unable to conduct the proper proceedings on remand. Here, on the contrary, Clovis has endeavored to amend its rent control ordinance to make it more efficient and expeditious. If Clovis engages, however, in further needless delay, then a writ of mandate to the trial court may legitimately request that the court intervene to set the proper rental rates, and the city may be liable for section 1983 damages.

[*52]

It is conceivable there might be a case when it is clear that resort to a *Kavanau* adjustment will not prevent a constitutional injury from occurring. For example, there may be an instance when, despite a landlord's reasonable efforts, confiscatory rent regulations sustained over a long period of time have caused the enterprise to fail. Under such circumstances, a section 1983 damages remedy may well be available. But nothing of that sort is evident in the record of the present case.

B. Excessive Procedural Costs

The Gallands claim, and the trial court found, that they were damaged in the amount of \$ 247,885 for costs incurred as a result of arbitrary and unreasonable administrative proceedings. Although difficult to pigeonhole, this claim is properly understood more as a substantive, rather than as a procedural, due process claim. A procedural due process claim possesses two

components: First, that an individual has been deprived of a constitutionally protected liberty or property interest; and second, that this deprivation, while not necessarily unconstitutional in and of itself, was rendered unconstitutional because it was undertaken without according the individual [*53] the appropriate hearing. (See, e.g., *Zinermon, supra*, 494 U.S. at pp. 133-134.) In the present case, however, the Gallands contend that the rent control process was itself an independent source of injury, by imposing on them exorbitant costs for what the trial court termed Clovis's "overly broad, unduly burdensome, arbitrary, unreasonable, and inconsistent requests for information" in order to obtain legitimate rent increases. In other words, the source of their injury was not the lack of procedural protections that led to the denial of a fair rent increase, but the fact that Clovis made demands on them as a condition of obtaining a rent increase that, in addition to being costly, were intrinsically arbitrary and irrational. This is best understood as a claimed violation of substantive due process.

The question, then, is whether Clovis's actions during the rent adjustment hearings of 1988 to 1990, independent of the outcome of those hearings (which was addressed in the previous part of this opinion), violated the Gallands' substantive due process rights. In order to answer this question, we must first understand in greater depth the nature of those rights. To do so, we begin [*54] with the recent clarification of the meaning of substantive due process in *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (*County of Sacramento*).

In *County of Sacramento*, the parents of a motorcycle passenger killed in a high-speed chase sued the county and the responsible officer for violations of substantive due process rights under section 1983. In rejecting their claim, the United States Supreme Court explained: "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action: ... [P] ... While due process protection in the substantive sense limits what the government may do in both its legislative [citation] and its executive capacities [citation], criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue. [P] Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' [citation], thereby recognizing the point [*55] made in different circumstances by Chief Justice Marshall, 'that it is a *constitution* we are expounding' ' [citations.]. Thus, ... we [have] said that the Due Process Clause was intended to prevent government officials from ' 'abusing

[their] power or employing it as an instrument of oppression." ' [Citations.] [P] To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which *shocks the conscience*.... [P] It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. ... We [have] explained that the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States,' [citation] and ... that 'our Constitution deals with the large concerns of the governors [*56] and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.' We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; *liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process*. [Citations.] It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." (*County of Sacramento, supra*, 523 U.S. at pp. 845-849, fn. omitted, italics added.)

The Gallands argue that *County of Sacramento* is inapposite inasmuch as it pertains to executive action, whereas Clovis's actions are what it characterizes as "quasi-judicial." Of course, most executive or administrative agencies perform quasi-judicial [*57] functions. These functions, when carried out by such agencies, are more appropriately designated as executive rather than legislative functions they are implementing legislation, not legislating. The Gallands' argument is valid, however, insofar as it recognizes that the determination of when a substantive due process violation occurs is contextual. As the *County of Sacramento* court itself suggested, a less egregious government action than was committed in that case may "shock the conscience" if the executive or administrative actor had an opportunity to deliberate. Thus, for example, the court recognized that the most appropriate substantive due process standard for injury inflicted on a person in custody may be "deliberate indifference," as it is under the Eighth Amendment, although the court

rejected the "deliberate indifference" standard in the context of high-speed chases. (*County of Sacramento, supra*, 523 U.S. at p. 851.)

Nonetheless, other cases both before and after *County of Sacramento* have affirmed in a variety of contexts, using a variety of verbal formulations, the principle that the arbitrary government conduct that triggers a substantive due process violation [*58] is not ordinary government error but conduct that is in some sense outrageous or egregious -- a true abuse of power. (See, e.g., *Fagan v. City of Vineland* (3d Cir. 1994) 22 F.3d 1296, 1306 ["shock the conscience" standard used for police pursuit, "deliberate indifference" standard for those in custody]); *Natale v. Town of Ridgefield* (2d Cir. 1999) 170 F.3d 258, 263 [rejecting substantive due process claim regarding issuance of building and zoning permits and affirming that "substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority"]; *Creative Environments, Inc. v. Estabrook* (1st Cir. 1982) 680 F.2d 822, 832-833 [ordinary state law error in land use planning process not a substantive due process violation]; *Uhlrig v. Harder* (10th Cir. 1995) 64 F.3d 567, 574 [in the context of arguable government negligence leading to murder of therapist by criminally insane mental patient, court affirms that substantive due process violation must be intentional or reckless and that the "degree of outrageousness and a magnitude of [*59] potential or actual harm [must be] truly conscience shocking"]; *Rivkin v. Dover Tp. Rent Leveling Bd.* (N.J. 1996) 143 N.J. 352, 671 A.2d 567, 574-575 (*Rivkin*) [rejecting claim that errors in mobilehome rent review process amounted to substantive due process violation, and affirming that "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights"]; *Clark v. City of Hermosa Beach* (1996) 48 Cal. App. 4th 1152, 1186 [zoning decision that violated state law in some respects but was not wholly irrational and did not shock the conscience was not a substantive due process violation].)

The New Jersey Supreme Court in *Rivkin, supra*, a case like our own in some respects, concisely explained why the mere finding that a government decision is arbitrary or capricious is not sufficient to establish a substantive due process violation. In that case, a mobilehome park owner brought an action against a municipality for denying a requested rent increase in a proceeding that was tainted with the open bias and conflict of interest of one of its members. In rejecting the owner's section [*60] 1983 substantive due process claim, the court stated: "It is a mistake ... to equate the concept of 'arbitrary and irrational' governmental land use decisions with the substantive component of the Due

Process Clause of the Fourteenth Amendment. In the land use context, the phrases 'arbitrary and irrational' or 'capricious' are often shorthand expressions for a standard of review that asks whether there are sufficient facts in the record to support the agency's action or whether the agency has followed its legislative mandate. ... [P] 'Frequently in our law a court on an appeal from action of a public agency will determine if the agency acted arbitrarily or capriciously. Accordingly while the words "arbitrary and capricious" may sound harsh, they are simply the standard of appellate review in particular cases.' [Citations.] [P] It is for this reason that ... substantive due process protections should be reserved for 'truly irrational' governmental abuses that bear no relationship to the merits of the pending matter." (*Rivkin, supra*, 671 A.2d at pp. 576-577.)

Moreover, the notion that a cognizable section 1983 action is found only in circumstances of outrageous government [*61] abuse applies even when it leaves a person seriously injured by government action or inaction without a remedy, as when the government is protected from liability by state law statutory immunities. Thus, in *Davidson v. Cannon* (1986) 474 U.S. 344, 346-348, 88 L. Ed. 2d 677, 106 S. Ct. 668, for example, a prisoner who was beaten by a fellow inmate after prison officials negligently failed to intervene, was denied any section 1983 relief, and was also unable to pursue a tort action due to state law immunity.

Against this background, we must formulate more precisely the appropriate substantive due process standard for determining when an administrative body charged with implementing a law acts erroneously in such a way as to injure an individual's economic and property interests. The shocks the conscience standard, although generally applicable, is not particularly helpful. As the *County of Sacramento* court recognized, that standard is "no calibrated yard stick," but merely "points the way." (*County of Sacramento, supra*, 523 U.S. at p. 847.) The standard seems especially apt with regard to assaults on bodily integrity by government officials when, as Justice [*62] Frankfurter stated, government action moves "too close to the rack and screw to permit of constitutional differentiation." (*Rochin v. California* (1951) 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205.) Is there a standard that can identify more precisely when the actions of an administrative body charged with implementing the law are arbitrary and conscience shocking in a constitutional sense?

We conclude that the court in *Silverman v. Barry* (D.C. Cir. 1988) 269 U.S. App. D.C. 327, 845 F.2d 1072 has given the most satisfactory answer to this question. In that case, a series of arguably unjustifiable administrative delays led to the frustration of the plaintiff's plans to convert his building from a rental into

condominium before a conversion moratorium was imposed. The court stated: "To succeed in a section 1983 suit for damages for a substantive due process ... violation, a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities. Only a substantial infringement of state law prompted by personal or group animus, or *a deliberate flouting of the law that trammels significant* [*63] *personal or property rights*, qualifies for relief under section 1983. [Citation.] Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute." (845 F.2d at p. 1080, italics added.) We conclude that the above standard is consistent with the Supreme Court's most recent pronouncements regarding substantive due process violations for executive action. Because substantive due process does not encompass "negligently inflicted harm" (*City of Sacramento, supra*, 523 U.S. at p. 848), but rather "only the most egregious official conduct," wherein government officials are " '[abusing their] power, or employing it as an instrument of oppression' " (*id.* at p. 846), it cannot be said to encompass governmental mistakes and bureaucratic errors that are something less than an abuse of power.

Roy v. City of Augusta, Maine (1st Cir.1983) 712 F.2d 1517, cited by the *Barry* court, illustrates this deliberate flouting of the law standard. In *Roy*, the Supreme Judicial Court of Maine decided that the city had wrongfully denied plaintiff the renewal of a license to operate [*64] a pool and billiard room that had met with some community opposition. In response to the resultant court order, the city clerk issued the license that the plaintiff had originally sought but that had expired in the interim. As a result, the plaintiff had to suspend his business activities, lost his property, and filed a section 1983 action against the city. The court reaffirmed the rule it had stated in *Creative Environments Inc. v. Estabrook, supra*, 680 F.2d 822, that ordinary state law error does not amount to a substantive due process violation. Nonetheless, the court reversed the district court's dismissal of the complaint, concluding that the plaintiff would have a valid claim of a substantive due process violation if it could "prove that his injury was due not merely to the law's delay and [the government's] errors but to defendants' deliberate disregard of the state's fundamental process." (*Roy v. City of Augusta, Maine, supra*, 712 F.2d at p. 1524.) n6

n6 This standard is similar to the rule we articulated in the takings contexts in *Landgate v. California Coastal Commission* (1997) 17 Cal. 4th 1006, 953 P.2d 1188. We held in that case that a delay in development caused by a

government agency's mistaken assumption of jurisdiction over a lot line adjustment was not a temporary taking of property under the Fifth and Fourteenth Amendments to United States Constitution. We evaluated the Coastal Commission's action against the standard that a denial of the development project that does not substantially advance a legitimate state interest constitutes a taking of property (see *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 704-705, 143 L. Ed. 2d 882, 119 S. Ct. 1624), and found that the Coastal Commission's actions, although erroneous, did in fact advance such an interest by contributing to the goals of coastal protection with which it was charged. (*Landgate*, at pp. 1023-1024.) We further held that the agency's legal error was not sufficient to constitute constitutional error, and that the latter would be implicated only if the agency's action was "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." (17 Cal. 4th at p. 1024.) We also held that "the proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." (17 Cal. 4th at p. 1022.) So too, in the case of substantive due process, evidence of deliberate flouting of the law is generally to be gleaned from the fact that a government agency's actions substantially and unreasonably diverged from clear legal rules, as the cases cited in the text immediately following illustrate.

[*65]

This standard is consistent with the holding of a series of cases, some of which are cited by the Gallands, that find substantive due process violations when municipalities refuse to issue nondiscretionary building permits. (See *Mission Springs, Inc. v. City of Spokane* (Wash. 1998) 134 Wn.2d 947, 954 P.2d 250 (*Mission Springs*); *Bateson v. Geisse* (9th Cir. 1988) 857 F.2d 1300, 1303-1305; *Bello v. Walker* (3d Cir. 1988) 840 F.2d 1124, 1129; *Scott v. Greenville County* (4th Cir. 1983) 716 F.2d 1409, 1419.) For example, in *Mission Springs, supra*, 954 P.2d 250, a developer that had run the entire gauntlet of zoning and planning requirements was denied building permits by the city council, even though it was clear from applicable statutes and ordinances, and from the advice of the city attorney, that

the city council had no discretion at that point to deny the permits. (*Mission Springs, supra*, 954 P.2d at pp. 252-259.) Such refusal to issue clearly nondiscretionary permits is properly characterized as a deliberate flouting of the law. n7 (See also *Cohan v. City of Thousand Oaks* (1994) 30 Cal. App. 4th 547, 561 [*66] [denial of development permits after numerous violations of the city's own procedures as well as state law amounts to a "cavalier ... disregard[]" of developers' substantive and procedural due process rights].) n8

n7 Other courts have found substantive due process violations by municipal regulators when it is clear from the record that the decision was motivated by economic conflict of interest or political animus rather than any legitimate governmental interest. (See *DeBlasio v. Zoning Bd. of Adjustment* (3d Cir. 1995) 53 F.3d 592, 601-602; *Brady v. Town of Colchester* (2d Cir. 1988) 863 F.2d 205, 215-216; but see *Rivkin, supra*, 671 A.2d 576-577 [blatant bias of one member of rent control board may violate state law but does not implicate substantive due process].) Without deciding whether the substantive due process standards enunciated or implicit in these cases are correct, we note that no such conflict of interest or political animus is alleged in the present case.

n8 The Gallands also cite *Sierra Lake Reserve v. City of Rocklin* (9th Cir. 1991) 938 F.2d 951, vacated in part by (1993) 987 F.2d 662 (*Sierra Lake Reserve*), for the proposition that arbitrary government conduct by itself can support a substantive due process violation. In that case, a rent increase was delayed by little over a year due to various procedural obstacles. (938 F.2d at pp. 953-954.) Most of the opinion focused on a reaffirmation of the court's doctrine that mobilehome rent control as commonly manifested in California was a physical taking of property, a doctrine repudiated by the United States Supreme Court in *Yee v. Escondido, supra*, 503 U.S. 519. The court's brief discussion of substantive due process concluded that, from the facts alleged in the complaint, "it is well within the realm of possibility that plaintiff could establish that the City's actions in processing the applications were wrongful or arbitrary," and therefore a basis for a substantive due process claim. (*Sierra Lake Reserve, supra*, 938 F.2d at p. 958.) Insofar as *Sierra Lake Reserve* can be taken to stand for the proposition that wrongful or arbitrary government action is per se a basis for a substantive due process claim, we believe it is

contrary to the principle recently clarified in United States Supreme Court and other cases discussed above, that only egregious conduct by government agencies can give rise to such claims.

[*67]

In cases such as the present, a deliberate flouting of the law may be said to have occurred if the city's demands for information and other procedural demands were so excessive and irrelevant to the regulatory task at hand as to lead a court to conclude that such demands were imposed not in order to obtain more information or increase the reliability of the eventual decision, but rather to obstruct or discourage landlords from either requesting or obtaining reasonable rent increases to which they are constitutionally entitled. We emphasize, however, that something more than mere "bureaucratic bungling" is required. Rent control boards, like other regulators, have need of information from those regulated, and the act of requesting information is itself a legitimate government activity. Even if, for example, the information requested is in retrospect excessive in relationship to the relevant inquiry, that does not of itself constitute a due process violation compensable under section 1983.

Consistent with the deliberate flouting of law standard announced today, we hold as a prospective rule that, if faced with a situation similar to this case, a landlord who believes that a rent board's [*68] information request is arbitrary and overly burdensome must register an objection to the request and give some explanation for the objection. This then puts the board on notice that the request is considered overreaching, and gives the board the opportunity to respond. If the board nonetheless insists on the information, then the landlord has the option of either submitting the information under protest or refusing to fully comply with information request. If the board then denies the application, either on the merits or based on the fact that not enough information had been provided, the landlord may then seek a writ of mandate overturning the decision. If the board based its decision on a failure to provide sufficient information, then the court would determine whether the information submitted was in fact sufficient. In making that determination, a court would look to analogous areas of law such as the law of administrative subpoenas. (See *Connecticut Indemnity Co. v. Superior Court* (2000) 23 Cal. 4th 807, 817; 2 LaFare, Search and Seizure (3d ed. 1996) § 4.13(d), pp. 740-741 [in determining whether a subpoena's request for information is excessive, courts perform [*69] a balancing test, considering factors including: (1) the scope of the investigation; (2) the probability that the records will reveal evidence helpful to the investigation; (3) the financial or economic burden that compliance imposes on the subpoenaed party].)

With the appropriate standard in mind, we review the trial court's determination that the Gallands suffered \$ 247,885 in damages from substantive due process violations because of the "arbitrary, unduly burdensome, and unreasonable actions" of Clovis in requiring expensive and unnecessary audits and other data during rent adjustment proceedings. We observe at the outset that these proceedings were, at the very least, inefficient. Neither the Ordinance nor any implementing regulations made clear precisely how the Gallands were to obtain a rent increase. This regulatory vacuum was filled by an ad hoc proceeding marked by Clovis's shifting, costly, and at times ill-considered requests for information. As a result, the Gallands lacked a timely and affordable means by which to seek rent increases.

But was the trial court correct in determining whether and in what amount damages were owed under section 1983? The amount of damages [*70] was based, as explained above, on a one-page document prepared by John Chamberlain, entitled *Costs of Fair Proceedings*, and on his testimony, that a fair rent adjustment proceeding should have cost no more than \$ 2,325 per year. Multiplying that by the three years in question, the total comes to \$ 6,975. That figure, subtracted from the \$ 254,860 that the Galland actually spent for the three years of rent proceedings, yielded the \$ 247,855 damages figure.

In light of the above discussion, the fallacy of the trial court's method of determining the existence and extent of the supposed substantive due process damages appears evident. Even assuming that the estimated cost of a "fair proceeding" were supported by substantial evidence, the fact remains that not every government action that fails to measure up to the ideal of a fair and efficient rent control proceeding inflicts a constitutional injury. Only those government actions that amount to a deliberate flouting of the law qualify for relief under section 1983 (*Silverman v. Barry*, *supra*, 845 F.2d at p. 1078), not "inadvertent errors, honest mistakes, agency confusion, [or] negligence" (*ibid.*) . n9 [*71]

n9 The dissent, inappropriately analogizing to tort law, opines that the trial court's measure of damages is correct. The dissent then concludes the above discussion is dicta, and the trial court is therefore free to impose on remand the same measure of damages that we here reject. (See *dis. opn.*, *post*, at p. 14.) Not so. We hold that although there may be some section 1983 damages owing based on the substantive due process claim, the trial court's method of calculating them was incorrect for the reasons explained immediately above, and for that reason

remand is necessary. Therefore, our conclusion that the trial court was incorrect in its calculation of damages is in no sense dicta, but is necessary to our holding, and on remand the court must follow the deliberate flouting of the law standard discussed in this opinion.

We observe that the determination of allowable increases under a rent control regime is a complicated calculation that often requires the production and analysis of extensive financial [*72] data. (See, e.g., *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal. 3d 184, 193, 197 Cal. Rptr. 284, 672 P.2d 1297 [mobilehome rent control ordinance includes review of "complex financial and tax data"]; see also Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 815 [the requirements that expense and income information for several years accompany individual rent adjustment petitions is inherent in some methods of determining fair return].) Nor is information comparing rental income and other data between mobilehome parks irrelevant to the task of adjusting rent levels. Indeed, the Gallands' own expert at trial used such data to argue that the permitted rental increases had been insufficient. Clovis's inquiries into the financial arrangements between the Gallands, Chamberlain, PMS, and the Rose Trust were also legitimate, allowing Clovis to understand whether certain transactions should be classified as income rather than expenses or investment. Moreover, the fact that some of the requested information proved not to be determinative of the rent regulators' ultimate decision does not establish [*73] constitutional injury.

Nor, unlike the building permit cases cited above, is it clear from the record that Clovis abused its authority by refusing to fulfill a clearly established, nondiscretionary duty toward the Gallands. On the contrary, the rate-setting process involves the exercise of considerable discretion and is, as we have recognized, "often hopelessly complex." (*Kavanau*, *supra*, 16 Cal. 4th at p. 778.)

Moreover, the Gallands themselves were not blameless. As discussed, their attempt at a rent increase in 1985 was rebuffed for failure to specify the cost increases that would justify such an increase, and they were sanctioned for frivolously appealing the trial court's decision. In spite of that fact, and in spite of the fact that the Clovis mobilehome rent control ordinance clearly provides that rent increases were to be justified by evidence of cost increases for such items as "utility rates, property taxes, insurance, advertising, governmental assessments, cost of living increases attributable to incidental services, normal repairs and maintenance,

capital improvements," etc. (Ord., § 5-13.06i), the Gallands were initially not forthcoming in providing such specific [*74] financial data.

All that being said, we conclude that we need not and should not decide whether any of the many information requests and other administrative requirements that the Gallands contend were arbitrary and burdensome violated their substantive due process rights. Rather, all we decide is that the trial court did not employ the proper standard of gauging constitutional injury. On remand, the court must consider in context, against the overall background of Clovis's dealings with the Gallands, each of the administrative expenses that the Gallands contend inflicted such injury to determine whether any such expenses were imposed in deliberate violation of the law.

In defense of the trial court's decision, the Gallands cite *Birkenfeld*, *supra*, 17 Cal. 3d at page 169. There, we held that one of the necessary components of a constitutional rent control ordinance is that it provide a mechanism to adjust rents to reflect changed conditions "without a substantially greater incidence and degree of delay than is practically necessary." (*Ibid.*) We invalidated in part an ordinance that failed to contain such a mechanism it provided no means of across-the-board rental adjustments [*75] in a city with more than 20,000 units under rent control, required an apartment-by-apartment consideration with no means by which a landlord could consolidate rent adjustment requests, and precluded the rent board from delegating adjustment hearings to staff. (17 Cal. 3d at pp. 169-172.) With such an inadequate mechanism, "many or most rent ceilings would be or become confiscatory." (17 Cal. 3d at p. 169.) The Gallands argue in effect that a rent-setting process that falls below the standard suggested in *Birkenfeld* is unconstitutional, and any costs incurred in complying with this substandard process should be recoverable in a section 1983 action.

Birkenfeld, however, is inapposite. There is no claim that Clovis's rent control ordinance is unconstitutional on its face. The issue is not whether Clovis's failure to adjust rents in a timely fashion has led to a confiscatory result a question we addressed in the previous part of this opinion. Rather, we are concerned in this part with whether the trial court was correct in awarding the Gallands \$ 247,855 in damages resulting from administrative and legal expenditures during the rent-setting process itself. In determining whether a constitutional [*76] injury has taken place, we follow the path of the United States Supreme Court and other courts in asking whether government agents have deliberately committed obstructive and unlawful acts designed to interfere with the Gallands' property rights.

n10

n10 The dissent appears to argue that landlords subject to rent control should be able to sustain a lighter burden in prosecuting a section 1983 action than other civil rights plaintiffs, proving only burdensome or dilatory conduct on the part of the government regulator. There is no basis for such a "landlord exception," nor does the dissent cite any section 1983 case in support of this exception. Alternatively, the dissent argues that the trial court should conclude that Clovis violated the deliberate flouting of the law standard because it failed to allow rent increases without undue burdens, contrary to *Birkenfeld*. For the reasons explained above, the question is not whether the Clovis rent control proceeding as applied to the Gallands conformed to the requirements set forth in *Birkenfeld*, but rather, if there was a lack of conformity, it amounted to ordinary government error or something more egregious amounting to a deliberate flouting of the law. The trial court must make this determination by looking concretely at Clovis's particular actions towards the Gallands.

[*77]

Finally, we note that even if Clovis's actions do not rise to a deliberate flouting of the law, the Gallands are not necessarily without a remedy. As explained above, Clovis cannot in this case arbitrarily exclude the administrative expenses it has imposed on the Gallands in calculating whether they are receiving a fair ROI. Thus, in determining whether a *Kavanau* adjustment is appropriate under the rent control regime in Clovis, the city must consider all such expenses. But administrative expenses can be charged directly to Clovis in the form of section 1983 damages only when the city imposes them in deliberate contravention of the law to obstruct the Gallands' constitutionally based property rights.

III. PROCEDURAL DUE PROCESS

The Gallands also claim that the rent adjustment process was marred by various procedural defects, such as reliance on ex parte materials. Of course, not all breaches of procedural due process by an administrative agency are prejudicial. (*In re La Croix* (1974) 12 Cal. 3d 146, 154, 115 Cal. Rptr. 344, 524 P.2d 816.) On the other hand, when the process itself is fundamentally unfair, even agency determinations supported by substantial [*78] evidence may be overturned; it is the very unfairness of the hearing that undermines the reliability of the administrative record being reviewed. (See *Gates v. Department of Motor Vehicles* (1979) 94

Cal. App. 3d 921, 926, 156 Cal. Rptr. 791.) In this case, however, if the procedural due process violations resulted in any injury, it was the identical injury discussed in the first part of our discussion, i.e., lost rents due to partial or complete denials of the 1988, 1989, and 1990 rent increase requests. Remand to the trial court and/or Clovis as outlined above will address this injury.

n11 IV. DISPOSITION

n11 Clovis also claims there is no procedural due process violation because the Gallands were afforded an adequate state law postdeprivation remedy, i.e., a writ of mandate under Code of Civil Procedure section 1094.5, that eventually allowed them the requested rent increases. (See *Zinermon, supra*, 494 U.S. at p. 125.) Because we determine there was no independent procedural due process injury, we need not address this question.

[*79]

The judgment of the Court of Appeal is reversed with directions to remand the cause to the trial court for proceedings consistent with this opinion, including remand to the City of Clovis if appropriate.

MOSK, J.

WE CONCUR: GEORGE, C. J.

KENNARD, J.

WERDEGAR, J.

CHIN, J.

CONCURRING AND DISSENTING OPINION BY JONES, J.

DISSENTING OPINION BY BROWN, J.

CONCURBY:
JONES

DISSENTBY:
JONES; BROWN

DISSENT:

CONCURRING AND DISSENTING OPINION BY JONES, J.

The majority holds, and I agree, that Clovis and its rent commission may have violated the Gallands'

substantive due process rights, in violation of 42 United States Code section 1983, **n1** by subjecting them to an arbitrary and unreasonably burdensome rent adjustment process. Relying on *Silverman v. Barry* (D.C. Cir. 1988) 269 U.S. App. D.C. 327, 845 F.2d 1072 and *Roy v. City of Augusta, Maine* (1st Cir. 1983) 712 F.2d 1517, the majority articulates an appropriate substantive due process standard for determining when an administrative process is so onerous as to establish constitutional injury. I further agree that it is for the trial court to assess on remand whether and to what extent [*80] "Clovis's shifting, costly, and at times ill-considered requests for information," (maj. opn., *ante*, 2001 Cal. LEXIS 530 at p. *69) "'bureaucratic bungling,'" (*id.*, 2001 Cal. LEXIS 530 at p. *67) and "unjustified delay" (*id.*, at p. 30), establish true governmental abuse of power.

n1 Section 1983 states, in part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"

The majority also holds, and I agree, that Clovis and its rent commission may have violated the Gallands' substantive due process rights by denying them a fair rate of return on their property.

However the majority goes on to hold that before the Gallands can state a cause of action for [*81] damages under section 1983 for this latter violation, they must first invoke and exhaust a judicially created administrative remedy, which the majority describes as a "Kavanau adjustment." **n2** (Maj. opn., *ante*, at p. 1.) Under this procedure, the Gallands must return to Clovis and its rent commission and seek, yet again, a future rent increase that is large enough to make up for the government's past refusal to approve rent increases reasonably calculated to provide the Gallands with a fair return on their property. Only after exhausting this administrative remedy and only if the potential rent increase awarded in that process fails to provide the Gallands with a fair rate of return, will they be able to state a cause of action under section 1983. Because I believe that holding violates binding authority from the United States Supreme Court, I respectfully dissent. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 369 P.2d 937.)

n2 The majority labels this a "Kavanau adjustment" because it is based on this court's holding in *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal. 4th 761, 941 P.2d 851.

[*82]

Section 1983 establishes a federal remedy for persons who believe their federal rights have been violated. The statute is unique because the remedy created by that section exists "independent of any other legal or administrative relief that may be available as a matter of federal or state law." (*Burnett v. Grattan* (1984) 468 U.S. 42, 50, 82 L. Ed. 2d 36, 104 S. Ct. 2924.) Acknowledging this unique character, the United States Supreme Court ruled in *Patsy v. Florida Board of Regents* (1982) 457 U.S. 496, 516, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (*Patsy*), that "exhaustion of state administrative remedies [is] not ... required as a prerequisite to bringing an action pursuant to [section] 1983."

The *Patsy* case involved a plaintiff who had filed her section 1983 suit in federal court. Following the *Patsy* decision, it was not clear whether a similar rule applied when a plaintiff filed his section 1983 action in state court. (Compare *Logan v. Southern Cal. Rapid Transit Dist.* (1982) 136 Cal. App. 3d 116, 124, 185 Cal. Rptr. 878, with *Bartschi v. Chico Community Memorial Hospital* (1982) 137 Cal. App. 3d 502, 508, 187 Cal. Rptr. 61.) [*83] That dispute was resolved in *Felder v. Casey* (1988) 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (*Felder*), where the issue was whether compliance with a state claim statute could validly be imposed as a prerequisite to a section 1983 action. The United States Supreme Court ruled that it could not. "The question before us today ... is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"? [Citations.] Under the Supremacy Clause of the Federal Constitution, 'the relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' [Citation.] Because the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and [*84] because its enforcement in such actions will frequently and

predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court." (*Felder, supra*, 487 U.S. at p. 138.)

Following *Felder*, virtually every court that has examined the issue has held that a plaintiff who files a section 1983 suit in state court need not first initiate or exhaust state administrative remedies. That was the ruling of this court in *Brosterhous v. State Bar* (1995) 12 Cal. 4th 315, 340-341, 906 P.2d 1242 (*Brosterhous*) ["we may not deny plaintiffs the right to a judicial action for relief in the first instance by imposing a requirement that the plaintiff initiate or exhaust state remedies before filing a section 1983 action"]. And that is also the holding in a host of other cases. (See, e.g., *McDaniel v. Board of Education* (1996) 44 Cal. App. 4th 1618, 1622; *Hall v. City of Dothan* (Ala. 1988) 539 So. 2d 286, 290; *Diedrich v. City of Ketchikan* (Alaska 1991) 805 P.2d 362, 368-369; [*85] *Zeigler v. Kirschner* (Ariz. 1989) 162 Ariz. 77, 781 P.2d 54, 60; *Arkansas State Medical Bd. v. Leipzig* (Ark. 1989) 299 Ark. 71, 770 S.W.2d 661, 662, disapproved on other grounds in *Villines v. Harris* (Ark. 2000) 340 Ark. 319, 11 S.W.3d 516, 520, fn. 4; *Patel v. Thomas* (Colo. 1990) 793 P.2d 632, 635; *Miller v. District of Columbia* (D.C. 1991) 587 A.2d 213, 215; *Howlett By and Through Howlett v. Rose* (Fla. 1990) 571 So. 2d 29, 30; *Brumage v. Woodsmall* (Iowa 1989) 444 N.W.2d 68, 70; *Earle v. Gunnell* (Md. 1989) 78 Md. App. 648, 554 A.2d 1256, 1258-1261; *Strictly Pediatrics v. De v. Hab. Assoc.* (Mo. 1991) 820 S.W.2d 731, 732; *Blackwell v. City of St. Louis* (Mo. 1989) 778 S.W.2d 711, 714; *Gibney v. Toledo Bd. of Educ.* (Ohio 1988) 40 Ohio St. 3d 152, 532 N.E.2d 1300, 1305; *Binkley v. City of Tacoma* (Wash. 1990) 114 Wn.2d 373, 787 P.2d 1366, 1376; *Casteel v. Vaade* (Wis. 1992) 167 Wis. 2d 1, 481 N.W.2d 476.) Indeed, the only cases that hold a plaintiff must exhaust state [*86] administrative remedies before filing a section 1983 suit are those which simply ignore *Felder*. (See *Peterson v. City of Pocatello* (Idaho 1990) 117 Idaho 234, 786 P.2d 1136, 1138-1139; *DeCoste v. City of Wahoo* (Neb. 1995) 248 Neb. 463, 534 N.W.2d 760, 761.)

The result compelled by *Patsy*, *Felder*, and *Brosterhous* is clear. Since a party need not exhaust state administrative remedies before filing a section 1983 suit in state court, this court cannot validly require the Gallands to invoke and exhaust a "Kavanau adjustment" before pursuing their section 1983 claim.

The majority does not discuss *Patsy*, *Felder*, or *Brosterhous* or explain why those decisions are inapplicable here. Instead the majority avoids the issue by redefining the problem. Specifically, the majority asserts the "Kavanau adjustment" does not "compensate

for a substantive due process injury that has already occurred"; rather it "prevents a substantive due process injury from occurring." (Maj. opn., *ante*, at p. 22.) The majority reasons that since a substantive due process injury has not occurred until the "*Kavanau* adjustment" proves inadequate to cure [*87] past confiscatory rent ceilings, there is no section 1983 claim.

I find this analysis unconvincing for two reasons. First, it is contrary to binding precedent from the United States Supreme Court. In *Zinermon v. Burch* (1990) 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975, the court stated clearly that a violation of a party's substantive due process rights is complete and actionable under section 1983 "when the wrongful action is taken." Here the "wrongful action" occurred when Clovis and its rent commission arguably precluded the Gallands from obtaining a fair rate of return on their property. That action is complete and remains complete regardless of whether Clovis and its rent commission are given the opportunity to mitigate the harm they caused by granting the Gallands future rent increases.

Second, as noted above, section 1983 states, in part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution [*88] and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

...." (Italics added.) I submit that upon the imposition of a constitutionally confiscatory rent ceiling, a right of action exists under the express language of section 1983. No further administrative remedies need be exhausted before a cause of action is stated under section 1983.

The majority also tries to find support for its conclusion in *Kavanau v. Santa Monica Rent Control Bd.*, *supra*, 16 Cal. 4th 761. "It would be incongruous," the majority asserts, "for us to conclude, on the one hand, as we did in *Kavanau*, that a landlord permitted adequate rent adjustments has not suffered a constitutional injury under the takings clause, but, on the other hand, that he or she has suffered such an injury under the due process clause." (Maj. opn., *ante*, at p. 23.) I respectfully disagree. For the many reasons cited by Justice Brown in her dissent, *post*, "the *Kavanau* adjustment" cannot supplant section 1983. *Kavanau* applied *takings* jurisprudence to strikingly different factual and procedural circumstances. The *Kavanau* [*89] court noted that under well-settled takings law, the benefits a property owner receives in connection with regulatory

activity may sometimes offset the burdens imposed by that regulation and thus negate a taking. (*Kavanau*, *supra*, 16 Cal. 4th at p. 782.) The *Kavanau* court extended that principle and held future rent increases could offset a past temporary taking. (*Id.* at p. 783.) While "the *Kavanau* adjustment" may be appropriate to remedy a *takings* claim for imposition of a confiscatory rent ceiling, no such state remedy may be imposed as a prerequisite to a section 1983 claim. As I have explained, *Patsy*, *Felder*, and *Brosterhous* dictate otherwise.

Finally, the result the majority reaches is unjust under the facts of this case. More than 12 years ago, the Gallands sought a modest rent increase amounting to only pennies per day. Clovis and its rent commission responded by forcing the Gallands into a bloated regulatory process that was "so time consuming, burdensome, and expensive that the potential benefits of participating in [it] were nonexistent and illusory" n3 The majority now says that process is still not complete and [*90] that the Gallands must return, yet again, to Clovis and its rent commission, "the very ... officials whose hostility to [their] rights precipitated their injuries." (*Felder*, *supra*, 487 U.S. at p. 147, *fn.* omitted.) I believe that result is unauthorized and unjust. Accordingly, I dissent.

n3 The trial court expressly ruled that Clovis and its rent commission violated the Gallands' due process rights by, among other things, "making the rent review process so time consuming, burdensome and expensive that the potential benefits of participating in the process were nonexistent and illusory"

JONES, J. *

* Presiding Justice, Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISSENTING OPINION BY [*91] BROWN, J.

In this case, we decide whether and in what circumstances 42 United States Code section 1983 (section 1983) provides a remedy for an unconstitutional and confiscatory restraint on prices--an issue the United States Supreme Court has not definitively resolved. The majority holds that, before a plaintiff may obtain damages under section 1983, he or she must first exhaust administrative remedies by seeking regulatory relief from the same agency that imposed the confiscatory

price regulations in the first place. Moreover, this exhaustion requirement applies even where unfairness in the administrative hearing process was the source of the constitutional injury. This conclusion directly contravenes *Patsy v. Florida Board of Regents* (1982) 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (*Patsy*), an inconsistency that is only explainable in terms of the reduced importance the majority gives to the constitutional interest that is at stake. Thus, in the latest of a series of decisions rejecting the claims of property owners, this court now refuses to enforce federal civil rights remedies when it comes to confiscatory regulations. I [*92] respectfully dissent.

INTRODUCTION

Sometimes, whether because of bias, incompetence, political expediency, bureaucratic malice, or some combination of oppressive practices, administrative agencies prove themselves incapable of regulating private affairs in a way that comports with fundamental justice. The City of Clovis (Clovis) subjected the Gallands to a rent adjustment procedure that was so "time-consuming, burdensome, and expensive" as to deprive them of due process of law. Frustrated by the patent unfairness of this administrative process, they sought recourse from the courts, and the trial court, recognizing the gross injustice that had occurred, awarded the Gallands compensation. The Court of Appeal affirmed. We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure and to announce a new due process standard that has never applied to rent control.

It is long settled that a rent control scheme is confiscatory and violates due process if it is not "capable of providing adjustments in maximum rents without a substantially [*93] greater incidence and degree of delay than is practically necessary." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 169, 130 Cal. Rptr. 465, 550 P.2d 1001 (*Birkenfeld*) .) The majority rejects this standard, noting that *Birkenfeld* involved a facial challenge to a rent control scheme, whereas the Gallands are seeking "damages resulting from ... the rent-setting process itself." (Maj. opn., ante, at p. 46.) But if a rent control scheme is unconstitutional on its face for failing to provide a streamlined rent adjustment procedure, then it is all the more unconstitutional when a concrete factual record establishes the scheme's inefficiency and inadequacy in practice. Surely, if Clovis had adopted regulations outlining all the convolutions of the rent adjustment procedure it imposed on the Gallands, including the unexplained delays and shifting demands

for information, then those regulations would have been facially unconstitutional under *Birkenfeld*. The fact that Clovis kept its arcane procedures secret, even seeming to make them up as it went along, certainly does not militate a different conclusion in Clovis's favor.

Clovis said to the Gallands, [*94] in effect: Before you can raise rents, you must prove you're not making too big a profit, and we will make it impossible, as a practical matter, for you to meet this burden of proof. The Gallands responded to Clovis's regulatory arrogance in much the same way as Lewis Carroll's Alice did when she found herself in a similar situation: " 'I don't think they play at all fairly,' Alice began, in rather a complaining tone, '... and they don't seem to have any rules in particular; at least, if there are, nobody attends to them--and you've no idea how confusing it is' " (Carroll, *Alice's Adventures in Wonderland* (1985 ed.) p. 115.) To which the majority replies: Go back and try again.

THE "KAVANAU ADJUSTMENT" DOES NOT SUPPLANT SECTION 1983

In *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal. 4th 761, 782, 941 P.2d 851 (*Kavanau*), this court held that future rent adjustments can compensate for past confiscatory rents, thus dispelling any due process violation that may have occurred in that case and making it unnecessary for us to decide whether a due process violation constitutes a per se taking requiring just compensation under the state [*95] and federal takings clauses. The majority now extends *Kavanau* far beyond its original modest scope, concluding, in a very different factual context, that the possibility of future rent adjustments precludes a section 1983 action. (Maj. opn., ante, at p. 25.)

The differences between this case and *Kavanau* are manifest. First, *Kavanau* involved a highly idiosyncratic fact pattern. In that case, Earl Kavanau had challenged the constitutionality of a 12 percent per year cap on rent increases. The cap did not prevent landlords from imposing very large rent increases, but it required those rent increases to be phased in over a number of years. That regulation was relatively modest as compared to the obstructionist practices of Clovis in this case. Nevertheless, a lower court had found that the 12 percent cap violated due process and that judgment was final. We had before us *Kavanau*'s subsequent takings claim based on the time period during which the 12 percent cap was in effect. The *Kavanau* majority did not believe that the 12 percent cap constituted an actual due process violation or a taking (*Kavanau, supra*, 16 Cal. 4th at pp. 779-781), but needed to address [*96] *Kavanau*'s

argument that the previous judgment in his favor entitled him automatically to a finding of a taking requiring just compensation. (*Id.* at p. 781.) In short, we needed to determine the effect in takings law of a due process judgment that we thought was wrong. In that unusual and convoluted context, the *Kavanau* majority reasoned that the relatively minor, if any, confiscation that may have occurred as a result of the due process violation could easily be dispelled through future rent adjustments, and therefore a takings clause remedy was inappropriate. It is one thing to reach the conclusion we reached in *Kavanau* that future rent adjustments can dispel a minor (or nonexistent) due process violation and thus obviate a related takings claim. It is quite another thing to extend that same conclusion to all due process violations, no matter what their scope or procedural posture.

Second, *Kavanau* was based on circumstances unique to takings jurisprudence. For example, we noted that under established takings law a court must consider the "reciprocity of advantage" that a party receives from a regulation of property before determining that a taking [*97] has occurred. (*Kavanau*, *supra*, 16 Cal. 4th at p. 782.) In light of that principle, the *Kavanau* majority concluded that the possibility of future rent adjustments was a potential benefit that negated *Kavanau*'s takings claim, at least at the stage of the proceeding that was then before us. No similar "reciprocity of advantage" (*ibid.*) principle applies under the due process clause. In this sense, our decision reflected principles of takings law that simply do not apply here.

Third, in *Kavanau* we made a specific finding that the rent control scheme at issue in that case was sufficiently flexible to allow the agency to take past confiscatory rent levels into account when setting future rent levels. (*Kavanau*, *supra*, 16 Cal. 4th at p. 784.) The majority makes no similar finding here.

Fourth, *Kavanau* was not a case in which the agency's ability to provide a fair rent adjustment procedure was brought into question. Rather, the agency had merely enforced a 12 percent cap that turned out to be confiscatory. Here, on the other hand, flaws in Clovis's rent adjustment mechanism are the very basis of the due process claim. In this circumstance, it defies [*98] logic to impose the remedy of further rent adjustment proceedings. Further administrative proceedings cannot possibly compensate for an injury caused by excessive administrative proceedings. In *Kavanau*, we acknowledged that the remedy of future rent adjustments might prove to be inadequate, in which case other remedies would be appropriate. (*Kavanau*, *supra*, 16 Cal. 4th at pp. 782-783.) Here, the remedy of future rent

adjustments is inadequate as a matter of law in light of Clovis's past conduct.

Finally, and most importantly, *Kavanau* did not involve a section 1983 claim. Section 1983 arose out of the sad failure of southern states in the aftermath of the Civil War to enforce the federal Constitution and protect basic civil rights. (*Wilson v. Garcia* (1985) 471 U.S. 261, 276-277, 85 L. Ed. 2d 254, 105 S. Ct. 1938.) A long series of high court precedents have bolstered the section 1983 remedy, precedents the majority would no doubt vigorously defend. The thrust of these decisions is that, far from relegating plaintiffs to the same corrupt system that inflicted their injury, section 1983 exists to give plaintiffs an adjudicative alternative that will [*99] ensure protection of their rights. (See, e.g., *Zinermon v. Burch* (1990) 494 U.S. 113, 124-125, 108 L. Ed. 2d 100, 110 S. Ct. 975; *Felder v. Casey* (1987) 487 U.S. 131, 147-148, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (*Felder*); *Patsy*, *supra*, 457 U.S. at pp. 502-507.) Therefore, as the high court stated in *Felder* at page 147, "there is simply no reason to suppose that Congress ... contemplated that those who sought to vindicate their federal rights ... could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." The majority can only avoid the clear instruction of these precedents if it can somehow find that no constitutional violation occurred here. Thus, in a formidable example of judicial sleight of hand, the majority argues, in effect, that a due process violation is not a due process violation. The majority reasons, by analogy to *Kavanau*, that there may be no due process violation when rents are averaged over a number of years. (Maj. opn., *ante*, at pp. 22-25.) Therefore, even if there is a manifest due process violation during a particular [*100] year (or even a series of years), that due process violation may disappear when future years are taken into consideration. Now you see it; now you don't.

The majority's interpretation of due process law is in error. It is true that, *after the fact*, a regulatory scheme may prove nonconfiscatory when the returns in a few years are averaged together, but that concession is very different from holding that in a particular confiscatory year (or after a series of confiscatory years) an investor may not pursue federal remedies and instead must wait and hope that the confiscatory regulations will be sufficiently relaxed in the future to make up the difference. How long must the investor wait? The Gallands have so far had to wait almost 13 years, and the majority tells them to keep on waiting. Certainly, if we infinitely expand the number of years that may be averaged together, there is always the possibility that future rent adjustments will compensate for past

confiscatory rent levels. Must a business enterprise prove it is on the verge of bankruptcy before it can obtain relief? Even then, would the majority deny relief, arguing the business was undercapitalized? In effect, the majority [*101] holds that investors must bear the brunt of a confiscatory regulation by providing a business with sufficient capital to survive a series of lean years. But constitutional protections should not (and do not) prefer large business enterprises over small ones.

I doubt the majority would be so quick to eviscerate section 1983 in a classic civil rights case. Suppose a Black firefighter were denied promotions and raises in a city with a long history of discrimination against Blacks, and the trial court awarded damages under section 1983. Would this court reverse and tell the firefighter: You have no remedy under section 1983; instead, you have to go back to the city and petition for extra promotions and raises that will diffuse the incipient constitutional violation? Or, to make the comparison to this case more precise, what if a city discriminated against a Black-owned business in the award of city contracts? Assuming the business was sufficiently capitalized to survive a series of lean years, would we deny a section 1983 claim and tell the business to petition for extralucrative contracts in the future to "dispel[]" the past discrimination? (Maj. opn., ante, at p. 23.) [*102] It is no answer to say that this case concerns merely an economic injury and that race is a "suspect class" requiring different treatment under the Constitution from price regulation. (2001 Cal. LEXIS 530 at pp. *39, fn. 3.) Arbitrary and unfair treatment by the government is not merely an economic injury; it is also, like race discrimination, an affront to personal dignity. While the standards for finding a constitutional violation may differ, the Constitution does not establish a hierarchy of rights in which some are deemed more worthy of protection than others.

Moreover, as the race discrimination examples illustrate, what is essentially an exhaustion requirement cannot be disguised by the simple trick of redefining the constitutional right so no violation occurs until after administrative remedies have been exhausted. To do so would render the holding in *Patsy* meaningless. Here, for example, the administrative adjustment of future rents is unquestionably remedial, not preventive. It follows a judicial finding that the administrative agency's rates are "confiscatory" (maj. opn., ante, at pp. 1, 22, 25, 29-31), and its express purpose is to "compensate" (id. at pp. 1, 19, [*103] 23, 31) for the confiscation, thereby ensuring a fair return on investment. Moreover, in light of the intervention of a reviewing court, the adjustment of future rents cannot be characterized merely as an ordinary part of the rate-setting process. Not surprisingly,

in *Kavanau* we expressly referred to this adjustment as a "remedy." (*Kavanau*, supra, 16 Cal. 4th at pp. 767, 782-786.) Indeed, the only reason to characterize it in other terms is to avoid the mandate of *Patsy*. Perhaps conscious of the weakness of its conclusion in this regard, the majority euphemistically refers to this remedy as the "*Kavanau* adjustment" (maj. opn., ante, at p. 1), though the majority concedes it is really a "remedy." (Id. at pp. 22, 25, 31, 47.)

But whether we use the term adjustment or remedy, a fair resolution of a constitutional breach cannot include sending an aggrieved party back to the same administrative system that caused the injury in the first place. On the contrary, the driving purpose of section 1983 is to get the plaintiff out of the corrupt state system where constitutional rights are being violated and into federal court where wrongs can be fairly redressed. [*104] (*Patsy*, supra, 457 U.S. at pp. 503-505.) Although the Gallands have opted to pursue their section 1983 claim in state court, the principle no less applies. (*Felder*, supra, 487 U.S. at p. 147.) The essence of section 1983 is to liberate a plaintiff from an abusive adjudicative mechanism, which Clovis's rent adjustment procedure has unquestionably proved itself to be. "A state law that conditions the right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of [section 1983], is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." (*Felder*, supra, 487 U.S. at p. 153.) Thus, instead of the judicial oversight that section 1983 was intended to afford, we now have judicial abdication, while plaintiffs are left to grind away at the state administrative level.

Moreover, the remedy of adjusting future rents is unfair in its operation, except perhaps in a case like *Kavanau* where the due process violation is negligible or nonexistent. Here, it is Clovis that violated due process, not the [*105] tenants, and Clovis should pay the damages. This is particularly true, because the source of the violation was in large part the imposition of excessive procedural costs that did not benefit the tenants. (Cf. *Kavanau*, supra, 16 Cal. 4th at p. 784 [finding it appropriate for tenants who benefited from unconstitutionally low rents to bear the burden of the remedy].) Unless we place the burden of the remedy on Clovis, we create no disincentive to prevent the sort of regulatory abuse that occurred here. Under the majority's opinion, a city, when regulating economic affairs, is pretty much free to disregard the due process rights of politically disfavored parties, and if questioned on this behavior—which may never happen, considering the

extraordinary efforts the Gallands had to exert in order to finally get a fair hearing--the city merely has to ease up on its regulations. Moreover, if the regulations continue to be confiscatory, which is not unlikely in light of the political forces that gave rise to the initial confiscation, it is "dej vu all over again." (Araiza et al., *The Jurisprudence of Yogi Berra* (1997) 46 Emory L.J. 697, 714.) The aggrieved [*106] party is back to square one, with more lengthy and burdensome administrative proceedings, more writ petitions, and more appeals.

Thus, under the majority view, landlords now have to win twice, first proving in court that the rent control scheme was confiscatory, then proving in a second court proceeding that the regulatory relief offered by the agency was inadequate. Meanwhile, new claims may well arise while prior claims are being adjudicated, remedied, and then readjudicated. The claims cannot be resolved as fast as they arise, creating a sort of "feedback loop" in which justice for landlords is the ever-receding dream. In this case, for example, we have dipped into a

13-year-old proceeding, made some solemn pronouncements, and then turned our attention to other matters, but for the Gallands, it is a quest for justice that will never end.

All of these concerns lead me to wonder if we took the wrong turn long ago when we began treating rent control like any other price-regulated industry. The result of that decision has been to obscure injustices that may not arise in the context of utility rate regulation but do arise where regulations affect private transactions in [*107] residential property. Landlords are not producers of a commodity, they are owners of real estate, and the state's action in enforcing rent control looks much more like an exercise of the sovereign's power of eminent domain than an exercise of its police power. In short, the unique issues that arise in the context of real estate warrant unique treatment of rent control under the Constitution. While it may be too late to change direction at this point, we should at least exercise the caution of magistrates and conserve what we can of constitutional constraints.

THE SUBSTANTIVE DUE PROCESS STANDARD

Having found no confiscation, the majority turns to whether the "bureaucratic bungling" (maj. opn., *ante*, at p. 41) that occurred here independently constituted a violation of substantive due process. The majority weighs various substantive due process standards, including "arbitrary" (*id.*

at p. 33), "shocks the conscience" (*id.* at p. 34, italics omitted), and "outrageous or egregious" (*id.* at p. 35), but

finally settles on "a deliberate flouting of the law" (*id.* at p. 38, italics omitted) as the appropriate verbal formulation. In so [*108] doing, the majority unnecessarily complicates the question before us. These various standards may be valid, but they are all subsumed within the more specific standards that apply in the context of price regulation (see, e.g., *Power Comm'n v. Hope Gas Co.* (1944) 320 U.S. 591, 602-603, 88 L. Ed. 333, 64 S. Ct. 281 (*Hope Gas*); *Power Comm'n v. Pipeline Co.* (1942) 315 U.S. 575, 584-585, 86 L. Ed. 1037, 62 S. Ct. 736), including the standard we articulated in *Birkenfeld* that a rent adjustment mechanism may not be prohibitively burdensome (*Birkenfeld, supra*, 17 Cal. 3d at p. 171) or fraught with "a substantially greater incidence and degree of delay than is practically necessary." (17 Cal. 3d at p. 169.) Putting the point another way, a rent adjustment mechanism that does not satisfy *Birkenfeld* is by definition a deliberate flouting of the law in violation of due process--the law in question being the constitutional right of investors to a fair return. In this regard, it is also worth noting that Clovis had ample opportunity to reflect upon its decisions, and therefore, as the majority concedes (maj. opn., *ante*, at p. 35), it is held [*109] to a stricter standard under the due process clause.

The majority's casual sidestepping of *Birkenfeld* flows, I think, from a basic conceptual error. The majority divides the Gallands' right to relief into categories based on the damages the trial court awarded. Thus, the majority treats the allegation that the rent control scheme was confiscatory separately from the allegation that the rent adjustment procedure was unfair. But *Birkenfeld* holds that an unfair, burdensome, and slow rent adjustment procedure is one of many ways a rent control scheme can be confiscatory. (*Birkenfeld, supra*, 17 Cal. 3d at pp. 169-171; see also maj. opn., *ante*, at p. 47.) Moreover, the costs associated with such a rent adjustment procedure are one of the operating expenses that the regulatory agency must take into consideration when determining fair return. (Maj. opn., *ante*, at pp. 28-29, 47.)

In short, the majority's categories collapse into one another. We do not have before us a trial court finding of two separate injuries for which we must articulate separate legal standards. Rather, we have before us a single finding that Clovis's unfair, burdensome, and slow rent [*110] adjustment procedure rendered the rent control scheme confiscatory both by increasing the Gallands' costs and by preventing or delaying meritorious rent increases. Pursuant to this one finding, the Gallands were entitled to recover the high costs they incurred complying with the unfair procedure and also the additional amount necessary to bring their actual

return on investment up to the level of a "fair return" (maj. opn., *ante*, at p. 19), and this remedy is what the trial court awarded.

Having unnecessarily divided the Gallands' right to relief into categories, the majority addresses Clovis's abusive rent adjustment procedure without reference to price regulation cases such as *Birkenfeld*, relying instead on substantive due process standards that fit this case imperfectly (maj. opn., *ante*, at pp. 33-40) and the law governing administrative subpoenas. (*Id.* at p. 42.) The majority then compounds its error by articulating a new "prospective rule" requiring writ proceedings to remedy any future abuses in rent adjustment processes. (*Ibid.*) This prospective rule, like the rule requiring the Gallands to pursue future rent adjustments to remedy past confiscatory rent [*111] regulation, conflicts with *Patsy*, *supra*, 457 U.S. 496, by forcing the victims of a constitutional breach to exhaust state law remedies prior to pursuing section 1983 remedies.

FURTHER PROCEEDINGS AFTER REMAND

Finally, I offer a few comments so that the error of the majority opinion is not further compounded after remand. The majority does not in principle bar recovery of all the amounts the trial court awarded, including costs associated with Clovis's unfair rent adjustment procedure, lost rental income (to the extent rents did not provide a fair return), prejudgment interest, postjudgment interest, and costs and fees associated with the judicial proceedings. All these losses are theoretically recoverable under the majority's opinion if adequately proved. The majority merely holds that the trial court must apply the deliberate flouting-of-the-law standard and that lost rental income (including associated interest) must be recovered through future rent adjustments.

Significantly, the majority's rule requiring writ proceedings to remedy future abuses in rent adjustment procedures (maj. opn., *ante*, at p. 42) is *prospective* only. Therefore, the trial [*112] court in this case can still award section 1983 damages, interest, and attorney fees if it concludes Clovis's unfair rent adjustment procedure deliberately flouted the law (maj. opn., *ante*, at p. 47), which I think it did--the law in question being the constitutional right to a rent adjustment procedure that is not prohibitively burdensome or fraught with unreasonable delays. (*Birkenfeld*, *supra*, 17 Cal. 3d at pp. 169-171.) In this regard, we must consider that the rent adjustment procedure at issue here cost significantly more than the rent increases the Gallands were seeking, and its costs are still mounting. Because these costs can be passed through to tenants (maj. opn., *ante*, at pp. 28-29, 47), Clovis's actions merely generated future rent

increases bigger than the ones under consideration. That sort of senseless regulatory conduct can only be explained as a deliberate flouting of the law, and an award of section 1983 damages is appropriate. Having won compensation for the high cost of the rent adjustment procedure, the Gallands can then petition for future rent increases that will not only assure a fair return in the year of the petition but also fully compensate [*113] them (including interest if necessary) for lost income resulting from the confiscatory rent ceilings the trial court already identified.

The majority discusses flaws it perceives in the trial court's measure of damages (maj. opn., *ante*, at pp. 42-45), arguing that a rent adjustment procedure may be inefficient and expensive without being unconstitutional, and therefore damages should not be determined by comparison to the cost of an ideal procedure. (*Id.* at p. 43.) First, I note Clovis did not raise this issue in its petition for review. Furthermore, all this discussion is, in a sense, beside the point. The Gallands are entitled under the Constitution to a fair return over and above their costs, *including the cost of the unfair rent adjustment procedure*. (*Id.* at pp. 28-29, 47.) Therefore, whatever portion of this cost they do not recover as a damage award, they can recover through future rent adjustments. (*Id.* at p. 47.)

Moreover, I think the majority is wrong as a legal matter to limit damages as it does. The exacting constitutional standard for establishing a due process violation should not serve to restrict damages once the high threshold is met. Rather, [*114] once the threshold is met, damages should be sufficient to compensate the plaintiff fully for the constitutional wrong, as well as to create the appropriate disincentive for the state. Would the majority argue in a tort case that the damages for negligence are not the full amount necessary to compensate the plaintiff for the injury, but rather some discounted amount that accounts for injuries the defendant might have inflicted without acting negligently? Obviously not. Accordingly, I think the difference between the actual cost of the unconstitutional proceeding and the projected cost of a reasonably efficient proceeding was an appropriate measure of economic damages for the trial court to apply. Because the issue was not raised in the petition for review and in light of the majority's decision to remand on the question of liability (maj. opn., *ante*, at p. 45), I take its discussion of the measure of damages (*id.* at pp. 42-45) to be dictum, despite the majority's assertions to the contrary. (2001 Cal. LEXIS 530 at p. *71, fn. 9.) I do not see how the majority can remand on the question of liability and nevertheless have its discussion of damages be "necessary to [its] holding." [*115] (2001 Cal. LEXIS 530 at pp. *71, fn. 9.)

The majority also questions the trial court's assumption that 20 to 25 percent per year represented a fair return in this case. (Maj. opn., *ante*, at pp. 26-28.) While much of this discussion is valid, I disagree that a confiscatory taking occurs " 'only when the owner has been deprived of substantially all reasonable use of the property.' " (2001 Cal. LEXIS 530 at p. *44, quoting *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 686, 209 Cal. Rptr. 682, 693 P.2d 261.) That statement has been repudiated by subsequent decisions of the high court, as well as this court. (See, e.g., *Kavanau, supra*, 16 Cal. 4th at p. 774.) Moreover, even for a regulated industry, a return of 20 to 25 percent is not per se excessive. Rather, it may be appropriate if the business enterprise is particularly risky or a high return is otherwise necessary to attract capital. (*Hope Gas, supra*, 320 U.S. at p. 603.) A seemingly high return may also be appropriate if, as occurred here, the trial court defines initial investment as down payment absent borrowed capital, rather than as total investment from all sources. On the other hand, a return matching the [*116] return of readily available certificates of deposit would presumably be confiscatory, because it would not compensate investors for the comparatively greater uncertainty, aggravation, and lack of liquidity associated with renting residential property. Because of these complexities, I would defer to the trial court's resolution of this factual question.

Finally, I think it important to emphasize that Clovis must change its behavior or risk an even larger damage

award. If, in the course of future rent adjustment proceedings, Clovis continues to interpose unfair procedural obstacles or does not permit adequate rent increases to assure a return that will offset any confiscatory returns the Gallands already suffered (including, if necessary, interest), or if market forces will not permit the Gallands to recoup their losses within a reasonable period of time, they can return to the courts and allege both section 1983 and takings claims. (Maj. opn., *ante*, at p. 30; see also *Kavanau, supra*, 16 Cal. 4th at pp. 782-783, 785.)

CONCLUSION

Section 1983 is supposed to stand as "a guarantor of the basic federal rights of individuals against incursions by state power. [*117] " (*Patsy, supra*, 457 U.S. at p. 503.) The real mischief of the majority's opinion lies in its disparate treatment of property rights when enforcing section 1983. Fair and nonconfiscatory price regulation is not such a slippery thing that it should be subject to vastly different treatment from other constitutional values. The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, no partiality among its protections of liberty. Nevertheless, today's majority consigns economic rights to a secondary status that can only reflect opposition to the balance the framers carefully struck between public and private power.

BROWN, J.

**STATE COMPENSATION INSURANCE FUND, Petitioner, v. THE SUPERIOR
COURT OF ORANGE COUNTY, Respondent; SCHAEFER AMBULANCE
SERVICE, INC., et al., Real Parties in Interest.**

S082133

SUPREME COURT OF CALIFORNIA

**2001 Cal. LEXIS 421; 103 Cal. Rptr. 2d 662; 2001 Cal. Daily Op. Service 945;
2001 Daily Journal DAR 1253**

February 1, 2001, Filed

PRIOR HISTORY:

[*1] Superior Court of California, Orange County.
Court of Appeal of California, Fourth Appellate District,
Division Three. G025861, Super.Ct.No. 725063. C.
Robert Jameson, Judge.

Original Opinion of November 10, 1999, Reported at:
1999 Cal. LEXIS 7792.

DISPOSITION:

The judgment of the Court of Appeal summarily denying
the petition for writ of mandate is affirmed and the order
to show cause issued November 10, 1999, is discharged.

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JUDGES:

BROWN, J. WE CONCUR: GEORGE, C.J., MOSK, J.,
KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN,
J.

**OPINIONBY:
BROWN**

OPINION:

The issue in this case is whether a workers' compensation
insurer is immune from civil liability under Insurance
Code n1 section 11758 for allegedly misallocating an

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insured employer's expenses and reporting that misinformation to a ratemaking organization, resulting in higher premiums for its insured. The [*3] trial court denied petitioner State Compensation Insurance Fund's (SCIF) motion for judgment on the pleadings, and the Court of Appeal summarily denied the insurer's petition for writ of mandate and request for immediate stay. While the question is close, we conclude section 11758 does not immunize SCIF from civil liability under these circumstances. We therefore affirm the judgment of the Court of Appeal summarily denying the petition for writ of mandate and discharge the order to show cause.

n1 All statutory references are to the Insurance Code unless otherwise indicated.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to January 1, 1995, minimum premiums for workers' compensation insurance were set by the Department of Insurance. **n2** (Former § 11736, Stats. 1977, ch. 459, § 3, p. 1514, repealed by Stats. 1993, ch. 228, § 1, p. 1793.) In calculating premiums, the department relied on the Workers' Compensation Insurance Rating Bureau (Rating Bureau) to gather and process the relevant [*4] financial information from insurers. SCIF is a public enterprise fund, established by law as a competitive insurance carrier. (Hanna & Tancor, Cal. Law of Employee Injuries and Workers' Compensation (2d rev. ed. 2000) § 1.20[1], pp. 1-70 to 1-71.)

n2 Following a substantial overhaul of the workers' compensation laws in 1993, an insurer may now charge any premium that does not tend to impair or threaten its solvency or tend to create a monopoly. (§ 11737, subd. (b).)

In April 1994, plaintiffs Schaefer Ambulance Service, Inc., Sectran Security, Inc., and Universal Courier Limited (collectively Schaefer), on behalf of themselves and all others similarly situated, filed a first amended class action complaint against SCIF. Schaefer alleged breach of the implied covenant of good faith and fair dealing and negligence, and sought declaratory relief, compensatory and punitive damages, attorney fees, and costs.

Plaintiffs alleged they were "typical members of an ascertainable class of approximately [*5] 300,000 business entities within the State of California who have purchased workers' compensation liability insurance from SCIF during the calendar years January 1, 1984

through December 31, 1992, and who, during that relevant time period, have had claims litigated against them by one or more of their injured workers." Each insured's policy for the relevant years was identical. The policy provided that "all premiums for this policy will be determined by the Workers' Compensation Insurance Rating Bureau's manuals of rules, rates, rating plans and classifications."

Schaefer alleged SCIF had misallocated and then misreported the insureds' financial information to the Rating Bureau. In order to calculate the premium to be charged by SCIF to its insureds, the Rating Bureau considers a variety of factors, including what is known as the experience modification factor. This factor involves in part a comparison of the expected losses of all employers to the actual incurred losses plus reserve estimates of the insured employer at issue.

SCIF forwards the financial information of its insureds to the Rating Bureau in unit statistical reports. Each report contains three columns: indemnity, [*6] medical, and defense expense or allocated loss expense. Only the financial information reported in the indemnity and medical expense columns, not in the defense expense column, is used by the Rating Bureau to compute an insured's experience modification factor. Medical-legal reports requested by the employer or insurer that were not prepared by the attending physician are properly allocated as defense expenses. Nevertheless, SCIF either intentionally or negligently misreported such expenses as medical expenses to the Rating Bureau. Hence, the insureds' experience modification factor was artificially inflated, which in turn allowed SCIF to collect excessive premiums.

Schaefer further alleged that SCIF had a policy of "refusing to provide to its insureds access to all individual claims files," "refusing to provide its own insureds ... the ability to audit and/or monitor the manner in which SCIF has represented them in various workers' compensation actions," and "barring its own insureds ... from having access to any information, including a showing of how Medical-Legal reports on workers' compensation claims ... are reported to the WCIRB." These policies were "designed by [*7] SCIF to prohibit insureds ... from auditing, questioning, or in any manner attempting to determine whether SCIF performed reasonably in administering the claims of the insureds," and "to prevent an insured from discovering SCIF's intentional or negligent manipulation of the reserves" and "misreporting of financial information to the WCIRB."

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In response to SCIF's motion for summary judgment, the civil action was stayed for several years while Schaefer pursued its administrative remedies. On August 9, 1994, the Rating Bureau determined that SCIF had improperly reported expenses for nonattending physician reports requested by the employer or insurer as incurred medical, not defense, expenses. It stated, "expenses for medical-legal reports prior to January 1, 1993 ... should (and could) only have fallen within the category of 'Defense Expense' for reporting under the Unit Statistical Plan, so long as they did not include expenses for actual medical 'treatment.'" The Rating Bureau directed SCIF to submit revised unit statistical reports for Schaefer Ambulance Service, Inc., Sectran Security, Inc., and Universal Courier Limited for the years January 1, 1988 to January 1, 1989, January 1, 1988 to [*8] January 1, 1991, and December 31, 1987 to December 31, 1991, respectively.

n3

n3 These periods of time differ from the civil complaint, which alleges misconduct beginning in 1984. This was apparently because the Rating Bureau's review was limited to written requests received within 12 months after the expiration date of the policy in question.

SCIF appealed the Rating Bureau's decision to the classification and rating committee of the Rating Bureau, which on January 13, 1995, after further argument and briefing, upheld the bureau's determination. SCIF then appealed the decision to the Insurance Commissioner. An evidentiary hearing was held in December 1995 before an administrative law judge, who received numerous documentary exhibits and heard two days' testimony from the parties' expert witnesses. On May 8, 1996, the administrative law judge issued a proposed decision affirming the Rating Bureau and stating, "The Bureau correctly determined that the Unit Statistical Plan provisions in effect [*9] from January 1, 1983, until January 1, 1993, require the costs of insurer-requested medical examination reports, provided by medical experts other than an attending physician, to be allocated as defense expenses in unit reports to the Bureau." The Insurance Commissioner adopted the proposed decision on May 28, 1996. According to SCIF, on January 11, 1999, the commissioner made this determination binding on all workers' compensation insurers.

In September 1996, SCIF filed a petition for writ of mandate in the trial court to direct the commissioner to vacate his order. On March 16, 1999, the trial court denied the petition for writ of mandate and entered judgment in May 1999. In May 2000, the Court of Appeal affirmed. (*State Compensation Ins. Fund v.*

Quackenbush (May 22, 2000, A087127) pp. 1, 11 [nonpub. opn.]

On March 19, 1999, the civil action stay was lifted. In May 1999, SCIF moved for judgment on the pleadings on the ground that the action was barred by section 11758. The trial court denied the motion, and the Court of Appeal summarily denied SCIF's ensuing petition for writ of mandate and immediate stay request. SCIF petitioned for review, and we issued an order [*10] to show cause why the relief sought in SCIF's petition should not be granted.

II. DISCUSSION

Section 11758, contained in article 3, chapter 3, part 3 of division 2 of the Insurance Code, the statute at issue in this case, provides: "No act done, action taken or agreement made pursuant to the authority conferred by this article shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance." Former section 11750, which also appeared in article 3, provided, prior to its amendment in 1993: "The purpose of this article is to promote the public welfare by regulating concert of action between insurers in collecting and tabulating rating information and other data that may be helpful in the making of adequate minimum rates for workers' compensation insurance and for employers liability insurance incidental thereto and written in connection therewith for all admitted insurers and in submitting them to the commissioner for issuance or approval; to authorize and regulate the existence and cooperation of qualified rating organizations to one of which [*11] each workers' compensation insurer shall belong; to authorize and regulate cooperation between insurers, rating organizations and advisory organizations in rate making and other related matters to the end that the purposes of this chapter may be complied with and carried into effect." n4 (Stats. 1981, ch. 714, § 298, p. 2712; see now, present § 11750 [substituting "pure premium rates" for "minimum rates," changing "issuance or approval" to "approval" and changing spelling of "ratemaking"].)

n4 We agree with SCIF that article 3 authorizes more than insurers acting in concert, such as providing for certain powers of the Insurance Commissioner. However, the authorization to act in concert is the only relevant authority pertaining to insurers.

Schaefer asserts that section 11758 grants immunity only for antitrust or concert of action claims, not claims that

an insurer engaged in unilateral misconduct. Along these lines, it disagrees with SCIF that this is a ratemaking case; rather it is simply [*12] a garden variety bad faith insurance dispute. SCIF contends this is a ratemaking case, and that section 11758 bars all civil claims "arising from workers' compensation rate-making disputes, unless brought under a statute which specifically relates to insurance." Since none of Schaefer's claims are brought under such a statute, they are barred by section 11758. SCIF concedes, however, that Schaefer's dispute with SCIF "relates to the alleged misreporting of 'medical-legal' costs, not the calculation of rates, experience modifications or premiums."

By its terms, section 11758 refers to an "act done, action taken or agreement made *pursuant to the authority conferred by this article*" (Italics added.) It does not refer to an "act done, action taken or agreement made pursuant to this article." As relevant here, what is authorized by article 3 is "cooperation between insurers, rating organizations and advisory organizations in ratemaking and other related matters to the end that the purposes of this chapter may be complied with and carried into effect." (§ 11750.) Such price-setting activity would arguably otherwise be barred by the antitrust laws. Thus, in order for the [*13] miscalculating and misreporting of loss information to fall within the scope of section 11758's immunity, it appears it must be related to such authorized cooperation in "ratemaking and other related matters." (§ 11750.)

Arguably, an insurer's act of reporting financial information to a rating organization is inextricably tied to the operation of a rating organization. That is, while the act of reporting (or misreporting) financial information is a unilateral act, it results in a rating organization receiving sufficient information from each insurer that it can set a minimum rate and appropriate premiums for each insured.

Here, however, Schaefer does not contend the mere act of reporting financial information to the Rating Bureau was misconduct. In particular, Schaefer does not allege that SCIF violated any antitrust laws by reporting such information. Nor does it challenge the manner in which premiums or rates are set by the Rating Bureau. Rather, it disputes the manner in which SCIF analyzed and allocated Schaefer's financial data prior to the data being sent to the Rating Bureau. The Rating Bureau presumably had no way of knowing, absent an audit, that medical reports [*14] of nonattending physicians were included in the reported figure for Schaefer's medical expenses.

Of course, Schaefer also alleges that SCIF misreported Schaefer's medical expenses to the Rating Bureau, and this led to the imposition of excessive premiums. However, while not addressing section 11758, numerous Courts of Appeal decisions in other contexts have sanctioned civil claims against SCIF and other workers' compensation insurers alleging that their misconduct resulted in unjustifiably higher premiums. In all of these cases, the insurer had to first report the misinformation to the Rating Bureau before the premiums could be affected.

Thus, in *Security Officers Service, Inc. v. State Compensation Ins. Fund* (1993) 17 Cal. App. 4th 887, 891 (*Security Officers Service*), the insured employer alleged that SCIF's misconduct, including its failing to promptly resolve claims and assigning excessive reserves for unresolved claims, increased plaintiff's experience modification rating and caused its premiums to rise to unwarranted levels. While SCIF apparently did not raise section 11758 as a defense in that case, the court rejected SCIF's tort immunity claim, [*15] and stated the "insurer may be liable if it processes claims and sets reserves without good faith regard for their impact on the insured's premiums." (*Security Officers Service*, at pp. 890, 892; see *Notrica v. State Compensation Ins. Fund* (1999) 70 Cal. App. 4th 911, 921, 925, 956 [reversing punitive damages award but otherwise affirming judgment against SCIF, including jury's implicit finding SCIF had failed to estimate reasonable claim reserves, resulting in Notrica's paying higher premiums and receiving lower dividends]; *MacGregor Yacht Corp. v. State Compensation Ins. Fund* (1998) 63 Cal. App. 4th 448, 453, 456-459 [upholding trial court ruling that SCIF breached the implied covenant of good faith and fair dealing by improperly overestimating claims reserves and ineffectively investigating claims leading to higher experience modification factor and thus higher premiums]; *Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America* (1996) 44 Cal. App. 4th 194, 197, 203 [insured challenging claims-handling practices that increased the insurer's reported losses, which resulted in higher premiums, higher reserves, and lower dividends, [*16] could pursue breach of contract and implied covenant of good faith and fair dealing claims without exhausting administrative remedies]; *Tricor California, Inc. v. State Compensation Ins. Fund* (1994) 30 Cal. App. 4th 230, 233, 242 [claim that SCIF engaged in bad faith in settling individual policy claims to artificially inflate its reserves and Tricor's premiums, and deflate Tricor's dividends was not a rate-setting dispute, and could be pursued as a civil claim without exhausting administrative remedies]; cf. *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal. App. 4th 1088, 1091, 1092, 1094, 1097 [employer

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that assigned its subrogation rights to its workers' compensation insurer had no cause of action for negligence or breach of the implied covenant of good faith and fair dealing when carrier did not actively pursue those rights, leading to unrecoverable higher premiums, because nothing in the relevant statutes requires subrogation rights to be pursued in a particular manner, and insured not complaining about receipt of policy benefits[.]

Given that premiums set for workers' compensation policies are dependent in part [*17] on the financial information submitted by the insurer, insurer misconduct in handling the insured's workers' compensation claims or other financial information can always potentially result in higher premiums. If we were to extend section 11758's immunity to the claims alleged in this case regarding analyzing and reporting financial information, liability for misconduct that resulted in higher premiums would arguably also be precluded in these other contexts. It is doubtful section 11758 intended to paint with so broad a brush. Indeed, section 11783, subdivision (a) expressly provides that SCIF may "sue and be sued in all actions arising out of any act or omission in connection with its business or affairs." Moreover, while Schaefer prevailed in the administrative proceedings, SCIF does not point to any authority allowing the Insurance Commissioner to order a carrier to refund all improperly collected premiums to the insured.

Interpreting section 11758 to only apply to concerted activity otherwise barred by the antitrust laws and not to the individual misconduct of an insurer regarding its insured, is also supported by section 11758's legislative history. In 1944, the United States [*18] Supreme Court held that the insurance business constituted interstate commerce subject to Sherman Act antitrust prosecution for insurer conspiracy to fix premium rates and monopolize trade and commerce in certain insurance areas. (*United States v. Underwriters Assn.* (1944) 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162,

534-535, 550, 553, 561 (*South-Eastern*).) Congress subsequently granted insurers a moratorium from the Sherman Act, Clayton Act, and Federal Trade Commission Act until June 30, 1948, at which time they would become applicable "to the extent that [the insurance] business is not regulated by State law." (15 U.S.C. § 1012(b).) In response, the California Legislature enacted the McBride-Grunsky Insurance Regulatory Act of 1947. This act included section 1860.1, n5 which has language virtually identical to section 11758.

n5 Section 1860.1 provides: "No act done, action taken or agreement made pursuant to the authority conferred by this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance."

[*19]

In a letter to Governor Warren, Deputy Insurance Commissioner Maloney stated, "It is generally conceded that concert of action in the making of insurance rates is not only desirable but necessary by reason of the very nature of insurance. Accordingly, to prevent the application of the Federal Anti-trust Laws to this necessary activity in the insurance field of interstate commerce it is essential that state legislation be enacted to affirmatively authorize such concert of action in the making of insurance rates to the extent consistent with the public interest and to regulate such concert of action." (State Deputy Ins. Comr. John R. Maloney, letter to Governor Earl Warren re Sen. Bill No. 1572 (1947 Reg. Sess.) June 10, 1947, pp. 1-2; Joint Interim Legis. Com., Rep. on Ins. Reg., 1 Sen. J. Appen. (1947 Reg. Sess.) p. 5 ["All concerned agreed that the business of insurance was unusual in that it required concert of action among insurance carriers so that adequate statistical information would be available upon which to promulgate rates. As a practical matter the business of insurance cannot be conducted and maintained upon a sound basis unless insurance carriers discuss and pool [*20] their experience for rate making purposes. One of the problems, then, was to adopt a regulatory law which would permit this collection of data which is unquestionably in the public interest and at the same time prevent the growth of monopolistic practices which would adversely affect the public"]; see *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal. 4th 368, 381, fn. 24.)

In 1951, the Legislature enacted article 3, including section 11758. (Stats. 1951, ch. 1123, § 1, pp. 2879, 2887.) The legislative history includes a letter stating: "Because Workmen's Compensation rates are not subject to the McBride-Grunsky Insurance Regulatory Act of 1947 (Insurance Code Sections 1850 to 1860.3), there is a question of whether or not Workmen's Compensation insurers thus working in concert in connection with rates may not be subject to Federal regulation. Under Federal law, this Federal regulation, with certain very minor exceptions, would not apply if the subject matter is adequately covered by State law. The principal purpose and effect of Senate Bill 928 is to achieve this State regulation. The new article very largely [*21] parallels the provisions of the [McBride-Grunsky Insurance

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Regulatory Act].... This bill applies much the same language to Workmen's Compensation Insurance specifically." (Ins. Comr. John R. Maloney, letter to Governor Earl Warren re Sen. Bill No. 928 (1951 Reg. Sess.) June 8, 1951, p. 1.)

In addition, the Department of Insurance, the government agency charged with enforcing the state's insurance laws, recently wrote to this court in an unrelated case. The Insurance Commissioner expressed the view, "The purpose of [Insurance Code section 11758] is to immunize insurers and rating organizations from anti-trust laws so that they can act in concert to make rates. It has long been considered necessary to allow the insurance industry an exemption from the laws that prohibit other industries from actions done in concert that affect the price of their products. The extraordinary grant of immunity from prosecution or civil proceedings in Section 11758 must be seen in context - as a recognition of the unique status of the insurance industry within the framework of federal and state anti-trust law. That immunity is for the purpose of acting in concert pursuant [*22] to the authority granted by Article 3. ... [P] ... [P] ... The plain language of Insurance Code Section 11758 does not immunize an insurer from misconduct in reporting data to the rating organization. Furthermore, the legislative history of that statute indicates that it was intended to allow insurers to act in concert to make rates. The action of a single insurer in reporting data that is eventually used to make rates is not the same as a concert of action among entities in order to make rates." (Ins. Comr. Charles Quackenbush, letter to Chief Justice Ronald M. George, May 12, 1999, pp. 1-2.) While this court is the final arbiter of what section 11758 means, the Insurance Commissioner's interpretation is entitled to "some consideration." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 11, 15, 960 P.2d 1031.)

SCIF asserts that while "potential antitrust liability obviously was a significant impetus to states when enacting insurance regulations," the provisions of both the McBride-Grunsky Insurance Regulatory Act and article 3 were adopted to ensure that all aspects of the insurance business, such [*23] as premiums, taxation, and antitrust were regulated by the state, not federal, government. Hence, SCIF argues, section 11758's immunity should be broadly interpreted.

Of course, permitting liability here does not remove SCIF from state regulation. More importantly, none of the legislative history relied on by SCIF demonstrates that section 11758 is to be so broadly construed.

SCIF also relies on *Burns v. State Compensation Ins. Fund* (1968) 265 Cal. App. 2d 98, 71 Cal. Rptr. 326 (*Burns*). In *Burns*, the plaintiff employee was injured and received workers' compensation benefits. (*Id.* at p. 100.) The employee then sued his employer's insurer, SCIF, and the California Inspection Rating Bureau, the predecessor to the current Rating Bureau. (*Ibid.*) He alleged SCIF and the Inspection Rating Bureau breached their agreement with his employer to carefully inspect the work premises, and he was injured as a result. (*Ibid.*) The Court of Appeal concluded the action against SCIF was barred by the exclusivity of the workers' compensation remedy. (*Id.* at pp. 101-102.)

As for the action against the Inspection Rating Bureau, [*24] the court observed section 11750.3, subdivision (d) provided that a rating bureau may be organized and maintained for certain purposes, including "to inspect risks for classification or rate purposes" (*Burns, supra*, 265 Cal. App. 2d at p. 103.) In light of this express authorization to inspect, the court concluded that the Inspection Rating Bureau was immune under section 11758 for any negligence in connection with such inspections. (*Burns*, at p. 103.) The court noted that the Legislature had recently enacted section 11759, which expressly exempted the Inspection Rating Bureau from liability. (*Burns*, at p. 103.) However, that section was not effective at the relevant time of the action. (*Ibid.*)

As noted above, the stated purpose of article 3 is "to authorize and regulate the existence and cooperation of qualified rating organizations" and "to authorize and regulate cooperation between insurers, rating organizations and advisory organizations in ratemaking and other related matters" (§ 11750.) After *South-Eastern, supra*, 322 U.S. 533, it appears the propriety of such rating organizations was in question. To the extent [*25] inspections are a necessary part of the Rating Bureau's risk evaluation in ratemaking and involve cooperation with and amongst insurers, it is arguable that section 11758 does act to immunize the Rating Bureau from civil liability. Thus, even assuming *Burns* was correctly decided, it does not support the argument that section 11758 applies to an individual carrier's unilateral conduct.

SCIF also relies on *Karlin v. Zalta* (1984) 154 Cal. App. 3d 953, 201 Cal. Rptr. 379 (*Karlin*), called into doubt by *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal. 4th 257, 263, 278-279, 895 P.2d 56 (*Manufacturers Life*), in which the court concluded an antitrust action directed at charged premium rates, and alleging violations of the Unfair Practices Act (§ 790 et seq.), was barred by section 1860.1. (*Karlin*, at pp. 963-964,

2001 Cal. LEXIS 421, *; 103 Cal. Rptr. 2d 662;

2001 Cal. Daily Op. Service 945; 2001 Daily Journal DAR 1253

972, 974.) However, unlike the claim in *Karlin*, Schaefer's claim has no antitrust implications.

Finally, SCIF relies on *Walker v. Allstate Indemnity Co.* (2000) 77 Cal. App. 4th 750 (*Walker*). In *Walker*, the plaintiffs sued over 70 insurers seeking damages or disgorgement of allegedly [*26] excessive premiums the insurers had been authorized to collect since 1994. (*Id.* at p. 752.) "The causes of action were each bottomed on the insurers charging approved rates alleged nevertheless to be 'excessive.'" (*Id.* at p. 753.) The Court of Appeal held the action was barred by section 1860.1. (*Walker*, at p. 756 ["If section 1860.1 has any meaning whatsoever ... the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner"].) The court noted that the statutory scheme enacted by the voters in Proposition 103 was elaborate and involved extensive hearings and consumer and interested party participation. "Interested parties may seek judicial review of the commissioner's decision by filing a timely petition for writ of administrative mandamus," which the parties here had not done. (*Walker*, at pp. 754, 756.) Rather, they were attempting to challenge, years later in a civil action, the method by which the rates were set, arguing that the "rates were approved without compliance with the 'generic factors regulations,' " rendering them " 'illegal and void.' " (*Ibid.*) Here, of course, Schaefer [*27] does not challenge the method by which the rate or premium charged was set, but rather the insurer's misallocation of certain expenses.

Schaefer asserts that SCIF's reporting obligation to the Rating Bureau arises under former article 2, not article 3, and hence section 11758's immunity provision is inapplicable. SCIF asserts that the obligation arises exclusively under article 3, and even if it does not, section 11758 applies to conduct arising under either former article 2 or article 3. Our review indicates that both articles (as they existed at the relevant time) touched on this requirement; at a minimum it is apparent the reporting requirement was at least addressed in article 3. For example, the 1983 unit statistical plan expressly states that it was issued in accordance with articles 2 and 3. Section 11755, contained in article 3, provides, "No person, insurer, rating or advisory organization shall willfully withhold information from, or knowingly give false or misleading information to, the commissioner or to any rating organization, which will affect ... premiums for workers' compensation insurance and employer's liability insurance incidental thereto" Section [*28] 11751.5, which is also in article 3, provides, "The commissioner ... may promulgate reasonable rules and statistical plans, ... which shall be used thereafter in the recording and reporting by insurers of their loss and expense experience in order that the

experiences of all insurers may be made available ... to aid the commissioner in administering the provisions of Article 2" Former article 2, which was repealed in 1993 (Stats. 1993, ch. 228, § 1, p. 1793), on the other hand, authorizes the Insurance Commissioner to establish an experience rating system. (Former § 11730, Stats. 1981, ch. 714, § 290, p. 2711; former § 11732, Stats. 1977, ch. 459, § 2, p. 1514; see also former § 11737, Stats. 1935, ch. 145, § 11737, p. 723.) Moreover, former section 11740, contained in former article 2, provided, "The commissioner may require every insurer issuing workers' compensation insurance ... to file with its annual statement a sworn report of its loss experience" (Stats. 1981, ch. 714, § 295, p. 2712.)

To the extent either party relies on statutes enacted or amended in 1993, and effective in 1995, they are not relevant to the time period at issue here. Even [*29] if they were applicable, a review of these statutes indicates that the reporting obligation is now clearly referenced in both articles. (See § 11734, subd. (b) [art. 2: "Every workers' compensation insurer shall record and report its workers' compensation experience to the designated rating organization"]; § 11751.8 [art. 3: describing when "an insurer shall report to its rating organization ... corrections or revisions of losses"].)

We are cognizant of the fact that the calculation of insurance premiums and interpretation of SCIF's reporting requirements as contained in the 1983 unit statistical plan is best suited to the administrative process. Here, however, the administrative process has run its course, and we enjoy the benefit of that expertise. In particular, at every level SCIF has been found to have committed malfeasance. Moreover, the formula by which premiums are determined, while complicated, is set by law and is public information, and hence the premium Schaefer should have been charged is capable of calculation by experts in a trial court. (See *MacGregor Yacht Corp. v. State Compensation Ins. Fund*, *supra*, 63 Cal. App. 4th at pp. 459-460 [*30] [trial expert used the same formula as Rating Bureau "to recalculate MacGregor's experience modifier, as it would have been had SCIF's reserves been reasonable ... [and] the same formulas used by the insurance industry to calculate workers' compensation insurance premiums," and "SCIF presented no evidence controverting the actuary's analysis"].) Indeed, the Rating Bureau may have already partially performed this task. Thus, contrary to SCIF's assertion, by allowing this suit to proceed, we will not be asking the trial court to struggle with an issue it cannot resolve.

In addition, SCIF argues that the workers' compensation system is intended to be implemented outside the civil

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court system to maintain its efficient and prompt disposition of workers' claims. Here, however, the dispute is between an insured employer and its insurer, and while it arises in the workers' compensation context, it is in practical effect no different from any other dispute between such parties. SCIF does not attempt to demonstrate the allegations here fall within the scope of the workers' compensation exclusive remedy provisions. (See generally *Vacanti v. State Compensation Ins. Fund* (2001) [*31] 24 Cal. 4th 800, 14 P.3d 234, 102 Cal. Rptr. 2d 562 [at pp. 6-8].)

We emphasize that in reaching this result we are not asked to and do not reach any conclusion as to whether Schaefer has stated a valid cause of action against SCIF. We merely determine whether a civil suit based on Schaefer's allegations is precluded by section 11758's immunity. For the reasons set forth above, we conclude it is not.

DISPOSITION

The judgment of the Court of Appeal summarily denying the petition for writ of mandate is affirmed and the order to show cause issued November 10, 1999, is discharged.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

THE PEOPLE, Plaintiff and Respondent, v. DONTE OSBON SMITH et al.,
Defendants and Appellants.

S088387

SUPREME COURT OF CALIFORNIA

24 Cal. 4th 849; 14 P.3d 942; 2001 Cal. LEXIS 5; 102 Cal. Rptr. 2d 731; 2001
Cal. Daily Op. Service 328; 2001 Daily Journal DAR 456

January 11, 2001, Filed

PRIOR HISTORY:

[***1] Superior Court of California, Los Angeles County. Court of Appeal of California, Second Appellate District, Division Five. B129442. Super.Ct. No. BA159749. Lance A. Ito, Judge.

DISPOSITION:

Affirmed the judgment of the Court of Appeal.

COUNSEL:

Attorneys for Appellant:

Matthew D. Alger, under appointment by the Supreme Court, for Defendant and Appellant Donte Osbon Smith.

Peter A. Leeming, under appointment by the Supreme Court, for Defendant and Appellant Jack Loney.

Attorneys for Respondent:

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Linda C. Johnson, Suzann E. Papagoda, Kyle S. Brodie and Kent J. Bullard, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES:

BROWN, J. WE CONCUR: GEORGE, C.J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J. CONCURRING OPINION BY MOSK, J.

OPINIONBY:

BROWN

OPINION:

[*851]

[**943]

Under subdivision (b) of Penal Code section 1202.4, **n1** a trial court *must* impose "a separate and additional restitution fine" as part of [***2] the judgment of conviction entered against a criminal defendant, "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." If the "sentence includes a period of parole," then the court *must* also impose a parole revocation fine "in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4." (§ 1202.45.) **n2** This second fine, however, is automatically suspended unless the court later revokes parole. (*Ibid.*)

n1 All further statutory references are to the Penal Code. Subdivision (b) of section 1202.4 states in relevant part: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record."

n2 Section 1202.45 states in full: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

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[***3]

Despite these statutory mandates, trial courts, at times, omit these fines from the judgment of conviction. In many of these cases, the People have asked the Court of Appeal to impose the fines even though it did not object at sentencing. We recently held that appellate courts may not correct these errors if the trial court failed to state a reason for its failure to impose a restitution and parole revocation fine, and the People failed to object below. (*People v. Tillman* (2000) 22 Cal. 4th 300, 303, 992 P.2d 1109 (*Tillman*).) We now address an issue left unresolved by *Tillman*: Where the trial court imposes a restitution fine but omits or imposes [*852] an erroneous parole revocation fine, may appellate courts correct this error even though the People failed to object at sentencing? n3 Here, the trial court imposed a \$ 5,000 restitution fine, but only imposed and suspended a \$ 200 parole revocation fine in violation of section 1202.45. Distinguishing *Tillman*, the Court of Appeal found the erroneous imposition of a parole revocation fine correctable despite the People's failure to object. We agree.

n3 Although defendants raised a number of issues in their petition for review, we limited review to this sentencing issue.

[***4]

[**944] As a general rule, only "claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal. 4th 331, 354, 885 P.2d 1040 (*Scott*).) We adopted this waiver rule "to reduce the number of errors committed in the first instance" (*id.* at p. 353), and "the number of costly appeals brought on that basis" (*People v. Welch* (1993) 5 Cal. 4th 228, 235, 851 P.2d 802 (*Welch*)). In the sentencing context, we have applied the rule to claims of error asserted by both the People and the defendant. (*Tillman, supra*, 22 Cal. 4th at p. 303.) Thus, all "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" raised for the first time on appeal are not subject to review. (*Scott, supra*, 9 Cal. 4th at p. 353 [refusing to correct defects in the trial court's statement of reasons for its discretionary sentencing choices]; see also *Welch, supra*, 5 Cal. 4th at p. 236 ["traditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court"].)

We have, however, created [***5] a narrow exception to the waiver rule for " 'unauthorized sentences' or sentences entered in 'excess of jurisdiction.' " (*Welch, supra*, 5 Cal. 4th at p. 235.) Because these

sentences "could not lawfully be imposed under any circumstance in the particular case" (*Scott, supra*, 9 Cal. 4th at p. 354), they are reviewable "regardless of whether an objection or argument was raised in the trial and/or reviewing court." (*Welch, supra*, 5 Cal. 4th at p. 235.) We deemed appellate intervention appropriate in these cases because the errors presented "pure questions of law" (*ibid.*), and were " 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Scott, supra*, 9 Cal. 4th at p. 354.) In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.

In *Tillman*, we applied the waiver rule to a case in which the trial court failed to articulate a reason for its omission of the restitution and parole revocation fines. Because the People failed to object at sentencing, we [*853] barred the Court of Appeal from [***6] correcting the judgment by adding the minimum restitution and parole revocation fines. (*Tillman, supra*, 22 Cal. 4th at p. 303.) We found the waiver rule applicable because the imposition of a restitution fine under section 1202.4 was "a discretionary sentencing choice" (*Ibid.*) In doing so, we implicitly recognized that the erroneous omission of a restitution fine was not correctable without considering factual issues presented by the record or remanding for additional findings. (See *Scott, supra*, 9 Cal. 4th at p. 353 [limited exception to the waiver rule for sentencing errors that are correctable independent of the factual issues in the record].) By waiving any objection to the restitution fine, the People also effectively waived any objection to the parole revocation fine, because the parole revocation fine had to match the restitution fine as a matter of law. (See § 1202.45.)

After considering *Tillman* and our other waiver cases in the sentencing context, we conclude that the Court of Appeal may correct the erroneous amount of the parole revocation fine in this case. Unlike *Tillman*, where the trial court failed to articulate a [***7] discretionary sentencing choice--the imposition of a restitution fine--the trial court in this case properly imposed a \$ 5,000 restitution fine. (See § 1202.4.) It erred only when it imposed a parole revocation fine in an amount different from the amount of the restitution fine. (See § 1202.45.) In contrast to the erroneous omission of a restitution fine, this error did not involve a discretionary sentencing choice. (See *Tillman, supra*, 22 Cal. 4th at p. 303.) Under section 1202.45, a trial court has *no* choice and *must* impose a parole revocation fine equal to the restitution fine whenever the "sentence includes a period of parole." Because the erroneous imposition of [***945] a parole revocation fine presents a pure question of law with only

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one answer, any such error is obvious and correctable without reference to any factual issues in the record or remanding for further findings. Accordingly, an invalid parole revocation fine falls within the narrow class of sentencing errors exempt from the waiver rule. (See *Scott, supra*, 9 Cal. 4th at p. 354; *Welch, supra*, 5 Cal. 4th at pp. 235-236.)

Defendants counter that the trial court [***8] could have imposed a \$ 200 parole revocation fine if it had imposed a \$ 200 restitution fine. Thus, the error is not exempt from the waiver rule because the \$ 200 parole revocation fine could have been lawfully imposed in this case. (See *Scott, supra*, 9 Cal. 4th at p. 354.) Defendants further speculate that the trial court would have imposed a lesser restitution fine if it had realized that the parole revocation fine must equal the restitution fine. Defendants, however, do not challenge the propriety of the \$ 5,000 restitution fine imposed by the trial court. Given that the restitution fine was proper and unchallenged, the \$ 200 parole revocation fine could never be lawfully imposed in this "particular case." (*Ibid.*)

[*854] Finally, defendants' invocation of principles of judicial economy is unavailing. A timely objection to a sentencing error *always* reduces the likelihood of error and the unnecessary waste of judicial resources. We have, however, determined that certain errors are so obvious and so easily fixable that correction of these errors in the absence of an objection at sentencing will not unduly burden the courts or the parties. (See *Scott, supra*, 9 Cal. 4th at p. 354; [***9] *Welch, supra*, 5 Cal. 4th at pp. 235-236.) The trial court's erroneous imposition of a \$ 200 parole revocation fine is one of these errors. Accordingly, we hold that the Court of Appeal may correct this error without remanding for further proceedings in the presence of defendants. (Cf. *People v. Fuhrman* (1997) 16 Cal. 4th 930, 946, 941 P.2d 1189 [refusing to remand for a new sentencing hearing in the interests of judicial economy where no "realistic possibility" of relief appears to exist].) In doing so, we agree with the published decisions of those Courts of Appeal that have addressed this issue. (See, e.g., *People v. Rodriguez* (2000) 80 Cal. App. 4th 372, 378; *People v. Terrell* (1999) 69 Cal. App. 4th 1246, 1255-

1256; *People v. Hong* (1998) 64 Cal. App. 4th 1071, 1084.) **DISPOSITION**

We affirm the judgment of the Court of Appeal.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

CONCURRING OPINION BY MOSK, J.

CONCURBY:

MOSK

CONCUR:

CONCURRING OPINION BY MOSK, J.

I concur in the opinion of the court.

I do so because I find the following propositions implicit [***10] in the court's analysis.

First, what is called "waiver" (maj. opn., *ante*, 2001 Cal. LEXIS 5 at p. *4) is, strictly speaking, forfeiture by a party in failing to preserve a claim of error for review on appeal. (See generally *People v. Williams* (1999) 21 Cal. 4th 335, 340, fn. 1, 981 P.2d 42; *Cowan v. Superior Court* (1996) 14 Cal. 4th 367, 371, 926 P.2d 438.)

Second, forfeiture does not *prohibit* an appellate court from reaching a nonpreserved claim, but merely *allows* it *not* to do so. (See generally *People v. Williams* (1998) 17 Cal. 4th 148, 161-162, fn. 6, 948 P.2d 429.)

[*855] Third, forfeiture nevertheless counsels an appellate court not to reach a nonpreserved claim when it has resulted in a void in the record that the court itself cannot or should not fill.

MOSK, J.

**APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC., et al.,
Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent.**

S082645

SUPREME COURT OF CALIFORNIA

**24 Cal. 4th 830; 14 P.3d 930; 2001 Cal. LEXIS 3; 102 Cal. Rptr. 2d 719; 2001
Cal. Daily Op. Service 209; 2001 Daily Journal DAR 237**

January 8, 2001, Filed

PRIOR HISTORY:

[**1] Superior Court of California, Los Angeles County. Court of Appeal of California, Second Appellate District, Division One. B130243. Super. Ct. No. BC195216. Charles W. McCoy, Jr., Judge.

DISPOSITION:

The Court of Appeal's judgment is reversed.

COUNSEL:

Attorneys for Appellant:

California Apartment Law Information Foundation, Trevor Grimm and Craig Mordoh, for Plaintiffs and Appellants.

Sharon L. Browne and Stephen R. McCutcheon, Jr., for Pacific Legal Foundation as Amicus Curiae, on behalf of Plaintiffs and Appellants.

Attorneys for Respondent:

James K. Hahn, City Attorney, Pedro B. Echeverria, Chief Assistant City Attorney, Ronald Tuller, Assistant City Attorney, and Miguel A. Dager, Deputy City Attorney, for Defendant and Respondent.

Hart, King & Coldren, Robert S. Coldren and C. William Dahlin for Western Manufactured Housing Communities Association as Amicus Curiae on behalf of Defendant and Respondent.

Gibson, Dunn & Crutcher, James P. Clark, Joel M. Tantalo; Western Center on Law & Poverty, Richard Rothschild; Bet Tzedek Legal Services and Lauren

Saunders [**2] for the Los Angeles Blue Ribbon Citizens' Committee on Slum Housing, Bet Tzedek Legal Services, the Inner City Law Center, Los Angeles Center for Law and Justice, Legal Aid Foundation of Los Angeles, Legal Services of Northern California, Los Angeles Housing Law Project, Public Counsel, San Fernando Valley Neighborhood Legal Services, Western Center on Law and Poverty, Esperanza Community Housing Corporation, Southern California Association of Non-Profit Housing, Southern California Mutual Housing Association, the Coalition for Economic Survival, Inquilinos Unidos, the St. Francis Center, the Fair Housing Congress of Southern California and SEIU Local 347 as Amici Curiae on behalf of Defendant and Respondent.

Richard Doyle, City Attorney (San Jose), George Rios, Assistant City Attorney, and Robert Fabela, Deputy City Attorney, for the City of San Jose, 89 Additional California Cities, the California State Association of Counties and the California Association of Sanitation Agencies as Amici Curiae on behalf of Defendant and Respondent.

JUDGES:

MOSK, J. WE CONCUR: GEORGE, C. J., KENNARD, J., WERDEGAR, J., CHIN, J. DISSENTING OPINION BY BROWN, J.

OPINIONBY:

MOSK

OPINION:

[*833]

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We granted review [***3] [**932] to decide whether a city ordinance imposing an inspection fee on private landlords violates article XIII D of the California Constitution (article XIII D), added by initiative measure, Proposition 218, in 1996. We conclude that it does not.

In July 1998, the city of Los Angeles put into effect the Los Angeles Housing Code. It is codified as article 1 of chapter XVI of the Los Angeles Municipal Code (§ 161.101 et seq.). Later that month, plaintiffs sued the city for declaratory and injunctive relief, alleging that Los Angeles Municipal Code section 161.352, imposing an inspection fee on private landlords, is unenforceable because it was enacted without complying with section 6 of article XIII D. The city demurred. The trial court sustained the demurrer without leave to amend, finding that the fee was not subject to the constitutional requirements. It entered judgment for the city.

In its statement of decision, the trial court recognized that the inspection fee "appears arguably to fall within the wide range of assessments which Proposition 218 was apparently written to encompass." But it added, "In *Pennell v. City of San Jose* (1986) 42 Cal. 3d 365, 375, 228 Cal. Rptr. 726, [*834] 721 P.2d 1111, [***4] the California Supreme Court held that a fee charged to cover the costs of operating San Jose's rent control ordinances, and not used to raise general revenue, is not subject to Article XIII A of the California Constitution. The City's ordinance here fits squarely within both the reason and rule of *Pennell*. The ordinance levies only property used for residential apartment rentals, and the money is used only to pay for regulat[ing such] rentals to insure, among other things, that they do not degenerate into what is commonly called 'slum conditions.' The assessment is not imposed on all property owners--only a subset of owners who rent apartments."

[**933] The Court of Appeal reversed, holding that the state constitutional provision invalidated the city ordinance. The court wrote: "There is nothing in Proposition 218 that exempts regulatory fees imposed on residential rental properties. It thus adds nothing to say, as does the City, that the fees are not 'imposed upon property owners in general, but only those who voluntarily engage in the business of renting, generate the risks of slum housing, and specially benefit from regular inspections as they contribute to the overall reputability [***5] and safety of the housing provided.' Quite plainly, Proposition 218 applies to any 'fee' or 'charge,' both of which are defined to mean 'any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including

a user fee or charge for a property-related service.' (Art. XIII D, § 2, subd. (e)) However well intentioned the City's program to abolish slum housing may be, we find it impossible to say that a fee imposed upon the owners of rental units so the City can locate and eradicate substandard housing is anything other than a user fee or charge for a property-related service."

I.

A.

Section 161.102 of the Los Angeles Municipal Code states the reason for enacting the Los Angeles Housing Code: "It is found and declared that there exist in the City of Los Angeles substandard and unsanitary residential buildings and dwelling units the physical conditions and characteristics of which render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety and welfare of [***6] their occupants and of the public.

"It is further found and declared that the existence of such substandard buildings as dwelling units threatens the physical, social and economic stability of sound residential buildings and areas, and of their supporting [*835] neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole."

Los Angeles Municipal Code section 161.301, entitled Scope, declares that the Los Angeles Housing Code applies to "all residential rental properties with two or more dwelling units on the same lot, the land, buildings and structures appurtenant thereto," but not to owner-occupied units, on-campus dormitory housing, hotels, motels, or certain other types of housing also specifically exempted.

Division 3.5 of the Los Angeles Housing Code (§ 161.351 et seq.) is entitled Housing Inspection Fees. Section 161.351 limits the scope of division 3.5 to "residential rental properties with two or more dwellings subject to the provisions [***7] of this Code." Those properties "will be subject to regular inspection by the General Manager or an authorized representative. Inspections may also be complaint-based." (*Ibid.*)

Section 161.352, at issue here, sets forth the inspection fee schedule. It provides, in its entirety: "Owners of all buildings subject to inspection shall pay a service fee of

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\$ 12.00 per unit per year. The fee will be used to finance the cost of inspection and enforcement by the Housing Department. Should the owner fail to pay the required fee, the City of Los Angeles will recover it, plus accrued interest, utilizing any remedies provided by law including nuisance abatement or municipal tax lien procedures established by ordinance or state law. This fee shall be known as the 'Systematic Code Enforcement Program Fee.' " (*Ibid.*, boldface omitted.)

B.

In November 1996 the voters approved Proposition 218, the Right to Vote on Taxes Act. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 1, p. 108; reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2000 supp.) foll. art. XIII C, § 1, p. 25.) The proposition amended the California Constitution, adding article XIII D. Section [***8] 3, [**934] subdivision (a)(3) of Article XIII D provides that, with certain exceptions not relevant here, "No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except: [P] ... [P] ... as provided by this article." An agency is a local or regional governmental entity. (*Id.*, § 2, subd. (a); Cal. Const., art. XIII C, § 1, subd. (b).)

[*836]

Section 1 of article XIII D provides that it applies to "all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority." Fees and charges are defined in subdivision (e) of section 2 thereof. " 'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (*Ibid.*)

"Property-related service" is further defined. It "means a public service having a direct relationship to property ownership." (Art. XIII D, § 2, subd. (h).)

Thus, and in summary, article XIII D applies, with certain exceptions not relevant [***9] here, to "any levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Art. XIII D, § 2, subd. (e).) As will appear, the outcome of this case turns on the meaning of this language.

C.

Before us is "a question of law for the appellate courts to decide on independent review of the facts." (*Sinclair*

Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 874, 937 P.2d 1350.) Though our reasoning turns on the language of the constitutional stricture, it may be helpful to explain, as did the Court of Appeal in *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal. App. 4th 679 (*Howard Jarvis*), the reasons that led to placing Proposition 218 on the ballot.

"Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. 'The purpose of Proposition 13 was to cut local property taxes. [Citation.]' [Citation.] Its principal provisions limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to [***10] 2 percent per year unless and until the property changed hands. (Cal. Const., art. XIII A, § 1, 2.)

"To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4; *Rider v. County of San Diego* (1991) 1 Cal. 4th 1, 6-7, 820 P.2d 1000.) It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. (*Knox v. City of [**837] Orland* (1992) 4 Cal. 4th 132, 141, 841 P.2d 144, and cases cited.) Accordingly, a special assessment could be imposed without a two-thirds vote.

"In November 1996, in part to change this rule, the electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution. Proposition 218 allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. (Cal. Const., art. XIII D, § 3, subd. (a)(1)-(4); see also [*id.*], § 2, subd. (a).) It buttresses Proposition 13's limitations on ad valorem property [***11] taxes and special taxes by placing analogous restrictions on assessments, fees, and charges." (*Howard Jarvis, supra*, 73 Cal. App. 4th 679, 681-682.)

D.

The Court of Appeal explained the parties' differing views of the effect of article XIII D on the city ordinance. "As viewed by [plaintiffs], the fee is imposed 'upon a parcel or upon a person as an incident of property ownership' and is, therefore, subject to the procedural requirements of Proposition 218. As viewed by the City, the fee is imposed upon a business activity (the rental of residential [**935] dwellings), separate and apart from property ownership, and purely for regulatory purposes, and it is therefore not subject to Proposition 218."

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Adhering before us to their point of view, plaintiffs contend that "nothing in Proposition 218 ... supports the contention that [it] was not meant to affect the ability of local governments to impose and collect business 'regulatory fees.' " The city also adheres to its position, devoting much of its briefing to an argument that because its inspection fee is a regulatory fee on business operations, it falls outside the purview of article XIII D. Examining the ballot arguments [***12] for and against Proposition 218 and the Legislative Analyst's analysis of the measure, the city also contends that article XIII D was intended only to restrict fees imposed directly on property owners in their capacity as such. A regulatory fee imposed on residential rental businesses, the city argues, necessarily falls outside article XIII D's ambit, even if the fee bears some relation to ownership of real property. n1

n1 We have also received several amicus curiae briefs. Along with one of them is a request to judicially notice three purported local mobilehome park rent control ordinances and two other documents regarding that topic. The request is denied. The five documents have no bearing on the question before us.

Amicus curiae also include a printed discussion issued by the Legislative Analyst in December 1996 and entitled Understanding Proposition 218. This document contains material relevant to the question at bench, and we grant the request for judicial notice regarding it. (Evid. Code, § § 452, subd. (c), 459, subd. (a).)

[***13]

As will appear, neither party is entirely correct. The relevant language of article XIII D does not compel a conclusion in plaintiffs' favor; rather, it [*838] compels the opposite. The city also misses the mark when it contends (or at least implies) that a regulatory fee or a levy on the operation of a business necessarily falls outside the scope of article XIII D.

But both parties are partly correct. Plaintiffs accurately state that the constitutional provision does not speak of regulatory fees or levies on business operations. Hence, the mere fact that a levy is regulatory (as this inspection fee clearly is) or touches on business activities (as it clearly does) is not enough, by itself, to remove it from article XIII D's scope. But the city is correct that article XIII D only restricts fees imposed directly on property owners in their capacity as such. The inspection fee is

not imposed solely because a person owns property. Rather, it is imposed because the property is being rented. It ceases along with the business operation, whether or not ownership remains in the same hands. For that reason, the city must prevail.

II.

Section 2 of Proposition 218 stated the measure's [***14] purpose. "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 2, p. 108; reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2000 supp.), *supra*, foll. art. XIII C, § 1, p. 25.)

The repeated references to taxes and taxpayers suggest an intent to prohibit unratified exactions imposed on property owners as such, rather than on the business of renting or leasing apartments--i.e., "residential rental properties with two or more dwellings" (L.A. Mun. Code, § 161.351).

As explained in *Howard Jarvis, supra*, 73 Cal. App. 4th 679, Proposition 218 is Proposition 13's progeny. Accordingly, [***15] it must be construed in that context. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal. 4th [*839] 294, 301, 926 P.2d 1042.) Specifically, because Proposition 218 was designed to close government-devised loopholes in Proposition 13, the intent and purpose of the latter [***936] informs our interpretation of the former. Proposition 13 was directed at taxes imposed on property owners, in particular homeowners. The text of Proposition 218, the ballot arguments (both in favor and against), the Legislative Analyst's analysis, and the annotations of the Howard Jarvis Taxpayers Association, which drafted Proposition 218, all focus on exactions, whether they are called taxes, fees, or charges, that are directly associated with property ownership.

The Legislative Analyst's analysis, printed in the November 1996 ballot pamphlet, is illustrative. It explained that Proposition 218 "would constrain local governments' ability to impose fees, assessments, and taxes," meaning "property-related" fees, including fees

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for water, sewer and refuse collection, but excluding gas and electricity charges (see Cal. Const., art. XIII D, § 3, subd. (b)) and development fees (see *id.*, § 1, subd. [***16] (b)). (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) Legis. Analyst's analysis, p. 73.) It did not refer to levies linked more indirectly to property ownership.

The ballot arguments for Proposition 218 are also illustrative. "Proposition 218 guarantees your right to vote on local tax increases--even when they are called something else, like 'assessments' or 'fees' and imposed on homeowners." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument in favor of Prop. 218, p. 76.) "After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees.' " (*Ibid.*) "There are now over 5,000 local districts which can impose fees and assessments without the consent of local voters. Special districts have increased assessments by over 2400% over 15 years. Likewise, cities have increased utility taxes 415% and raised benefit assessments 976%, a ten-fold increase." (*Ibid.*) "To confirm the impact of fees and assessments on you, look at your property tax bill. You will see a growing list of assessments imposed without voter approval. The list will grow even longer unless Proposition 218 passes. [***17] " (*Ibid.*)

The ballot arguments identify what was perhaps the drafter's main concern: tax increases disguised via euphemistic relabeling as "fees," "charges," or "assessments." But in fairness to plaintiffs, it cannot be denied that the text of article XIII D does not limit its scope to taxes and taxpayers. We turn to the definitive language: restrictions on *any* levy imposed "upon a parcel or upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).)

The foregoing language means that a levy may not be imposed on a property owner as such--i.e., in its capacity as property owner--unless it [*840] meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.

The contrary reasoning of the Court of Appeal, and of plaintiffs, stems from a reliance on the word "incident," leaving aside that [***18] the constitutional provision does not refer to fees imposed *on* an incident of property

ownership, but on a parcel or a person *as* an incident of property ownership. As amicus curiae for the city persuasively argue, the distinction is crucial.

Were the principal words *parcel* and *person* missing, and were *as* replaced with *on*, so that article XIII D restricted the city's ability to impose fees "on an incident of property ownership," plaintiffs' argument might have merit. For among the incidents n2 [***937] of estates in land are the so-called bundle of rights that flow from such tenure. (31 C.J.S. (1996) Estates § 12, pp. 28-30; *id.*, § 14, pp. 32, 34; *id.*, § 31, p. 58.) Among them is the fundamental right to alienate one's property held in fee simple. (E.g., *id.*, § 12, p. 30; *Holien v. Trydahl* (N.D. 1965) 134 N.W.2d 851, 856; *Davis v. Geyer* (1942) 151 Fla. 362, 369 [9 So. 2d 727, 728]; *Hardy v. Galloway* [*841] (1892) 111 N.C. 519, 523 [15 S.E. 890]; see also *Yee v. City of Escondido* (1992) 503 U.S. 519, 528, 118 L. Ed. 2d 153, 112 S. Ct. 1522.) That incident, or right, has been called [***19] "inseparable" (*Holien, supra*, 134 N.W.2d at p. 856; *Hardy, supra*, 15 S.E. at p. 890), "indispensable" (*Dukes v. Crumpton* (1958) 233 Miss. 611, 620 [103 So. 2d 385, 388]), and "necessary" (*Re Collier* (Nfld. 1966) 60 D.L.R.2d 70, 75 [52 M.P.R. 211, 216] (per Puddester, J.)).

n2 Over time, "incident" has meant many things. As a noun, the meanings include the burden of the risk of a diminution of the value of real property during condemnation proceedings (*Agins v. City of Tiburon* (1980) 447 U.S. 255, 263, fn. 9, 65 L. Ed. 2d 106, 100 S. Ct. 2138), the "burdens and disabilities" of slavery prohibited by the Thirteenth Amendment to the United States Constitution (*Jones v. Mayer Co.* (1968) 392 U.S. 409, 441, 88 S. Ct. 2186, 20 L. Ed. 2d 1189), or, in earlier times, the monetary obligations imposed by the king or a mesne lord (McPherson, *Revisiting the Manor of East Greenwich* (1998) 42 Am. J. Legal Hist. 35, 39; see also 2 Coke (1641) Institutes of the Lawes of England (Butler & Hargrave's Notes ed.) 69a, § 95, fn. 7). And, in a more general sense, the meanings of "incident" include benefits or duties that appertain to some greater right or interest, i.e., the principal. (Civ. Code, § § 662, 1084, 3540; *Owsley v. Hamner* (1951) 36 Cal. 2d 710, 716-717, 227 P.2d 263; *Fender v. Waller* (1941) 139 Neb. 612, 616 [298 N.W. 349, 351]; *Harris v. Elliott* (1836) 35 U.S. (10 Pet.) 25, 54, 9 L. Ed. 333.) In its fourth edition (1897), Bouvier's Law Dictionary defined "incident" as a term "used both substantively and adjectively of a thing which, either usually or naturally and inseparably depends upon, appertains to, or follows another

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that is more worthy. For example, ... the right of alienation is necessarily incident to a fee-simple at common law" (*Id.* at p. 1006, col. 1.) Many cases have followed the Bouvier's Law Dictionary definition, or ones similar to it. (E.g., *Watts v. Copeland* (1933) 170 S.C. 449, 452 [170 S.E. 780]; *Moccasin State Bank v. Waldron* (1928) 81 Mont. 579, 586 [264 P. 940].) "Thus, timber trees are incident to the freehold, and so is a right of way." (*Cromwell v. Phipps* (N.Y. Surr. 1888) 1 N.Y.S. 276, 278 [dictum]; accord, *Harris v. Elliott, supra*, 35 U.S. (10 Pet.) at p. 54 [easements]; Black's Law Dict. (7th ed. 1999) p. 765, col. 1 ["the utility easement is incident to the ownership of the tract"].)

[***20]

The power to alienate property or a property right is not limited to the right to sell or assign it. It means generally the power "to transfer or convey [it] to another." (Black's Law Dict., *supra*, p. 73, col. 1.) The conveyance need not be the whole fee. The right of alienation applies when fee holders seek to convey lesser estates. n3 " 'The power or right of alienation' " " 'incident to the ownership of an estate in fee-simple' " " 'includes the power or right to dispose of property held in fee ... by lease, mortgage, or other mode of conveyance' " (*Porter v. Barrett* (1925) 233 Mich. 373, 379-380 [206 N.W. 532, 535], quoting *Manierre v. Welling* (1911) 32 R.I. 104, 140 [78 A. 507, 522], italics added here.)

n3 It is, of course, axiomatic in Anglo-American law that ownership of real property in fee simple absolute is the greatest possible estate (1 Coke (1628) Institutes of the Lawes of England (Butler & Hargrave's Notes ed.) 18a, § 11), and among the panoply of lesser estates are such nonfreehold chattels real as leases for a specific term and periodic tenancies (*Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal. 4th 155, 162, 820 P.2d 1046)--in common parlance, rentals or leases of limited duration. (1 Tiffany, the Law of Real Property (3d ed. 1939) § 76, pp. 112-113; *Wilgus v. Commonwealth* (1873) 72 Ky. 556, 557 [1873 WL 6660], citing 2 Blackstone, Commentaries *143 ["An estate for years in land is regarded in law as inferior to an estate for life or an inheritance"]; *Brydges v. Millionair Club* (1942) 15 Wn.2d 714, 719 [132 P.2d 188, 190]; see also *Williams v. R. R.* (1921) 182 N.C. 267, 272 [108 S.E. 915, 918].)

[***21]

Accordingly, if article XIII D restricted the city's ability to impose a "tax, assessment, fee, or charge on an incident of property ownership" (cf. *id.*, § 2, subd. (e), 3), plaintiffs' argument might be persuasive. The business of renting apartments is an incident of owning them, an activity necessarily dependent on that ownership but not vice versa. One can own apartments without renting them, but no one can rent them without owning them. (See fn. 2, *ante*, 2001 Cal. LEXIS 3 at p. *19.) n4

n4 In *Acme Freight Lines Inc. v. Vidalia* (1942) 193 Ga. 334 [18 S.E.2d 540] (*Acme Freight*), similar statutory language favored an analogous argument--that a tax on an incident of the trucking business was a tax on a trucking company's ancillary delivery business.

In *Acme Freight, supra*, a trucking company sought an injunction against a city's practice of imposing a business tax on those ancillary operations. The firm relied on this law: "No subdivision of this State ... shall levy any excise, license, or occupation tax of any nature on ... any incidents of said motor carrier business, or on a motor common carrier." (193 Ga. 334, 18 S.E.2d 540, 541, italics added.)

The city, Vidalia, acknowledged "its lack of authority to levy any tax against the plaintiff in reference to its transportation of freight as a motor common carrier Justification for the tax is founded upon the fact that, in addition to the operation of trucks for the transportation of freight ...,the plaintiff carries on ... a 'pick-up and delivery service' in and around the city. The trial judge ruled that this 'is not a necessary incident to the operation of a common carrier,' and that as to it 'the plaintiff is not a motor common carrier, but is engaged in a special and distinct business in the City of Vidalia, and is taxable as such.' This formula interpolates before the word 'incidents,' used in the statute, the word 'necessary' so as to require, as a condition of tax immunity, that the operation be a necessary incident of the business of a motor common carrier. This appears to us to be erroneous. [Rather,] ... an incident of the business of a motor common carrier of freight would be something naturally associated as pertinent to such transportation and necessarily dependent upon it, but without which the business of transportation might nevertheless be carried on. In other words, the incidental

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operation would be necessarily dependent upon the transportation, but the business of transportation would not be necessarily dependent upon the incidental operation. ... As we understand the evidence adduced in this case, the plaintiff's operations against which the tax is said to be levied is of the above-described character; and accordingly we conclude that the tax is illegal, and should have been enjoined." (*Acme Freight, supra*, 18 S.E.2d 540, 541.)

[***22]

[**938] But the language of article XIII D is materially dissimilar. As stated, article XIII D, section 3, provides that "no tax, assessment, fee, or charge [*842] shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except [P] ... [P] ... as provided by this article." (See also *id.*, § 2, subd. (e).) In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business--i.e., because they are landlords. n5 What plaintiffs ask us to do is to alter the foregoing language--changing "as an incident of property ownership" to "on an incident of property ownership." But to do so would be to ignore its plain meaning--namely, that it applies only to exactions levied solely by virtue of property ownership. We may not interpret article XIII D as if it had been rewritten. (Accord, *People ex rel. Lungren v. Superior Court, supra*, 14 Cal. 4th 294, 301.)

n5 We acknowledge that landlords may rent because they wish to keep the property occupied in their absence, for philanthropic reasons, or to a family member for a nominal charge. Such arrangements are not rare, and may lie within the province of the ordinance, which refers to "residential rental properties." But even nonprofit or charitable purposes are business purposes under broad constructions of the term, and we believe that as long as the property is being rented for consideration, it is being conveyed for a business purpose. (Cf. *Marin Municipal Water Dist. v. Chenu* (1922) 188 Cal. 734, 738, 207 P. 251 ["'business' " has "a narrower meaning applicable to occupation or employment for livelihood or gain, and to mercantile or commercial enterprises or transactions"].)

[***23]

The language of article XIII D, sections 2, subdivision (e), and 3, shows that it applies to levies imposed on a person or on property strictly as an incident of property ownership. Had the law included levies imposed on incidents of the ownership or use of residential real property (as relevant [*843] here, the exercise of the right to rent one's property), its text would have said so. But it did not. And although the plain language of the relevant constitutional provisions requires us not to consider extrinsic evidence of the voters' intent, we reiterate, purely as an aside, that neither the ballot arguments nor the Legislative Analyst's analysis suggested that article XIII D was intended to encompass fees of the type at issue here.

The subordinate clause in section 2, subdivision (e), of article XIII D, as clarified in section 2, subdivision (h), supports our conclusion. It may be recalled that among the fees or charges covered by article XIII D, section 2, subdivision (e), is "a user fee or charge for a property-related service." Such a service "means a public service having a direct relationship to property ownership." (*Id.*, § 2, subd. (h).) In this case, the relationship [***24] between the city's inspection fee and property ownership is indirect--it is overlain by the requirement that the landowner be a landlord.

As stated, the foregoing clause is subordinate. It does not include all possible fees and charges that fall within the ambit of article XIII D. But it does provide additional evidence of the scope of the constitutional [**939] provision. n6

n6 We turn to discuss briefly the authorities on which the city chiefly relies. They consist of two cases: *Sinclair Paint Co. v. State Bd. of Equalization, supra*, 15 Cal. 4th 866; and *Pennell v. City of San Jose* (1986) 42 Cal. 3d 365, 228 Cal. Rptr. 726, 721 P.2d 1111 (affd. *sub nom. Pennell v. San Jose* (1988) 485 U.S. 1, 99 L. Ed. 2d 1, 108 S. Ct. 849). They are inapposite.

In *Sinclair* we held that an exaction on sources of lead contamination to remediate the effects of lead poisoning was a fee, not a tax. In *Pennell*, we held that a \$ 3.75 charge on each residential rental unit, imposed by a rent control ordinance to fund its hearing process, also was a fee, not a tax. In *Sinclair* and *Pennell*, we defined such fees, which are similar to the city's inspection charge, as regulatory in nature. Regulatory fees are those " 'charged in connection with regulatory activities[,] which fees do not exceed the reasonable cost of providing services necessary to the activity for

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which the fee is charged and which are not levied for unrelated revenue purposes." ' ' (Sinclair, supra, 15 Cal. 4th 866, 876, quoting Pennell, supra, 42 Cal. 3d 365, 375, in turn quoting Mills v. County of Trinity (1980) 108 Cal. App. 3d 656, 659-660, 166 Cal. Rptr. 674, bracketed material added here.)

We have stated that the city's inspection fee is a regulatory fee. And we have concluded that it does not fall within article XIII D's ambit. But Sinclair or Pennell do not concern themselves with the issue we confront here. Indeed, in Sinclair we cautioned that "We are not here concerned with issues arising under constitutional amendments effected by a recent initiative measure (Proposition 218) adopted at the November 5, 1996, General Election. That measure contains new restrictions on local agencies' power to impose fees and assessments." (Sinclair, supra, 15 Cal. 4th 866, 873, fn. 2.) In Pennell, we could not have written a similar caveat, for article XIII D did not exist at the time. But it applies just as well.

[***25]

At oral argument, plaintiffs emphasized article XIII D's exemptions for existing development fees and all charges to provide gas and electrical [*844] service. (Article XIII D, § § 1, subd. (b), 3, subd. (b).) They assert that a developer fee is a fee on an incident of property--the right to improve it--and that there would have been no need to exempt such fees if other fees imposed on incidents of property did not fall within article XIII D's scope. Similarly, they argue that one can own property without having utility service, and that if article XIII D applied strictly to levies that are imposed solely on the basis of property ownership, there would have been no need to exempt such utility charges in the constitutional provision.

We note, however, that the provision regarding development fees refers only to those existing at the time of article XIII D's enactment. Moreover, it is unclear to us whether a fee to provide gas or electricity service is the same as a fee imposed on the consumption of electricity or gas. In any event, we believe that the aforementioned exemptions may have been included in an abundance of caution in case court interpretations of article XIII D similar [***26] to the Court of Appeal's should prevail. Finally, we do not believe that any incongruity can trump the plain language we have discussed herein. In short, we are unpersuaded.

Similarly unpersuasive is plaintiffs' contention, also emphasized at oral argument, that the city's ability to enforce payment of the inspection fee by imposing a lien on the property shows that the fee is property-related, not business-related. The fact is that the city is simply availing itself of all possible means to collect the fee. Property liens may be precipitated by at least one cause unconnected to land ownership (except ownership of the land on which the lien is imposed): the cost of removing graffiti. (Gov. Code, § 38772.) A lien may be imposed on parents' land to defray the cost of removing graffiti their child has scrawled on that belonging to another. (*Id.*, subd. (b).)

Plaintiffs also advert to section 5 of Proposition 218, which requires that "the provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 5, [***27] p. 109; reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2000 supp.), supra, foll. art. XIII C, p. 25.) But "liberal construction cannot overcome the plain language of Proposition 218 limiting [its] scope ... to [levies] based on real property." (Howard Jarvis Taxpayers Assn. v. [**940] City of San Diego (1999) 72 Cal. App. 4th 230, 237-238.) As a rule, a command that a constitutional provision or a statute be liberally construed "does not license either enlargement or restriction of its evident meaning" (People v. Cruz (1974) 12 Cal. 3d 562, 566, 116 Cal. Rptr. 242, 526 P.2d 250). Thus, [*845] given that article XIII D's scope is, as we have explained, unambiguously limited to burdens on landowners as such, " 'no resort to this command [of liberal construction] is required' " (Howard Jarvis, supra, 73 Cal. App. 4th 679, 687, quoting Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1533, fn. 4, 247 Cal. Rptr. 190) or even permitted. III.

The Court of Appeal's judgment is reversed.

MOSK, J.

WE CONCUR: GEORGE, C. J.

KENNARD, J.

WERDEGAR, J.

CHIN, J.

DISSENTING OPINION [***28] BY BROWN, J.

**DISSENTBY:
BROWN**

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DISSENT:**DISSENTING OPINION BY BROWN, J.**

I respectfully dissent.

Under the provisions of Proposition 218, affected property owners must approve the imposition of any new or increased fee, which is "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e) (article XIII D).) The dispositive determination in this case is whether a rental inspection fee is imposed "upon a person as an incident of property ownership." (*Ibid.*) To find that it is not, the majority concludes the Court of Appeal erroneously substituted "on" for "as." It is the majority that errs, however, in assuming "incident" denotes "the so-called bundle of rights that flow from [estates in land]." (Maj. opn., *ante*, 2001 Cal. LEXIS 3 at pp. *18; see maj. opn., *ante*, pp. 11-13.) In my view, the voters did not intend the courts to look any further than a standard dictionary in applying the terms of article XIII D.

"A constitutional amendment should be construed in accordance with the natural [***29] and ordinary meaning of its words. [Citation.]" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 245, 149 Cal. Rptr. 239, 583 P.2d 1281; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal. 4th 294, 302, 926 P.2d 1042.) Nothing in the ballot arguments in favor of or against Proposition 218 or in the Legislative Analyst's analysis implies that a different rule should obtain with respect to "incident," or that the voters intended it to have other than a plain meaning. The dictionary defines an "incident" as "something incident to something else," that is, "dependent upon or involved in something else." (Webster's New World Dict. (3d college ed. 1988) p. 682; see also Black's Law Dict. (4th ed. 1968) p. 904, col. 2 ["Used as a noun, [incident] denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing Also, less strictly, it denotes anything which is usually [*846] connected with another, or connected for some purposes, though not inseparably".]) In other words, if the imposition of a fee depends upon one's ownership of property, it comes within the purview of [***30] article XIII D unless otherwise excepted.

The fee at issue here plainly meets this definition. Pursuant to its police powers, the City of Los Angeles (City) enacted a Housing Code (L.A. Mun. Code, § 161.101 et seq.), which provides that residential rental properties are subject to regular inspection for

substandard and unsanitary conditions. Under the Housing Code, funding for these inspections devolves to a particular class of property owners, the landlords of the rental units, who must pay a \$ 12 fee for every unit owned. (*Id.*, § 161.352.) n1 As the majority [***941] acknowledge, "no one can rent [apartments] without owning them." (Maj. opn., *ante*, 2001 Cal. LEXIS 3 at p. *21; see also *Nash v. City of Santa Monica* (1984) 37 Cal. 3d 97, 105, 207 Cal. Rptr. 285, 688 P.2d 894.) And, no one is subject to the rental inspection fee without owning them. This exaction is thus imposed "as an incident of property ownership" (art. XIII D, § 2, subd. (e)); that is, it is dependent upon such ownership. (Cf. Off. of Legis. Analyst, Understanding Proposition 218 (Dec. 1996) p. 30 ["Generally, we think these fees would be considered property-related if there were no practical way that the owner could avoid the fee, short of selling the property or fundamentally changing its use"].) Moreover, "should the owner fail to pay the required fee, the City of Los Angeles will recover it, plus accrued interest, utilizing any remedies provided by law including nuisance abatement or municipal tax lien procedures established by ordinance or state law." (L.A. Mun. Code, § 161.352.) The use of tax lien procedures is a typical enforcement mechanism for delinquent levies imposed against property.

n1 Los Angeles Municipal Code section 161.352 provides: "*Owners* of all buildings subject to inspection shall pay a service fee of \$ 12.00 per unit per year. The fee will be used to finance the cost of inspection and enforcement by the Housing Department. Should the *owner* fail to pay the required fee, the City of Los Angeles will recover it, plus accrued interest, utilizing any remedies provided by law including nuisance abatement or municipal tax lien procedures established by ordinance or state law. This fee shall be known as the 'Systematic Code Enforcement Program Fee.'" (Italics added.)

[***31]

The majority avoids this result in part by finding the City "imposes a fee on its subjects by virtue of their ownership of a business--i.e., because they are landlords." (Maj. opn., *ante*, 2001 Cal. LEXIS 3 at pp. *22.) The last portion of this statement proves too much: Landlords are property owners. Imposition of the fee is an incident of, i.e., depends upon, that status and thereby runs afoul of article XIII D. As for the first portion of the statement, it ignores or disregards what the majority elsewhere concedes, that the business at issue is

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inseparable from property [***32] ownership. No amount of parsing can change that ineluctable fact.

[*847] The majority also concludes "neither the ballot arguments nor the Legislative Analyst's analysis suggested that article XIII D was intended to encompass fees of the type at issue here." (Maj. opn., *ante*, 2001 Cal. LEXIS 3 at p. *23.) Ultimately, the terms of the measure as enacted control our interpretation (see *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal. 4th 607, 673, 905 P.2d 1248 (conc. opn. of Mosk, J.)); and their plain meaning does not support the majority's reasoning. But the ballot materials also belie the majority's conclusion. While those materials do not specifically mention rental inspection fees, such an intention is readily discernable from any fair reading. The Legislative Analyst warned generally that "this measure would constrain local governments' ability to impose fees" and "reduce the amount of fees ... businesses pay." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by the Legis. Analyst, p. 73 (Ballot Pamphlet).) More particularly, the Legislative Analyst's list of "most likely fees and assessments affected by these provisions" (*id.* at p. 74) easily encompasses this type [***33] of exaction: "park and recreation programs, fire protection, lighting, ambulance, business improvement programs, library, and water service." (*Ibid.*) The argument in favor of Proposition 218 reminded the electorate that "after voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees.' " (Ballot Pamp., *supra*, argument in favor of Prop. 218, at p. 76.) "Proposition 218 guarantees your right to vote on local tax increases--even when they are called something else, like 'assessments' or 'fees'" (*Ibid.*) The argument did not limit the type of "fee" that would be subject to a vote under article XIII D but instead promised "Proposition 218 ... stops politicians' end-runs around Proposition 13." (Ballot Pamp., *supra*, rebuttal to argument against Prop. 218, at p. 77.) Particularly in light of its timing, the City's rental inspection fee appears to be just the kind of evasive maneuver at which proponents aimed Proposition 218. (See generally *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal. 3d 100, 105, 211 Cal. Rptr. 133, 695 P.2d 220 [***34] [purpose, in part, of Prop. 13 was "to prevent the government from recouping its losses from decreased property [**942] taxes by imposing or increasing other taxes"].)

In this regard, the majority also fails to accord any significance to two important provisions of Proposition 218. In any action challenging imposition of a new or increased fee or charge, the initiative assigns to the agency "the burden ... to demonstrate compliance with this article" (art. XIII D, § 6, subd. (b)(5)), thereby

reversing the usual deference accorded governmental action in such matters and making it more difficult to defend its legitimacy. (See Ballot Pamp., *supra*, analysis of Prop. 218 by the Legis. [*848] Analyst, at p. 74; see also art. XIII D, § 4, subd. (f) [imposing same burden for assessments].) The voters also expressly provided that Proposition 218 "shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Ballot Pamp., *supra*, text of Prop. 218, § 5, p. 109, also reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2000 supp.) foll. art. XIII C, § 1, p. 25.) The majority's construction frustrates both these goals. [***35]

The City argues that conditioning imposition of its rental inspection fee on compliance with the procedures set forth in article XIII D would allow landlords to defeat regulation of their businesses. This argument misses two critical points: First and generally, since the City has decided its rental inspections are necessary to eradicate "substandard and unsanitary residential buildings and dwelling units the physical conditions and characteristics of which ... are such as to be detrimental to or jeopardize the health, safety and welfare of their occupants and of the public" (L.A. Mun. Code, § 161.102), it can reasonably expect the public to pay for the program.

Second and specifically, the Los Angeles Municipal Code already provides substantial enforcement authority to prosecute landlords who violate the City's Housing Code. If a property owner fails to correct violations, the City may recover its administrative as well as abatement costs (L.A. Mun. Code, § 161.206.2), may seek criminal penalties including fines and imprisonment (*id.*, § 161.206.3), and may pursue civil remedies as provided in the Health and Safety Code (L.A. Mun. Code, § 161.206.4).

When the voters passed [***36] Proposition 13 in 1978, they sought to restrict the ability of government to impose taxes and other charges on property owners without their approval. For almost two decades, however, they witnessed politicians evade this constitutional limitation. The message of Proposition 218 is that they meant what they said. With the majority turning a deaf ear to that message, we may well expect a future effort to "stop[] politicians' end-runs around Proposition 13." (Ballot Pamp., *supra*, rebuttal to argument against Prop. 218, at p. 77.)

BROWN, J.

I CONCUR:

BAXTER, J.

**CHARLES J. VACANTI, M.D., INC., et al., Plaintiffs and Appellants, v. STATE
COMPENSATION INSURANCE FUND et al., Defendants and Respondents.**

S071945

SUPREME COURT OF CALIFORNIA

**24 Cal. 4th 800; 14 P.3d 234; 2001 Cal. LEXIS 1; 102 Cal. Rptr. 2d 562; 2001
Cal. Daily Op. Service 149; 2001 Daily Journal DAR 191**

January 4, 2001, Filed

PRIOR HISTORY:

[***1] Superior Court of California, Los Angeles County. Court of Appeal of California, Second Appellate District, Division Five. B114190. Super. Ct. No. BC116099. Mary Ann Murphy, Judge.

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JUDGES:

BROWN, J. WE CONCUR: GEORGE, C.J., MOSK, J., KENNARD, J., BAXTER, J., CHIN, J. CONCURRING OPINION BY WERDEGAR, J.

OPINIONBY: BROWN

OPINION:

[*807] [**240] This case contains a new twist on the seemingly endless litigation over the scope of workers' compensation exclusivity. Unlike the typical case where

an employee wishes to sue his or her employer or workers' compensation [**241] insurance carrier, this case involves a group of medical providers that wish to sue a group of workers' compensation insurers. In their novel complaint, the medical providers allege the [***5] insurers conspired to put them out of business by intentionally mishandling their lien claims before the Workers' Compensation Appeals Board (WCAB) and seek *only* to recover the damage to their businesses. We now consider whether the exclusive remedy provisions of the Workers' Compensation Act (WCA) preempt the statutory and tort claims asserted by these medical providers and conclude that these provisions bar some claims but not others.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because "this case comes to us after the sustaining of a general demurrer

..., we accept as true all the material allegations of the complaint." (*Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 7, 276 Cal. Rptr. 303, 801 P.2d 1054 (*Shoemaker*)). The following facts appear from the allegations of the complaint. n1

n1 Plaintiffs request judicial notice of a verified complaint filed by one of the defendants in an unrelated case. Certain amicus curiae request judicial notice of the form 10-Q filed by TriCare, Inc., a plaintiff in the companion case that settled, and its 1990 annual report. Because none of these documents are relevant, we deny these requests. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063, 875 P.2d 73.)

[***6]

Plaintiffs are (1) licensed medical groups that provided medical-legal services to employees with workers' compensation claims, and (2) medical [*808] management companies under contract to the medical groups. n2 To provide these services, plaintiffs employed or contracted with physicians to treat and evaluate employees injured in the workplace. After promptly paying these physicians, plaintiffs would seek compensation from the workers' compensation insurance carrier of the employee's employer.

n2 Plaintiffs are: (1) Charles J. Vacanti, M.D., Inc., doing business as NPI Medical Group; (2) Marina Pain Physicians Medical Group, Inc.; (3) Marina del Rey Ambulatory

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Surgery Center; (4) Huntington Pain Physicians Medical Group, Inc.; (5) Pain Centers of America Medical Group, Inc.; (6) National Pain Institute, Inc., doing business as Huntington Beach Surgery Center; and (7) Allegiant Physician Services, Inc.

Defendants are workers' compensation insurance carriers. n3 At a meeting in 1991, defendants [***7] decided to put plaintiffs out of business by delaying payment or refusing to pay for services rendered by plaintiffs to injured workers. As part of their scheme, defendants agreed to keep the meeting secret and to deny the existence of their plan to eliminate plaintiffs.

n3 Defendants are: (1) State Compensation Insurance Fund; (2) Golden Eagle Insurance Company; (3) California Compensation Insurance Company; (4) Superior Pacific Casualty Company (previously known as Pacific Rim Assurance Company); (5) American Manufacturers Mutual Insurance Company; (6) American Motorists Insurance Company; (7) American Protection Insurance Company; (8) Lumbermens Mutual Casualty Company; (9) Fremont Compensation Insurance Company; (10) Pacific Compensation Insurance Company; (11) Beaver Insurance Company; (12) Liberty Mutual Insurance Company; (13) Liberty Mutual Fire Insurance Company; (14) Liberty Insurance Corporation; (15) California Indemnity Insurance Company; (16) Republic Indemnity Company of America; (17) Continental Casualty Company; (18) CNA Casualty of California; (19) Transportation Insurance Company; (20) Transcontinental Insurance Company; (21) Valley Forge Insurance Company; (22) Superior National Insurance Company; (23) California Casualty Management Company; (24) California Casualty Insurance Company; (25) California Casualty General Insurance Company; (26) California Casualty & Fire Insurance Company; (27) California Casualty Indemnity Exchange; and (28) Unicare Insurance Company. Golden Eagle Insurance Company, California Compensation Insurance Company, Superior Pacific Casualty Company, and Superior National Insurance Company are no longer parties to the appeal because the action against them was stayed pursuant to Insurance Code section 1020.

[***8]

In subsequent meetings, defendants discussed strategies and distributed "hit lists" of targeted medical providers,

including plaintiffs. Reminiscent of the methods used by Great Benefit Insurance Company, the villain in the John Grisham thriller, *The Rainmaker*, defendants developed procedures for delaying or avoiding payment to plaintiffs using "false, fraudulent and frivolous objections." Defendants incorporated these procedures into their claims manuals and training protocols. Defendants [**242] also misled plaintiffs into believing they would promptly pay all valid lien claims. Meanwhile, they publicly accused plaintiffs of being "fraud mills" and advised other insurance carriers not to pay plaintiffs' claims.

[*809]

Due to the " 'no pay' " or " 'slow pay' " tactics of defendants, plaintiffs suffered heavy business losses. Because plaintiffs promptly paid the treating physician even if they failed to receive timely compensation, plaintiffs were especially susceptible to a disruption in cash flow. Not surprisingly, defendants' tactics were quite effective, as "the average time from billing to payment rose dramatically" and "the percentage collected [by plaintiffs] of the amount billed [***9] steadily declined." These tactics eventually forced plaintiffs out of business, and plaintiffs "now exist only to collect outstanding accounts receivable."

Plaintiffs filed suit against defendants, alleging: (1) abuse of process; (2) fraud; (3) violations of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.); (4) violations of the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. § 1962(c) (hereafter RICO)); (5) conspiracy to violate RICO (*id.*, § 1962(d)); (6) intentional and negligent interference with ongoing businesses; (7) intentional and negligent interference with contractual and prospective economic relations; and (8) violations of the unfair competition law (Bus. & Prof. Code, § 17200 et seq. (hereafter UCL)). Plaintiffs based their claims on defendants' alleged scheme to wrongfully delay or avoid payment on plaintiffs' lien claims and sought to recover the damage to their businesses. In doing so, plaintiffs declined to seek recovery of any amount owed on their individual lien claims against defendants.

Defendants filed a demurrer to plaintiffs' first amended complaint, [***10] alleging, among other things, that the exclusive remedy provisions of the WCA bar plaintiffs' claims. The first trial court judge overruled the demurrer on exclusivity grounds, but dismissed with leave to amend on other grounds. After plaintiffs filed a second amended complaint, defendants filed another demurrer, again alleging that workers' compensation exclusivity bars plaintiffs' claims. The same judge overruled the demurrer again and held that "this is not an

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action to adjudicate medical liens in Worker's Compensation cases" and plaintiffs' "use of the liens does not impinge on the exclusive jurisdiction of the Worker's Compensation Appeals Board."

After the first judge retired, a new judge took over. Two defendants subsequently added to the complaint filed a demurrer, contending once again that plaintiffs could only recover the remedies provided by the workers' compensation system. After plaintiffs amended their complaint a third time, the second judge sustained the demurrer solely on exclusivity grounds. Concluding that "the gravamen of the complaints is ... delay or refusal to pay medical liens," the judge held that "exclusive jurisdiction is with the WCAB."

[*810]

Plaintiffs [***11] appealed. The Court of Appeal affirmed for the reasons cited in its unpublished opinion in *FWHC Medical Group v. CNA Casualty of California* (June 18, 1998, B113493), a companion case with identical allegations and issues. n4 Specifically, the court concluded that: (1) section 5300 of the Labor Code n5 establishes that the WCAB has exclusive jurisdiction over plaintiffs' claims; (2) defendants did not act outside their proper roles as insurers as understood in *Unruh v. Truck Insurance Exchange* (1972) 7 Cal. 3d 616, 630, 102 Cal. Rptr. 815, 498 P.2d 1063 (*Unruh*); and (3) plaintiffs' claims do not fall within the public policy exception to workers' compensation exclusivity stated in *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1100, 824 P.2d 680 (*Gantt*), overruled on other grounds by *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 80, 960 P.2d 1046, footnote 6.

n4 Because *FHWC Medical Group v. CNA Casualty of California* settled, we dismissed that appeal.

n5 All further statutory references are to the Labor Code unless otherwise stated.

[***12]

We granted review to determine whether the claims asserted by these medical providers, alleging that various workers' compensation insurers conspired to intentionally mishandle plaintiffs' lien claims in order to drive [***243] them out of business, are barred by workers' compensation exclusivity.

II. DISCUSSION

Article XIV, section 4 of the California Constitution gives the Legislature "plenary power ... to create, and

enforce a complete system of workers' compensation." Pursuant to this authority, the Legislature enacted the WCA--a comprehensive statutory scheme governing compensation given to California employees for injuries incurred in the course and scope of their employment. (§ 3201 et seq.)

Under this statutory scheme, an employee injured in the workplace may request workers' compensation benefits by delivering a claim form to the employer within 30 days of the injury. (See § § 5400, 5401.) Benefits include compensation for medical treatment and other services "reasonably required to cure or relieve [the employee] from the effects of the injury." (§ 4600; see also § 3207.) The employee may also obtain compensation for medical-legal evaluations necessary [***13] to establish his or her entitlement to benefits. (§ 4621.) If the employer's workers' compensation insurer accepts coverage, then the insurer substitutes for the employer and assumes liability for benefits owed to the employee under the WCA. (§ § 3755, 3757.)

Ordinarily, the insurer must pay all medical or medical-legal bills of an injured employee within 60 days of receiving the bill. (§ § 4603.2, subd. (b), [***811] 4622, subd. (a).) If the insurer, however, contests the bill, then the insurer has to pay the contested portion of the bill only after the WCAB orders payment. (See § § 4603.2, subd. (b), 4622, subd. (a).)

Medical providers that treat employee injuries covered by the WCA may file a lien claim for the costs of their services directly with the WCAB. (§ § 4903, 5300.) Any such provider is a "party in interest" to the WCAB proceeding (*Independence Indem. Co. v. Indus. Acc. Com.* (1935) 2 Cal. 2d 397, 408, 41 P.2d 320 (*Independence Indemnity*)), and receives full due process rights, including an opportunity to be heard (see *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal. App. 4th 789, 803-804).

The [***14] underlying premise behind this statutorily created system of workers' compensation is the " 'compensation bargain.' " (*Shoemaker, supra*, 52 Cal. 3d at p. 16.) Pursuant to this presumed bargain, "the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." (*Ibid.*)

To effectuate this theoretical bargain, the Legislature enacted several provisions limiting the remedies

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available for injuries covered by the WCA (the exclusive remedy provisions). (See *Shoemaker, supra*, 52 Cal. 3d at p. 16.) Although the trade-off appears straightforward, "this court and the Courts of Appeal have struggled with the problem of defining the scope" of the compensation bargain. (*Id.* at p. 15.) Indeed, the unabated flow of published decisions *clarifying* the scope of workers' compensation exclusivity suggests considerable confusion [***15] as well as innovative lawyering.

Nonetheless, we glean several guiding principles from the case law. In determining whether exclusivity bars a cause of action against an employer or insurer, courts initially determine whether the alleged injury falls within the scope of the exclusive remedy provisions. Where the alleged injury is "collateral to or derivative of " an injury compensable by the exclusive remedies of the WCA, a cause of action predicated on that injury may be subject to the exclusivity bar. (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991, 997, 945 P.2d 781 (*Snyder*).) Otherwise, the cause of action is not barred.

If the alleged injury falls within the scope of the exclusive remedy provisions, then courts consider whether the alleged acts or motives that [*812] establish the elements of the [**244] cause of action fall outside the risks encompassed within the compensation bargain. "In some exceptional circumstances the employer is not free from liability at law for his intentional acts even if the resulting injuries to his employees are compensable under workers' compensation." (*Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal. 3d 465, 473, 165 Cal. Rptr. 858, 612 P.2d 948 [***16] (*Johns-Manville*).) Where the acts are "a normal part of the employment relationship" (*Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 717, 872 P.2d 559 (*Fermino*)), or workers' compensation claims process (see *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal. 3d 1, 10-11, 259 Cal. Rptr. 733, 774 P.2d 762 (*Marsh*)), or where the motive behind these acts does not violate a "fundamental policy of this state" (*Gantt, supra*, 1 Cal. 4th at p. 1100), then the cause of action is barred. If not, then it may go forward.

With these principles in mind, we conclude that, while the alleged injury falls within the scope of the exclusive remedy provisions, some of the alleged acts and motives do not. Thus, we bar plaintiffs' abuse of process and fraud claims on exclusivity grounds, but not their Cartwright Act and RICO claims. We also bar in part and allow in part plaintiffs' tortious interference and UCL claims.

A. The Alleged Injury

The starting point of our analysis is the alleged injury underlying plaintiffs' claims. This injury is collateral to or derivative of a personal "injury sustained and arising out of the course [***17] of employment" (a compensable injury). (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 (*Cole*).) Therefore, it falls within the scope of the exclusive remedy provisions.

Because workers' compensation exclusivity is statutory in nature, we begin with the pertinent statutory provisions. (See *American Psychometric Consultants,*

Inc. v. Workers' Comp. Appeals Bd. (1995) 36 Cal. App. 4th 1626, 1638 (*American Psychometric Consultants*).) Subdivision (a) of section 3600 provides in relevant part: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person ... shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the ... conditions of compensation concur" (Italics added.) The "conditions of compensation" applicable to this case include: "(1) Where, at the time of the injury, [*813] both the employer and the employee are subject [***18] to the compensation provisions of this division. [P] (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment. [P] (3) Where the injury is proximately caused by the employment, either with or without negligence." (*Ibid.*) Subdivision (a) of section 3602 then provides that: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is ... the *sole and exclusive remedy* of the employee ... against the employer" (Italics added.) Finally, section 5300, subdivision (a), states that proceedings "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto" "shall be instituted before the [WCAB] and *not elsewhere*, except as otherwise provided in Division 4" (Italics added.)

The Legislature has extended the protection of these exclusive remedy provisions to workers' compensation insurance carriers by defining the term "employer" to include "insurer." (§ 3850, subd. (b).) Thus, these insurers "retain immunity [***19] from lawsuit as the 'alter ego' of the employer." (*Unruh, supra*, 7 Cal. 3d at p. 625, italics omitted.) Employees may, however, "bring suit against any person other than [their] employer [or their employer's workers' compensation insurer] who

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proximately caused [their] injury." (*Marsh, supra*, 49 Cal. 3d at p. 6, italics omitted; see also § 3852.)

[**245] Together, these provisions establish that the liability of employers and insurers for "industrial injury which results in occupational disability or death" is limited to workers' compensation remedies. (*Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 752, 828 P.2d 1195, italics omitted (*Livitsanos*).) Where "the essence of the wrong is personal physical injury or death, the action is barred by the exclusiveness clause no matter what its name or technical form if the usual conditions of coverage are satisfied." (*Cole, supra*, 43 Cal. 3d at p. 160.) In other words, the exclusivity provisions encompass all injuries "collateral to or derivative of" an injury compensable by the exclusive remedies of the WCA. (*Snyder, supra*, 16 Cal. 4th at p. 997.)

Thus, the trigger for workers' [***20] compensation exclusivity is a compensable injury. An injury is compensable for exclusivity purposes if two conditions exist. First, the statutory conditions of compensation must concur. (See § 3600, subd. (a).) For example, if the injury arises "out of and in the course of the employment, the exclusive remedy provisions apply notwithstanding that the injury resulted from ... intentional conduct ... even though the ... conduct might be characterized as egregious." (*Shoemaker, supra*, 52 Cal. 3d at p. 15.)

[*814]

Second, the injury must cause a "disability or the need for medical treatment." (*Gomez v. Acquistapace* (1996) 50 Cal. App. 4th 740, 748 (*Gomez*).)

" 'Injury' includes any injury or disease" (§ 3208.) Therefore, "the exclusive remedy provisions apply *only* in cases of such industrial personal injury or death," and the workers' compensation system subsumes all statutory and tort remedies otherwise available for such injuries. (*Shoemaker, supra*, 52 Cal. 3d at p. 16.)

Where the alleged injury is neither collateral to nor derivative of an injury that satisfies both of these conditions, then it is not subject to exclusivity. [***21] (See *Snyder, supra*, 16 Cal. 4th at p. 997.) Thus, a cause of action predicated on an injury where "the basic conditions of compensation" are absent is not preempted. (*Livitsanos, supra*, 2 Cal. 4th at p. 754.) For example, courts have allowed tort claims in cases where the alleged injury--the aggravation of an existing workplace injury--did not occur in the course of an employment relationship. (See, e.g., *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal. App. 4th 1223, 1235-1236 [allowing a medical malpractice claim against the employer because the resulting aggravation of the

workplace injury did not arise out of the employment relationship].)

Causes of action seeking to recover "economic or contract damages incurred *independent* of any" workplace injury are also exempt from workers' compensation exclusivity. (*Pichon v. Pacific Gas & Electric Co.* (1989) 212 Cal. App. 3d 488, 501, 260 Cal. Rptr. 677, italics added (*Pichon*).) Indeed, only injuries "to the worker's *person*, as opposed to his *property*," are compensable. (*Coca-Cola Bottling Co. of Los Angeles v. Superior Court* (1991) 233 Cal. App. 3d 1273, 1287, 285 Cal. Rptr. 183 [***22] (*Coca-Cola*).) Thus, courts have refused to bar spoliation of evidence or fraud claims where the alleged injury--the loss of a prospective lawsuit against a third party--was not collateral to or derivative of an injury to the worker's person. (See *Gomez, supra*, 50 Cal. App. 4th at pp. 749-750 [spoliation of evidence]; *Coca-Cola, supra*, 233 Cal. App. 3d at pp. 1288-1289 [same]; *Ramey v. General Petroleum Corp.* (1959) 173 Cal. App. 2d 386, 400-401, 343 P.2d 787 [fraud]; but see *Continental Casualty Co. v. Superior Court* (1987) 190 Cal. App. 3d 156, 162, 235 Cal. Rptr. 260.) Courts have also allowed an employee to recover economic damages on a wrongful termination claim because the damages arose out of the act of termination--and not out of an injury to the employee's person. (See *Pichon, supra*, 212 Cal. App. 3d at pp. 500-501.) Finally, courts have exempted defamation claims from exclusivity because an injury to reputation does not depend on a personal injury. (See *Howland [*246] v. Balma* (1983) 143 Cal. App. 3d 899, 904, 192 Cal. Rptr. 286.)

On the other hand, courts have regularly [***23] barred claims where the alleged injury is collateral to or derivative of a compensable workplace injury. For [*815] example, courts have barred employees from suing for psychic injuries caused by their termination (see *Semore v. Eric Pool* (1990) 217 Cal. App. 3d 1087, 1104-1105, 266 Cal. Rptr. 280), or their employer's abusive conduct during the termination process (see *Gates v. Trans Video Corp.* (1979) 93 Cal. App. 3d 196, 199-201, 206, 155 Cal. Rptr. 486).

Courts have also consistently held that injuries arising out of and in the course of the workers' compensation claims process fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury. Indeed, every employee who suffers a workplace injury must go through the claims process in order to recover compensation. Thus, we have barred all claims based on "disputes over the delay or discontinuance of [workers' compensation] benefits" (*Marsh, supra*, 49 Cal. 3d at p. 7), including those claims

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seeking to recover economic or contractual damages caused by the mishandling of a workers' compensation claim (see *Stoddard v. Western Employers Ins. Co.* (1988) 200 Cal. App. 3d 165, 168-169, 172, 245 Cal. Rptr. 820 [***24] (*Stoddard*) [barring claims where the employee alleged economic damages due to delays in benefit payments]; *Mottola v. R.L. Kautz & Co.* (1988) 199 Cal. App. 3d 98, 109, 244 Cal. Rptr. 737 (*Mottola*) [barring a breach of contract claim based on the refusal to pay benefits]). Likewise, claims seeking compensation for services rendered to an employee in connection with his or her workers' compensation claim fall under the exclusive jurisdiction of the WCAB. (See *Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal. App. 3d 486, 490, 131 Cal. Rptr. 582 [physician may not sue to recover fees for services rendered to an injured employee]; *Workmen's Comp. Appeals Bd. v. Small Claims Court* (1973) 35 Cal. App. 3d 643, 647, 111 Cal. Rptr. 6 [physician may not sue to recover fees for testimony at a WCAB hearing].)

In this case, plaintiffs seek to recover the economic damage to their businesses resulting from the failure to receive full and timely payment on their lien claims before the WCAB. These damages arise out of the alleged mishandling of plaintiffs' lien claims. Plaintiffs concede that their underlying lien claims sought [***25] to recover compensation for medical services provided to workers injured in the course of their employment. Thus, the alleged injury underlying all of plaintiffs' causes of action is collateral to or derivative of a compensable workplace injury and falls within the scope of the exclusivity provisions. (See *Marsh, supra*, 49 Cal. 3d at pp. 7-8; *Stoddard, supra*, 200 Cal. App. 3d at pp. 168-169, 172.)

In reaching this conclusion, we reject plaintiffs' narrow interpretation of the exclusive remedy provisions. The mere fact that plaintiffs are medical [*816] providers, and not employees, does not preclude the application of these provisions. The rights of lien claimants "derive from" the rights of injured employees. (*Fox v. Workers' Compensation Appeals Bd.* (1992) 4 Cal. App. 4th 1196, 1204.) Therefore, plaintiffs stand in the place of the employees with respect to claims for workers' compensation benefits, and plaintiffs' rights cannot exceed employees' rights. Because employees are limited to WCA remedies for *all* injuries caused by wrongful delays or refusals to pay (see, e.g., *Marsh, supra*, 49 Cal. 3d at pp. 7-8; *Stoddard, supra*, [***26] 200 Cal. App. 3d at p. 172; *Mottola, supra*, 199 Cal. App. 3d at p. 109), plaintiffs are limited to the same. Indeed, we established long ago that the WCAB "has exclusive jurisdiction over *all* claims for compensation against an employer or insurance carrier involving medical, surgical and hospital treatment to injured

employees" (*Independence Indemnity, supra*, 2 Cal. 2d at p. 406, italics added.)

Plaintiffs' decision to forgo recovery on their individual lien claims and to seek only economic damages also does not insulate their claims from the exclusivity provisions. [***247] Unlike the economic damages alleged in *Coca-Cola, supra*, 233 Cal. App. 3d at pages 1288-1289, and *Pichon, supra*, 212 Cal. App. 3d at pages 500-501, the damage to plaintiffs' businesses were proximately caused by the alleged mishandling of lien claims before the WCAB. Therefore, plaintiffs' alleged injury was not "independent" of a compensable injury. (*Pichon, supra*, 212 Cal. App. 3d at p. 501.) In any event, plaintiffs' proposed distinction is meaningless. Every time an insurer fails to timely pay a valid lien claim, the aggrieved medical provider suffers economic damages. [***27] Accordingly, plaintiffs' causes of action do not fall outside the scope of the exclusive remedy provisions by virtue of the remedy they seek. (See *Marsh, supra*, 49 Cal. 3d at pp. 7-8.)

A contrary result would create a huge loophole in the workers' compensation system and eviscerate the compensation bargain. Employees often suffer economic damages when they suffer workplace injuries or fail to receive prompt payment of their medical bills. Under plaintiffs' logic, these employees could circumvent the workers' compensation system by asserting claims for economic damages even though their claims derive from their workplace injuries. This circumvention of the system, if allowed, would destroy the careful balancing of employee-employer rights created by the WCA and effectively breach the compensation bargain.

Finally, our recent decision in *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 959 P.2d 752 (*City of Moorpark*), is inapposite. In *City of Moorpark*, an employee alleged that her employer [*817] terminated her because of her physical disability and asserted, among other things, violations of the California Fair Employment and Housing [***28] Act (Gov. Code, § 12900 et seq. (hereafter FEHA)), and wrongful termination in violation of public policy (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330 (*Tameny* claim)). The employer demurred, contending that section 132a was the employee's exclusive remedy. The trial court overruled the demurrer. The Court of Appeal denied the employer's petition for writ of mandate, and we affirmed. (*City of Moorpark, supra*, 18 Cal. 4th at pp. 1149, 1161.)

In concluding that FEHA and *Tameny* claims fall outside the scope of the exclusive remedy provisions, we observed that "the existence of a workers' compensation remedy does not by itself establish that the remedy is exclusive." (*City of Moorpark, supra*, 18 Cal. 4th at p.

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1154.) Only remedies found in division 4 of the Labor Code are exclusive. Because section 132a is located in division 1, we concluded it does not provide the exclusive remedy for disability discrimination. (*City of Moorpark*, at pp. 1154-1155.) We also held that section 5300 only makes the WCAB "the exclusive forum for pursuing a section 132a claim" and "does not [***29] establish that the section 132a claim is the employee's exclusive remedy." (*City of Moorpark*, at pp. 1155-1156.)

Here, unlike section 132a, the provisions that create the remedies for the mishandling of workers' compensation claims--sections 4603.2, 4622 and 5814--are located in division 4. These remedies are therefore exclusive. (See *City of Moorpark*, *supra*, 18 Cal. 4th at pp. 1154-1155.) Sections 4603.2 and 4622 give medical providers their sole remedy for delayed payment and impose a 10 percent penalty plus interest if the employer fails to pay their medical bills within 60 days under certain conditions. n6 (See [**248] *American Psychometric Consultants*, *supra*, 36 Cal. App. 4th at p. 1640, fn. omitted [The [*818] Legislature enacted sections 4603.2 and 4622 in order "to ensure that the bills of medical providers were promptly paid, and that protests or objections to the bills were promptly raised and adjudicated"].) Section 5814 then provides the exclusive remedy for employees "when [the] payment of compensation has been *unreasonably delayed or refused*" and states that "the full amount of the [WCAB] order, decision or award shall be increased [***30] by 10 percent" (Italics added.) Section 5300 further states that the WCAB is the exclusive forum for resolving disputes relating to the remedies provided in division 4. Consequently, "the workers' compensation system encompasses *all* disputes over coverage and payment." (*Marsh*, *supra*, 49 Cal. 3d at p. 8, italics added; see also *Schlick v. Comco Management, Inc.* (1987) 196 Cal. App. 3d 974, 981, 242 Cal. Rptr. 241 (*Schlick*) ["Where compensation is available under [division 4 of] the act for the alleged misconduct, ... the [WCAB] has exclusive jurisdiction".])

n6 Section 4603.2 states in relevant part:

"(b) Payment for medical treatment provided or authorized by the treating physician selected by the employee or designated by the employer shall be made by the employer within 60 days after receipt of each separate, itemized billing, together with any required reports. If the billing or a portion thereof is contested, denied, or considered incomplete, the physician shall be notified, in writing, that the billing is contested, denied, or considered incomplete, within 30

working days after receipt of the billing by the employer. A Notice that a billing is incomplete shall state all additional information required to make a decision. Any properly documented amount not paid within the 60-day period shall be increased by 10 percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the bill, unless the employer does both of the following:

"(1) Pays the uncontested amount within the 60-day period.

"(2) Advises, in the manner prescribed by the administrative director, the physician, or another provider of the items being contested, the reasons for contesting these items, and the remedies available to the physician or the other provider if he or she disagrees. ...

"If an employer contests all or part of a billing, any amount determined payable by the appeals board shall carry interest from the date the amount was due until it is paid.

"An employer's liability to a physician or another provider under this section for delayed payments shall not affect its liability to an employee under Section 5814 or any other provision of this division."

Section 4622 states in relevant part:

"All medical-legal expenses for which the employer is liable shall, upon receipt by the employer of all reports and documents required by the administrative director incident to the services, be paid to whom the funds and expenses are due, as follows:

"(a) Except as provided in subdivision (b), within 60 days after receipt by the employer of each separate, written billing and report, and where payment is not made within this period, that portion of the billed sum then unreasonably unpaid shall be increased by 10 percent, together with interest thereon at the rate of 7 percent per annum retroactive to the date of receipt of the bill and report by the employer. Where the employer, within the 60-day period, contests the reasonableness and necessity for incurring the fees, services, and expenses, payment shall be made within 20 days of the filing of an order of the appeals board directing payment.

"The penalty provided for in this subdivision shall not apply if (1) the employer pays the provider that portion of his or her charges which do not exceed the amount deemed reasonable

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pursuant to subdivision (c) of Section 4624 within 60 days of receipt of the report and itemized billing, and (2) the appeals board sustains the employer's position in contesting the reasonableness or necessity for incurring the expenses. ...

"(b) Where requested by the employee, or the dependents of a deceased employee, within 20 days from the filing of an order of the appeals board directing payment, and where payment is not made within that period, that portion of the billed sum then unpaid shall be increased by 10 percent, together with interest thereon at the rate of 7 percent per annum retroactive to the date of the filing of the order of the board directing payment. [P] ... [P]

"The provisions of Sections 5800 and 5814 shall not apply to this section."

[***31]

The existence of a penalty provision covering defendants' alleged misconduct does not alter our analysis. Section 129.5, found in division 1, does not create a remedy against workers' compensation insurers. Instead, it gives the Administrative Director of the Division of Workers' Compensation (DWC) [*819] the power to impose an "administrative" or "civil penalty" on insurers who unreasonably delay or refuse payment of compensation. (*Ibid.*) Potential penalties include "a civil penalty, not to exceed one hundred thousand dollars (\$ 100,000)" (*id.*, subd. (d)), and revocation of an insurer's "certificate of authority." (*Id.*, subd. (d)(4).) n7 The director may impose [**249] these penalties in addition to any other remedy available under the WCA, including the penalties provided by sections 4603.2, 4622, and 5814. Thus, section 129.5 does not affect the exclusivity of remedies in division 4. Indeed, the Legislature's enactment of a penalty provision--as opposed to a remedy provision--equally suggests an intent to have the DWC, rather than private litigants, address the type of insurer misconduct alleged here. Accordingly, the alleged injury underlying plaintiffs' claims falls within [***32] the scope of the exclusive remedy provisions.

n7 Section 129.5 provides in relevant part that:

"(a) The administrative director shall assess an administrative penalty against an insurer, self-insured employer, or third-party administrator for any of the following:

"(1) Failure to comply with the notice of assessment issued pursuant to subdivision (c) within 15 days of receipt.

"(2) Failure to pay when due the undisputed portion of an indemnity payment, the reasonable cost of medical treatment of an injured worker, or a charge or cost of implementing an approved vocational rehabilitation plan.

"(3) Failure to comply with any rule or regulation of the administrative director. [P] ... [P]

"(d) In addition to the penalty assessment permitted by subdivision (a), the administrative director may assess a civil penalty, not to exceed one hundred thousand dollars (\$ 100,000), upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed and has performed with a frequency as to indicate a general business practice any of the following:

"(1) Induced employees to accept less than compensation due, or made it necessary for employees to resort to proceedings against the employer to secure compensation due.

"(2) Refused to comply with known and legally indisputable compensation obligations.

"(3) Discharged or administered compensation obligations in a dishonest manner.

"(4) Discharged or administered compensation obligations in a manner as to cause injury to the public. ...

"Upon a second or subsequent finding, the administrative director shall refer the matter to the Insurance Commissioner or Director of Industrial Relations and request a hearing be conducted to determine whether the certificate of authority, certificate of consent to self-insure, or certificate of consent to administer claims of self-insured employer, as the case may be, should be revoked."

[***33]

B. The Alleged Acts and Motives

Even if the exclusivity provisions cover the alleged injury, plaintiffs may still pursue their causes of action if they fit within the "narrow exception to the WCAB's jurisdiction" established in *Unruh, supra*, 7 Cal. 3d at pages 629-631. (*Marsh, supra*, 49 Cal. 3d at p. 6.) This exception focuses on the alleged acts or motives that

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establish the elements of the cause of action and considers whether these acts or motives constitute "a risk reasonably [*820] encompassed within the compensation bargain." (*Shoemaker, supra*, 52 Cal. 3d at p. 16.) If they do, then the exclusive remedy provisions govern and bar the cause of action. If they do not, then the exclusive remedy provisions are inapplicable because the malfeasor is *no longer* acting as an "employer," as understood in these provisions. (§ § 3600, 3602, 3850.) Here, plaintiffs' abuse of process and fraud claims do not fall within this exception, but their Cartwright Act and RICO claims do. In addition, plaintiffs' tortious interference and UCL claims escape preemption to the extent they are predicated on the conspiratorial acts of defendants--and not on the individual [***34] misdeeds of each defendant.

Since *Unruh*, courts have struggled to define the contours of this exception to workers' compensation exclusivity. Throughout the years, we have identified various circumstances where the exception precludes application of the exclusive remedy provisions. For example, we have held that conduct "having a 'questionable' relationship to the employment" is not protected by the exclusivity rule. (*Cole, supra*, 43 Cal. 3d at p. 161; see also *Magliulo v. Superior Court* (1975) 47 Cal. App. 3d 760, 779, 121 Cal. Rptr. 621 (*Magliulo*).) We have also stated that conduct going "beyond the normal role of an insurer in a compensation scheme intended to protect the worker" is exempt from exclusivity. (*Unruh, supra*, 7 Cal. 3d at p. 630; see also *Marsh, supra*, 49 Cal. 3d at p. 11 [only conduct "so extreme and outrageous that" the defendant "in effect stepped out of its role as" an insurer precludes the application of workers' compensation exclusivity].)

Despite these vague pronouncements, several guiding principles are clear. When determining whether the exception applies to a cause of action, courts first determine [***35] whether the alleged acts that give rise to that cause of action are "of the kind that [are] within the compensation bargain." (*Fermino, supra*, 7 Cal. 4th at p. 718.) In making this determination, courts may consider only [**250] those acts that relate to an element of the cause of action. Where these acts are "a normal part of the employment relationship" (*Cole, supra*, 43 Cal. 3d at p. 160) or the workers' compensation claims process (see *Mitchell v. Scott Wetzel Services, Inc.* (1991) 227 Cal. App. 3d 1474, 1480-1481, 278 Cal. Rptr. 474 (*Mitchell*)), the cause of action is subject to exclusivity. Otherwise, it is not.

For this initial determination, courts consider only the acts themselves--and not the motive behind the acts. (See *Fermino, supra*, 7 Cal. 4th at pp. 722-723.) In the

exclusivity context, motive refers to the purpose or reason behind the acts and *not* the intentional or negligent nature of these acts. (See *ibid.*) Thus, courts should disregard any alleged intent beyond the intent to [*821] do the acts that establish the elements of the cause of action when determining whether these acts are encompassed within the compensation [***36] bargain. Such a focus is necessary in order to preserve the compensation bargain. Indeed, permitting civil claims based on conduct that "appeared on its face to be a normal part of the employment relationship [or claims process] ... merely because the mental state ... rendered the conduct intentionally or knowingly tortious" undermines the premise behind the workers' compensation system. (*Id.* at p. 713.)

Thus, typical employer actions "such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances" do not, by themselves, exempt a cause of action from exclusivity. (*Cole, supra*, 43 Cal. 3d at p. 160.) Similarly, termination, a known risk of any employment relationship, does not, by itself, insulate a cause of action from the exclusive remedy provisions. (See *Shoemaker, supra*, 52 Cal. 3d at p. 20.) "Reasonable attempts to investigate employee theft, including employee interrogation, are [also] a normal part of the employment relationship" and cannot give rise to a court action against the employer. (*Fermino, supra*, 7 Cal. 4th at p. 717.)

Insurer activity intrinsic to the workers' [***37] compensation claims process is also a risk contemplated by the compensation bargain. Thus, insurer actions "closely connected to the payment of benefits" fall within the scope of the exclusive remedy provisions. (*Mitchell, supra*, 227 Cal. App. 3d at p. 1481.) For example, a claims investigation, by itself, does not exempt a cause of action from exclusivity. (See *Unruh, supra*, 7 Cal. 3d at pp. 628-629; *Teague v. Home Ins. Co.* (1985) 168 Cal. App. 3d 1148, 1153, 214 Cal. Rptr. 773 (*Teague*).) Because denying or objecting to claims for benefits is also a normal part of the claims process, misconduct stemming from the delay or "discontinuance of payments ... is properly addressed by the WCAB." (*Marsh, supra*, 49 Cal. 3d at p. 11.) Indeed, California courts have invariably barred statutory and tort claims alleging that an insurer unreasonably avoided or delayed payment of benefits even though the insurer committed fraud and other misdeeds in the course of doing so. n8

n8 See, e.g., *Marsh, supra*, 49 Cal. 3d at pages 7, 9-10; *Mitchell, supra*, 227 Cal. App. 3d at pages 1480-1481; *Phillips v. Crawford & Co.* (1988) 202 Cal. App. 3d 383, 389, 248 Cal. Rptr. 371; *Stoddard, supra*, 200 Cal. App. 3d at page

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173; *Mottola, supra*, 199 Cal. App. 3d at pages 103, 109; *Schlick, supra*, 196 Cal. App. 3d at pages 981-982; *Soto v. Royal Globe Ins. Co.* (1986) 184 Cal. App. 3d 420, 429-430, 229 Cal. Rptr. 192; *Caplan v. Fireman's Fund Ins. Co.* (1985) 175 Cal. App. 3d 146, 147-148, 220 Cal. Rptr. 549; *Teague, supra*, 168 Cal. App. 3d at pages 1151-1152; *Santiago v. Employee Benefits Services* (1985) 168 Cal. App. 3d 898, 905-907, 214 Cal. Rptr. 679; *Cervantes v. Great American Ins. Co.* (1983) 140 Cal. App. 3d 763, 774, 189 Cal. Rptr. 761; *Denning v. Esis Corp.* (1983) 139 Cal. App. 3d 946, 948-949, 189 Cal. Rptr. 118; *Droz v. Pacific National Ins. Co.* (1982) 138 Cal. App. 3d 181, 187, 188 Cal. Rptr. 10; *Depew v. Hartford Acc. & Indem. Co.* (1982) 135 Cal. App. 3d 574, 578-579, 185 Cal. Rptr. 472; *Fremont Indemnity Co. v. Superior Court* (1982) 133 Cal. App. 3d 879, 881-882, 184 Cal. Rptr. 184; *Ricard v. Pacific Indemnity Co.* (1982) 132 Cal. App. 3d 886, 894-895, 183 Cal. Rptr. 502; *Everfield v. State Comp. Ins. Fund* (1981) 115 Cal. App. 3d 15, 171 Cal. Rptr. 164,

20-21.

[***38]

[**251] Of course, an employer or insurer may not use the exclusive remedy provisions as a "get out of jail free" card by characterizing its acts as a [*822] normal employer or insurer activity. "What matters ... is not the label that might be affixed to the ... conduct" (*Fermino, supra*, 7 Cal. 4th at p. 718.) Rather, the critical issue is whether the alleged acts, bereft of their motivation, "can ever be viewed as a normal aspect of the employer relationship" or claims process. (*Ibid.*) Where the tortious act is not closely connected to a normal employer or insurer action, it is not subject to exclusivity. (See *Marsh, supra*, 49 Cal. 3d at p. 10 ["Only when the entity commits tortious acts independent of its role as a provider of workers' compensation benefits may an employee maintain a private cause of action under *Unruh*"].)

Thus, courts have permitted fraud claims against an employer when the employer conceals the existence of an employee's workplace injury because such concealments cannot be linked to a normal employer action. (See *Johns-Manville, supra*, 27 Cal. 3d at p. 477.) Involuntary confinement is not closely connected [***39] to a typical employment action even when committed in the course of an investigation of employee theft. Therefore, a claim of false imprisonment, by definition, falls "outside the scope of the compensation

bargain." (*Fermino, supra*, 7 Cal. 4th at p. 723.) Indeed, violent and coercive criminal conduct committed against an employee's person is *always* illegal regardless of the employer's state of mind and is *never* subject to the exclusive remedy provisions. (7 Cal. 4th at p. 723, fn. 7; see also *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal. App. 3d 219, 227-228, 191 Cal. Rptr. 696 [physical assault and false imprisonment]; *Meyer v. Graphic Arts International Union* (1979) 88 Cal. App. 3d 176, 178-179, 151 Cal. Rptr. 597 [assault and battery, false imprisonment, and rape]; *Magliulo, supra*, 47 Cal. App. 3d at pp. 763, 779 [assault and battery].)

With respect to insurers, courts have permitted fraud claims when the insurer denies the existence of a workers' compensation insurance policy, because such denials are not a normal part of the claims process. (See *Jablonski v. Royal Globe Ins. Co.* (1988) 204 Cal. App. 3d 379, 391, 251 Cal. Rptr. 160.) [***40] Trespassing is also an atypical insurer activity even when committed in the course of a claims investigation. Therefore, it falls outside the compensation bargain. (See *Teague, supra*, 168 Cal. App. 3d at p. 1153.) Finally, assault and the formation of a romantic relationship with an injured [*823] employee are not closely connected to the claims process and are exempt from exclusivity. (See *Unruh, supra*, 7 Cal. 3d at pp. 627-628, 630-631.)

In addition to the acts themselves, the motive element of a cause of action may insulate that cause of action from the purview of the exclusive remedy provisions. This exception to exclusivity, however, is quite limited. "Any inquiry into an employer's motivation is undertaken not to determine whether the employer intentionally or knowingly injured the employee, but rather to ascertain whether the employer's conduct violated public policy and therefore fell outside the compensation bargain." (*Fermino, supra*, 7 Cal. 4th at pp. 714-715.) In other words, the motive element of a cause of action excepts that cause of action from exclusivity *only if* it violates a fundamental public policy of this state. [***41] (See *Gantt, supra*, 1 Cal. 4th at p. 1100.) Thus, we have refused to bar both statutory and tort claims where their motive element violates such a policy. (See, e.g., *City of Moorpark, supra*, 18 Cal. 4th at pp. 1155, 1161 [FEHA claim]; *Gantt*, at p. 1100 [*Tameny* claim]; *Shoemaker, supra*, 52 Cal. 3d at pp. 22-23 [whistleblower claim under Gov. Code, former § 19683].)

We now apply these principles to plaintiffs' specific claims and allegations.

[**252] 1. *Abuse of process and fraud claims*

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After reviewing the acts and motives that give rise to plaintiffs' abuse of process and fraud claims, we conclude these claims do not fit within the *Unruh* exception to workers' compensation exclusivity. Thus, they are barred.

Plaintiffs' abuse of process and fraud claims, in essence, allege that each defendant engaged in a pattern or practice of delaying or denying payments in bad faith. For example, the abuse of process claims allege that defendants misused the claims process by making frivolous objections, filing sham petitions and documents with the WCAB, issuing unnecessary subpoenas, and improperly threatening to depose plaintiffs' [***42] physicians. Similarly, the fraud claim states that each individual defendant made false statements about and during its processing of plaintiffs' lien claims. All of these alleged acts are closely connected to a normal insurer activity--the processing and payment of medical lien claims. Therefore, plaintiffs' abuse of process and fraud claims are encompassed within the compensation bargain. (See *Marsh, supra*, 49 Cal. 3d at pp. 9-11.)

In reaching this conclusion, we reject plaintiffs' attempt to shield these claims from preemption by including superfluous allegations unrelated to the [*824] elements of the cause of action. For example, plaintiffs claim defendants committed abuse of process by advising other insurers not to pay plaintiffs' claims, distributing hit lists of medical providers and conducting training sessions on how to delay or avoid payments on plaintiffs' claims. These acts do not, however, support an abuse of process claim because they do not involve the use of a procedure "incident to litigation." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 104, fn. 4, 101 Cal. Rptr. 745, 496 P.2d 817. (*Barquis*).) Consequently, they [***43] cannot shield plaintiffs' abuse of process claims from the reach of the exclusive remedy provisions.

Plaintiffs' characterization of defendants' acts of fraud as a "scheme" suffers from the same defect. Fraud does not require a scheme, and a scheme does not establish an element of a fraud claim. (See Civ. Code, § 1709.) Thus, the existence of a scheme cannot insulate plaintiffs' fraud claim from preemption. In any event, the mere allegation of a conspiracy is not enough where, as here, the alleged acts in furtherance of the conspiracy--i.e., the fraudulent statements--are closely connected to claims processing, a normal insurer activity. (See *Hazelwerdt v. Industrial Indem. Exchange* (1958) 157 Cal. App. 2d 759, 763, 321 P.2d 831 (*Hazelwerdt*).)

The fact that the misdeeds alleged in the abuse of process and fraud claims may constitute crimes under Insurance

Code sections 1871 and 1871.4 does not alter our conclusion. Unlike "those classes of intentional ... crimes against the employee's person by means of violence and coercion, such as those crimes numerated in part 1, title 8 of [***44] the Penal Code," regulatory crimes like the ones cited by plaintiffs do not "violate the employee's reasonable expectations and transgress the limits of the compensation bargain." (*Fermino, supra*, 7 Cal. 4th at p. 723, fn. 7; see also *Up-Right, Inc. v. Van Erickson* (1992) 5 Cal. App. 4th 579, 582-584 (*Up-Right*) [criminal violations of child labor laws do not support an exception to exclusivity].)

Finally, neither abuse of process nor fraud contains a motive element that violates a fundamental public policy. Abuse of process claims merely require malice, which "may be inferred from the wilful abuse of the process." (*Tranchina v. Arcinas* (1947) 78 Cal. App. 2d 522, 526, 178 P.2d 65.) This malice element does not violate a fundamental public policy. Meanwhile, fraud requires only an "intent to induce" another "to alter his position to his injury or risk" and not an intent that violates a public policy rooted in a constitutional, statutory, or regulatory provision. (Civ. Code, § 1709.) Because the acts and motives underlying plaintiffs' abuse of process and fraud claims fall within the risks contemplated by the compensation [***45] bargain, these claims are barred. (See *Shoemaker, supra*, 52 Cal. 3d at p. 16.)

[*825]

[**253] 2. Cartwright Act claim

Although we find plaintiffs' abuse of process and fraud claims barred on exclusivity grounds, we reach a contrary conclusion as to their Cartwright Act claim. Because the wrongful acts and motives that give rise to plaintiffs' Cartwright Act claim fall outside the compensation bargain, it is not subject to workers' compensation exclusivity.

We begin with the alleged acts that give rise to plaintiffs' Cartwright Act claim. The Cartwright Act "makes unlawful any 'trust.' " (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal. 3d 93, 118, 81 Cal. Rptr. 592, 460 P.2d 464 (*Jones*); Bus. & Prof. Code, § 16726.) To establish that defendants comprised a trust, plaintiffs allege that defendants combined their "capital, skill and acts" in order to drive them "out of business." As part of this combination, each defendant not only mishandled lien claims filed against it, but also: (1) encouraged other insurers to deny plaintiffs' claims; (2) distributed hit lists of medical providers; and (3) exchanged strategies for [***46] delaying or avoiding payments to plaintiffs. This concerted effort by insurers to interject themselves into lien claims *they did not insure* is not a normal part of

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the claims process. Indeed, only the insurer that has insured a claimant's employer--and no other insurer--is typically involved in that claimant's workers' compensation claim. By conspiring to influence the processing of claims it did not insure, each defendant stepped outside its proper role as an insurer and became "a person other than the employer." (*Unruh, supra*, 7 Cal. 3d at p. 630.) In doing so, each defendant stripped itself of the protection afforded by the exclusive remedy provisions of the WCA.

The motive element of a Cartwright Act claim also makes the exclusivity bar inapplicable. A "cause of action for restraint of trade under the Cartwright Act ... must allege ... a purpose to restrain trade." (*Jones, supra*, 1 Cal. 3d at p. 119; see also Bus. & Prof. Code, § 16726.) By imposing such a requirement, "the Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. [***47]" (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal. 2d 34, 44, 172 P.2d 867 (*Speegle*)). Because a Cartwright Act claim requires a motive that violates a fundamental public policy rooted in a statutory provision, it is not reasonably encompassed within the compensation bargain.

Hazelwerdt does not compel a contrary result. In *Hazelwerdt*, plaintiff alleged that an insurer and a physician employed by that insurer to treat plaintiff conspired to mishandle plaintiff's medical treatment. The Court [*826] of Appeal barred plaintiff's civil conspiracy claim because the acts in furtherance of the conspiracy were closely connected to a normal insurer activity--the provision of medical treatment for a workplace injury. (See *Hazelwerdt, supra*, 157 Cal. App. 2d at p. 763.) Unlike the conspiracy claim in *Hazelwerdt*, plaintiffs' Cartwright Act claim alleges that each defendant conspired with parties that had no role in the handling of that defendant's claims and sought to influence lien claims filed against other unrelated insurers. Thus, defendants' conspiratorial acts cannot be linked to a normal insurer action during the claims process. [***48] (See *Fermino, supra*, 7 Cal. 4th at p. 718.) Moreover, a Cartwright Act claim, unlike a civil conspiracy claim, requires a motive that violates a fundamental public policy. (Compare *Speegle, supra*, 29 Cal. 2d at p. 44, with *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal. App. 4th 1001, 1019.) Accordingly, *Hazelwerdt* is inapposite, and we decline to bar plaintiffs' Cartwright Act claim on exclusivity grounds.

3. RICO claims

We reach a similar conclusion with respect to plaintiffs' RICO claims. The pattern of racketeering activity

necessary to establish a RICO enterprise always falls outside the scope of the compensation bargain. Thus, plaintiffs' RICO claims are exempt from the exclusivity bar.

In their complaint, plaintiffs allege that defendants violated and conspired to violate 18 United States Code section 1962(c). A violation of 18 United States [**254] Code section 1962(c) requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." (*Sedima, S.P.R.L. v. Imrex Co., Inc.* (1985) 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275, [***49] fn. omitted.) To establish a pattern of racketeering activity, plaintiffs must allege at least two predicate acts that "are interrelated by distinguishing characteristics" (*H.J. Inc. v. Northwestern Bell Telephone Company* (1989) 492 U.S. 229, 240, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (*H.J. Inc.*)) and "amount to or pose a threat of continued criminal activity." (*Id.* at p. 239.) "The threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes" or "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business ... or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" (*Id.* at pp. 242-243, fn. omitted.)

Here, plaintiffs' RICO claims allege that defendants conducted or conspired to conduct various enterprises through numerous acts of mail and wire [*827] fraud. Because these predicate acts of mail and wire fraud allegedly form a pattern of racketeering activity, they, by definition, cannot be closely connected to a normal insurer activity. [***50] The compensation bargain anticipates that an insurer may commit various misdeeds during the claims process, including some criminal acts. (See *Fermino, supra*, 7 Cal. 4th at p. 723, fn. 7; *Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal. App. 4th 1280, 1286-1287 [involuntary manslaughter does not support an exception to exclusivity]; *Up-Right, supra*, 5 Cal. App. 4th at pp. 582-584.) It does not contemplate that an insurer will engage in systematic and long-term criminal activities bound by common "purposes, results, participants, victims, or methods of commission" (*H.J. Inc., supra*, 492 U.S. 229, 240, quoting 18 U.S.C. former § 3575(e).) Indeed, such organized and systemic criminal misconduct is always illegal, regardless of the employer's state of mind. (See 18 U.S.C. § 1962.) Accordingly, RICO claims are never subject to the exclusive remedy provisions, and we refuse to bar them here. (See *Fermino, supra*, 7 Cal. 4th at p. 723, fn. 7.)

4. Tortious interference and UCL claims

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We now turn to plaintiffs' remaining claims--tortious [***51] interference with business relations and violations of the UCL. These claims encompass a wide range of misconduct due, in part, to the breadth of these causes of action and some haziness in the pleadings. After reviewing the alleged misconduct, we conclude these claims are barred to the extent they focus on the individual misdeeds of each defendant. They, however, are not precluded to the extent they are predicated on the conspiratorial misconduct of defendants.

As an initial matter, we note that neither tortious interference nor the UCL requires a motive that violates a fundamental public policy. Tortious interference claims encompass "wrongful" interferences and do not require an improper motive. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal. 4th 376, 392-393, 902 P.2d 740 (*Della Penna*)). The UCL focuses solely on conduct and prohibits " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " (*Barquis, supra*, 7 Cal. 3d at p. 113, quoting Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition* (1968) 19 Hastings L.J. 398, 408-409.) "As [***52] a result, to state a claim under the [UCL] one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.' " (*Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1267, 10 Cal. Rptr. 2d 538, [*828] 833 P.2d 545, quoting *Chern v. Bank of America* (1976) 15 Cal. 3d 866, 876, 127 Cal. Rptr. 110, 544 P.2d 1310.) Thus, these claims only escape preemption if the underlying acts fall outside the scope of the compensation bargain.

An examination of the alleged acts underlying plaintiffs' tortious interference and [***255] UCL claims yields mixed results. These acts fit into two categories: (1) individual acts of a defendant that establish a pattern or practice of mishandling plaintiffs' lien claims; or (2) acts in furtherance of a conspiracy among defendants to mishandle plaintiffs' lien claims. As explained below, we find plaintiffs' tortious interference and UCL claims barred to the extent they are predicated on the first category of misconduct but permissible to the extent they are based on the second.

The first category of misconduct covers the wrongful acts of each individual defendant during the claims [***53] process and is virtually identical to the misconduct alleged in plaintiffs' abuse of process and fraud claims. The mere fact that an individual insurer has a pattern or practice of bad faith delays or denials of payment is not enough to insulate a cause of action from preemption where, as here, each wrongful act is closely

connected to a normal insurer activity--the processing of medical lien claims. Indeed, such misconduct is indistinguishable from the insurer misconduct alleged in the claims barred by *Marsh, supra*, 49 Cal. 3d at pages 9-11, 259 Cal. Rptr. 733, 774 P.2d 762. n9

n9 Plaintiffs may, however, pursue their tortious interference and UCL claims to the extent they are predicated on their RICO claims because conducting an enterprise through a pattern of racketeering activity establishes a wrongful interference (see *Della Penna, supra*, 11 Cal. 4th at pp. 392-393) and an unlawful business practice (see *Barquis, supra*, 7 Cal. 3d at p. 113).

In contrast, the second category involves far more than the [***54] pattern or practice of an individual insurer. This misconduct consists of a conspiracy among multiple insurers to coordinate the economic destruction of plaintiffs through the mishandling of their lien claims. By joining this conspiracy, each individual defendant necessarily became involved in claims *it did not insure*. Thus, the second category of misconduct is almost identical to the misconduct underlying plaintiffs' Cartwright Act claim and cannot be connected to a normal insurer activity. Accordingly, plaintiffs' tortious interference and UCL claims are not barred to the extent they are predicated on defendants' conspiratorial acts.

In closing, we stress that our decision today merely holds that some of plaintiffs' claims are not barred by the exclusive remedy provisions of the WCA. We make *no* judgment as to the viability of these claims, and defendants are free to challenge them on any other grounds.

[*829] DISPOSITION

We affirm in part and reverse in part the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

KENNARD, J.

BAXTER, J.

CHIN, J.

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CONCURRING OPINION BY [***55]
WERDEGAR, J.

CONCURBY:
WERDEGAR

CONCUR:

CONCURRING OPINION BY WERDEGAR, J.

I agree with the disposition and much of the reasoning of the majority opinion. I write separately only to distance myself from the suggestion that *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 824 P.2d 680 created a free-floating exception to the exclusivity provisions of the Workers' Compensation Act (Lab. Code, § § 3600, 3602) applicable whenever a court determines that the motive behind an employer's tortious acts violates a fundamental public policy. (See maj. opn., *ante*, at pp. 5, 8, 24.) To interpret *Gantt* this way is to elevate its broad rhetoric to positive law. Properly and narrowly read, *Gantt* does not purport to create such an exception. Instead, the case holds simply that an employer that interfered with an official investigation of sexual harassment, by firing an employee who spoke with investigators of the Department of Fair Employment and Housing, thereby committed "misconduct [that] cannot

under any reasonable viewpoint be considered a 'normal part of the employment relationship' (*Cole v. Fair Oaks Fire Protection Dist.* [(1987)] [***56] 43 Cal. 3d [148,] 160[, 729 P.2d 743, 233 Cal. Rptr. 308]) or a 'risk reasonably encompassed within the compensation bargain.' (*Shoemaker v. Myers* [(1990)] 52 Cal. 3d [1,] 16[, 801 P.2d 1054, 276 Cal. Rptr. 303].)" (*Gantt v. Sentry Insurance*, at p. 1100.) In [***256] other words, the gravamen of the *Gantt* plaintiff's claim was not an interest protected by the Workers' Compensation Act. "The fundamental basis of workers' compensation is an injury sustained in and arising out of the course of employment when the injury is 'personal physical [or emotional] injury or death.' (*Cole v. Fair Oaks Fire Protection Dist.*, [43 Cal. 3d at p.] 160.) Conversely, the exclusive remedy provisions apply *only* in cases of such industrial personal injury or death." (*Shoemaker v. Myers*, [52 Cal. 3d] at p. 16, italics in original.) When a lawsuit does not implicate the employee's interest in recovering for such injuries, the act simply has nothing to say. The same is true here. No one can seriously argue the Legislature intended the act to protect health care providers against combinations in restraint of trade. Because the act and its exclusivity [***57] provisions do not apply, we need not speak of exceptions.

WERDEGAR, J.

THE PEOPLE, Plaintiff and Respondent, v. ROBERT TINDALL, Defendant and Appellant.

S080078

SUPREME COURT OF CALIFORNIA

24 Cal. 4th 767; 14 P.3d 207; 2000 Cal. LEXIS 9409; 102 Cal. Rptr. 2d 533; 2000 Cal. Daily Op. Service 10224; 2000 Daily Journal DAR 13666

December 28, 2000, Filed

PRIOR HISTORY:

[**1] Superior Court of California, Los Angeles County. Court of Appeal of California, Second Appellate District, Division Two. B114899. Super. Ct. No. YA029183. Francis J. Hourigan III, Judge.

DISPOSITION:

For reasons set forth above, we conclude the trial court erred by allowing a section 969a amendment after discharging the jury, in violation of section 1025, subdivision (b). Accordingly, we reverse the Court of Appeal's judgment affirming that order and remand this action to the Court of Appeal for further proceedings consistent with this opinion.

COUNSEL:

Attorneys for Appellant:

Barry J. Post and Edward H. Schulman, for Defendant and Appellant.

Attorneys for Respondent:

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Robert F. Katz, Marc J. Nolan, Pamela C. Hamanaka and Mitchell Keiter, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES:

CHIN, J. WE CONCUR: GEORGE, C.J., MOSK, J., KENNARD, J., WERDEGAR, J., DISSENTING
OPINION BY BROWN, J.

OPINION BY:

CHIN

OPINION:

[*769] [**208] In this case, we decide [***2] the question left open in *People v. Valladoli* (1996) 13 Cal. 4th 590, 608, 918 P.2d 999, footnote 4 (*Valladoli*): whether a postverdict amendment to an information to add prior conviction allegations is permissible before sentencing but after the [*770] jury has been discharged. Under the circumstances of this case, we conclude it is not permissible. Under Penal Code section 1025, subdivision (b), n1 a defendant has the statutory right to have the same jury decide both the issue of guilt and the truth of any prior conviction allegations. Because the jury in this case was discharged before the prosecution amended the information to add additional priors, defendant did not have the same jury, as required under section 1025, subdivision (b). We conclude the trial court acted in excess of its jurisdiction by permitting the postdischarge amendment to the information. Thus, we reverse the Court of Appeal's judgment affirming that order.

n1 All further statutory references are to the Penal Code unless otherwise noted.

[***3]

FACTUAL AND PROCEDURAL HISTORY

The facts are taken largely from the Court of Appeal's opinion.

Police arrested defendant Robert Tindall after they saw him drop a plastic baggie containing what was later

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determined to be a usable quantity of rock cocaine. The information charged defendant with possession of rock cocaine (Health & Saf. Code, § 11350, subd. (a)) and alleged that he was convicted in 1983 for possession for sale of rock cocaine (Health & Saf. Code, § 11378) and in 1992 for possession for sale of rock cocaine (Health & Saf. Code, § 11351.5), each conviction disqualifying him for probation. (§ 1203, subd. (e)(4).) The information also alleged that defendant had served a prior prison term for the 1992 conviction (§ 667.5, subd. (b)), which also disqualified him for probation under Health & Safety Code section 11370, subdivisions (a) and (c). The trial on the prior conviction allegations was bifurcated.

On December 18, 1996, the jury returned a guilty verdict, and defendant waived jury trial on the prior conviction allegations. The [***4] trial court then discharged the jury. The matter was continued to January 16, 1997, for preparation of a probation report, a court trial on the priors, and sentencing. The probation report later revealed that, in addition to numerous Missouri misdemeanor and felony convictions, defendant had three 1985 [**209] federal convictions for bank robberies committed in California, and was currently on federal parole for those convictions.

At the January 16 hearing, the prosecution moved to amend the information to add the three prior felony bank robbery convictions as "strikes" (§ 1170.12, subs. (a)-(d)) and to add allegations that defendant had served prior prison terms (§ 667.5, subd. (b)) for those convictions and for the 1983 conviction for possession for sale of rock cocaine. The trial court granted the [*771] motion without prejudice to defendant to renew his opposition. It also granted defendant a continuance. Defendant invoked his right to a jury trial on the strike allegations. The trial court allowed defendant to withdraw his previous waiver of jury trial on the prior convictions originally alleged.

After hearing further argument on the motion to amend the information, the trial court reaffirmed [***5] its ruling granting the motion over defendant's continuing objection. On March 24, 1997, trial commenced on the strike allegations before a new jury. After the trial court declared a mistrial because the jury was unable to reach a verdict on the truth of the prior convictions, it impaneled a new jury, which found true the three alleged prior bank robbery convictions. Defendant was sentenced to prison for 25 years to life.

On appeal, as relevant here, defendant argued that the amendment adding the priors after the first jury had been discharged violated his constitutional right against double jeopardy, and that under *Valladoli, supra*, 13 Cal. 4th 590, a late amendment under section 969a n2 is

permissible only until a jury is discharged. (§ § 1025, 1164, subd. (b).) The Court of Appeal affirmed the trial court's order allowing the postverdict, postdischarge amendment. Recognizing that we did not decide this issue in *Valladoli*, the Court of Appeal applied our reasoning in that case to conclude that section 969a permits a postverdict amendment even after a jury has been discharged, and that the trial court did not abuse its discretion by permitting the amendment in this [***6] case. The Court of Appeal relied on both *Monge v. California* (1998) 524 U.S. 721, 141 L. Ed. 2d 615, 118 S. Ct. 2246, and *Valladoli, supra*, 13 Cal. 4th at page 609, to dispose of defendant's double jeopardy challenge to the section 969a amendment.

n2 Section 969a provides, in pertinent part: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere, said indictment or information may be forthwith amended to charge such prior conviction or convictions, and if such amendment is made it shall be made upon order of the court"

We granted defendant's petition for review to decide one issue--whether a postverdict amendment to an information to add previously unalleged prior convictions is permissible after a jury has been discharged.

DISCUSSION

Section 1025, subdivision (b) provides, in pertinent part: "the question of whether or not the defendant [***7] has suffered the prior conviction shall [*772] be tried by the jury that tries the issue upon the plea of not guilty" n3 Section 969a, however, states that prior conviction allegations may be added "whenever it shall be discovered that a pending indictment or information does not charge all prior

n3 Because defendant's crimes and sentencing preceded the January 1, 1998, effective date of the 1997 amendment (Stats. 1997, ch. 95, § 1), the issue here is governed by the preamendment version of section 1025, which was not divided into subdivisions. (*People v. Kelii* (1999) 21 Cal. 4th 452, 457, 981 P.2d 518 (Kelii).) As relevant here, the prior version of the statute provided: "the question whether or not [the defendant] has suffered such previous

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conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose, or by the court if a jury is waived." (Stats. 1951, ch. 1674, § 88, p. 3844.) In order to provide future guidance and assistance, we shall refer to the *current* version of section 1025, which does not differ in any material respect from the prior version as relevant to the issue presented in this case.

[***8]

felonies" We interpreted section 969a to permit the prosecution, on order of the court, to amend the information until sentencing so long as the court has not discharged the jury. (*Valladoli, supra*, 13 Cal. 4th at pp. 605, 608, fn. 4; [**210] see 13 Cal. 4th at p. 610 (conc. opn. of Chin, J.) ["section 969a authorizes postverdict amendments at least until the trial court discharges the jury"].) Notwithstanding section 969a, defendant argues that section 1025, subdivision (b), prohibits the prosecution from amending the information to allege prior convictions after the jury that decided the guilt issue has been discharged. For reasons that follow, we agree.

In construing section 1025, "we must 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*Valladoli, supra*, 13 Cal. 4th at p. 597.) We first look at the actual words of the statute, "giving them a plain and commonsense meaning." (*Ibid.*) "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not 'interpret away [***9] clear language in favor of an ambiguity that does not exist.' " (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal. 4th 263, 268, 885 P.2d 976.)

Preliminarily, we find that the pertinent language of section 1025 is straightforward and clear: if a defendant pleads not guilty to the underlying offense, and a jury decides the issue of guilt, that same jury shall decide whether the defendant "suffered the prior conviction," unless the defendant waives jury trial. (§ 1025, subd. (b); see also *Kelii, supra*, 21 Cal. 4th at p. 454 [trial court, not jury, determines whether a prior conviction is serious for purposes of § 1025]; *People v. Vera* (1997) 15 Cal. 4th 269, 276, 934 P.2d 1279 (*Vera*) [defendant may forfeit the right to a jury trial on prior conviction allegations by failing to timely object to discharge of the jury that decided defendant's guilt on the underlying offenses]; *People v. Wiley* (1995) 9 Cal. 4th 580, 592, [**773] 889 P.2d 541 (*Wiley*) [trial court, not jury, determines whether allegations of multiple prior

convictions were brought and tried separately]; *People v. Saunders* (1993) 5 Cal. 4th 580, 590, 853 P.2d 1093 [***10] (*Saunders*); cf. § 1025, subd. (c) [notwithstanding subd. (b) of § 1025, trial court, not jury, determines whether the defendant is the person who suffered the prior conviction].) n4

n4 In this case, we do not consider whether a postdischarge amendment is proper after the guilt phase jury has been discharged, when the only contested issue in a defendant's trial on the alleged prior convictions is an issue to be decided by the court, and not the jury. (See § 1025, subd. (c); see also *Kelii, supra*, 21 Cal. 4th at p. 454; *Wiley, supra*, 9 Cal. 4th at p. 592.)

Notwithstanding the seemingly clear language of section 1025, subdivision (b), a conflict arises when this provision and section 969a both apply in a case. In other words, when section 1025, subdivision (b) and section 969a compel different results, which statute controls? Although we have explained that section 969a's purpose is "towards effectuating the Legislature's expressed view that all known prior felony convictions [***11] of an accused be pleaded" (*Valladoli, supra*, 13 Cal. 4th at p. 602), section 1025, subdivision (b), requires further elucidation. (See *Vera, supra*, 15 Cal. 4th at p. 276 ["'same jury' provision reflects the statute's unitary trial procedure, and does not constitute a statutory entitlement separate from the jury trial right itself"].) That is, what are the reasons for, or benefits of, having the same jury decide both the issue of a defendant's guilt and the truth of alleged prior convictions?

Because section 1025 was enacted over a century ago (*Saunders, supra*, 5 Cal. 4th at p. 587, fn. 2), our review of its legislative history sheds no light on the purpose behind the same jury requirement, which existed from the time of the statute's 1874 enactment. (Code Amends. 1873-1874 (Pen. Code), ch. 614, § 50, p. 439; *Saunders, supra*, 5 Cal. 4th at pp. 587-588.) However, we do perceive a possible and obvious reason for the same jury requirement--judicial economy.

[**211] By requiring the same jury to decide both issues of guilt and alleged prior convictions, section 1025, subdivision (b) saves the state courts the additional time and cost of [***12] having to impanel *two* juries in countless criminal trials. (See *People v. Owens* (1980) 112 Cal. App. 3d 441, 447, 169 Cal. Rptr. 359.) The savings in time and cost are no doubt significant compared to the "little, if any, time" saved from having a unitary rather than a bifurcated trial. (*People v. Calderon* (1994) 9 Cal. 4th 69, 77, 885 P.2d 83

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(*Calderon*) [in a bifurcated trial, a not guilty verdict obviates the need for later proving the alleged prior conviction].) Indeed, we believe that the aggregate savings from all criminal trials subject to section 1025 must be [*774] staggering. Thus, we find the "state's legitimate interest in conserving judicial resources" sufficiently explains, and perhaps justifies, the same jury requirement under section 1025, subdivision (b). (*Calderon, supra*, 9 Cal. 4th at p. 77.)

However, a defendant's interests, which obviously are not in saving the state time or money, may not be advanced by having the same jury. Frequently, a defendant would prefer *not* to have the same jury under section 1025, subdivision (b). "In most instances, a defendant is benefitted by having a new jury determine the truth of alleged [***13] prior convictions, because the new jury will not have heard the evidence supporting the defendant's conviction of the current charges." (*Saunders, supra*, 5 Cal. 4th at p. 596.) Moreover, in a unitary trial, where a jury decides the truth of alleged prior convictions at the same time it decides the issue of guilt, "there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense." (*Calderon, supra*, 9 Cal. 4th at p. 75.)

Although the same jury requirement under section 1025, subdivision (b) may not particularly inure to defendant's benefit, we cannot conclude thereby that defendant has no right to invoke the statute. (*Saunders, supra*, 5 Cal. 4th at p. 591.) Nowhere does section 1025 provide that only at the prosecution's request, or through the trial court's order or exercise of discretion, shall the same jury decide both the issue of guilt and the truth of alleged prior convictions. (*Saunders, supra*, 5 Cal. 4th at pp. 591-592.) The statute is clear in its procedural instructions--the same jury that decides the issue of guilt shall also decide the truth of the alleged [***14] prior convictions, unless jury trial is waived. (§ 1025, subd. (b).) Indeed, because a defendant may forfeit the right to have the same jury under section 1025 (*Saunders, supra*, 5 Cal. 4th at p. 591), he thus possesses that right and may forfeit, waive, or invoke it. n5

n5 We are not confronted with, and thus do not consider, the situation where a defendant waives or forfeits the right under section 1025, subdivision (b), but the trial court and/or the prosecution seek to invoke that provision. Whether the same jury *must* decide both the issue of guilt and the truth of alleged prior convictions, in the face of a defendant's waiver or forfeiture, is a question for another day.

Moreover, as noted, section 1025 has been part of this state's framework of criminal procedure for over a century. (See *ante*, at p. 6.) Even though the Legislature has amended several times (in addition to repealing and reenacting) the statute, it has not eliminated the same jury requirement. (See *Saunders, supra*, 5 Cal. 4th at p. 587, fn. 2; [***15] see also *Kelii, supra*, 21 Cal. 4th at p. 457.) To the contrary, the Legislature has taken steps to ensure that the [*775] court does not prematurely discharge the jury. In 1988, the Legislature amended section 1164 to add subdivision (b), which requires the trial court, before discharging the jury, to first verify that the jury has decided all issues before it. (Stats. 1988, ch. 413, § 1, p. 1780.) "No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, *including, but not limited to, ... the truth of any alleged prior* [**212] *conviction* whether in the same proceeding or in a bifurcated proceeding." (§ 1164, subd. (b), italics added.) Section 1164 "is expressly qualified by the need to retain the jury to decide the truth of prior felony allegations." (*Valladoli, supra*, 13 Cal. 4th at p. 601,, 54 Cal. Rptr. 2d 695, 918 P.2d 999.)

We are not persuaded by the mandatory-directory distinction the dissent raises. (Dis. opn., *post*, at pp. 2-4.) We do not perceive a clear legislative intent that section 1025, subdivision (b)'s requirement that the same jury decide both the [***16] issue of guilt and the truth of any priors is directory, particularly in light of other statutes which further ensure compliance with the same jury requirement (§ 1164, subd. (b)), and without readily dismissing the laudable "public purpose" of judicial economy in this situation. (*Morris v. County of Marin* (1977) 18 Cal. 3d 901, 910, 136 Cal. Rptr. 251, 559 P.2d 606.) Indeed, whether a statute imposes a sanction for its noncompliance is not dispositive in this context, which does not concern specific time limits. (See e.g., (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal. 4th 1133, 1145, 899 P.2d 79 [" 'cases have suggested that a time limitation is deemed merely directory 'unless a consequence or penalty is provided for failure to do the act within the time commanded' " '"]; *Malengo v. Municipal Court* (1961) 56 Cal. 2d 813, 816, 17 Cal. Rptr. 10, 366 P.2d 453 [§ 1050, "providing for the time for trial of criminal cases, is directory only and contains no provision for the dismissal of a case when its terms are not complied with"]; *People v. Marshall* (1930) 209 Cal. 540, 546, 289 P. 629 [***17] [same]; *Ray v. Superior Court* (1929) 208 Cal. 357, 359, 281 P. 391 [same]; *People v. Flores* (1978) 90 Cal. App. 3d Supp. 1, 9, 152 Cal. Rptr. 896 [same].

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Likewise, we are not convinced by the dissent's reliance on a portion of the legislative history of section 969a, which originally allowed the prosecution to file a supplemental information adding prior conviction allegations after sentencing as long as a defendant's sentence had not yet expired. (*Valladoli, supra*, 13 Cal. 4th at pp. 603-604, 54 Cal. Rptr. 2d 695, 918 P.2d 999; dis. opn., *post*, at p. 5.) Given this was "an aspect of the 1927 version of the statute that did not survive to the present day," but was eliminated shortly thereafter in 1931 (*Valladoli, supra*, 13 Cal. 4th at p. 603), we do not ascribe the same importance as does the dissent to this aspect of the original statute for purposes of the present controversy. (Dis. opn., *post*, at p. 5.)

[*776] Under the circumstances of this case, we conclude that in light of section 1025, subdivision (b), the trial court acted in excess of its jurisdiction by permitting the amendment to add previously unalleged prior convictions after discharging the jury. [***18] (See *Abelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280, 288, 109 P.2d 942.) A court acts in excess of its jurisdiction when "it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Ibid.*) Contrary to the Court of Appeal's assertion, a defendant's right to have the same jury under section 1025, subdivision (b) is not a statutory preference, but a "procedural requirement." (*Saunders, supra*, 5 Cal. 4th at p. 590.) Therefore, although the prosecution may amend an information to add alleged prior convictions on the trial court's order until sentencing (*Valladoli, supra*, 13 Cal. 4th at pp. 605-606, 54 Cal. Rptr. 2d 695, 918 P.2d 999), the court may not permit such an amendment if the jury has been discharged, unless the defendant waives or forfeits the right to have the same jury try both guilt and priors. n6 (§ 1025, subd. (b); *Saunders*, [**213] *supra*, 5 Cal. 4th at p. 591.)

n6 Contrary to the dissent's suggestion, this is not a case where a court lacks fundamental subject matter jurisdiction, which cannot be conferred by waiver, estoppel, or consent. (4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 1822, p. 2159.) In contrast, a court's act in excess of its jurisdiction is valid until set aside, and a party may be precluded from setting it aside, due to waiver, estoppel or the passage of time. (*People v. Mendez* (1991) 234 Cal. App. 3d 1773, 1781, 286 Cal. Rptr. 216.) Thus, because a violation based on section 1025 will accommodate the circumstance of a defendant's forfeiture or waiver, our decision is entirely

consistent with our recent decisions, *Saunders* and *Vera*. (Cf. dis. opn., *post*, at pp. 4-5.)

[***19]

In this case, the Court of Appeal disregarded the "procedural requirement" of section 1025 (*Saunders, supra*, 5 Cal. 4th at p. 590), instead finding nothing in the plain language of section 969a that prohibited the trial court from allowing the information to be amended after the jury was discharged. Relying on *Valladoli*, the Court of Appeal applied an abuse of discretion standard to determine whether the postdischarge amendment was proper. (*Valladoli, supra*, 13 Cal. 4th at pp. 607-608, fn. omitted.) It concluded that "under *Saunders* and *Valladoli* that right [under section 1025] is not absolute where there was good cause to empanel a different jury." Neither *Valladoli, supra*, 13 Cal. 4th 590, nor *Saunders, supra*, 5 Cal. 4th 580, compels this conclusion.

In contrast to this case, the jury in *Valladoli* had not been discharged when the prosecution moved after the verdict to add the prior felony conviction enhancements that were inadvertently omitted from the information. After finding section 969a to be controlling and examining its plain language and legislative history, we concluded in *Valladoli* that section 969a [*777] authorized [***20] postverdict, presentencing amendments to charge prior felony convictions that were previously known, newly discovered, or omitted through clerical error. (*Valladoli, supra*, 13 Cal. 4th at pp. 605-606, 54 Cal. Rptr. 2d 695, 918 P.2d 999.) However, we also recognized a trial court has the discretion to permit or deny such an amendment. (*Id.* at pp. 606, fn. 3, 607, 54 Cal. Rptr. 2d 695, 918 P.2d 999.) To guide trial courts in exercising this discretion, we urged them to scrutinize five nonexclusive factors. (*Id.* at pp. 607-608, 54 Cal. Rptr. 2d 695, 918 P.2d 999.)

Citing section 1025, we included among these factors whether the jury had already been discharged. (*Valladoli, supra*, 13 Cal. 4th at pp. 607-608.) Indeed, in rejecting defendant *Valladoli*'s due process claim, we observed that "significantly, at the time of amendment the jury had not yet been discharged." (*Id.* at p. 608, fn. 4, and see accompanying text.) Contrary to respondent Attorney General's contention, we did not suggest jury discharge to be "immaterial" in *Valladoli*, which was consistent with our declining to express an opinion on whether section 969a amendments are limited by other statutes, such as section 1025. (*Valladoli, supra*, 13 Cal. 4th at p. 608, fn. 4.) [***21]

Saunders, which did not involve previously unalleged prior convictions, also does not help the Attorney General's position. In *Saunders*, the defendant requested that the trial of the substantive offenses be

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bifurcated from the prior conviction allegations. After the jury returned a guilty verdict on the burglary charge, the trial court discharged it and continued the case to the next day. (*Saunders, supra*, 5 Cal. 4th at p. 586.) The defendant, who was represented by substitute counsel at that time, did not object to the jury's discharge. The following day, the defendant's trial counsel appeared, and the defendant waived jury trial on the prior conviction allegations. After the court found the allegations true, defense counsel learned that the jury had been discharged before the defendant waived jury trial. Defense counsel objected, claiming she would not have advised the defendant to waive jury trial had she known the jury was discharged after returning its verdict. (5 Cal. 4th at pp. 586-587.) The trial court permitted the defendant to withdraw his waiver, and a newly impaneled jury found the prior conviction allegations true. (5 Cal. 4th at p. 587.)

We found the trial [***22] court violated sections 1025 and 1164, subdivision (b), by discharging the jury before it determined the truth of the prior conviction allegations. (*Saunders, supra*, 5 Cal. 4th at pp. 591-592.) [**214] However, we rejected the defendant's claim that he was entitled to relief based on his section 1025 right to have the same jury that decided the guilt issue. (*Saunders, supra*, 5 Cal. 4th at p. 591.) "He forfeited that right by failing to object in a timely fashion when the jury was discharged." (*Ibid.*) We emphasized that "a defendant may not complain on appeal of a departure [**778] from this procedural requirement unless the error has been brought to the attention of the trial court by means of a timely and specific objection." (5 Cal. 4th at p. 590.) However, we did not suggest that, in the absence of the defendant's forfeiture or waiver, his statutory right to have the same jury decide both the guilt issue and the sentencing allegations was ineffectual or unprotected. Defendant here did not fail to object, but lodged a continuing objection to the postdischarge amendment.

The Attorney General, however, emphasizes that section 969a's underlying policy allowing permissive amendments--to [***23] ensure a defendant will not "escape the consequences" of his or her prior conduct--will be undermined by prohibiting postdischarge amendments. (*Valladoli, supra*, 13 Cal. 4th at p. 603.) He contends section 969a and former section 969 1/2 (now 969.5) n7 should be interpreted similarly "to prevent the creation of anomalous rules and improper incentives for convicted defendants."

n7 In 1998, section 969 1/2 was amended and renumbered section 969.5. (Stats. 1998, ch. 235, § 1.) Section 969.5 does not substantially

differ from prior section 969 1/2 for purposes of this discussion.

For instance, section 969.5, as a parallel provision to section 969a, applies when a defendant pleads guilty or nolo contendere to the underlying offense. (See *Valladoli, supra*, 13 Cal. 4th at pp. 601-602 [interpreting former § 969 1/2 in part].) Section 969.5, subdivision (b) states, in pertinent part: "The question of whether or not the defendant has suffered the prior conviction shall be [***24] tried by a jury impaneled for that purpose unless a jury is waived, in which case it may be tried by the court." In contrast to section 969a, section 969.5 is not limited by section 1025, subdivision (b)'s requirement that the same jury decide both the issue of guilt and the truth of any prior conviction allegations. The reason for this is simple: when a defendant enters a guilty or nolo contendere plea, there is no jury "that tries the issue upon the plea of not guilty" that could be prematurely discharged before deciding the prior conviction allegations. (§ 1025, subd. (b); see also § 1164.) Therefore, if a defendant pleads guilty or nolo contendere, the prosecution may, on the court's order, amend the information to add previously unalleged prior convictions until sentencing. (§ 969.5, subd. (a); see *Valladoli, supra*, 13 Cal. 4th at p. 602.)

The same result may occur if a defendant waives a jury trial on the charged offense and/or on the alleged prior conviction or admits the latter. (§ 1025, subds. (b) & (e).) In these circumstances, section 1025 does not prohibit amendment of the information before sentencing because an impaneled jury is not required to decide [***25] both the issue of guilt and the truth of any prior conviction allegations. There is no risk that a jury will be prematurely [**779] discharged in contravention of section 1025 and section 1164. (See also § 1025, subd. (c); *Kelii, supra*, 21 Cal. 4th at p. 454; *Wiley, supra*, 9 Cal. 4th at p. 592.)

However, we do not find the foregoing situations constitute *anomalies*, which may result from the interpretation of section 969a and section 1025, subdivision (b), in this case. As noted, depending on a defendant's plea or waiver of a jury, the prosecution may or may not be permitted to add prior conviction allegations after a jury is discharged. These resulting differences, however, are not anomalies based on perceived internal inconsistencies between related statutes that must be construed together and reconciled accordingly. (*Valladoli, supra*, 13 Cal. 4th at pp. 601-602.) Rather, any divergence results from the factual circumstance that a defendant pleads not [**215] guilty and does not waive jury trial of alleged prior convictions, which may implicate section 1025, subdivision (b).

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We are also not persuaded by the Attorney General's contention that prohibiting postdischarge [***26] amendments will give defendants "an incentive to waive their jury trial right quickly to prevent their being correctly sentenced." (See *Valladoli, supra*, 13 Cal. 4th at p. 602.) In other words, those defendants who know the prosecution has not alleged all of their prior convictions will waive a jury trial on the priors, causing the guilt phase jury to be discharged. If the prosecution seeks to amend the information to add the prior conviction allegations, the defendants will assert that they waived a jury without full knowledge of the alleged prior convictions, and they will seek to withdraw the waiver and impanel another jury. Consequently, they will not have the same jury, as required under section 1025, subdivision (b). Under defendant's interpretation of this provision, the prosecution may not be permitted to add previously unalleged prior convictions.

Though not entirely without merit, the Attorney General's argument loses force when we consider the realities of this incentive. To take unfair advantage of section 1025, subdivision (b), a defendant must plead not guilty, undergo the trial of the alleged underlying offenses, and be found guilty. During this [***27] entire time, the prosecution must fail to allege all of the defendant's prior convictions. Only then does a defendant's incentive to waive jury trial on the priors arguably become manifest.

In contrast, a defendant would have a clear motivation and effective means to prevent being correctly sentenced by quickly pleading guilty, "thereby limiting the amount of time the prosecutor has to investigate, discover, and charge the accused's prior felony convictions." (*Valladoli, supra*, 13 Cal. 4th at p. 602 [interpreting former § 969 1/2].) In that situation, [*780] where a defendant's incentive is obvious and problematic, section 1025, subdivision (b), does not otherwise limit an amendment before sentencing. (See *ante*, at pp. 13-14.) However, we do not find a defendant's incentive to waive jury trial on prior conviction allegations similarly compelling to justify disregarding section 1025, subdivision (b)'s limitation. Contrary to the Attorney General's suggestion, prohibiting a postdischarge amendment still gives the prosecution a fair opportunity--until the conclusion of the guilt phase trial--to add previously unalleged prior convictions.

Moreover, we agree that although defendants [***28] are most familiar with their own criminal records, they are not likely to alert the prosecution that it has failed to allege some prior convictions, which invariably would increase their sentences. (*In re Yurko* (1974) 10 Cal. 3d 857, 862, 112 Cal. Rptr. 513, 519 P.2d 561.) However, a defendant who takes advantage of the

prosecution's omission by waiving jury trial on the prior conviction allegations will also have to forgo the "various procedural guaranties" that accompany the right to a jury trial under section 1025 (*People v. Monge* (1997) 16 Cal. 4th 826, 833-834, 941 P.2d 1121 (plur. opn. of Chin, J.) (*Monge*), *affd. sub nom. Monge v. California, supra*, 524 U.S. 721 [reasonable doubt standard for proving prior conviction allegations, privilege against self-incrimination, application of rules of evidence, confrontation and cross-examination of witnesses]), which the jury will have heeded with its "full and independent consideration." (*People v. Peters* (1982) 128 Cal. App. 3d 75, 91, 180 Cal. Rptr. 76 [discussing in part a defendant's right to a unanimous verdict].) Thus, we hesitate to characterize a defendant's [***29] incentive to waive the right to a jury trial as without adverse consequences.

The Attorney General also argues that the reasoning of *Monge* compels the conclusion that the postdischarge amendment made here is proper. We disagree. In *Monge*, we considered only state and federal double jeopardy protections and whether they applied to proceedings on prior conviction allegations. (*Monge, supra*, 16 Cal. 4th at pp. 843-845.) Rejecting defendant *Monge*'s constitutional claims, we expressed no view on whether section 1025 or any other applicable section [**216] precluded retrial of prior conviction allegations. (*Monge, supra*, 16 Cal. 4th at p. 845.) Moreover, *Monge*'s circumstance of a retrial on prior conviction allegations is a procedural posture arguably distinguishable from this case. n8 Thus, we do not find *Monge* lends support on the present statutory issue--whether an amendment to add prior [*781] conviction allegations may be made after a jury has been discharged. (See § 1025, subd. (b); *Saunders, supra*, 5 Cal. 4th at p. 592, fn. 8 ["an opinion is not authority for a proposition not therein considered"].)

n8 Although the jury impaneled to hear the priors deadlocked, which required impaneling a second jury, the section 1025 issue presented in this case concerns only the initial bifurcated trial. (See *People v. Moore* (1992) 8 Cal. App. 4th 411, 421 ["Section 1025 speaks to the initial trial of a defendant who is charged with a new offense and prior convictions alleged for purposes of sentence. It does not address the circumstance of an appellate reversal of only an alleged prior conviction, coupled with an affirmance of the conviction on the primary offense"].)

[***30]

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Moreover, we observe that in this case, section 1025's limitation on a postdischarge amendment was not accomplished by way of a "procedural trap." (*Saunders, supra*, 5 Cal. 4th at p. 590.) Here, defendant waived jury trial before the prosecution amended the information to add three prior felony convictions. This amendment increased his possible sentence from four years to 25 years to life in prison. As noted, the trial court allowed defendant to withdraw his previous waiver "out of a sense of fairness." In contrast, the defendant in *Saunders* did not face previously unalleged prior convictions. He simply "changed his mind" about waiving jury trial on advice of counsel, and the trial court permitted him to withdraw his waiver. (5 Cal. 4th at p. 591.)

Although section 969a may allow amendments until sentencing on court order (*Valladoli, supra*, 13 Cal. 4th at p. 605), other applicable provisions may limit these amendments. A contrary interpretation would suggest that amendments under section 969a are mandatory until sentencing, which is contradicted by the provision's discretionary term "may," and the requirement that amendments "shall be made [***31] upon the order of the court" (§ 969a), guided by factors we articulated in *Valladoli, supra*, 13 Cal. 4th at pages 607-608. Although prohibiting postdischarge amendments will prevent the prosecution in certain cases from charging defendants with all their prior convictions (§ 969), we do not find this circumstance distinctly unjust, when the prosecution has what we consider a fair opportunity, i.e., until the conclusion of the guilt phase trial, to discover and charge the prior convictions.

Notwithstanding section 969a's intent "that all known prior felony convictions of an accused be pleaded" (*Valladoli, supra*, 13 Cal. 4th at p. 602), we decline to adopt any interpretation that would deny a defendant's long-established statutory right under section 1025, subdivision (b), which we recently reaffirmed in *Vera, supra*, 15 Cal. 4th at page 276 ("Section 1025 establishes a defendant's right to jury trial of alleged prior convictions by the same jury which determines guilt of the substantive offenses"). Without clear legislative intent to the contrary, we choose not to allocate greater significance to section 969a over section 1025, or vice versa. (See *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal. 3d 288, 298, 285 Cal. Rptr. 86, 814 P.2d 1328 [***32] ["statutes should be interpreted in such a way [*782] as to make them consistent with each other, rather than obviate one another"].) In this regard, prohibiting postdischarge amendments strikes a fair balance between section 1025 and section 969a. To add previously unalleged prior convictions under section 969a--where a defendant has not waived or forfeited his or her right to a jury trial on the prior conviction allegations--the prosecution has until

the conclusion of the guilt phase trial to do so upon court order, consistent with section 1025, subdivision (b).

Whether the Legislature considered the single-jury requirement in subdivision (b) of [**217] section 1025 to be of less importance in light of a recent amendment to *another* subdivision in that section and case law concerning separate, distinct issues (dis. opn., *post*, at p. 6), is not apparent. Thus, we must interpret section 1025, subdivision (b) as we find it, requiring the same jury to decide both the issue of a defendant's guilt and the truth of any prior conviction allegations in the absence of a defendant's waiver or forfeiture. (See *Kelii, supra*, 21 Cal. 4th at p. 459.) Moreover, although section 667, [***33] subdivision (b) provides that it is the Legislature's intent "in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment" for those defendants with prior convictions, we doubt that this necessarily includes an intent that the provision, along with section 969a, trump all other statutory directives such as section 1025, subdivision (b). Indeed, our interpretation of section 1025, subdivision (b) does not entirely nor substantially prohibit the prosecution from amending an information to add prior conviction allegations. Our interpretation, however, sets a reasonable time frame within which the prosecution may find and charge a defendant's prior convictions. n9

n9 Contrary to the dissent's suggestion, section 969a's term "whenever" is not without temporal limits. (Dis. opn., *post*, at p. 6.) The term "whenever" is limited by the term "pending," which we concluded meant until sentencing. (*Valladoli, supra*, 13 Cal. 4th at pp. 598, 604-605.) We specifically did not consider, however, any further limitations to section 969a under section 1025, subdivision (b). (*Valladoli, supra*, 13 Cal. 4th at p. 608, fn. 4.)

[***34]

In light of the foregoing, we conclude that in the absence of a defendant's forfeiture or waiver, section 1025, subdivision (b) requires that the same jury that decided the issue of a defendant's guilt "shall" also determine the truth of alleged prior convictions. Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged (see *People v. Hendricks* (1987) 43 Cal. 3d 584, 597, 238 Cal. Rptr. 66, 737 P.2d 1350), it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged. Thus, under the circumstances of this case, we find that the postdischarge amendment, which increased defendant's prison sentence from four

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years to 25 years to life, was erroneous. The prejudice to defendant is manifest.

[*783] Finally, we disagree with defendant's suggestion that we adopt a due diligence standard--whether or not the jury has been discharged--that the prosecution must satisfy before it may amend the information. n10 As the Attorney General correctly notes, this due diligence standard does not comport with our decision in *Valladoli*. Although we did not decide the section 1025 [***35] issue in that case (*Valladoli*, *supra*, 13 Cal. 4th at p. 608, fn. 4), we observed that the prosecution may amend the information under section 969a to charge prior convictions that were previously known, newly discovered, or omitted through clerical error. (*Valladoli*, *supra*, 13 Cal. 4th at p. 606; see *ante*, at p. 11.) Plainly, a due diligence standard is not required. Contrary to defendant's suggestion, we see no basis to reconsider *Valladoli*.

n10 Defendant requests judicial notice of a letter from the Los Angeles County District Attorney's Office (Bureau of Management and Budget), which responds to defendant's inquiry regarding the office's budget for the fiscal year 1996-1997. Because the document has no bearing on the question before us, we deny this request.

Moreover, because we find the postdischarge amendment was improper under section 1025, subdivision (b), we decline to consider defendant's claims that such amendment also violated defendant's protection against double jeopardy, [***36] and his rights under the due process clause of the state and federal Constitutions. (See *De Lancie v. Superior Court* (1982) 31 Cal. 3d 865, 877, fn. 13, 183 Cal. Rptr. 866, 647 P.2d 142 ["courts should avoid resolving constitutional issues if a case can be decided on statutory grounds"].) **DISPOSITION**

For reasons set forth above, we conclude the trial court erred by allowing a section [**218] 969a amendment after discharging the jury, in violation of section 1025, subdivision (b). Accordingly, we reverse the Court of Appeal's judgment affirming that order and remand this action to the Court of Appeal for further proceedings consistent with this opinion.

CHIN, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

KENNARD, J.

WERDEGAR, J.

DISSENTING OPINION BY BROWN, J.

DISSENTBY:
BROWN

DISSENT:

DISSENTING OPINION BY BROWN, J.

The majority has created a jurisdictional mountain out of a procedural molehill. A statute enacted almost a century ago--most likely, as the majority concedes, for reasons of judicial economy--now categorically forecloses the prosecution from alleging belatedly discovered serious prior convictions simply because the trial court discharged [***37] the jury that tried the underlying issues of guilt. The prosecution is thus foreclosed despite the unambiguous statutory authorization to make such allegations [*784] "whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere" (Pen. Code, § 969a (hereafter all unspecified statutory references are to the Penal Code).) The majority's holding also contravenes "the intent of the People of the State of California ... to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Ballot Pamp., Gen. Elec. (Nov. 8, 1994) text of Prop. 184, p. 64.) I dissent.

The majority's interpretation of section 1025 depends upon a narrow and incomplete reading of the text. Inferentially, the majority concludes that "shall" denotes a mandatory requirement and on that basis invokes a jurisdictional bar for failure--in the absence of waiver or forfeiture--to have a single jury decide both guilt and prior conviction allegations. This conclusion is unsupported [***38] by the terms of the statute and likely legislative intent, particularly when considered in light of section 969a, the three strikes law, and the recent amendments to section 1025. It is also at odds with recent decisional authority of this court.

To begin, unlike some codes (see, e.g., Gov. Code, § 14), the Penal Code does not dictate that "shall" is always mandatory. Rather, apart from words and phrases specifically defined, which do not include "shall," section 7, subdivision 16, provides that "words and phrases must be construed according to the context and

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the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning."

Contrary to the majority, I find "shall" in this context more reasonably construed as directory rather than mandatory. "The 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating [***39] the governmental action to which the procedural requirement relates." (*Morris v. County of Marin* (1977) 18 Cal. 3d 901, 908, 136 Cal. Rptr. 251, 559 P.2d 606; see generally 1A Sutherland, *Statutory Construction* (5th ed. 1993) pp. 763-769.) Thus, "[a] statutory requirement may impose on the state a duty to act in a particular way, and yet failure to do so may not void the governmental action taken in violation of the duty. [Citations.]" (*In re Richard S.* (1991) 54 Cal. 3d 857, 865, 819 P.2d 843.) "If the action is invalidated, the requirement will be termed 'mandatory.' If not, it is 'directory' only." (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal. 4th 1133, 1145, 899 P.2d 79.)

Whether the Legislature intended a particular statute to impose a mandatory duty "is a question of interpretation for the courts. [Citations.]" (*Nunn v. State of California* (1984) 35 Cal. 3d 616, 624, 200 Cal. Rptr. 440, 677 P.2d 846.) "In determining whether statutory language is mandatory or directory, 'in the absence of express language, the intent must be gathered from the terms of the statute construed [***40] as a whole, from the nature and character of the act to be done, [**219] and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [citation]...." ' [Citations.]" (*In re Richard S.*, *supra*, 54 Cal. 3d at pp. 865-866.) "It is, of course, difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but of all the rules mentioned, the test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing to be accomplished, or, in other words, whether it relates to matters material or immaterial--to matters of convenience or of substance." (*Francis v. Superior Court* (1935) 3 Cal. 2d 19, 28, 43 P.2d 300; see, e.g., *id.* at pp. 28-29; see also *California Correctional Peace Officers Assn. v. State Personnel Bd.*, *supra*, 10 Cal. 4th at p. 1145 [identifying a "variety of tests" for making

mandatory/directory [***41] determination].) Courts also consider "failure to provide for a consequence or penalty for noncompliance [to] strongly suggest[] that the provision is merely directory. [Citation.]" (*Meridian Ocean Systems, Inc. v. State Lands Com.* (1990) 222 Cal. App. 3d 153, 168, 271 Cal. Rptr. 445; *Nunn v. State of California*, *supra*, 35 Cal. 3d at p. 625; see also *Ryan v. Byram* (1935) 4 Cal. 2d 596, 603-604, 51 P.2d 872; see, e.g., *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal. App. 4th 55, 75.)

These principles apply equally to construction of the Penal Code, as sections 1050 and 1382 illustrate. Section 1050 states the trial court "shall" proceed according to specified directives with respect to trial setting and continuances. For example, section 1050, subdivision (e), currently provides that "continuances shall be granted only upon a showing of good cause." The statute also formerly directed that "the court shall set all criminal cases for trial for a date not later than thirty days after the date of entry of the plea of the defendant." (Stats. 1927, ch. 600, § 1, p. 1036.) Nevertheless, [***42] appellate courts have uniformly construed this language as "not mandatory, but ... directory only" because it contains no sanction for noncompliance. [**786] (*People v. Flores* (1978) 90 Cal. App. 3d Supp. 1, 9, 152 Cal. Rptr. 896; *Malengo v. Municipal Court* (1961) 56 Cal. 2d 813, 816, 17 Cal. Rptr. 10, 366 P.2d 453; *People v. Marshall* (1930) 209 Cal. 540, 546, 289 P. 629; *Ray v. Superior Court* (1929) 208 Cal. 357, 358-359, 281 P. 391.) By contrast, section 1382, subdivision (a), requires that the court "shall order the action to be dismissed" for noncompliance with specified time limits for commencing trial and has been construed as mandatory in light of the express sanction for noncompliance. (*Flores*, at Supp. 9.)

By any of the foregoing measures, section 1025 is more reasonably construed as directory rather than mandatory. While the statute may set forth a "procedural requirement" (*People v. Saunders* (1993) 5 Cal. 4th 580, 590, 853 P.2d 1093), it does not prescribe any remedy for noncompliance much less a jurisdictional bar.

The majority's analysis is also inconsistent with this court's recent [***43] decisional authority. In *People v. Saunders*, *supra*, 5 Cal. 4th 580, the court held that a defendant's failure to object to discharge of the jury prior to its determination of any prior convictions waived the statutory right to have a single jury resolve both guilt and priors issues. (*Id.* at p. 589; cf. § 1164 [precluding discharge until the court has verified the jury has reached or is unable to reach a verdict on all issues including the truth of any alleged priors].) In *People v. Vera* (1997) 15 Cal. 4th 269, 272, 934 P.2d 1279, the court determined that the trial court did not violate section 1025 by failing

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to obtain an "express, personal waiver" of the statutory right to jury trial on prior conviction allegations when the defendant did not object to discharge of the jury that determined his guilt on the underlying offenses. (*Vera*, at p. 274.) The court reached this conclusion in part because the right to a jury trial of prior conviction allegations [**220] is statutory only and does not implicate any constitutional guarantees. (*Id.* at pp. 276-279; see *People v. Wiley* (1995) 9 Cal. 4th 580, 585-586, 889 P.2d 541.) [***44] A jurisdictional bar generally will not accommodate waiver or forfeiture. (Cf. *Cowan v. Superior Court* (1996) 14 Cal. 4th 367, 926 P.2d 438.)

Moreover, the majority's holding conflicts with the legislative history of section 969a as outlined in *People v. Valladoli* (1996) 13 Cal. 4th 590, 602-606, 918 P.2d 999. There, the court noted that as originally enacted, section 969a not only mandated amendment to include additional prior conviction allegations but authorized such amendment after sentencing as long as the defendant's sentence had not yet expired. (*Valladoli*, at pp. 603-604.) At the same time, the Legislature was presumptively aware section 1025 provided for a single jury to decide both guilt and prior [*787] conviction allegations. Implicitly, the Legislature could not have intended "shall" in section 1025 to be mandatory while allowing for the addition of priors allegations after discharge of the original jury. Harmonizing section 1025 with the original provisions of section 969a, the only reasonable conclusion is that the Legislature understood "shall" to be directory, with no sanction for failure to provide a unitary jury in this circumstance. [***45]

With respect to the legislative intent of section 1025, as the majority acknowledges, a plausible purpose in having the same jury try both guilt and prior conviction allegations was to conserve judicial resources, not to benefit defendants. (Cf. § 1098 [statutory preference for joint trials].) Thus, the

" 'material' " matter or " 'substance' " of the statute (*Francis v. Superior Court*, *supra*, 3 Cal. 2d at p. 28) does not require a single jury; no legislative goal is displaced or compromised by having a second jury determine the truth of prior conviction allegations. The same result would be necessary if the original jury could not reach a unanimous verdict as to the priors. The primary benefit to defendants, i.e., " 'the essence of the thing to be accomplished' " (*ibid.*), was most likely according any right to jury trial on the truth of the priors. This intent is accommodated as long as some jury, whether original or subsequent, resolves the issue of prior conviction allegations.

Counter to the majority's holding, the Legislature, seconded by the voters, has of late made clear its intent

"to ensure longer prison sentences and greater punishment [***46] for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (§ 667, subd. (b).) To this end, section 969a ensures that the indictment or information may, in the trial court's discretion, be amended to allege prior convictions "whenever it shall be discovered" they have been omitted. (See also § 667, subd. (g); *People v. Valladoli*, *supra*, 13 Cal. 4th at pp. 602-603, 54 Cal. Rptr. 2d 695, 918 P.2d 999.) As this case illustrates, the majority's reasoning fundamentally undermines this goal.

The Legislature has also narrowed the jury's function with respect to determining the truth of prior conviction allegations. Section 1025, subdivision (c), now provides that "the court without a jury" shall decide "whether the defendant is the person who has suffered the prior conviction" The court also determines whether prior serious felony convictions were brought and tried separately (*People v. Wiley*, *supra*, 9 Cal. 4th at p. 592) and whether a prior felony conviction qualifies as a " 'serious felony' " for purposes of the three strikes law (*People v. Kelii* (1999) 21 Cal. 4th 452, 454, 981 P.2d 518). These limitations [***47] further minimize the likelihood a single-jury requirement was of paramount legislative concern. (See also *id.* at pp. 457-458.)

[*788] The right to jury trial on priors allegations is wholly statutory; it assumes no constitutional dimension. (See *People v. Vera*, *supra*, 15 Cal. 4th at p. 277; cf. *People v. Wims* (1995) 10 Cal. 4th 293, 303-309, 895 P.2d 77.) Nor does the impaneling of a second jury to determine added prior conviction allegations implicate the prohibition against double jeopardy. (*People v. Saunders*, *supra*, 5 Cal. 4th at pp. 592-596.) [**221] To the extent particular circumstances may raise due process concerns, the trial court's exercise of its discretion to permit or deny belated amendment (§ 969a; see *People v. Valladoli*, *supra*, 13 Cal. 4th at p. 606, fn. 3)--guided by the considerations identified in *People v. Valladoli*, 13 Cal. 4th at pages 607-608, and any other relevant factors--adequately safeguards the defendant's interests in fair notice and opportunity to be heard.

Without analysis, the majority assumes "shall" is mandatory and from that assumption infers the [***48] only remedy for noncompliance is to bar consideration of any prior allegations added after discharge of the jury that determined the defendant's guilt. These assumptions do not follow from either the statutory language or any decisional authority cited by the majority. Nor is a bar necessary to effectuate legislative intent to confer a statutory right to jury trial for prior convictions. That right may be preserved even if the original jury is discharged prior to amendment. Here, defendant received his jury trial. He offers only speculation and conjecture

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in support for his assertions of prejudice because the same panel did not determine both guilt and the priors, and logic suggests none.

BROWN, J.

I CONCUR:

Accordingly, I would affirm the judgment of the Court of Appeal.

BAXTER, J.

**HI-VOLTAGE WIRE WORKS, INC., et al., Plaintiffs and Respondents, v. CITY
OF SAN JOSE et al., Defendants and Appellants.**

S080318

SUPREME COURT OF CALIFORNIA

**24 Cal. 4th 537; 12 P.3d 1068; 2000 Cal. LEXIS 8928; 101 Cal. Rptr. 2d 653;
2000 Cal. Daily Op. Service 9442; 2000 Daily Journal DAR 12705**

November 30, 2000, Filed

NOTICE:

[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

Superior Court of California, Santa Clara County. Court of Appeal of California, Sixth Appellate District. H018407. Super. Ct. No. CV768694. Richard C. Turrone, Judge.

DISPOSITION:

The judgment of the Court of Appeal is affirmed.

COUNSEL:

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JUDGES:

BROWN, J. WE CONCUR: MOSK, J., BAXTER, J., CHIN, J. CONCURRING OPINION BY MOSK, J. CONCURRING OPINION BY KENNARD, J. CONCURRING AND [***5] DISSENTING OPINION BY GEORGE, C.J.

OPINION BY:

BROWN

OPINION:

[EDITOR'S NOTE: PART 1 OF 2. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

[*541] "In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race." (*Fullilove v. Klutznick* (1980) 448 U.S. 448, 516, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (conc. opn. of Powell, J.); see also *DeFunis v. Odegaard* (1974) 416 U.S. 312, 350, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (dis. opn. of Brennan, J.).) In November 1996, the California voters added yet another chapter to the long and tortuous history of this question when they approved Proposition 209, which amended our Constitution to prohibit the state and its political subdivisions from "discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (Cal. Const.,

art. I, § 31.) Subsequent to the approval of Proposition 209, the City of San Jose adopted a program that requires contractors bidding on city projects to utilize a specified percentage of minority and women subcontractors or to document efforts to include minority [***6] and women subcontractors in their bids.

The question before the court is whether this program contravenes article I, section 31 of the California Constitution. Although the precise issue is a [*542] narrow one, the electorate did not approve Proposition 209 in a vacuum. Quite the contrary. Thus, while it may be possible to resolve the matter, as do the Chief Justice and Justice Kennard, simply by relying on differences between Proposition 209 and Title VII of the Civil Rights Act of 1964 or on the plain meaning of the initiative's language, we can discern and thereby effectuate the voters' intention only by interpreting this language in its historical context. Viewing the provisions

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of article I, section 31 from this perspective, it is clear the voters intended to adopt the original construction of the Civil Rights Act and prohibit the kind of preferential treatment accorded by this program.

FACTUAL AND PROCEDURAL BACKGROUND

The salient facts, which are not in dispute, are drawn from the opinion of the Court of Appeal. In 1983, the City of San Jose (City) established a program to encourage public works projects participation by minority business enterprises (MBE's) and women [***7] business enterprises (WBE's). n1 For each contract, the City set a "participation goal" based on the "availability and ability of the MBE and WBE to do the work to be contracted." To qualify as a "responsible bidder," a contractor had to meet or exceed this goal or demonstrate "reasonable efforts" to obtain MBE/WBE participation. "Reasonable efforts" entailed documenting written notice to at least four MBE's/WBE's soliciting them for the project, follow-up contact to [**1071] determine their interest in bidding, and written reasons justifying rejection of an MBE's or WBE's low bid.

n1 An MBE is defined as a business with at least 51 percent ownership or control by one or more minority persons, as the City's municipal code defines "minority." A WBE must be 51 percent owned by a woman or women, who also control and operate it.

In 1989, the United States Supreme Court held in *City of Richmond v. J. A. Croson Co.* (1989) 488 U.S. 469, 498-507, 102 L. Ed. 2d 854, 109 S. Ct. 706 (*Croson*), that [***8] a state government could not implement a program designed to remedy past discrimination absent a factual predicate substantiating an inference of prior discriminatory exclusion. Following *Croson*, in 1990 the City suspended its MBE/WBE program and commissioned a study to identify any statistically significant disparity in the number and dollar value of contracts and subcontracts awarded to MBE's and WBE's. The resulting report established such a disparity as to the amount of contract dollars awarded MBE subcontractors. In response, the City adopted the "MBE/WBE Construction Program" to encourage nondiscriminatory subcontracting. Like its predecessor, the new program included participation goals and required documentation of good faith efforts to meet them.

After the passage of Proposition 209, the City's Office of Affirmative Action/Contract Compliance became the Office of Equality Assurance. The [*543]

City also adopted the Nondiscrimination/Nonpreferential Treatment Program Applicable to Construction Contracts in Excess of \$ 50,000 (Program) at issue here. The Program reaffirms the findings of the 1990 disparity study and attempts to clarify the City's policy of nondiscrimination and [***9] nonpreference in the subcontracting of its construction projects to "ensure that the historical discrimination does not continue." n2

n2 Also by local ordinance, a contractor may not "discriminate or grant preferential treatment on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in the selecting of any subcontractor for work on a City or Agency contract." (San Jose Mun. Code, § 4.08.070.) Prime contractors submitting bids on city projects must certify they have not unlawfully discriminated.

As with the 1983 version, the Program requires contractors bidding on City projects to fulfill either an outreach or a participation component. The "Documentation of Outreach" option entails maintaining records of written notice, or "solicitation letters," to four certified MBE's/WBE's for each trade area identified for the project. Copies of the notice or letters must accompany the bid. The contractor must document at least three attempts to contact [***10] the MBE/WBE firms to determine their interest in participating in the project. If any MBE's/WBE's express interest, the contractor must negotiate in good faith. It may not unjustifiably reject any bids prepared by MBE's/WBE's and must specify the reasons for doing so. n3 With respect to the "Documentation of Participation" option, the City determines for each project the number of MBE/WBE subcontractors that would be expected in the absence of discrimination. If a contractor lists a sufficient number of MBE's/WBE's in the bid to meet this "evidentiary presumption" of nondiscrimination, it will satisfy the participation alternative, and the City will not require any documentation of outreach.

n3 The City apparently interprets these latter requirements as prohibiting a prime contractor from rejecting a subcontractor's proposal based upon race or sex. It is unclear, however, how it makes this determination.

A bid failing to document either MBE/WBE outreach or participation is rejected as "nonresponsive,

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***11] " and the contractor is deemed not a "responsible" bidder. The Program's requirements apply to all contractors, including MBE's, WBE's, and those not planning to subcontract any portion of the project.

In 1997, the City solicited bids on a project for which plaintiff Hi-Voltage Wire Works, Inc. (Hi-Voltage), a general contracting firm, was the low bidder. Because it intended to utilize entirely its own work force, it failed to comply with either the MBE/WBE outreach or participation requirement. The City therefore rejected its bid. Joined by plaintiff Allen Jones, a City taxpayer, Hi-Voltage initiated this litigation challenging the Program as a [*544] violation of article I, section 31 of the California Constitution (section 31) because it required contractors to accord "unlawful preferences" to minority and women subcontractors by giving them "special assistance and information" not provided non-MBE/WBE subcontractors. Plaintiffs [*1072] sought declaratory relief and an injunction preventing continuation of the Program. The trial court granted plaintiffs' motion for summary judgment, finding that both components of the Program constituted race- and sex-based classifications that violated section [*12] 31.

The Court of Appeal affirmed. Considering the language of section 31 in light of the ballot materials accompanying Proposition 209, the court concluded "that the term 'preferential treatment' ..., viewed in its ordinary, natural sense, refers to any kind of treatment favoring one group or individual over another. The prohibition is not limited to set-asides, quotas, and 'plus factors,' but extends to all preferences granted to the target groups. [Fn. omitted.]" The court found section 31, as thus defined, invalidated the Program's MBE/WBE outreach option because it does more than "encourage contractors to include MBE/WBE's in soliciting subcontractor bids." It requires them "to give personal attention to and consideration of minority and women businesses that need not be given to non-MBE/WBE's. Furthermore, the contractor may not 'unjustifiably reject as unsatisfactory bids prepared by any [MBE's/WBE's].' This requirement alone grants a distinct preference to MBE/WBE businesses."

With respect to the participation option, the court determined the evidentiary presumption established an impermissible goal for including MBE/WBE firms in a contractor's bid. It found unpersuasive [*13] the City's contention that the evidentiary presumption is not discriminatory or preferential because its purpose is "only to 'screen' for discrimination, 'not to have contractors achieve some predetermined objective'" In the court's view, "neither the text of Proposition 209 nor its accompanying ballot materials suggest that a violation

occurs only when the government *intentionally* discriminates or grants preferences."

We granted the City's petition for review to settle this important question of state constitutional law. To properly measure the relevant analytical context, we trace back almost 150 years before the passage of Proposition 209 and find recurring patterns in the law as to the appropriate role of government concerning questions of race. n4 This extended perspective both illuminates the meaning and purpose of Proposition 209 and guides its application.

n4 Section 31 proscribes discrimination and preferential treatment on the basis of sex as well as race. (See *post*, 2000 Cal. LEXIS 8928 at p. *46, fn. 12.) Our preliminary discussion focuses on the development of legal and philosophical norms concerning governmental actions relating to race because the history of racial discrimination is the genesis of all we discuss here. At the same time, we do not ignore or discount the reality that women were long denied equality, albeit often for different reasons than racial or ethnic minorities. (See, e.g., *Sanderson v. Niemann* (1941) 17 Cal. 2d 563, 569, 110 P.2d 1025 [by statute and decisional law husband had management and control of community property and must, with limited exceptions, bring all actions that concerned the community property]; *Griffey v. Pacific Electric Ry. Co.* (1922) 58 Cal. App. 509, 521, 209 P. 45 [married woman is "duty bound to follow her husband to any reasonable fit abode which he might select"]; *Basler v. Sacramento Gas & Elec. Co.* (1910) 158 Cal. 514, 518, 111 P. 530 [wife's personal injury action barred "if [her husband's] negligence contributed proximately to her injury (since under the laws of this state the recovery for her injuries is community property, in which the husband shares and over which he has control)"]; see also *In the Matter of the Motion To Admit Miss Lavinia Goodell to the Bar of this Court* (1875) 39 Wis. 232 [1875 WL 3615, *8] [Wisconsin Supreme Court refused to admit first female applicant to the state bar, in part because the "peculiar qualities of womanhood ... are surely not qualifications for forensic strife"].) While the struggle for racial equality is paradigmatic, it is not singular in its influence on the law.

***14] [*545]

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DISCUSSION

I

A

The United States was founded on the principle that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." (*Declaration of Independence*.) Yet, our history reflects a continuing struggle to enable every individual to fully realize this "self-evident" article of faith. (See *University of California Regents v. Bakke* (1978) 438 U.S. 265, 387-395, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (conc. & dis. opn. of Marshall, J.) (*Bakke* [**1073] II) .) That struggle demarcates the historical and cultural context within which we decide the issue before us.

While the courts have been instrumental in effecting positive change in the quest for equality, their involvement in articulating a coherent vision of the civil rights guaranteed by our Constitution has not been without its low points. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 343-344, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (dis. opn. of Brennan, J.); *Fullilove v. Klutznick*, *supra*, 448 U.S. at p. 516 (conc. opn. of Powell, J.).) The nadir was perhaps the [***15] *Dred Scott* decision, in which the United States Supreme Court denied citizen status to African-Americans, "whether emancipated or not." (*Dred Scott v. Sandford* (1856) 60 U.S. (19 How.) 393, 405 [15 L. Ed. 691] (*Dred Scott*) .) The true vice of *Dred Scott* lies not so much in the fact it "treated prohibition of slavery in the Territories as nothing less than a general assault on the concept of property." (*Washington v. Glucksberg* (1997) 521 U.S. 702, 770, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (conc. opn. of Souter, J.); see *Dred Scott*, *supra*, 60 U.S. at [**546] pp. 449-452, 15 L. Ed. 2d at pp. 719-720.) Rather, a majority of the United States Supreme Court endorsed the then-prevailing societal view that African-Americans--whether slave or free--were "altogether unfit to associate with the white race, either in social or political relations"; and "had no rights which the white man was bound to respect." (*Dred Scott*, *supra*, 60 U.S. at p. 407; cf. *People v. Hall* (1854) 4 Cal. 399, 404-405 [holding as a matter of "public policy" under state statute that Chinese, "a race of people whom nature has marked as inferior," were precluded from testifying against [***16] White persons].) In legitimating this pernicious concept, the court set the stage not only for the cataclysm of the Civil War but for the contentiousness that continues to this day over government's proper role with respect to race.

Following the Civil War, Congress overturned the *Dred Scott* decision when it adopted the Fourteenth Amendment expressly defining citizenship and

forbidding any state from "denying to any person within its jurisdiction the equal protection of the laws." Nevertheless, in *Plessy v. Ferguson* (1896) 163 U.S. 537, 552, 41 L. Ed. 256, 16 S. Ct. 1138 (*Plessy*), the Supreme Court validated government-initiated racial restrictions and gave its imprimatur to legally enforced segregation on the theory that "if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." The court approved "separate but equal" (*ibid.*, (dis. opn. of Harlan, J.)) accommodations as a valid exercise of the state's "police power" to prevent racial strife. (*Id.* at p. 544.) Although speaking only for himself at the time, Justice Harlan vigorously dissented: "Our Constitution is color-blind, [***17] and neither knows nor tolerates classes among citizens." (*Id.* at p. 559 (dis. opn. of Harlan, J.).) "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." (*Id.* at p. 560 (dis. opn. of Harlan, J.).)

Justice Harlan's view would not prevail for more than half a century. But, in *Brown v. Board of Education* (1954) 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, a unanimous Supreme Court acknowledged the invidious effect of separating individuals solely because of their race. "The impact is greater when it has the sanction of the law" (*Id.* at p. 494.) Repudiating *Plessy*, the court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal [and] deprive[] [those affected] of the equal protection of the laws guaranteed by the Fourteenth Amendment." (*Id.* at p. 495.)

[**547] *Brown v. Board of Education*, *supra*, 347 U.S. 483, [***18] concerned state-imposed segregation in education, but the courts did not hesitate to apply its animating principle in other contexts. (See Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution* (1979) 46 U.Chi. L.Rev. 775, 783, fn. 24, and cases cited therein (Van Alstyne).) In summarizing the common thread of these cases, Professor Van Alstyne observed that in the years between 1955 and 1976 following *Brown v. Board of Education*, *supra*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, "virtually [**1074] every other race-related decision by the Supreme Court appeared to convey" Justice Harlan's conviction "that the Civil War amendments altogether 'removed the race line from our governmental systems.'" (Van Alstyne, *supra*, 46 U.Chi. L.Rev. at p. 783.) "To the reasonably discerning, this appeared true even in instances involving highly controversial judicial decrees that paired racially identifiable schools, redrafted attendance lines, or mandated busing. In each instance, the fulcrum of

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judicial leverage was an *existing governmental* race line, which the particular judicial order sought to remove. The object was thus to disestablish particular, existing uses of race, not [***19] to establish new ones." (*Id.* at pp. 783-784, fn. omitted.)

Although a landmark decision, *Brown v. Board of Education* was not singular. Both before and after, the United States Supreme Court was actively developing a "color-blind" jurisprudence. *Hughes v. Superior Court of California* (1950) 339 U.S. 460, 94 L. Ed. 985, 70 S. Ct. 718 involved an injunction against picketers seeking to have a supermarket hire African-American grocery clerks at a particular location proportionate to the number of African-American customers at that store. This court upheld a judgment of contempt for violation of the injunction, and the high court affirmed. The picketers had claimed a deprivation of due process for infringement of their right to free speech. The Supreme Court rejected the argument, noting "that it would encourage discriminatory hiring to give constitutional protection to petitioners' efforts to subject the opportunity of getting a job to a quota system." (*Id.* at p. 463; cf. *DeFunis v. Odegaard*, *supra*, 416 U.S. at p. 336 (dis. opn. of Douglas, J.) ["There is no constitutional right for any race to be preferred"].)

In *Peterson v. Greenville* (1963) 373 U.S. 244, 10 L. Ed. 2d 323, 83 S. Ct. 1119, [***20] the high court struck down a city ordinance requiring restaurant and hotel proprietors to maintain segregated facilities. When a state "passes a law compelling persons to discriminate against other persons because of race," it commits "a palpable violation of the Fourteenth Amendment" (*Id.* at p. 248.) *Reitman v. Mulkey* (1967) 387 U.S. 369, 18 L. Ed. 2d 830, 87 S. Ct. 1627 concerned a state constitutional [*548] amendment that, while facially neutral, encouraged and facilitated racial discrimination in the rental and sale of residential property. As in analogous decisions, the state had violated the right of equal protection because it "had taken affirmative action designed to make private discriminations legally possible." (*Id.* at p. 375.) n5

n5 See also *Loving v. Virginia* (1967) 388 U.S. 1, 10, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (striking down state ban on interracial marriage; "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States"); *Anderson v. Martin* (1964) 375 U.S. 399, 402, 11 L. Ed. 2d 430, 84 S. Ct. 454 (invalidating state statute requiring designation of candidates' race on electoral ballots; "The vice ... [is] not in the resulting injury but in the placing

of the power of the State behind a racial classification that induces racial prejudice at the polls"); *Shelley v. Kraemer* (1948) 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (finding Fourteenth Amendment violation in state court's enforcement of restrictive covenants); *Buchanan v. Warley* (1917) 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16 (invalidating statute forbidding Blacks and Whites from moving into a block where the greater number of residences were occupied by persons of the other race); but see *Korematsu v. United States* (1944) 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (upholding order excluding citizens of Japanese ancestry from their homes located in West Coast war area and requiring detention at relocation centers); *Hirabayashi v. United States* (1943) 320 U.S. 81, 87 L. Ed. 1774, 63 S. Ct. 1375 (upholding curfew imposed only against citizens of Japanese ancestry).

[***21]

Professor Alexander Bickel referred to these cases as "the great decisions of the Supreme Court" whose lesson "and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." (Bickel, *The Morality of Consent* (1975) p. 133 (Bickel).) For Professor Van Alstyne, "the message is commendably even stronger. Laws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid. And laws attempting to advance either policy even in disguise will likewise be struck down whenever it is within the capacity of conscientious courts to see [**1075] beneath their cellophane wrappers." (Van Alstyne, *supra*, 46 U.Chi. L.Rev. at p. 792, fn. omitted.)B

Although the United States Supreme Court had rejected the principle of separate but equal and had directed the admission of students to public schools "on a racially nondiscriminatory basis with all deliberate speed" (*Brown v. Board of Education* (1955) 349 U.S. 294, 301, 99 L. Ed. 1083, 75 S. Ct. 753), many [***22] officials charged with implementing the mandate were reluctant if not recalcitrant. Discrimination remained the norm generally, prompting protests and acts of civil disobedience. (See, e.g., *Peterson v. Greenville*, *supra*, 373 U.S. 244.) In response, Congress enacted the Civil [*549] Rights Act of 1964 (Civil Rights Act or Act). As the floor debates and committee reports attest, Congress intended that the Act reflect Justice Harlan's understanding of the Constitution and "be 'colorblind' in its application." (*Bakke II*, *supra*, 438 U.S. at p. 415, fn.

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omitted (conc. & dis. opn. of Stevens, J.); see *Steelworkers v. Weber* (1979) 443 U.S. 193, 229-252, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (dis. opn. of Rehnquist, J.) [detailing legislative history of title VII of the Act].)

Title VII of the Civil Rights Act (Title VII) forbids, with limited exceptions, discrimination in employment on the basis of race, color, religion, sex, or national origin. n6 Because section 31 closely parallels this provision in both language and purpose, the next phase in developing our historical context concerns the analytical and philosophical evolution in the interpretation [***23] and application of Title VII.

n6 Among other provisions, Title VII states: "It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. § 2000e-2(a)(1).)

Title VI of the Act provides in part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (42 U.S.C. § 2000d.)

Many of the floor debates and other legislative history materials reference both titles. (See, e.g., *Bakke II*, *supra*, 438 U.S. at p. 287.)

The Supreme Court first considered an alleged violation [***24] of Title VII in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (*Griggs*). African-American workers claimed a racially neutral hiring and promotion criterion unrelated to any job requirement discriminated against them in its actual effect. In a unanimous opinion by Chief Justice Burger, the high court agreed: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities" (*Id.* at p. 429; see also *Teamsters v. United States* (1977) 431 U.S. 324, 335, fn. 15, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (*Teamsters*).) To that end, the Act prohibited "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." (*Griggs*, *supra*, 401 U.S. at p. 431.) Nevertheless, the court stressed, "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. ... Discriminatory

preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, [***25] arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate [*550] on the basis of racial or other impermissible classification." (*Id.* at pp. 430-431, 91 S. Ct. at p. 853.)

Equally clear in the court's view, "Title VII ... prohibits the discharge of 'any individual' because of 'such individual's race,' [citation]. Its terms are not limited to discrimination against members of any particular race." (*McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 278-279, 49 L. Ed. 2d 493, 96 S. Ct. 2574, fn. omitted (*McDonald*); see *ante*, 2000 Cal. LEXIS 8928 at p. *23, fn. 6.) "This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white [**1076] women and all Americans,' [citation], and create an 'obligation not to discriminate against whites,' [citation]." (*McDonald*, at p. 280.) Accordingly, regardless of the complainant's race, the "same standards" prohibiting employment discrimination applied. (*Ibid.*) n7

n7 With respect to proving a violation of Title VII, the Supreme Court explained in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (*McDonnell Douglas*) that a complainant "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." If the complainant establishes a prima facie case, "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." (*Ibid.*) If so, the complainant may counter with evidence the "stated reason for [his or her] rejection was in fact pretext." (*Id.* at p. 804.)

[***26]

Regarding appropriate relief for Title VII violations, the court reaffirmed in *Teamsters*, *supra*, 431 U.S. 324, that "an equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' [Citation.] In determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.' [Citation.]" (431 U.S. at p. 364.) Consistent with the broad equitable powers conferred by Congress, Title VII courts may even, under limited circumstances, award

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seniority to persons who had never actually applied for a job. "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." (*Teamsters*, at p. 365.) Such a violation may not be unduly attenuated, however. The claimant must "show that he was a potential victim of unlawful discrimination" and discharge "the not always easy burden of proving that he would have applied for the job had it not been for those practices. [Citation.]" [***27] (431 U.S. at pp. 367-368.)

The court cautioned, however, that "Title VII ... does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." [*551] (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 577-578, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (*Furnco*)). "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. [Citations.]" (*Id.* at p. 579.) Thus, "courts may not impose such a remedy on an employer at least until a violation of Title VII has been proved" (*Id.* at p. 578.)

The Supreme Court's early interpretation of Title VII emphasized several factors: The purpose of Title VII was to ensure equal opportunity for all. Thus, discriminatory practices were forbidden irrespective of the victim's race. Relief could take the form of restitution to individual victims, including those establishing that an employer's pattern and practice of discrimination deterred their applications for employment. [***28] It could also be remedial to eradicate the effects of specific discriminatory practices, but courts had no obligation or authority to require any particular affirmative hiring or other employment practices. In other words, consistent with congressional intent, the court's construction confirmed and reinforced the role of government as color-blind in these matters.

C

The analytical framework of Title VII jurisprudence underwent substantial modification in 1979 when the United States Supreme Court decided *Steelworkers v. Weber*, *supra*, 443 U.S. 193 (*Weber*). In *Weber*, the employer voluntarily instituted a training program as part of an effort to eliminate a conspicuous racial imbalance in its craftworkers. Selection for the program was based on seniority with the proviso that at least half of the trainees chosen be African-Americans "until the percentage of black skilled craftworkers in the ... plant

approximated the percentage of blacks in the local labor force." (*Id.* at p. 199.) A White employee who had been denied entry despite greater seniority than some African-Americans admitted into the program brought suit under Title VII. [***29] A majority of the court found no violation. "Examination of [the legislative [*1077] history of Title VII and the historical context from which the Act arose] makes clear that an interpretation ... that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected. [Citations.]" (*Weber*, at pp. 201-202.) Because "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy' " (*Weber*, at p. 202, 99 S. Ct. [*552] at pp. 2726-2727) and "private and voluntary affirmative action efforts [was] one method of solving this problem" (443 U.S. at p. 203, 99 S. Ct. at p. 2727), Congress could not have meant to ban them absolutely. (443 U.S. at p. 206, 99 S. Ct. at pp. 2728-2729.) The court further interpreted Title VII to permit race-conscious action "whenever the job category in question is 'traditionally segregated.' [Citation.]" (*Weber*, at p. 212, 99 S. Ct. at p. 2731 (conc. opn. of Blackmun, J.).)

Although concurring, Justice Blackmun admitted, "The Court's expansive approach is somewhat disturbing for me because, as Mr. Justice Rehnquist points out, the Congress [***30] that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates 'arguable violations,' discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted." (*Weber*, *supra*, 443 U.S. 193, 212-213, 99 S. Ct. at p. 2721, 2732 (conc. opn. of Blackmun, J.).) Justice Blackmun also expressed concern that under the majority's rule, "the individual employer need not have engaged in discriminatory practices in the past." (*Id.* at p. 213, 99 S. Ct. at p. 2732.) Nevertheless, he discerned some analytical support for the result and concluded that "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." (*Id.* at p. 21699 S. Ct. at p. 2734; but see *DeRonde v. Regents of University of California* (1981) 28 Cal. 3d 875, 902, fn. 6, 172 Cal. Rptr. 677, 625 P.2d 220 [***31] (dis. opn. of Mosk, J.) (*DeRonde*); *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 671-672, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (dis. opn. of Scalia, J.) (*Johnson*)).

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Chief Justice Burger and then-Justice Rehnquist dissented. The Chief Justice criticized the majority's apparent reversal of settled law: "Until today, I had thought the Court was of the unanimous view that 'discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed' in Title VII." (*Weber, supra*, 443 U.S. 193, 218, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (dis. opn. of Burger, C.J.), quoting *Griggs, supra*, 401 U.S. at p. 431.) In his view, the legislative history established that the Civil Rights Act "was conceived and enacted to make discrimination against any individual illegal, and I fail to see how 'voluntary compliance' with the no-discrimination principle that is the heart and soul of Title VII as currently written will be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others." (*Weber*, at p. 218.)

[*553] Justice Rehnquist recounted the numerous cases in which the court had "never wavered in our [***32] understanding that Title VII 'prohibits all racial discrimination in employment, without exception for any group of particular employees.' [Citation.]" (*Weber, supra*, 443 U.S. 193, 220 (dis. opn. of Rehnquist, J.), quoting *McDonald, supra*, 427 U.S. at p. 283.) He also exhaustively analyzed extensive portions of Title VII's legislative history supporting that understanding. (*Weber*, at pp. 226-254.) For example, "Senator Humphrey [one of the [**1078] bipartisan floor managers of the entire civil rights bill in the Senate] ... stated that 'nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.' [Citation.]" (*Id.* at p. 237, fn. omitted.) n8 Senator Kuchel, the other bipartisan floor manager explained: " 'Employers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin. In such matters ... the bill now before us ... is color-blind.' [Citation.]" (*Id.* at p. 238.) As its proponents emphasized, the Act " 'provides no preferential treatment for any group of citizens. In fact, [***33] it specifically prohibits such treatment.' [Citation.]" (*Id.* at p. 248, fn. omitted.)

n8 Senator Humphrey expressed similar views regarding the purpose and effect of title VI: " 'The bill has a simple purpose. That purpose is to give fellow citizens--Negroes--the same rights and opportunities that white people take for granted. ... It is no more than what our Constitution guarantees.' [Citation.]" (*Bakke II, supra*, 438 U.S. at p. 287, fn. omitted.)

In the wake of *Weber*, Title VII jurisprudence underwent a sea change in less than a decade (see *Johnson, supra*, 480 U.S. 616, 642-643 (conc. opn. of Stevens, J.)), from providing individualized restitutionary relief for specific injury to approving race-conscious practices by court order or employer-initiated programs. n9 (Compare, e.g., *Teamsters, supra*, 431 U.S. at pp. 342-343, fn. 24, 346-347, 356-362, 374-375, fn. 61, [*554] 97 S. Ct. at pp. 1858, 1860-1861, 1865-1868, 1874, with, e.g., *Sheet Metal Workers' v. EEOC* (1986) 478 U.S. 421, 445, 92 L. Ed. 2d 344, 106 S. Ct. 3019 [***34] (*Sheet Metal Workers*) .) Having once validated consideration of race, the United States Supreme Court struggled to articulate a principled, consistent standard for doing so given its earlier construction of Title VII. (See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-231, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) [reflecting similar difficulty developing coherent principles for consistently resolving equal protection challenges to race-based actions].)

n9 A comparable evolution occurred in decisions involving equal protection challenges. Setting aside such holdings as *Hughes v. Superior Court of California, supra*, 339 U.S. 460, and *Brown v. Board of Education, supra*, 347 U.S. 483, five members of the Supreme Court in *Bakke II, supra*, 438 U.S. 265, expressed the view that the Constitution will tolerate race-based state action intended to remedy the effects of past discrimination even on behalf of individuals who did not personally suffer as a result. (See *Bakke II*, at pp. 316-319 (lead opn. of Powell, J.); *id.* at pp. 324-326 & fn. 1 (conc. & dis. opn. of Brennan, J., in which White, Marshall, and Blackmun, JJ., joined).)

Thereafter, in *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 274, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (*Wygant*), the court accepted the licitness of race-conscious remedies with the caveat "a public employer ... must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted." (*Id.* at p. 277; see also *Adarand Constructors, Inc. v. Peña* (1995) 515 U.S. 200, 236-237, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (*Adarand*) [allowing a "narrowly tailored race-based remedy" in response to "lingering effects of racial discrimination against minority groups" by federal agencies]; *Croson, supra*, 488 U.S. at p. 509 ["Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to

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perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise" and justify taking affirmative action to rectify the effects[.] In *United States v. Paradise* (1987) 480 U.S. 149, 177, 94 L. Ed. 2d 203, 107 S. Ct. 1053, the high court expressly approved a judicial decree that included a racial quota for future promotions by the Alabama Department of Public Safety. Because the order was narrowly tailored to redress "pervasive, systematic, and obstinate discriminatory conduct of the Department" (*id.* at p. 167), it did not offend equal protection even though none of the beneficiaries had experienced promotional discrimination.

[***35]

For example, in *Sheet Metal Workers, supra*, 478 U.S. at page 445, the court determined--over contrary arguments by the Equal Employment Opportunity Commission--that Title VII "does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief [in the form of fixed union membership goals] as a remedy for past discrimination" even if it may benefit individuals who were not identified victims of such discrimination. (See also *Firefighters v. Cleveland* (1986) 478 U.S. 501, 92 L. Ed. 2d 405, 106 S. Ct. 3063 [consent decree requiring race-conscious promotions did not violate Title VII even though beneficiaries had not suffered discrimination].) In reaching this result, a plurality of the court construed Title VII not only to guarantee equal employment opportunities but to "foster" them as well. (*Sheet Metal Workers, supra*, 478 U.S. at p. 448.) "Even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities. An employer's reputation [**1079] for discrimination may discourage minorities from seeking available employment. [Citations.] In these circumstances, [***36] affirmative race-conscious relief may be the only means available 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' [Citations.]" (478 U.S. at pp. 449-450, 106 [*555] S. Ct. at p. 3036.) As Justice O'Connor observed, however, "the plurality offers little guidance as to what separates an impermissible quota from a permissible goal." (478 U.S. at p. 494 (conc. & dis. opn. of O'Connor, J.).)

A year later, in *Johnson, supra*, 480 U.S. 616, the Supreme Court validated a public agency's plan whereby it promoted a woman over a male who ranked higher on

the promotional test. Notwithstanding the lack of any evidence the agency had actually discriminated against women, the court found the plan justified by a "conspicuous ... imbalance in traditionally segregated job categories." [Citation.] (480 U.S. at p. 630.) Departing from the burden-shifting procedures of *McDonnell Douglas, supra*, 411 U.S. 792, and *Furnco, supra*, 438 U.S. 567 (see *ante*, 2000 Cal. LEXIS 8928 at p. *25, fn. 7), the court concluded "[a] manifest imbalance need not be such that it would [***37] support a prima facie case against the employer ... since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans." (*Johnson, supra*, 480 U.S. at p. 632, fn. omitted; see also 480 U.S. at p. 633, fn. 10.) Accordingly, the agency "appropriately took into account ... sex" in making its promotional decision. (480 U.S. at p. 641.)

The court in *Johnson* approved preferential treatment of a woman because "the decision to hire [her] was made pursuant to an Agency plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation." (*Johnson, supra*, 480 U.S. at p. 634.) In relying on this justification, it replaced individual right of equal opportunity with proportional group representation. Although pursued for the purpose of eliminating invidious discrimination, history reveals that this prevailing social and political norm had its parallel in laws antedating the Civil Rights Act, when government could legally classify according to race. (See Van Alstyne, *supra*, 46 U.Chi. L.Rev. at pp. 797-803.)

D

Our own decisional law has mirrored this [***38] change in focus from protection of equal opportunity for all individuals to entitlement based on group representation. During the period the United States Supreme Court was issuing its great decisions, California was not without its own "judicial harbingers of a prejudice-free society" (*DeRonde, supra*, 28 Cal. 3d 875, 893 (dis. opn. of Mosk, J.)), opinions in which "this court had consistently maintained that race or similar characteristics are not a qualification or [*556] disqualification for the benefits of society." (28 Cal. 3d at p. 892.) In *Perez v. Sharp* (1948) 32 Cal. 2d 711, 198 P.2d 17, we struck down the state's antimiscegenation statute as inimical to civilized society. In *James v. Marinship Corp.* (1944) 25 Cal. 2d 721, 155 P.2d 329, the court affirmed an order that a union admit African-Americans so they could continue to work for an employer with which the union had a closed shop agreement. "Where, as here, a labor union has attained a monopoly of the labor supply through closed shop agreements, such a union, like a public service business, may not unreasonably discriminate against Negro

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workers for the sole reason that they are colored persons. [***39] " (*Id.* at p. 740.)

Hughes v. Superior Court (1948) 32 Cal. 2d 850, 198 P.2d 885 (the decision reviewed in *Hughes v. Superior Court of California*, *supra*, 339 U.S. 460) upheld a judgment of contempt against picketers who had the "unlawful objective" "not to induce [an employer] not to discriminate against, but, rather, expressly to compel [it] to discriminate arbitrarily in favor of, one race as against all others in the hiring of a portion of its clerks" (*Hughes v. Superior Court*, *supra*, 32 Cal. 2d at p. 854.) In words that presaged the Civil [**1080] Rights Act debates, the court condemned the picketers' objective, which "would, to the extent of the fixed proportion, make the right to work for [the employer] dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis." (*Hughes*, at p. 856.)

In *Mulkey v. Reitman* (1966) 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 [***40] (the decision reviewed in *Reitman v. Mulkey*, *supra*, 387 U.S. 369), the court invalidated a constitutional initiative that guaranteed owners the right to discriminate in the rental or sale of their property. " 'For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of equal protection of the laws, in violation of the Fourteenth Amendment.' " (*Mulkey v. Reitman*, *supra*, 64 Cal. 2d at p. 541, 50 Cal. Rptr. 881, 413 P.2d 825.) "Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is [impermissibly] encouraged" (*Id.* at p. 542.)

Finally, in *Bakke v. Regents of University of California* (1976) 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (*Bakke I*), the plaintiff challenged a medical school admissions program that reserved 16 percent of the admission opportunities in each year's class for minority students. The court did not hesitate to find a denial of equal protection. We acknowledged, "The [*557] persuasiveness of these arguments [that preferential treatment [***41] of minorities is necessary to eliminate the lingering effects of past discrimination] cannot be denied, for the ends sought by such programs are clearly just if the benefit to minorities is viewed in isolation. But there are more forceful policy reasons against preferential admissions based on race. The divisive effect of such preferences needs no explication and raises serious doubts whether the advantages obtained by the

few preferred are worth the inevitable cost to racial harmony. ... Perhaps most important, the principle that the Constitution sanctions racial discrimination against a race--any race--is a dangerous concept fraught with potential for misuse in situations which involve far less laudable objectives than are manifest in the present case." (*Id.* at pp. 61-62, fn. omitted.) n10

n10 California's Legislature was active in banning discrimination during this period as well. As early as 1939, state law prohibited racial discrimination on public works projects. (Lab. Code, § 1735, added by Stats. 1939, ch. 643, § 1, p. 2068.) Beginning in 1959, the Unruh Civil Rights Act barred discrimination by "business establishments of every kind." (Civ. Code, § 51, 52; as amended by Stats. 1959, ch. 1866, § 1, p. 4424.) In 1963, the Legislature passed the Rumford Fair Housing Act, which provided that "the practice of discrimination because of race, color, religion, national origin, or ancestry is declared to be against public policy." (Health & Saf. Code, former § § 35700-35744, added by Stats. 1963, ch. 1853, § 2, p. 3823, and repealed by Stats. 1980, ch. 992, § 8, p. 3166, and replaced by Stats. 1980, ch. 992, § 4, p. 3140, adding Gov. Code, § 12900 et seq.; see also Civ. Code, § § 53, 782.)

[***42]

Following *Weber*, however, this court in *Price v. Civil Service Com.* (1980) 26 Cal. 3d 257, 161 Cal. Rptr. 475, 604 P.2d 1365 (*Price*), declined to reaffirm its categorical hostility toward racial classifications and approved a race-conscious hiring program that required the appointment of minority applicants on a preferential basis until the appointing agency attained a certain percentage of minority employees. (See *id.* at p. 266.) Because the program was remedial and intended "to overcome the continuing effects of past discrimination" (*id.* at p. 270) as well as "bring[] about the full participation of minority individuals in our society" (*id.* at p. 286), a majority found it did not violate Title VII or California's Fair Employment Practices Act (FEPA). (*Price*, at pp. 270-277.) "The *Weber* court held that title VII's prohibition against racial discrimination does not mandate a 'color-blind' approach to all employment remedies and does not compel an employer to eschew race-conscious affirmative action programs under all circumstances." (*Id.* at p. [**1081] 273, fn. omitted.) Since FEPA "arose out [***43] of the same historical context as the federal Civil Rights Act," "those provisions should similarly ... be interpreted" n11 (*Price*, at p. 276, 161 Cal. Rptr. 475, 604 P.2d 1365; see

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also *Minnick v. Department of Corrections*, *supra*, 95 Cal. App. 3d 506, 523-524.)

colorblind America" (*DeRonde*, *supra*, 28 Cal. 3d 875, 891-892, 625 P.2d 220, 172 Cal. Rptr. 677 (dis. opn. of Mosk, J.).)

n11 Neither did the court find a denial of equal protection under the federal or state Constitution. (*Price*, *supra*, 26 Cal. 3d at pp. 277-285; see also *DeRonde*, *supra*, 28 Cal. 3d at pp. 882-891; *Minnick v. Department of Corrections* (1979) 95 Cal. App. 3d 506, 519-523, 157 Cal. Rptr. 260.) Departing from the understanding it had articulated in *Bakke I*, *supra*, 18 Cal. 3d at pages 48-63, the court relied substantially on its interpolation of the equal protection analysis in *Bakke II*, *supra*, 438 U.S. 265. (*Price*, *supra*, 26 Cal. 3d at pp. 278-283; see *ante*, 2000 Cal. LEXIS 8928 at p. *34, fn. 9.)

As with decisions of the United States Supreme Court, we thus find a fundamental shift from a staunch antidiscrimination jurisprudence to approval, sometimes endorsement, of remedial race- and sex-conscious governmental decisionmaking. (See also *Price*, *supra*, 26 Cal. 3d 257, 287-289 (dis. opn. of Mosk, J.); *Estes v. Metropolitan Branches of Dallas NAACP* (1980) 444 U.S. 437, 450, 62 L. Ed. 2d 626, 100 S. Ct. 716 (Powell, J., dis. from dism. of cert.); Bickel, [***46] *supra*, at p. 133; Van Alstyne, *supra*, 46 U.Chi. L.Rev. at p. 809; Bunzel, *Affirmative Action, Negative Results* (No v. 1979) Encounter, 43, 51.) [*559]

II

From *Johnson* and *DeRonde*, we move forward a decade to the

[*558] Dissenting, Justice Mosk characterized the majority's reasoning as " 'doublethink' ": "[They] ... purport [***44] to eliminate discrimination by means of creating discrimination; they construe equality of all persons regardless of race to mean preference for persons of some races over others; and a hiring program which compels compliance by a reluctant [county agency] is described as voluntary." (*Price*, *supra*, 26 Cal. 3d 257, 287 (dis. opn. of Mosk, J.).) "It is now clear that undergirding much of the rhetoric supporting racial quotas, and preferential treatment in general, is a view of justice that demands not that the state treat its citizens without reference to their race, but that it rearrange and index them precisely on the basis of their race. The objective is not equal treatment but equal representation." (26 Cal. 3d at pp. 290-291.)

November 5, 1996 General Election and voter approval of Proposition 209, which added section 31 to article I of the California Constitution. Section 31, subdivision (a), provides: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." n12 The question is: Does the City's Program contravene this injunction?

One year later in *DeRonde*, *supra*, 28 Cal. 3d 875, the court rejected an equal protection challenge to racial preferences accorded in a law school admissions program. "Having held in *Price*, wherein an express quota was applied, that the state Constitution places no greater restrictions on affirmative action programs encouraging increased minority representation than are imposed by the federal Constitution, a fortiori, [***45] under principles of stare decisis, we impose no state constitutional bar where the program involves no fixed quota but only consideration of race as one among several other qualifying factors." (28 Cal. 3d at p. 890.) As in *Price*, Justice Mosk challenged the majority's premise: "The majority, armed in adamant, insist upon turning the calendar back several decades. They have chosen to revive the indefensible practices of pre-Brown days [citation] when skin pigmentation and ethnicity were the qualifications that determined a child's school. They have rejected the plea of Justice Harlan ... for a

n12 Section 31 further provides: "(b) This section shall apply only to action taken after the section's effective date.

"(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

"(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

"(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

"(f) For the purposes of this section, 'state' shall include, but not necessarily be limited to, the state itself, any city, county, city and county,

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public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

"(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

"(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section."

[***47]

A

[**1082] "A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words. [Citation.]" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 245, 149 Cal. Rptr. 239, 583 P.2d 1281 (*Amador Valley*); *People ex rel. Lungren v. Superior Court* (1997) 14 Cal. 4th 294, 302, 926 P.2d 1042.) Nothing in the ballot arguments or in the Legislative Analyst's analysis suggests that a different rule should apply with respect to "discriminate" and "preferential treatment" as used in section 31, or that the voters intended them to have any specialized meaning. (See also *Kidd v. State of California* (1998) 62 Cal. App. 4th 386, 407; *Lungren v. Superior Court* (1996) 48 Cal. App. 4th 435, 441 (*Lungren*).) "Discriminate" means "to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)" [*560] (Webster's New World Dict. (3d college ed. 1988) p. 392); "preferential" means giving "preference," which is "a giving of priority or advantage to one person ... over others." (*Id.* at p. 1062.) n13 Interpreting section [***48] 31 accordingly, we conclude, as did the Court of Appeal, that the City's Program is unconstitutional because the outreach option affords preferential treatment to MBE/WBE subcontractors on the basis of race n14 or sex, and the participation option discriminates on the same bases against non-MBE/WBE subcontractors as well as general contractors that fail to fulfill either of the options when submitting their bids.

n13 Contrary to the City's argument, this determination does not render "preferential treatment" surplusage. An overt act of discrimination against one person does not require the granting of preferential treatment to another. Preferential treatment may, but does not necessarily, involve overt discrimination. " 'Preferences' includes, at a minimum, programs or policies that use racial or gender classifications." (*Coalition for Economic Equity v. Wilson* (N.D.Cal. 1996) 946 F. Supp. 1480, 1489, fn. 4 (*Coalition I*).)

n14 As used in our discussion of section 31, "race" includes color, ethnicity, and national origin.

[***49] While the language of Proposition 209 is clear and literally interpreted does not lead to absurd results (see *Amador Valley, supra*, 22 Cal. 3d at p. 245), we may "test our construction against those extrinsic aids that bear on the enactors' intent" (*Powers v. City of Richmond* (1995) 10 Cal. 4th 85, 93, 893 P.2d 1160), in particular the ballot materials accompanying Proposition 209 that place the initiative in historical context. (See *Hodges v. Superior Court* (1999) 21 Cal. 4th 109, 114, 980 P.2d 433; *Mulkey v. Reitman, supra*, 64 Cal. 2d at pp. 533-534, 50 Cal. Rptr. 881, 413 P.2d 825; see also *Amador Valley*, at pp. 245-246, 149 Cal. Rptr. 239, 583 P.2d 1281.)

The argument in favor of Proposition 209 stated in part, "A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. [P] Proposition 209 is called the California Civil Rights Initiative [**1083] because it restates the historic Civil Rights Act [P] ... [P] Real 'affirmative action' originally meant no discrimination and sought to provide opportunity." (Ballot [***50] Pamp., Gen. Elec. (No. v. 5, 1996) argument in favor of Prop. 209, p. 32 (Ballot Pamphlet).) "Anyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act." (*Id.*, rebuttal to argument against Prop. 209, p. 33.)

The initiative's proponents further argued: " 'REVERSE DISCRIMINATION' BASED ON RACE OR GENDER IS PLAIN WRONG! [P] And two wrongs don't make a right! ... [P] Government should not discriminate. It must not [*561] give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination! ... [P] Government cannot work against discrimination if government itself discriminates. ... It's time to bring us together under a single standard of equal

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treatment under the law. ... [P] ... [P] We are individuals! Not every white person is advantaged. And not every 'minority' is disadvantaged. Real 'affirmative action' originally meant no discrimination and sought to provide opportunity. ... [P] The only honest and effective way to address inequality of opportunity is by making sure that *all* California children are provided with the tools to compete in our society. And then let them succeed [***51] on a fair, color-blind, race-blind, gender-blind basis. [P] Let's not perpetuate the myth that 'minorities' and women cannot compete without special preference. Let's instead move forward by returning to the fundamentals of our democracy: individual achievement, equal opportunity and *zero tolerance for discrimination against--or for--any individual.*" (Ballot Pamp., *supra*, argument in favor of Prop. 209, p. 32; see also *id.*, Legis. Analyst's analysis of Prop. 209, p. 30 ["[Current] law requires [state] departments ... to reject bids from companies that have not made sufficient 'good faith efforts' to meet ['affirmative action' contracting] goals."].)

As the district court in *Coalition I*, *supra*, 946 F. Supp. at page 1489, correctly perceived from these arguments, "the people of California meant to do something more than simply restate existing law when they adopted Proposition 209." In taking a measure of that "something more," the "historic Civil Rights Act" referent tells us the voters intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated *Weber*, *supra*, 443 U.S. 193, and *Bakke II*, *supra*, [***52] 438 U.S. 265, as well as *Price*, *supra*, 26 Cal. 3d 257, and *DeRonde*, *supra*, 28 Cal. 3d 875, viz., an interpretation reflecting the philosophy that "however it is rationalized, a preference to any group constitutes inherent inequality. Moreover, preferences, for any purpose, are anathema to the very process of democracy." (*Price*, *supra*, 26 Cal. 3d 257, 299 (dis. opn. of Mosk, J.).)

By virtue of the initiative process, the California electorate "set a different course" from that charted by the courts since *Weber* and *Price*. (*Weber*, *supra*, 443 U.S. 193, 216, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (conc. opn. of Blackmun, J.).) "Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender." (*Coalition for Economic Equity* (9th Cir. 1997) 122 F.3d 692, 702 (*Coalition II*); see also *Johnson*, *supra*, 480 U.S. at p. 658, 107 S. Ct. 1442 (dis. opn. of Scalia, J.).) The ballot arguments--from which we draw our historical perspective--make clear that in approving [*562] Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, "to achieve equality of [public employment, education, [***53] and contracting] opportunities" (*Griggs*, *supra*, 401 U.S. at p.

429) and to remove "barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification." (401 U.S. at p. 431.) In short, the electorate desired to restore the force of constitutional law to the principle articulated by President Carter on Law Day 1979: "Basing present discrimination on past discrimination is obviously not right." ((May 15, 1979) 47 U.S.L. Week 2726.)

B

Considering the entirety of our discussion, we remain persuaded the City's Program [**1084] violates section 31. Because the City rejects any bid that fails to comply with one or the other requirement, both of which are race and sex based, the essential structure of the Program discriminates on an impermissible basis against prime contractors that neither engage in outreach nor meet the evidentiary presumption, and it grants preferential treatment to those that do. (See *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702, 707, 710 (*Monterey Mechanical*); see also *Coalition I*, *supra*, 946 F. Supp. at pp. 1495-1496.)

The outreach component requires contractors [***54] to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-MBE's/WBE's. The fact prime contractors are not precluded from contacting non-MBE's/WBE's is irrelevant. The relevant constitutional consideration is that they are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of section 31. (See *Monterey Mechanical*, *supra*, 125 F.3d at p. 711; see also *Furnco*, *supra*, 438 U.S. at p. 577 ["The central focus of the inquiry ... is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin' [citation]."]; cf. *Mulkey v. Reitman*, *supra*, 64 Cal. 2d at pp. 540, 542; *Anderson v. Martin*, *supra*, 375 U.S. at p. 403; *Peterson v. Greenville*, *supra*, 373 U.S. at p. 248.)

The participation component authorizes or encourages what amounts to discriminatory quotas or set-asides, or at least race- and sex-conscious numerical goals. (See [***55] *Monterey Mechanical*, *supra*, 125 F.3d at p. 711; *Bras v. California Public Utilities Commission* (9th Cir. 1995) 59 F.3d 869, 875 (*Bras*); see generally *Mulkey v. Reitman*, *supra*, 64 Cal. 2d at p. 541; *Anderson v. [**563] Martin*, *supra*, 375 U.S. 399.) A participation goal differs from a quota or set-aside only in degree; by whatever label, it remains "a line drawn on the basis of race and ethnic status" as well as sex. (*Bakke II*, *supra*, 438 U.S. at p. 289, fn. omitted; see *Bras*,

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supra, 59 F.3d at pp. 874-875.) Thus understood, such a goal plainly runs counter to the express intent of the historic Civil Rights Act and, concomitantly, the intent of Proposition 209. As members of Congress were repeatedly assured regarding Title VII, the Act "provides no preferential treatment for any group of citizens. *In fact, it specifically prohibits such treatment.*" [Citation.]" (*Weber, supra*, 443 U.S. at p. 248, first italics added (dis. opn. of Rehnquist, J.), quoting remarks of Sen. Saltonstall, Chair of the Republican Conf. of Sens. (110 Cong. Rec. 12691 (1964).) While perhaps less explicit in [***56] the Act itself, the same may be said for the race- and sex-conscious outreach at issue here, in that it effectively provides an advantage to members of the targeted groups. For example, in *Furnco, supra*, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957, the Supreme Court rejected a requirement that an employer alter its race-neutral hiring practices and institute a method that allowed it "to consider the qualifications of the largest number of minority applicants." (*Id.* at p. 576.) "We think the imposition of that ... simply finds no support either in the nature of the prima facie case or the purpose of Title VII." (*Id.* at pp. 576-577; see *id.* at p. 578.)

The City's Program essentially places on a contractor the burden of disproving a negative. Without any prima facie proof of past misconduct, a contractor must establish its responsibility as a bidder by showing it does not discriminate on an impermissible basis in its subcontracting. As with any requirement that utilizes preferences, this completely inverts the normal procedures for making discrimination claims. (See, e.g., *Furnco, supra*, 438 U.S. at pp. 577-578 [describing the burden-shifting procedure for complainants under Title VII]; [***57] cf. *Croson, supra*, 488 U.S. 469, 516 (conc. opn. of Stevens, J.) ["It is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt [of past discrimination]"]; *Sheet Metal Workers, supra*, 478 U.S. at p. 494 (conc. & dis. opn. of O'Connor, J.) ["it is completely [**1085] unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination"].) Furthermore, a contractor may show nondiscrimination only in the manner designated by the City, either according to a fixed participation goal or by prescribed outreach to MBE's and WBE's. In other words, it can only prove it does not discriminate against minorities and [*564] women by discriminating or granting preferences in their favor. (See *Johnson, supra*, 480 U.S. 616, 675-676 (dis. opn. of Scalia, J.); *Bras, supra*, 59 F.3d at p. 874.)

Contrary as well to the principles of the Civil Rights Act, listing a sufficient number of MBE/WBE subcontractors to meet the evidentiary presumption may

potentially give cover to discrimination [***58] committed after a contractor has met the established goal. In *Furnco, supra*, 438 U.S. at page 579, the Supreme Court made clear, "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." "The obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. [Citations.]" (*Ibid.*)

To summarize, the City's own description of its Program--requiring that a responsive bid contain either a sufficient number of MBE/WBE subcontractors or documentation of outreach--demonstrates its invalidity under section 31. (See *Coalition I, supra*, 946 F. Supp. at pp. 1495-1496.) Satisfying the participation option discriminates against non-MBE's/WBE's on the basis of race and sex in the operation of public contracting to the extent the prime contractor utilizes sufficient MBE/WBE subcontractors to meet the City's evidentiary presumption. Satisfying the outreach option grants preferential treatment because prime contractors must notify, solicit bids [***59] from, and negotiate with MBE's and WBE's, but may exclude non-MBE's/WBE's. If a contractor fails to satisfy either option, the City discriminates on the basis of race and sex by rejecting its bid out of hand even, as in this case, when that bid is the lowest otherwise responsive submission.

This result is precisely what the voters were told Proposition 209 would prohibit. "Programs designed to ensure that all persons--regardless of race or gender--are informed of opportunities and treated with equal dignity and respect will continue as before." (Ballot Pamp., *supra*, rebuttal to argument against Prop. 209, p. 33.) By implication, programs such as the City's that disseminate information on a selective basis would not continue. The Legislative Analyst also explained that "the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. ... [P] ... Bidders on contracts no longer would need to show 'good faith efforts' to use minority-owned or women-owned subcontractors. Thus, state and local governments would save money to the extent they otherwise would have rejected a low bidder--because the bidder did not make a 'good [***60] faith effort'--and awarded the contract to a higher bidder." (*Id.*, Legis. Analyst's analysis of Prop. 209, p. 31.)

[*565] Although we find the City's outreach option unconstitutional under section 31, we acknowledge that outreach may assume many forms, not all of which would be unlawful. (Cf. *Lungren, supra*, 48 Cal. App. 4th 435.) Our holding is necessarily limited to the form at issue here, which requires prime contractors to notify,

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solicit, and negotiate with MBE/WBE subcontractors as well as justify rejection of their bids. Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification. (See *Ballot Pamp.*, *supra*, rebuttal to argument against Prop. 209, p. 33; see also *Lungren*, *supra*, 48 Cal. App. 4th at p. 442; cf. *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 174, 885 P.2d 934 [pre-Proposition 209 decision upholding city requirement "mandating reasonable good faith outreach to all types of subcontractor enterprises," not just MBE's and WBE's, that sought "to increase opportunity and participation [***61] within the competitive bidding process"].) We express no opinion regarding the permissible parameters of such efforts.

[**1086] III

The City and its amici curiae advance several arguments in support of the Program's constitutionality, none of which is persuasive.

The City first contends *Lungren*, *supra*, 48 Cal. App. 4th 435, established that "targeted" or "focused" outreach does not come within the scope of section 31. In *Lungren*, various parties brought a preelection challenge to the title and summary of Proposition 209 prepared by the Attorney General, asserting it was misleading because it failed to inform the voters the initiative would ban all

"affirmative action." (*Lungren*, at p. 441.) The Court of Appeal rejected the challenge because the title contained "essentially verbatim recitations of the operative terms of the measure. The Attorney General has added nothing, omitted nothing and the words used are all subject to common understanding." (*Ibid.*) The court then went on to note that "'affirmative action'" had no commonly agreed upon definition and that "most definitions of the term would include not only the conduct which Proposition 209 would [***62] ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs." (48 Cal. App. 4th at p. 442.)

From this single observation, which appears unnecessary to the holding (see *Lungren*, *supra*, 48 Cal. App. 4th 435, 443 (conc. opn. of Sims, J.)), the City extrapolates that the voters must have understood and intended that the outreach component of its program would not run afoul of Proposition 209. The simple answer is that the Court of Appeal in *Lungren* was not considering the constitutionality of the City's Program or the meaning of "discriminate" or "preferential treatment" as those terms apply to the Program. The [*566] court also did not refer to "targeted" or "focused" outreach or to programs formulated to take into account race and sex.

Moreover, both the Legislative Analyst's analysis and the arguments against Proposition 209 indicated outreach would likely be eliminated by the initiative to the extent it operated on the basis of race or sex. (*Ballot Pamp.*, *supra*, Legis. Analyst's analysis of Prop. 209, p. 31; *id.*, argument against Prop. 209, p. 33.)

The City also relies on the fact the ballot argument in favor of Proposition 209 did not [***63] indicate the initiative would prohibit "targeted" outreach. We do not read the ballot arguments as an exhaustive catalogue of the specific programs and measures that would fall under section 31. Rather, they spoke generically, emphasizing that any action that discriminates or grants preferential treatment on the basis of race or sex would be forbidden. By the same token, they assured voters Proposition 209 "allows any program that does not discriminate, or prefer, because of race or sex, to continue." (*Ballot Pamp.*, *supra*, argument in favor of Prop. 209, p. 32.) "Affirmative action programs that don't discriminate or grant preferential treatment will be UNCHANGED." (*Id.*, rebuttal to argument against Prop. 209, p. 33.) Impliedly, those programs that do discriminate would be illegal. Moreover, the opponents warned that the initiative "'puts at risk every outreach program'" (*Id.*, argument against Prop. 209, p. 33, quoting Gen. Colin Powell.) These indicia of voter intent leave no room for the City's outreach requirement, which is overtly predicated on race and sex preferences.

The City and some amici curiae contend "focused" outreach is not a "preference" as [***64] that term is presently construed under Title VII and the equal protection clause. Considering the historical context of Proposition 209, this contention reflects a fundamental misperception of the electorate's intent to "restate[] the historic Civil Rights Act" (*Ballot Pamp.*, *supra*, argument in favor of Prop. 209, p. 32.) As we have explained, those who supported and enacted "the historic Civil Rights Act" sought to ensure equal opportunity for all and eliminate race and sex from decisionmaking in employment and other areas. By 1996, however, judicial construction of both the Act and the equal protection clause had engrafted a series of qualifications permitting race- and sex-conscious programs formulated to remediate the lingering effects of past discrimination or conspicuous imbalance in the work force. If the electorate had determined merely to reiterate this status quo, an initiative amending the state Constitution would be unnecessary. Rather, we have concluded the "something [**1087] more" the voters intended (*Coalition I*, *supra*, 946 F. Supp. at p. 1489) was essentially a repudiation of the decisional authority that permitted such discrimination and preferential [***65] treatment notwithstanding antecedent statutory and

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constitutional law to the contrary. (See also *Coalition II*, *supra*, 122 F.3d at p. 709, fn. 18.)

[*567] The City's assertion that its outreach requirement merely "expands the applicant pool" is both misleading and irrelevant. To the extent it automatically eliminates bids that fail to document outreach or meet the evidentiary hiring presumption, it reduces the number of otherwise qualified bids it considers responsive. Even if it did accomplish its purported goal, a benign motivation cannot sanction a requirement that conflicts with the proscription against discrimination and preferential treatment on the basis of race and sex. Moreover, the Civil Rights Act was intended only to remove the barriers to equal opportunity (*Griggs*, *supra*, 401 U.S. at pp. 430-431) not maximize the number of applicants actually considered. (*Furnco*, *supra*, 438 U.S. at pp. 577-578.) Cases cited by the City as examples of impermissible programs more overtly preferential are equally beside the point. At best, they illustrate what would suffice, not what is necessary, to violate section 31.

In a related vein, the City and its amici curiae argue [***66] that equal protection does not preclude race-conscious programs. While true, this point has no bearing on our construction of section 31. Equal protection allows discrimination and preferential treatment whenever a court determines they are justified by a compelling state interest and are narrowly tailored to address an identified remedial need. (See, e.g., *United States v. Paradise*, *supra*, 480 U.S. at pp. 185-186 [approving racial quotas].) It does not, however, preclude a state from providing its citizens greater protection against both. (Cf. *Shaw v. Reno* (1993) 509 U.S. 630, 654, 125 L. Ed. 2d 511, 113 S. Ct. 2816 [with respect to equal protection, "courts must bear in mind the difference between what the law permits and what it requires"].) Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no "compelling state interest" exception; we find nothing to suggest the voters intended to include one sub silentio.

The fact that as currently interpreted Title VII and title VI allow outreach of the type the City requires misses the mark for the same reason. [***67] Rather than incorporate the judicial gloss of *Weber* and its progeny, the voters intended to remove it. "Let's ... return[] to the fundamentals of our democracy: individual achievement, equal opportunity and zero tolerance for discrimination against--or for--any individual." (Ballot Pamp., *supra*, argument in favor of Prop. 209, p. 32.) As originally implemented, "Title VII tolerated no racial discrimination, subtle or otherwise." (*McDonnell Douglas*, *supra*, 411 U.S. at p. 801.) It was applied to "remove barriers that have operated ... to favor

an identifiable group ... over other employees." (*Griggs*, *supra*, 401 U.S. at pp. 429-430, 91 S. Ct. at [*568] p. 853.) With the approval of Proposition 209, the electorate chose to reassert the principle of equality of individual opportunity as a constitutional imperative.

Finally, the City and several amici curiae, including the United States, contend the Program is necessary to discharge the City's duty under federal law to eradicate the discrimination against subcontractors documented by its disparity study. (See, e.g., *Wygant*, *supra*, 476 U.S. 267, 291 (conc. opn. of O'Connor, J.); see also *Crosen*, *supra*, 488 U.S. at [***68] p. 509.) At oral argument, however, the San Jose City Attorney conceded the Program is "not constitutionally required" and "not federally mandated." Even without this concession, we are unpersuaded of the argument for several reasons.

First, the United States Supreme Court "never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination." (*Wygant*, *supra*, 476 U.S. at p. 274.) Thus, the only constitutional obligation is the "affirmative duty to desegregate" (476 U.S. at p. [**1088] 276, quoting *Swann v. Charlotte-Mecklenburg Bd. of Education* (1971) 402 U.S. 1, 31-32, 28 L. Ed. 2d 554, 91 S. Ct. 1267), also referred to as the duty to "disestablish" the results of intentional discrimination. (*North Carolina State Bd. of Education v. Swann* (1971) 402 U.S. 43, 46, 28 L. Ed. 2d 586, 91 S. Ct. 1284; see also *Associated General Contractors of California, Inc. v. City and County of San Francisco* (9th Cir. 1987) 813 F.2d 922, 929; [***69] *Associated General Contractors of California v. San Francisco Unified Sch. Dist.* (9th Cir. 1980) 616 F.2d 1381, 1386.) Where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely, means of rectifying the resulting injury. (*North Carolina State Bd. of Education v. Swann*, *supra*, 402 U.S. at p. 46; see Van Alstyne, *supra*, 46 U.Chi. L.Rev. at pp. 783-784.) The City's disparity study, at best, creates only an inference of discrimination against MBE/WBE subcontractors by prime contractors; it does not establish intentional acts by the City.

Second, this argument ignores the distinction between actions the federal Constitution allows and those it demands. As the Ninth Circuit Court of Appeals observed in finding that Proposition 209 did not violate federal equal protection, "To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the

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program is [*569] constitutionally required. The Fourteenth Amendment, [***70] lest we lose sight of the forest for the trees, does not require what it barely permits." (*Coalition II, supra*, 122 F.3d at p. 709; see *Shaw v. Reno, supra*, 509 U.S. at p. 654.)

There is also no duty under federal statutory law to take corrective action in the absence of discrimination. The Supreme Court in *Weber, supra*, 443 U.S. 193, and *Johnson, supra*, 480 U.S. 616, only determined Title VII does not preclude an employer from utilizing race- and sex-conscious programs under certain circumstances. It did not find Title VII mandates such programs. In fact, Title VII expressly provides for the supremacy of state law "other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." (42 U.S.C. § 2000e-7.) Moreover, the federal courts have held Proposition 209 does not conflict with Titles VI, VII, or IX of the Civil Rights Act. (*Coalition II, supra*, 122 F.3d at pp. 709-719 [Title VII]; *Coalition I, supra*, 946 F. Supp. at pp. 1517-1519 [titles VI and IX].) "The mere fact that affirmative action is [***71] permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action." (*Coalition I, supra*, 946 F. Supp. at p. 1518.)

Third, if it were determined the City had violated federal constitutional or statutory law, the supremacy clause as well as the express terms of Proposition 209 would dictate federal law prevails: "If any part or parts of [section 31] are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit." (§ 31, subd. (h); see also *id.*, subds. (d) [preserving preexisting court orders and consent decrees] & (e) [preserving any action necessary to establish or maintain eligibility for federal funding].)

Finally, we question the City's implicit premise that its Program meets the federal equal protection standard. As the Supreme Court explained in *Wygant, supra*, 476 U.S. 267, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. [Citation.] 'Racial classifications [***72] are simply too pernicious to permit any but the most exact connection between justification and classification.' [Citation.]" (476 U.S. at p. 280, fn. omitted.) **The disparity study is not part of the record in this case.** Without it, the court has no basis for measuring the fit between the Program and the goal of eliminating a disparity in the amount of contract dollars awarded MBE's in comparison to non-MBE's. [*570]

DISPOSITION

[**1089] The judgment of the Court of Appeal is affirmed.

BROWN, J.

WE CONCUR:

MOSK, J.

BAXTER, J.

CHIN, J.

CONCURRING OPINION BY MOSK, J.

CONCURRING OPINION BY KENNARD, J.

CONCURRING AND DISSENTING OPINION BY GEORGE, C.J.

CONCURBY:

MOSK; KENNARD; GEORGE

CONCUR:

CONCURRING OPINION BY MOSK, J.

I concur in the opinion of the court.

I write separately because, on one point, I wish to say somewhat more.

I

I agree with the court in the substance of its analysis, which involves its reading of section 31 of article I of the California Constitution and its application to the City of San Jose's "Nondiscrimination/Nonpreferential Treatment Program" applicable to public contracts for construction [***73] projects in excess of \$ 50,000.

A

By initiative measure denominated as Proposition 209 on the ballot at the November 5, 1996, General Election, and approved by the voters thereat, section 31 was added to article I of the California Constitution.

Section 31 provides that "the State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (Cal. Const., art. I, § 31, subd. (a).) It defines the "State" "to include, but not necessarily be limited to, the State itself, any city, county, city and county, public university

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system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state." (*Id.*, art. I, § 31, subd. (f).)

Stated negatively, section 31 prohibits governmental actors from improperly burdening or benefiting any individual or group in the operation of public employment, public education, or public contracting. The prohibition is not limited to barring [***74] such actors from improperly assigning burdens or benefits themselves. Rather, it extends to barring them from enabling, facilitating, encouraging, or requiring private parties to do so as well. For the operation of each of the indicated activities involves private parties as well as governmental actors -- in other words, the *operation* of each entails the *cooperation* of both. One of section 31's purposes is to preclude any invidious barrier or privileged entrance to participation.

[*571] Stated positively, section 31 commands governmental actors to treat all individuals and groups equally in the operation of public employment, public education, and public contracting. The command is not limited to compelling governmental actors to afford equal treatment themselves. Rather, it extends to compelling governmental actors to enable, facilitate, encourage, and require private parties to do so as well. Again, the operation of each of the indicated activities involves private parties as well as governmental actors, the *operation* of each entailing the *cooperation* of both. One of section 31's purposes is to remove all invidious barriers and privileged entrances to participation.

Neither [***75] section 31's prohibition against the improper assigning of any burden or benefit in the operation of public employment, public education, or public contracting, nor its command of equal treatment therein, is limited solely to ends. Rather, both extend to means as well. Thus, one may not assign any burden or benefit improperly in an attempt to assign some other burden or benefit properly. Similarly, one may not afford treatment that in any respect is unequal in an attempt to afford treatment that in some other respect is equal. For section 31 at least, the end does not justify the means. Rather, means and end must each justify itself in light of section 31's prohibition and command.

B

On October 21, 1997, through its city council, the City of San Jose adopted its "Nondiscrimination/Nonpreferential Treatment Program" applicable to public contracts for construction projects in excess of \$ 50,000. It did so in response to "evidence that discriminatory practices existed in construction

subcontracting" for public works on the part of prime contractors and evidently [**1090] the city itself with regard to subcontracting firms that are owned by women or members of minority groups. It sought to [***76] remedy the effects of past discrimination and preferential treatment, and to prevent present or future discrimination or preferential treatment, in the operation of public subcontracting.

The city's program requires a prime contractor bidding on a covered public works contract, among other things, "to demonstrate nondiscrimination/nonpreferential treatment ... in the hiring of subcontractors" before he can become eligible to be awarded the contract in question.

Specifically, the city's program requires the prime contractor to make a demonstration of nondiscrimination/nonpreferential treatment by providing, as he may choose, either "documentation of outreach" or "documentation of participation."

[*572] Under the documentation-of-outreach component, which is relatively more burdensome, the prime contractor *must* "provide[] written notice ... of his ... interest in bidding on the contract" in question "to not less than four" subcontracting firms that are owned by women or members of minority groups "in each appropriate trade or area of work or supply ... at least 10 calendar days prior to the opening of bids"; *must* "follow[] up" such "written notices by contacting" each [***77] such firm "to determine with certainty whether" it is "interested in proposing to perform specific items of the project," "documenting the name of an individual employee of each ... firm with whom" he "spoke concerning the project or the date and time of at least three ... attempts during regular business hours to contact each ... firm"; and *must* "negotiate[] in good faith with" each such firm and "not unjustifiably reject" any ensuing bid "as unsatisfactory." (Underscoring omitted.)

By contrast, under the documentation-of-participation component, which is relatively less burdensome, the prime contractor *must* "document[] the participation of" subcontracting firms that are owned by women or members of minority groups meeting the "percentage of" such firms that the city has "established, as an evidentiary presumption," as the "percentage ... that would be expected to be included ... in the absence of discrimination" or preferential treatment.

After review, it becomes evident that, in both its documentation-of-outreach and its documentation-of-participation components, the city's program violates section 31.

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To be sure, the end that the city's program seeks is [***78] altogether legitimate and even necessary under section 31.

The purpose of the city's program accords with, and is indeed compelled by, the purpose of section 31. As stated, the program's object is to remedy the effects of past discrimination and preferential treatment, and to prevent present or future discrimination or preferential treatment, in the operation of public subcontracting. As also stated, section 31's object is to remove and preclude any and all invidious barriers and privileged entrances to participation in the operation of activities including public contracting.

Nevertheless, despite the legitimacy and even necessity of its end, the means that the city's program employs offend section 31.

The documentation-of-outreach component of the city's program, with which a prime contractor who so chooses must comply in order to establish [*573] eligibility, requires the prime contractor to grant preferential treatment to subcontracting firms that are owned by women or members of minority groups. As explained, it requires him to provide written notice of his interest in bidding on the contract in question to no fewer than four subcontracting firms that are owned by women or members [***79] of minority groups in each pertinent trade or area of work or supply at least 10 calendar days prior to the opening of bids, to follow up such written notice with documentation of his efforts, and to negotiate in good faith and not unjustifiably reject as unsatisfactory any bid that may be forthcoming. It does not require him to take any of these steps otherwise. It thereby skews the process in favor of subcontracting firms that are owned by women or members of minority groups. Not only does it invite those firms into the process, it also guarantees that they will be dealt with well during its course, and will not be ushered out without reason at its end. It does not do the same for others.

[**1091] The documentation-of-participation component of the city's program, with which a prime contractor who so chooses must comply in order to establish eligibility, at least encourages the prime contractor to grant preferential treatment to subcontracting firms that are owned by women or members of minority groups. As explained, it requires him to meet the "evidentiary presumption" that the city has established as the percentage of such firms that would be expected to be included in the absence of discrimination [***80] or preferential treatment. It at least encourages him to select such firms in such percentage when all other things are equal -- and even when they are not -- in order to avoid the need to comply

with the more burdensome documentation-of-outreach component. It thereby skews the outcome in favor of subcontracting firms that are owned by women or members of minority groups. Inclusion of those firms can help the prime contractor obtain award of the contract in question. Inclusion of others cannot.

In sum, the means that the city's program employs through its documentation-of-outreach and documentation-of-participation components offend section 31 because they either require or at least encourage a prime contractor to grant preferential treatment to subcontracting firms that are owned by women or members of minority groups.

II

Although I agree with the court in the substance of its analysis, on a single point I would go farther than it does.

In a strict sense, it is sufficient to read section 31 soundly and apply it to the city's program correctly.

[*574] But, as a practical matter, to do so is hardly enough. It gives scant guidance to the city itself or to other governmental actors. [***81] Some such guidance seems appropriate and even needed. Passivity is not demanded by section 31. Nor can it even be tolerated. Not only does section 31 prohibit governmental actors from improperly burdening or benefiting any individual or group in the operation of activities including public contracting, in order to preclude any invidious barrier or privileged entrance to participation. But it also commands such actors to treat all individuals and groups equally, in order to remove all such barriers and entrances.

By way of guidance, we may perhaps use the city's program as a template for a measure that would satisfy section 31 in both its end and its means by retaining only its documentation-of-outreach component, and by modifying that component as follows.

A prime contractor would have to provide written notice of his interest in bidding on the contract in question to no fewer than, say, 10 subcontracting firms of his own choosing in each pertinent trade or area of work or supply at least 10 calendar days prior to the opening of bids, noting the identity of the owner or owners of each such firm -- all to be reflected on a form to be filed as a public record. He would have to follow [***82] up such written notice with documentation of his efforts -- again, all to be reflected on a form to be filed as a public record. And he would have to negotiate in good faith and not unjustifiably accept as satisfactory, or reject as unsatisfactory, any bid that may be forthcoming, stating his reasons for accepting or

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rejecting each -- yet again, all to be reflected on a form to be filed as a public record.

Such a documentation-of-outreach component would be consistent with section 31's prohibition that governmental actors must not themselves improperly burden or benefit any individual or group in the operation of activities including public contracting, or enable, facilitate, encourage, or require private parties to do so. It would also be consistent with section 31's command that such actors must themselves treat all individuals and groups equally, and enable, facilitate, encourage, and require such parties to do so.

A documentation-of-outreach component like the above might prove to be an effective mechanism for prophylaxis. It would cause the prime contractor, one would hope, to rationalize his subcontracting conduct and thereby afford the commanded equal treatment and avoid the [***83] prohibited improper benefiting or burdening.

Furthermore, a documentation-of-outreach component like the above might prove to be an effective mechanism for monitoring. It would cause the [*575] prime contractor to make a [**1092] public record of his subcontracting conduct and thereby provide evidence of compliance or noncompliance, as the case may be.

It is true that such a documentation-of-outreach component would require the prime contractor to note the identity of the owner or owners of each subcontracting firm to which he chooses to provide written notice. But it would hardly require him to improperly benefit any such firm or burden any other or to afford treatment that is at all unequal -- or even encourage, facilitate, or enable him to do so. For it would work solely as a prophylactic and monitoring device, furthering the component's prophylactic and monitoring function.

III

In conclusion, concurring as I do in the opinion of the court, I concur in its judgment affirming the judgment of the Court of Appeal.

MOSK, J.

CONCURRING OPINION BY KENNARD, J.

I concur in the judgment without joining Justice Brown's majority opinion, Justice Mosk's concurring opinion, or [***84] the Chief Justice's concurring and dissenting opinion.

At issue is whether a public contracting program of the City of San Jose violates article I, section 31 of the California Constitution, enacted by initiative in 1996, which declares that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." I agree with the majority that the ordinary plain meaning of "preferential" is "priority or advantage to one person ... over others." (Maj. opn., *ante*, 2000 Cal. LEXIS 8928 at p. *47.) Both the majority and the Chief Justice review the ballot materials that explained the constitutional initiative measure to the voters (maj. opn., *ante*, at pp. 27-30; conc. & dis. opn., *post*, at pp. 9-16), and I agree with the majority that nothing in those materials suggests that those who enacted this constitutional provision intended the word "preferential" to have other than its common and accepted meaning. Applying this common meaning of "preferential," I agree with the majority, the Chief Justice, and Justice Mosk [***85] that the challenged program of the City of San Jose grants preferential treatment on the basis of race and sex in the operation of public contracting. (Maj. opn., *ante*, at p. 30; conc. opn. of Mosk, J., *ante*, at pp. 4-6; conc. & dis. opn., *post*, at pp. 24, 29.)

Because the issue presented is readily resolved by reference to the ordinary meaning of the constitutional text and a review of the ballot materials [*576] submitted to the voters who enacted the constitutional provision, I see no need to discuss potentially divisive matters, such as the history of judicial construction of federal constitutional equal protection and statutory civil rights provisions as applied to racial distinctions (maj. opn., *ante*, at pp. 7-25), possible modifications of the City of San Jose's program to "satisfy section 31 in both its end and its means" (conc. opn. of Mosk, J., *ante*, at pp. 6-8), or commonly offered justifications for race-conscious affirmative action programs (conc. & dis. opn., *post*, at pp. 4-6). But I join the majority, Justice Mosk, and the Chief Justice in affirming the Court of Appeal's judgment.

KENNARD, J.

DISSENTBY:
GEORGE

DISSENT:

CONCURRING AND DISSENTING [***86]
OPINION BY GEORGE, C.J.

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I agree with all of my colleagues that the particular features of the affirmative action program that are challenged in this case violate article I, section 31, of the California Constitution the section added to the California Constitution in 1996 by the voters' passage of Proposition 209 because these features grant "preferential treatment" to individuals or groups on the basis of race or gender as proscribed by this newly added constitutional provision. n1

n1 For convenience, in this opinion I shall use the phrase "race or gender" as a shorthand term that refers to all of the categories listed in article I, section 31 i.e., "race, sex, color, ethnicity, or national origin." (Cal. Const., art. I, § 31, subd. (a).)

[**1093] I cannot join the majority opinion, however, because in my view the major portion of that opinion's discussion is not only unnecessary to the resolution of the issue before us, but is likely to be viewed as less than evenhanded. Particularly [***87] in a case involving an initiative measure that is as sensitive and potentially divisive as Proposition 209, I believe it is essential that this court speak through an opinion whose language and analysis clearly demonstrate to the parties and to the public that the court appreciates that its task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent. Viewing the majority opinion as a whole, I believe it falls short of this standard.

I

There can be no dispute that discrimination on the basis of race, gender, color, ethnicity, and national origin has played a pernicious role in the history of both our nation and our state. This historical discrimination has left our society with a woeful legacy that has proven difficult to overcome. Persons of good will hold widely differing, and very strongly felt, views regarding both the morality and the efficacy of utilizing race- or gender-conscious policies or programs as remedial tools to combat the lingering [*577] effects of past discrimination and to attempt to avoid the perpetuation of such discrimination in the present and into the future.

In resolving the issue presented in the [***88] case now before us, there is no reason for this court to revisit and reassess past judicial decisions, rendered prior to the passage of Proposition 209, that considered the general validity of utilizing race- or gender-conscious measures as part of an affirmative action program, or to engage in an extended inquiry into whether such measures are or

are not consistent with our nation's and our state's constitutional tradition. Our role, rather, is simply to interpret and apply the language of the new state constitutional provision so as to effectuate the intent of the voters who adopted the measure. In my view, the majority opinion departs from that role in a number of respects.

First, a substantial portion of the majority opinion is devoted to a lengthy discussion of past decisions of the United States Supreme Court and this court that involve either racially discriminatory practices that unquestionably had no remedial purpose or effect, or affirmative action programs that predate the passage of Proposition 209. (See maj. opn., ante, at pp. 7-25.) The majority opinion's lengthy discussion of these cases culminates in a general critique of a number of past decisions of the United [***89] States Supreme Court and of this court that have concluded that (in some circumstances) neither the federal nor the state equal protection clause, or title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (hereafter Title VII) or its California counterpart, precludes Congress, a state, or private parties from voluntarily adopting an affirmative action program that, for remedial purposes, explicitly takes race or gender into account. (See, e.g., *University of California Regents v. Bakke* (1978) 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733; *Steelworkers v. Weber* (1979) 443 U.S. 193, 61 L. Ed. 2d 480, 99 S. Ct. 2721; *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 94 L. Ed. 2d 615, 107 S. Ct. 1442; *Price v. Civil Service Com.* (1980) 26 Cal. 3d 257, 161 Cal. Rptr. 475, 604 P.2d 1365.) The overall tenor of the majority opinion's discussion of these decisions including its repeated and favorable quotation from dissenting opinions in these cases and from academic commentators critical of these decisions leaves little doubt that the majority opinion embraces the view that [***90] the type of affirmative action programs at issue in these past decisions *always* have violated the provisions of the federal and state equal protection clauses and Title VII, and that the numerous decisions of the United States Supreme Court and this court that reached a contrary conclusion were wrongly decided.

The issue before us in this case, however, is *not* the validity of past decisions interpreting or applying other constitutional or statutory provisions such as the federal or state equal protection clauses or Title VII--but [*578] rather the proper interpretation and application of article I, section 31, the provision added to the California Constitution by Proposition 209 (hereafter article I, section 31). This newly added constitutional provision is by its terms limited specifically to *governmental* [**1094] actions "in the operation of public

employment, public education, or public contracting," and does not purport to affect constitutional or statutory doctrine outside this specified realm. In view of the limited issue before us, it is unnecessary and inappropriate to use this case as an occasion in which to attack the analysis and conclusions of pre-Proposition 209 decisions [***91] of either the United States Supreme Court or this court construing *other* constitutional or statutory provisions, and thereby to throw into doubt the continued applicability of those decisions outside the realm addressed by article I, section 31. The devotion of so much of the majority opinion's discussion to criticism of the currently prevailing interpretation of both Title VII and the equal protection clause, can serve only to undermine confidence in the opinion's analysis of the legal question actually presented by this case, i.e., the proper interpretation and application of article I, section 31.

Second, by using misleading and unflattering slogans to characterize past judicial decisions upholding race-conscious and gender-conscious affirmative action programs -- describing such decisions as "replacing individual right of equal opportunity with *proportional group representation*" (maj. opn., p. 21, italics added) and as endorsing a change "from protection of equal opportunity for all individuals to *entitlement based on group representation*" (*ibid.*, italics added) -- the majority opinion, in my view, will be widely and correctly viewed as presenting an unfair [***92] and inaccurate caricature of the objective or justification of the overwhelming majority of race- or gender-conscious affirmative action programs. Nowhere does the majority opinion consider alternative rationales for affirmative action programs grounds that cannot be as easily disparaged when not saddled by the catch phrases ("proportional group representation," "entitlements based on group representation") employed by the majority opinion.

The terminology employed by the majority opinion ignores the circumstance that, in many instances, race or gender have been utilized as a "plus" factor in the affirmative action setting not because of any belief in group entitlement or proportional representation, but rather to obtain the benefits that are anticipated to flow from the inclusion of one or more persons from groups that are not currently represented in a given entity or organization. For example, at a time when no woman or member of a racial minority ever had served on the United States Supreme Court, if a President, in choosing among equally qualified candidates for a seat on the court, were to have [*579] taken into consideration a candidate's race or gender as a factor in the decision [***93] whom to appoint, the use of race or gender

could not accurately be characterized as based on group entitlement or proportional representation, but rather likely would rest on the belief that such a characteristic of the candidate would bring something worthwhile to the court as a whole, both in terms of the public's relative confidence in the institution and because members of such previously unrepresented groups might add something distinctive and valuable to the court's deliberations and decisionmaking. Similarly, when a college or university whose student body has been and continues to be almost all-White voluntarily decides to institute an affirmative action policy under which qualified minority applicants are given special consideration, the justification for the policy may not be based upon any notion of "entitlement based on group representation" or "proportional group representation," but instead may well stem from a genuine belief on the part of the institution that an integrated student body will provide a better education for all students attending the school. And a comparable justification may underlie many of the affirmative action programs voluntarily instituted in recent [***94] years by those large corporations that have concluded that an integrated work force (including management) enables the organization to better serve its diverse clientele.

Another common justification for the adoption of an affirmative action program is that it may serve as a means of taking into account or remedying the continuing effects of past discrimination. For example, with regard to a job category (such as the construction trades) from which women traditionally have been excluded, an employer might conclude that when two applicants (one a man, one a woman) perform equally well on a [**1095] qualifying test, the woman's performance actually might demonstrate that she has greater potential because she has managed to attain her current skill level despite the lack of general societal or cultural support for such an endeavor. Again, the use of gender-conscious affirmative action in this manner does not necessarily reflect a belief in group entitlement or proportional representation, but rather a more benign justification.

Of course, the circumstance that the objective or justification for a race- or gender-conscious affirmative action program is not group entitlement or proportional [***95] representation but some other, more defensible, purpose does not necessarily mean that the program is constitutional, either under pre-Proposition 209 or post-Proposition 209 principles. But the majority opinion's characterization of past judicial decisions upholding race- or gender-conscious affirmative action as based in general upon a view that emphasizes group entitlement or proportional representation is not an objective

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description, and the opinion's resort to these highly charged slogans undermines the credibility of its ruling. [*580]

Finally, in my view, the general theme that runs throughout the majority opinion's historical discussion -- that there is no meaningful distinction between discriminatory racial policies that were imposed for the clear purpose of establishing and preserving racial segregation, on the one hand, and race-conscious affirmative action programs whose aim is to break down or eliminate the continuing effects of such segregation and discrimination, on the other -- represents a serious distortion of history and does a grave disservice to the sincerely held views of a significant segment of our populace. As is demonstrated by the numerous and lengthy past [***96] judicial decisions that have considered race- and gender-conscious affirmative action programs, the legal questions posed by such programs have been widely understood as difficult and close, but the majority opinion's presentation does not do justice to the legal and historical arguments that have been articulated on both sides of the issue. In this respect, as well, I believe the majority opinion's approach cannot help but detract from the persuasiveness and credibility of its ultimate ruling.

In the ballot pamphlet distributed to registered voters prior to the November 1996 election, the analysis prepared by the Legislative Analyst described as follows the effect of the adoption of Proposition 209: "This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve 'preferential treatment' based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) *court rulings on what types of activities are considered 'preferential treatment'* and (2) whether federal law [***97] requires the continuation of certain programs." (Ballot Pamp., Gen. Elec. (No v. 5, 1996) Legis. Analyst's analysis of Prop. 209, p. 30, italics added.) The issue presented by this case is whether *the particular affirmative action program* here at issue "discriminates against" or "grants preferential treatment to" any individual or group on the basis of race or gender within the meaning of article I, section 31.

To resolve that question, it is unnecessary to venture back to the beginnings of our nation's history, as the majority opinion does. Instead, I believe it is appropriate to turn first to the language of article I, section 31, and its contemporary background (as reflected in the ballot pamphlet materials that were before the voters when they

were considering the measure), and then to review the specifics of the city's challenged affirmative action program to determine whether the program violates this state constitutional provision.

II

Article I, section 31, subdivision (a) the principal substantive provision of the initiative measure provides in full: "The State shall not discriminate [*581] against, or grant preferential treatment to, any individual or group [***98] on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Subdivision (f) of section 31 provides in turn: "For purposes of this section, 'State' shall include but not necessarily be [**1096] limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State." n2

n2 Article I, section 31, reads in full:

"(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

"(b) This section shall apply only to action taken after the section's effective date.

"(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

"(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

"(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

"(f) For the purposes of this section, 'State' shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political

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subdivision or governmental instrumentality of or within the State.

"(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

"(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section."

***99]

The city acknowledges that the provisions of article I, section 31, are applicable to the recently adopted public contracting affirmative action program that is challenged in this case. The city maintains, however, that the challenged aspects of its affirmative action program do

not "discriminate against" or "grant preferential treatment to" any individual or group on the basis of the enumerated characteristics, as these quoted terms are used in article I, section 31. That constitutional measure contains no express definition of the terms "discriminate against" or "grant preferential treatment to" as used in the section, and, in deciding how that language properly should be interpreted, it is appropriate to consider the material relating to Proposition 209 contained in the ballot pamphlet that was distributed to all voters prior to the election to determine whether that material provides any guidance as [*582] to how the voters are likely to have understood the meaning and effect of these terms. (See Ballot Pamp., *supra*, pp. 30-33.) n3

n3 The section of the ballot pamphlet relating to Proposition 209 is set forth in full in an appendix to this opinion. The text of Proposition 209, which was set forth in a separate section at the end of the ballot pamphlet, has been omitted from the appendix.

**THE PEOPLE, Plaintiff and Respondent, v. RUSSELL RAY RATHERT, JR.,
Defendant and Appellant.**

S070946

SUPREME COURT OF CALIFORNIA

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Cal. Daily Op. Service 7238; 2000 Daily Journal DAR 9539

August 28, 2000, Filed

NOTICE:

[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

Superior Court of California, Los Angeles County. Super. Ct. No. YA028077. Court of Appeal of California, Second Appellate District, Division Seven. B111761. William R. Hollingsworth, Jr., Judge

DISPOSITION:

The judgment of the Court of Appeal is reversed.

COUNSEL:

Attorneys for Appellant:

Richard Jay Moller, under appointment by the Supreme Court, for Defendant and Appellant.

Attorneys for Respondent:

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JUDGES:

WERDEGAR, J. WE CONCUR: GEORGE, C.J., MOSK, J., BAXTER, J., CHIN, J. CONCURRING OPINION BY KENNARD, J. CONCURRING OPINION BY BROWN, J.

OPINIONBY:

WERDEGAR

OPINION:

[*202] [**702]

In this case we define the mental state necessary to violate Penal Code n1 section 529, paragraph 3 (hereafter sometimes paragraph 3), prohibiting false personation. The Court [***2] of Appeal held the statute requires an intent to subject the impersonated individual to liability for suit or prosecution, or to secure a benefit for any person. It therefore reversed defendant's burglary conviction, which was predicated on entry with the intent to commit the underlying felony of false personation, because the pertinent jury instruction prejudicially omitted the required intent element.

n1 Unless otherwise indicated, all further statutory references are to the Penal Code.

We conclude section 529, paragraph 3, by its terms, is violated when one intentionally falsely personates another and, in such assumed character, does *any* act that *might* cause the liability or benefit described in the statute. Paragraph 3, in other words, requires the existence of no state of mind or criminal intent beyond that plainly expressed on the face of the statute. Accordingly, we reverse the decision of the Court of Appeal.

FACTS

About 9:35 p.m. on March 22, 1996, defendant entered [***3] a Lucky supermarket in Rancho Palos Verdes. He approached store clerk Carlos Mariscal with a check and a driver's license, asking Mariscal "if it was okay to cash the check before [defendant] started getting groceries" and stating he wanted the check approved by the manager. The Talcro Financial Services check was made out to one Chris Laughrey and endorsed by Laughrey. Recognizing that Laughrey, the person pictured on the license, was obviously not defendant, Mariscal called the manager, Sergio Montez, who told defendant he would have to verify the check. Defendant acquiesced and said he would remain there and buy some groceries.

Montez recognized the check as similar to one he had refused several days earlier. Another Lucky supermarket had then cashed that check and later discovered it was invalid. Both checks had been drawn on a closed account.

Montez asked Michael Gutierrez, another employee, to keep an eye on defendant. Meanwhile, Montez telephoned the other Lucky store to verify that the earlier check was of the same kind as the one defendant was attempting to cash. He then called the police.

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Defendant abruptly left the store for the parking lot when the police [***4] drove up. He entered an El Camino car on the passenger's side. Gutierrez waved down Deputy Sheriff Chris Knox, who had been patrolling the Lucky parking lot in his vehicle, and told Knox, "That's him." Knox followed the El Camino as it drove out of the parking lot, stopped it, and detained defendant and the driver. Defendant gave Knox two false names.

Defendant testified that, on the day he was arrested, he had met his friend, Cherise Hartley, at her house in San Pedro. Hartley asked him if he would cash a check for her, as she needed money to pay for food, diapers and rent. Chris Laughrey, the father of her child, had given her the check and permission to cash it, but was then in a rehabilitation center. She showed defendant a previously endorsed check and Laughrey's driver's license. Hartley told defendant, and he believed, the check was good. He agreed to help her, and they drove to the Lucky store. His account of what happened there generally accorded with the testimony of the [**703] store personnel, except he denied leaving the store because of the arrival of the police. Defendant testified he never said he was Chris Laughrey, but he admitted saying he had no other identification [***5] and that he intended to pass himself off as Laughrey in order to cash the check. When

the manager took the check, saying he would have to verify it, defendant felt something was not quite right, so he went outside to ask Hartley if there was a problem with the check. She told him to get into the car and "forget it." When arrested, defendant gave a false name because he was then on parole and would have been "assumed guilty of anything."

Defendant was charged with forgery (§ 470), possession of a completed check with intent to defraud (§ 475, subd. (a)) and second degree burglary (§ 459). It was specially alleged he had previously been convicted of three serious or violent felonies (§ 1170.12, subds. (a)-(d); § 667, subds. (b)-(i)) and had served three prior prison terms (§ 667.5, subd. (b)).

The prosecution presented four alternative theories of burglary: entering a building (1) with the specific intent to steal, (2) with the specific intent to commit forgery, (3) to commit the crime of possession of a completed check with the specific intent to defraud, or (4) to falsely personate another in violation of section 529, paragraph 3. The jury convicted defendant of [***6] second degree burglary on the false personation theory, n2 acquitted him of forgery, and failed to reach a verdict on the charge of possession of a [*204] completed check with the intent to defraud. It found true the special allegations. The trial court denied defendant's motions for new trial, to strike the prior convictions, and to reduce the charge to a misdemeanor. It imposed a sentence of 25 years to life imprisonment.

n2 When polled, the jurors unanimously indicated they had found defendant guilty on the false personation theory.

DISCUSSION

In a burglary prosecution, complete and accurate jury instructions include the definition of each felony the defendant is alleged to have intended to commit upon entry into the burglarized structure. (See *People v. Failla* (1966) 64 Cal. 2d 560, 564, 51 Cal. Rptr. 103, 414 P.2d 39; cf. *People v. Prettyman* (1996) 14 Cal. 4th 248, 266-267, 926 P.2d 1013 [similar instructional requirement obtains under natural and [***7] probable consequences doctrine].) Thus, in order to convict defendant of burglary on the theory that he entered the Lucky store with the intent to commit false personation, the jury should have been provided with a correct definition of false personation.

In assessing whether the jury in this case was correctly instructed, we first turn to the statute defining the offense

of false personation. As relevant here, section 529 provides: "Every person who falsely personates another in either his private or official capacity, and in such assumed character ...: [P] ... [P] 3. Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person; [P] Is punishable by a fine not exceeding ten thousand dollars (\$ 10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." The statutory language first appeared in the Statutes of 1850, chapter 99, section 90, page 241, apparently having [***8] been derived from the New York Revised Statutes of 1828 (2 N.Y. Rev. Stats. (1828) 676, § 48). The California Legislature codified section 529 in 1872 and has not changed it in any relevant respect since that time. Unsurprisingly, given the antiquity of the statute, there is no available legislative history to assist us in its interpretation.

At issue here is whether, as defendant urges, paragraph 3 of section 529 requires, for conviction, that defendant impersonated Chris Laughrey, specifically intending to cause Laughrey to become liable to any suit or prosecution or to pay any sum of money, or specifically intending to benefit himself or another. The Court of Appeal so construed [**704] the statute and, [*205] because the jury was not so instructed, reversed defendant's burglary conviction. n3

n3 The instruction given the jury generally tracked the statutory language and read as follows: "Every person who falsely personates another, and does an act which, had it been done by the person falsely personated, might have subjected that person to either a suit or prosecution, or some kind of debt or fine; or which benefitted the defendant or any other person in some way, is guilty of a felony."

[***9]

"Specific and general intent," we have cautioned, "have been notoriously difficult terms to define and apply" (*People v. Hood* (1969) 1 Cal. 3d 444, 456, 82 Cal. Rptr. 618, 462 P.2d 370.) The standard formulation of the two concepts appears in *Hood*: "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is

deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*Hood*, 1 Cal. 3d at pp. 456-457.)

Resolution of this case does not require us to fit the offense of false personation into either the specific or the general intent category. Such classification of offenses is necessary "only when the court must determine whether a defense of voluntary intoxication or mental disease, defect, or disorder is available; whether evidence thereon is admissible; or whether appropriate jury instructions are thereby required. [***10] [Citation.]" (*People v. Hering* (1999) 20 Cal. 4th 440, 446-447, 976 P.2d 210.) In this case, defendant does not defend on any such ground; rather, "[he] simply contends that in addition to instructions that tracked the statutory language, the trial court should have included one on specific intent. ... This case aptly illustrates the general principle that--other than circumstances involving a mental state defense--'the characterization of a crime as one of specific intent [or general intent] has little meaningful significance in instructing a jury. The critical issue is the accurate description of the state of mind required for the particular crime.' [Citations.]" (*Id.* at p. 447, second bracketed text added in *Hering*.)

Section 529, paragraph 3 does not explicitly require that a defendant who impersonates another specifically intend to cause the latter to become liable to any suit or prosecution or to pay any sum of money, or specifically intend to benefit defendant himself or another person. The Legislature included in paragraph 3 none of the language typically denoting specific intent, such as "with the intent that" or "for the [***11] purpose of." (See *People v. Hering*, *supra*, 20 Cal. 4th at p. 446.) To the contrary, paragraph 3 [*206] is framed in language reasonably susceptible of only one interpretation: that the Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen. No fewer than seven times does the word "any" appear in the statute: "Any other act ... in any event ... any suit or prosecution ... any sum of money ... any charge ... any benefit ... any other person." (§ 529, par. 3, italics added.) The impersonator's act, moreover, is criminal provided it *might* result in any such consequence; no higher degree of probability is required.

Despite the absence of any language restricting section 529, paragraph 3 to acts undertaken by impersonators with an intent to cause a benefit or liability as described therein, the Court of Appeal in *People v. Robertson* (1990) 223 Cal. App. 3d 1277, 273 Cal. Rptr. 209,

opined that such an intent is required for a conviction of false personation. The defendant in *Robertson* [***12] was arrested in August 1986 for stealing a truck. On arrest he gave a false name, that of his brother, and continued to masquerade as his brother throughout his arraignment and release on his own recognizance. He failed to appear at a scheduled hearing, whereupon a bench warrant was issued. The brother was later arrested in Texas on the warrant and extradited [**705] to California, where criminal proceedings were instituted. The brother was found incompetent to stand trial and was committed to Atascadero State Hospital, where he remained incarcerated for more than a year before hospital authorities notified county officials that they did not believe the brother was the person arrested in August 1986. Ultimately the deception was discovered, and the defendant was identified through fingerprint evidence. The sole issue on appeal in *Robertson* was whether section 529, paragraph 3 criminalizing false personation, was preempted by a more specific statute, section 148.9, subdivision (a), which prohibits falsely identifying oneself to a peace officer during a lawful detention. In the course of comparing the elements of the two offenses, the Court of Appeal stated: "For a conviction based on section [***13] 529, [paragraph] 3, the prosecution must establish that at the time of the offense the defendant had the specific intent to commit that crime; or, in the words of the court here, he falsely personated another with the specific intent to obtain a benefit for himself or to cause another to become liable for prosecution or pay a sum of money." (*People v. Robertson*, *supra*, 223 Cal. App. 3d at pp. 1281-1282.) For this proposition, the *Robertson* court cited only *People v. Vaughn* (1961) 196 Cal. App. 2d 622, 630-631, 16 Cal. Rptr. 711.

Whether *Vaughn* is properly read as requiring a specific intent to obtain a benefit or subject another to liability, however, is questionable. *Vaughn* arose out of the prosecution of a criminal defense attorney who, to test the [*207] reliability of a police officer's identification of his client, caused the client's twin sister to pose as the client during a court hearing. He was convicted of violating section 529, paragraph 3 on an aiding and abetting theory, for which the prosecution was required to prove he acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either [***14] of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal. 3d 547, 560, 199 Cal. Rptr. 60, 674 P.2d 1318, italics omitted; see *People v. Mendoza* (1998) 18 Cal. 4th 1114, 1131, 959 P.2d 735 [aider and abettor's state of mind is a "required specific intent" for which evidence of voluntary intoxication is admissible pursuant to section 22].) In affirming the conviction, the

Court of Appeal held "the jury could reasonably conclude defendant had the specific intent to do an act whereby a benefit *might* accrue to [his client] and that he thereby aided and abetted [his client's sister] in personating [his client]." (*People v. Vaughn*, *supra*, 196 Cal. App. 2d at p. 631, italics in original.) Significantly, the Court of Appeal found no error in instructional language taken almost verbatim from section 529, paragraph 3, which, as we have seen, contains no explicit reference to an intent to subject another to liability or to obtain a benefit. (*People v. Vaughn*, *supra*, at p. 633.) *Vaughn*, therefore, is doubtful authority for the proposition that false [***15] personation is a specific intent crime; the *Robertson* court uncritically read *Vaughn*'s description of the standard of aider and abettor liability, as applied to paragraph 3, into the definition of the crime itself.

Defendant argues that, when section 529, paragraph 3 is considered in the context of its surrounding statutes (see *People v. Simon* (1995) 9 Cal. 4th 493, 514, 886 P.2d 1271), the section obviously contains a requirement of a specific intent to cause another person harm or wrongfully to benefit someone. This is because virtually all other impersonation statutes, according to defendant, include an element of specific intent to defraud, or some similar mens rea, or some wrongful conduct in addition to the impersonation. (E.g., § 528 [marriage under false personation], 530 [receiving money or property under false personation]; see also § 146a, subd. (b) [impersonating a state public officer, investigator or inspector]; Veh. Code, § 27 [impersonating a California Highway Patrol officer].) We find defendant's argument unpersuasive. The various statutes prohibiting different types of impersonations neither appear to comprise [***16] a statutory scheme governing false personation generally (cf. *People v. Simon*, *supra*, 9 Cal. 4th at p. 514) nor invariably contain a specific intent requirement. To the extent, moreover, that other statutes include a specific intent element, the [**706] omission of such an element in section 529 weighs in favor of our interpretation.

Defendant may be understood to argue, more broadly, that, whatever the actual language of section 529, paragraph 3, for this court not to construe the [*208] statute as requiring a specific intent to cause the described liability or benefit would be unfair, given that other impersonation statutes expressly requiring such intent carry only misdemeanor penalties. (E.g., § 532b [impersonating a veteran or ex-serviceman], 538d [impersonating a peace officer], 538e [impersonating a member of a fire department or a state fire marshal], 538f [impersonating a public utility employee].) His argument, of course, is better addressed to the

Legislature. Given, moreover, the potentially drastic consequences that may befall an impersonated individual in the circumstances described by the statute, including serious damage to his or her financial circumstances [***17] or personal freedom, we cannot say that felony punishment is necessarily too harsh.

In any event, section 529 is punishable as either a felony or a misdemeanor, and trial courts in the course of sentencing violators of the statute may exercise whatever discretion they otherwise possess in determining the appropriate penalty. (E.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal. 4th 968, 928 P.2d 1171 [discretion to reduce "wobblers" to misdemeanors]; *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, 917 P.2d 628 [discretion to strike priors].) In the present case, after the jury found defendant guilty of second degree burglary on the theory he entered the Lucky store with the intent to commit false personation, and found true the allegation he had previously been convicted of three prior serious felonies, the trial court denied defendant's motions to strike the priors or reduce the charge to a misdemeanor. Defendant, therefore, has availed himself (albeit unsuccessfully) of the opportunity to seek a favorable exercise of the sentencer's discretion.

Defendant urges that the false personation statute must be read to contain a specific [***18] intent element in order to avoid criminalizing innocent behavior. Defendant's brief recites a variety of scenarios in which a person utterly free from criminal intent could be subject to prosecution for engaging in some conduct that might confer a benefit on him or her while impersonating another. Defendant, however, cites no instance in the history of this state of any person's being prosecuted for, e.g., trick-or-treating or attending a costume party, and we are aware of none. The ancient customs of masquerade and trick-or-treating antedate, and have survived, the enactment of section 529. The statute clearly was not designed to eliminate these innocuous practices.

Indeed, early decisions by this court strongly suggest that the offense of false personation requires a *deliberate effort* to pass oneself off as another. (See *People v. Maurin* (1888) 77 Cal. 436, 439, 19 P. 832 [reversing a conviction under section 529 in the absence of evidence defendant "pretended to any human being" that he was another]; cf. *People v. Sprague* [*209] (1879) 53 Cal. 491, 494 [interpreting "false" as used in Code of Civil Procedure, former section 2061, as meaning [***19] "untrue, not as the result of mistake or inadvertence, but willfully and with the design to deceive"]; see also 1 Bouvier's Law Dict. (1897 ed.) p. 755 ["Applied to the intentional act of a responsible being," the word "false"

"implies a purpose to deceive"].) The innocent examples proffered by defendant differ from the criminal offense with which we are concerned, in that they involve acts of transparent impersonation, highlighting--rather than concealing--the impersonator's artifice.

Defendant further argues that the potentially harsh penalties for false personation compel us to infer a specific intent requirement, as the offense is not of a "public welfare" type such as would justify dispensing with a mental element. (See *United States v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 71, 130 L. Ed. 2d 372, 115 S. Ct. 464; *Staples v. United States* (1994) 511 U.S. 600, 606-607, 616-617, 128 L. Ed. 2d 608, 114 S. Ct. 1793; *People v. Simon, supra*, 9 Cal. 4th at pp. 509, fn. 13, 519-522; *In re Jorge M.* (2000) 23 Cal. 4th 866.) As we have [**707] seen, however, section 529, paragraph 3, unlike public welfare offenses, [***20] does not dispense with a mental element. One does not violate paragraph 3 merely by happening to resemble another person. Rather, one must intentionally engage in a deception that may fairly be described as non-innocent behavior, even if, in some instances, it might not stem from an evil motive.

Defendant contends that to apply our ruling to him would violate the due process and ex post facto clauses of the state and federal Constitutions. We disagree. "A statute "which makes more burdensome the punishment for a crime, after its commission," "violates article I, section 9, clause 3, of the United States Constitution as an ex post facto determination of criminal liability [citations], as well as its California counterpart, article I, section 9 of the state Constitution [citation]. Correspondingly, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law. [Citations.]" (*People v. Davis* (1994) 7 Cal. 4th 797, 811, 872 P.2d 591.) Courts violate constitutional due process guarantees when they impose unexpected criminal penalties by construing existing laws in a manner that the accused [***21] could not have foreseen at the time of the alleged criminal conduct. (*United States v. Lanier* (1997) 520 U.S. 259, 266-267, 137 L. Ed. 2d 432, 117 S. Ct. 1219; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353, 12 L. Ed. 2d 894, 84 S. Ct. 1697; *People v. Blakeley* (2000) 23 Cal. 4th 82, 91-92, 999 P.2d 675.)

We conclude that our reading of paragraph 3 cannot fairly be described as an unforeseeable enlargement of criminal liability, notwithstanding the error of the court below. As we have seen, the statute plainly [*210] encompasses an impersonator's commission of *any* act that *might* result in a liability. That one appellate decision (i.e., *People v. Robertson, supra*, 223 Cal. App.

3d 1277) erroneously conflated another's (i.e., *People v. Vaughn*, *supra*, 196 Cal. App. 2d 622) description of the mens rea of an aider and abettor of false personation with the elements of the crime itself did not generate such a firmly established rule as to erect a constitutional bar to our applying the present decision to this defendant. (See *People v. Sobiek* (1973) 30 Cal. App. 3d 458, 476, 106 Cal. Rptr. 519.) [***22]

DISPOSITION

The judgment of the Court of Appeal is reversed.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

BAXTER, J.

CHIN, J.

CONCURRING OPINION BY KENNARD, J.

CONCURRING OPINION BY BROWN, J.

CONCURBY:

KENNARD; BROWN

CONCUR:

CONCURRING OPINION BY KENNARD, J.

I concur in the judgment affirming defendant's conviction of second degree burglary (Pen. Code, § 459), which was tried on the theory that he entered a store with the intent to commit a felony offense, falsely impersonating another for gain (Pen. Code, § 529, par. 3). **n1** Together with his companion, Cherise Hartley, defendant went to a supermarket, where he attempted to pass himself off to store personnel as one Chris Laughrey, the father of Hartley's child, in order to cash a check made out to, and endorsed with the name, Chris Laughrey.

n1 All further undesignated statutory references are to the Penal Code.

As relevant here, [***23] the crime of burglary entails entering a store with the specific intent to commit therein "any felony." (§ 459.) A trial court in instructing on

burglary must advise the jury "which *acts* the defendant, upon entry, may have intended to commit [that] would amount to [a] felony." (*People v. Failla* (1966) 64 Cal. 2d 560, 564, 51 Cal. Rptr. 103, 414 P.2d 39, italics added.) Here, the trial court instructed the jury that to convict defendant of burglary it had to find that "at the time of entry, ... [he] had the specific intent to commit the crime ... of false personage of another." The court further instructed that "every person who falsely personates another, and does an act which, had it been done by the person falsely personated, might have subjected that person to either a suit or prosecution, or some kind of debt or fine; or which benefitted the defendant or any other person in some way, [**708] is guilty of a felony." **n2** These jury instructions accurately defined the felonious *acts* of false personation underlying the charge of burglary.

n2 As relevant here, section 529 defines the crime of false personage as follows: "Every person who falsely personates another in either his private or official capacity, and in such assumed character ...:[P] ... [P] 3. Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person; [P] Is punishable by a fine not exceeding ten thousand dollars (\$ 10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." (*Id.*, par. 3.)

[***24] [*211]

Assuming as the majority and concurring opinions apparently do, that a trial court instructing a jury on burglary must also instruct on the *mental states* associated with the felonious acts underlying the burglary charge, defendant here suffered no possible prejudice from the trial court's failure to specifically instruct on the mental elements of false personation. In convicting defendant of burglary under the instructions given, the jury necessarily found that when he entered the supermarket, he *actually intended* to "falsely personate[] another" and "do[] an act" that might burden the person falsely personated or benefit himself or some other person in violation of section 529, paragraph 3. Actual intent is the mental state requirement most favorable to criminal defendants. (See § 20; *In re Jorge M.* (2000) 23 Cal. 4th 866, 891 (dis. opn. of Kennard, J.)) Defendant's own testimony amply supported the

jury's finding that he acted with such actual intent: he admitted that in going to the store with the check at Hartley's behest, his intent was to pass himself off as Chris Laughrey in order to "cash the check to help [Cherise Hartley] out."

I [***25] agree with my colleagues that in intending to commit the crime of false personation, defendant did not have to actually know or intend that the benefit likely to accrue to himself or another would be "wrongful," that is, a benefit to which neither had a legal right. Even if the statute required that the benefit actually be wrongful, whether or not so intended, that factual requirement of wrongfulness was amply satisfied here. The check defendant unsuccessfully tried to cash was later determined to be a forgery, written on a closed business account. n3 Therefore, defendant's false portrayal of Chris Laughrey, if successful, stood to benefit defendant himself or Cherise Hartley, neither of whom had any lawful or legal claim to the proceeds of the bad check. Given this evidence, "no jury could reasonably find" that the benefit would not have been wrongful. (*Neder v. United States* (1999) 527 U.S. 1, 16, 144 L. Ed. 2d 35, 119 S. Ct. 1827.) Thus, any error in the trial court's failure to instruct on wrongfulness was necessarily harmless. (*Ibid.*)

n3 The jury acquitted defendant of a forgery charge, thus concluding the prosecution failed to prove he committed that offense.

[***26]

For these reasons, I join in reversing the Court of Appeal.

KENNARD, J.

[*212] CONCURRING OPINION BY BROWN, J.

I agree with the majority's conclusion that Penal Code section 529, paragraph 3, n1 does not require "an intent to subject the impersonated individual to liability for suit or prosecution, or to secure a benefit for any person." (Maj. opn., ante, 24 Cal. 4th 200, 202, 6 P.3d 700, 2000 Cal. LEXIS 6689, *2.) I also concur with its disposition. The majority, however, does not adequately define the mental state required for the crime of false personation and, in failing to do so, further obfuscates the standards for determining the mental element of a crime. I therefore write separately to clarify the mental state required for the crime of false personation. In the process, I reject the specific intent/general intent framework and propose an alternative approach.

n1 All further statutory references are to the Penal Code unless otherwise stated.

I.

The concepts of specific and general [***27] intent "evolved as a judicial response to the problem of the intoxicated offender' and the availability [**709] of voluntary intoxication as a defense." (*People v. Hering* (1999) 20 Cal. 4th 440, 445, 976 P.2d 210 (*Hering*), quoting *People v. Hood* (1969) 1 Cal. 3d 444, 455, 82 Cal. Rptr. 618, 462 P.2d 370 (*Hood*).) In *Hood*, supra, 1 Cal. 3d at pages 456-457, we formulated the standard definitions of specific and general intent now cited in many a judicial opinion in California: "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. There is no real difference, however, only a linguistic one, between an intent to do an act already performed and an intent to do that same act in the future."

Since *Hood*, courts and litigants, when determining [***28] the mental element of a crime, invariably attempt to classify the crime as a specific or general intent crime. They have done so even though the terms "have been notoriously difficult ... to define and apply" (*Hood*, supra, 1 Cal. 3d at p. 456.) Not surprisingly, the concepts of specific and general intent have "proved to be mischievous." (*People v. Cain* (1995) 10 Cal. 4th 1, 84, 892 P.2d 1224 (conc. opn. of Mosk, J.).)

Indeed, the concept of general intent has been especially problematic because California law recognizes *more than* one criminal mental state other than an "intent to do some further act or achieve some additional consequence." (*Hood*, supra, 1 Cal. 3d at p. 457.) For example, a crime in [*213] California may also require: (1) knowledge or actual knowledge of "the facts ... [that] bring the act or omission within the provisions of" the Penal Code (§ 7, par. 5); (2) criminal negligence or "aggravated or reckless" conduct showing an "indifference to the consequences" (*People v. Peabody* (1975) 46 Cal. App. 3d 43, 47, 119 Cal. Rptr. 780); or (3) a form of negligence where the defendant knows or should have known [***29] the facts that make the act or omission unlawful. (*In re Jorge M.* (2000) 23 Cal. 4th 866, 887-888, fn. 11.) General intent or the intent to do

the proscribed act, however, does not distinguish among the mental states of knowledge, criminal negligence and negligence. As a result, our courts have struggled to consistently define the mental element of so-called general intent crimes, with little success. This struggle has, in turn, confused prosecutors and defendants alike.

n2

n2 Indeed, oral argument proved instructive in this regard. During argument, the deputy attorney general, on several occasions, stated that the crime of false personation was a general intent crime that required an intent to mislead. She, however, found it difficult, if not impossible, to conflate the concept of general intent with an intent to mislead. Indeed, she made several aborted attempts to reconcile these concepts with no success. Of course, the deputy attorney general can hardly be faulted for her inability to resolve a conundrum of our own making.

***30]

We have recently recognized the mischief created by our reliance on the concepts of specific and general intent and cautioned against their "rote application." (*Hering, supra*, 20 Cal. 4th at p. 445.) The majority reiterates this admonition. (See maj. opn., *ante*, 24 Cal. 4th at 204-206, 2000 Cal. LEXIS 6689, *8-11.) I would go further. Rather than tepidly caution courts against classifying offenses as specific or general intent crimes, I would eschew *any* use of these concepts except where "the court must determine whether a defense of voluntary intoxication or mental disease, defect, or disorder is available" as a policy matter. (*Hering*, 20 Cal. 4th at pp. 446-447.)

Rejecting the specific intent/general intent framework does not, however, end our task. We must still determine the mental state necessary for the crime of false personation. To do so, we must develop a new framework for describing the mental element of a crime.

Unfortunately, the majority fails to do so. Rather than clearly define the mental element of false personation through the application [**710] of ascertainable standards, the majority offers a cryptic definition that appears to conflict with its own analysis and our case law. In [***31] doing so, the majority not only obscures the mental element of false personation, but also adds to the confusion of lower courts who must interpret our decision today.

For example, the majority "suggests" that false personation "requires a *deliberate effort* to pass oneself off as another" (maj. opn., *ante*, 24 Cal. 4th at 208, 2000 Cal. LEXIS 6689, *18), [*214] and states that a person guilty of false personation "must intentionally engage in a deception." (Maj. opn., *ante*, 24 Cal. 4th at 209, 2000 Cal. LEXIS 6689, *20.) Yet, the majority also suggests that the statutory language adequately conveys this intent to a jury (see maj. opn., *ante*, 24 Cal. 4th at 206-207, 2000 Cal. LEXIS 6689, *13-14), even though the statutory phrase, "falsely personates" (§ 529), does not have "a plain, unambiguous meaning." (*People v. Mayfield* (1997) 14 Cal. 4th 668, 773, 928 P.2d 485 (*Mayfield*) [must define a statutory term for the jury if the meaning of the term is not plain and unambiguous].) Indeed, the word "false" has many meanings, including "intentionally untrue," "not true," and "inconsistent with the facts,"--and does not necessarily imply an intent to mislead. (Webster's Collegiate Dict. (10th ed. 1993) p. 419; see also *Washer v. Bank of America* (1943) 21 Cal. 2d 822, 828, 136 P.2d 297 [***32] ["falsify" has at least three meanings: (1) "mistakenly and accidentally untrue," (2) "an intentional untruth, without, however, an intent to defraud," or (3) "intentionally or knowingly untrue, made with intent to defraud"], disapproved on other grounds by *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal. 2d 536, 551, 343 P.2d 36; *Brown v. State Department of Health* (1978) 86 Cal. App. 3d 548, 556, 150 Cal. Rptr. 344 [in the context of Bus. & Prof. Code, § 2411, the phrase "falsely represents" does not "require[] a finding of intent to deceive"].)

The majority also concedes that section 529, paragraph 3 requires an act "that might result in a liability or a benefit." (Maj. opn., *ante*, 24 Cal. 4th at 205, 2000 Cal. LEXIS 6689, *11.) It, however, construes the Legislature's silence as to the mental element for this act as an intent "to punish all acts by an impersonator that might result in a liability or a benefit, *whether or not such a consequence was intended or foreseen*." (*Ibid.*, italics added.) By removing "the requirement of a 'guilty mind' with respect to [the benefit/detriment] element of [the] crime," the majority, in effect, [***33] makes false personation a strict liability offense. (*Staples v. United States* (1994) 511 U.S. 600, 607-608, fn. 3, 128 L. Ed. 2d 608, 114 S. Ct. 1793.) Because false personation is not a "public welfare" offense (maj. opn., *ante*, 24 Cal. 4th at 209, 2000 Cal. LEXIS 6689, *19), such an interpretation violates section 20 and the well-established rule against imposing strict liability in criminal actions. (See *People v. Simon* (1995) 9 Cal. 4th 493, 521, 886 P.2d 1271 (*Simon*) [only public welfare offenses need not require "some type of criminal intent or negligence" in addition to the criminal act].)

Rather than compound the confusion, I propose the following two-step approach for determining the mental element of a crime: (1) identify each act or omission proscribed by statute; and (2) determine the mental state for each such act or omission. This approach flows directly from the language of section 20, which provides that: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." [*215] Because section 20 is "an invariable element of every crime unless excluded expressly or by necessary implication" (*People v. Vogel* (1956) 46 Cal. 2d 798, 801, 299 P.2d 850, [***34] fn. omitted), "the scienter for any crime is inextricably linked to the proscribed act or omission." (*People v. Sargent* (1999) 19 Cal. 4th 1206, 1222, 970 P.2d 409 (*Sargent*)).

In the first step, we identify each act or omission proscribed by the statute. In doing so, we omit matters extrinsic to that act or omission, including the particular context or circumstances in which the statute applies. (See *Sargent, supra*, 19 Cal. 4th at p. 1223.)

After completing the first step, we then determine the mental state attached to each act or omission. (See § 20.) All crimes in California "are statutory and there are no [**711] common law crimes." (*In re Brown* (1973) 9 Cal. 3d 612, 624, 108 Cal. Rptr. 465, 510 P.2d 1017.) Thus, we first look to the statutory language. Where the statutory language states the crime's mental element, we simply follow the Legislature's lead. For example, a criminal statute may expressly define the requisite mental state as: (1) an intent to do some further act or achieve some further consequence (see, e.g., § 653f, subd. (a) [solicitation must be made "with the intent that the crime [solicited] be [***35] committed" (italics added)], 289, subd. (k)(1) ["sexual penetration" must be "for the purpose of sexual arousal, gratification, or abuse" (italics added)]); (2) knowledge (see, e.g., § 308, subd. (a) [making it unlawful to "knowingly" sell, give or furnish tobacco products to a person under the age of 18 years (italics added)]); (3) criminal negligence (see, e.g., § 191.5, subd. (a) [gross vehicular manslaughter while intoxicated requires "the commission of an unlawful act ... with gross negligence" (italics added)]); or (4) negligence (see, e.g., § 836.6, subds. (b), (c) [making it unlawful to escape arrest by force or violence if the person "knows, or by the exercise of reasonable care should have known, that he or she has been so arrested" (italics added)]).

Of course, the second step is rarely so simple because the Legislature is often silent as to the mental element of a crime. In such cases, we must search elsewhere for guidance. Where the Legislature's intent is not clear from

the statute or legislative history, we typically look to the nature of the proscribed acts or omissions in order to ascertain the mental state necessary for the [***36] offense.

As a general rule, "some type of criminal intent or negligence is a necessary element of a criminal offense." (*Simon, supra*, 9 Cal. 4th at p. 521.) Thus, most criminal offenses, at a minimum, require a mental state of criminal negligence. (See *People v. Martin* (1989) 211 Cal. App. 3d 699, 712-713, [*216] 259 Cal. Rptr. 770 (*Martin*).) We have, however, created an exception to this general rule for "regulatory or malum prohibitum crimes ... where the purpose is to protect public health and safety and the penalties are relatively light." (*Simon, supra*, 9 Cal. 4th at p. 521.) Such offenses "are punishable despite the absence of any criminal intent or criminal negligence." (*Martin, supra*, 211 Cal. App. 3d at p. 713.)

Thus, if the proscribed act or omission is akin to a violation of a regulation designed to protect the public from widespread injury, then we may construe the Legislature's silence as an intent to impose strict liability (see *Simon, supra*, 9 Cal. 4th at p. 521 [identifying several strict liability offenses]) or a form of negligence (see *In re Jorge M.*, *supra*, 23 Cal. 4th at pp. 887-888, fn. 11 [requiring [***37] "proof of a mental state slightly lower than ordinarily required for criminal liability"]). If not, then we must adhere to section 20 and require at least knowledge or criminal negligence. (See *Martin, supra*, 211 Cal. App. 3d at pp. 712-713.)

In those cases where legislative silence requires us to choose between knowledge and criminal negligence, we focus on the nature of the proscribed acts or omissions. If the statute criminalizes traditionally lawful conduct, the requisite mental state should be knowledge. (See, e.g., *People v. Rubalcava* (2000) 23 Cal. 4th 322, 331-332 [construing "the statute to contain a 'knowledge' element"]; *People v. Coria* (1999) 21 Cal. 4th 868, 880, 985 P.2d 970 (*Coria*) ["the defendant must have knowledge of the facts which make the chemical synthesis unlawful"].) In other words, the guilty party must have actual knowledge of the facts that makes his or her act or omission unlawful. (§ 7, par. 5.) Otherwise, the mental state attached to the proscribed act or omission should be criminal negligence. (See *Simon, supra*, 9 Cal. 4th at p. 522 [requiring proof of "knowledge [***38] or criminal negligence"].) In other words, the guilty party must act in an "aggravated, culpable, gross, or reckless" manner even though he had "actual or imputed" knowledge of the facts that makes his act or omission unlawful. (*People v. Penny* (1955) 44 Cal. 2d 861, 879-880, 285 P.2d 926.) [**712] II.

I now apply this framework to the crime of false personation codified in section 529, paragraph 3. As written, the statute proscribes two acts: (1) "falsely personating another in either his private or official capacity"; and (2) an "act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit [*217] might accrue to the party personating, or to any other person" (*Ibid.*) Both acts are necessary to establish guilt.

As to the first proscribed act, the phrase "falsely personate," as understood at the time of the enactment of section 529, defines the mental state attached to the act as an intent to mislead others into believing that defendant is the impersonated individual. This phrase, as I noted [***39] earlier, is neither clear nor unambiguous in modern times. Our early decisions interpreting the statute (see *People v. Maurin* (1888) 77 Cal. 436, 439, 19 P. 832 [reversing a conviction under § 529 because there was no evidence defendant "pretended to any human being that he" was another]), and similar language in other statutes (see, e.g., *People v. Sprague* (1879) 53 Cal. 491, 494 [the word "false" as used in Code Ci v. Proc., former § 2061, means "untrue, not as the result of mistake or inadvertence, but willfully and with design to deceive"]), however, indicate that no such confusion existed at the time of the enactment of section 529 and establish the intent to mislead as an element of the offense. Such a conclusion is further bolstered by the 19th century definition of "false." (See 1 Bouvier's Law Dict. (1987 ed.) p. 755 ["Applied to the intentional act of a responsible being, the word "false" "implies a purpose to deceive"].) Indeed, the majority acknowledges that these 19th century sources "strongly suggest" that a defendant guilty of false personation must have an intent to mislead. (See maj. opn., ante, 24 Cal. 4th at 208, 2000 Cal. LEXIS 6689, *18-19.) [***40] n3

n3 Although the majority appears to reach the same conclusion (see maj. opn., ante, 24 Cal. 4th at 208-209, 2000 Cal. LEXIS 6689, *17-20), its analysis does not seem to be internally consistent. By implicitly approving the trial court's instruction, which parroted the statute and did not require an intent to mislead, the majority effectively deleted this mental element from the offense. (See *Mayfield, supra*, 14 Cal. 4th at p. 773.)

With respect to the second proscribed act, the Legislature is silent as to the requisite mental state. Instead, the statute merely proscribes an act that either creates liability for the impersonated individual or provides a benefit to another. (§ 529, par. 3.) Because the crime of false personation is not regulatory in nature (see *Simon, supra*, 9 Cal. 4th at p. 521) and does not criminalize traditionally lawful conduct (see *Coria, supra*, 21 Cal. 4th at p. 880), the mental state attached to the second proscribed act should be criminal negligence. Thus, a defendant [***41] is only guilty of false personation "if a reasonable person in defendant's position would have been aware of" the possibility that his act might create a liability or provide a benefit. (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 574, 853 P.2d 507, italics omitted, quoting *People v. Watson* (1981) 30 Cal. 3d 290, 296, 179 Cal. Rptr. 43, 637 P.2d 279.)

Synthesizing these proscribed acts and their attached mental states, I would find that the crime of false personation has the following elements. [*218] First, a defendant must impersonate another individual with the intent to deceive others into believing he is the impersonated individual. Second, a defendant must be criminally negligent in doing an act that might impose liability on the impersonated individual or provide a benefit to another.

III.

Although my interpretation of the mental element of false personation differs from the majority's, the difference does not benefit defendant. At trial, defendant admitted that "he intended to pass himself off as [Chris] Laughrey in order to cash the check" for Cherise Hartley. (Maj. opn., ante, 24 Cal. 4th at 203, 2000 Cal. LEXIS 6689, *4.) In doing [***713] so, defendant admitted the [***42] very elements of the offense I described above. Specifically, he (1) assumed the identity of another individual with the intent to mislead others as to his true identity, and (2) knew that his act might benefit another person.

In any event, defendant's proposed interpretation is unavailing. Even if, as defendant contends, the crime of false personation requires an intent to create a liability or provide a benefit, defendant still cannot prevail because he admitted that he intended to benefit Hartley. Accordingly, any error is harmless beyond a reasonable doubt, and I would affirm his conviction. (See *People v. Flood* (1998) 18 Cal. 4th 470, 504, 957 P.2d 869.)

BROWN, J.

**MARYBETH ARMENDARIZ et al., Plaintiffs and Respondents, v. FOUNDATION
HEALTH PSYCHCARE SERVICES, INC., Defendant and Appellant.**

S075942

SUPREME COURT OF CALIFORNIA

**24 Cal. 4th 83; 6 P.3d 669; 2000 Cal. LEXIS 6120; 99 Cal. Rptr. 2d 745; 83 Fair
Empl. Prac. Cas. (BNA) 1172; 78 Empl. Prac. Dec. (CCH) P40,202; 2000 Cal. Daily
Op. Service 7127; 2000 Daily Journal DAR 9401**

August 24, 2000, Filed

NOTICE:

[**1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

Marin County. Court of Appeals of California, First Appellate District, Division One A080224. Super. Ct. No. 170420. Lynn Duryee, Judge. *

* Judge of the former Municipal Court for the Marin Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISPOSITION:

The judgment of the Court of Appeal upholding the employer's petition to compel arbitration is reversed, and the cause is remanded to the Court of Appeal with directions to affirm the judgment of the trial court.

COUNSEL:

Attorneys for Appellant: Pillsbury Madison & Sutro, William Gaus, Craig E. Stewart, Alice Kwong Ma Hayashi and Emily E. Flynn for Defendant and Appellant.

Paul, Hastings, Janofsky & Walker, Paul W. Crane, Jr., Leslie L. Abbott and Kristen L. McMichael for California Employment Law Council as Amicus Curiae on behalf of Defendant and Appellant.

Jones, Day, Reavis & Pogue, William J. Emanuel, Harry I. Johnson III, Holger G. Besch; Law Offices of Steven

Drapkin and Steven Drapkin for Employers Group as Amicus Curiae on behalf of Defendant [**2] and Appellant.

Attorneys for Respondent: Miller, Clark, Calvert & Raimondi, Glenn M. Clark, Allan C. Miller; Altshuler, Berzon, Nussbaum, Berzon & Rubin, Michael Rubin and Indira Talwani for Plaintiffs and Respondents.

McGuinn, Hillsman & Palefsky, Cliff Palefsky and Keith Ehrman for California Employment Lawyers Association as Amicus Curiae on behalf of Plaintiffs and Respondents.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Louis Verdugo, Jr, Assistant Attorney General, and Kathleen W. Mikkelsen, Deputy Attorney General, for the State of California as Amicus Curiae on behalf of Plaintiffs and Respondents.

The Sturdevant Law Firm and James C. Sturdevant for Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiffs and Respondents.

JUDGES:

MOSK, J. WE CONCUR: GEORGE, C. J. KENNARD, J. BAXTER, J. WERDEGAR, J. CONCURRING OPINION BY BROWN, J. I CONCUR: CHIN, J.

OPINIONBY:

MOSK

OPINION:

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[*90] [**674] In this case, we consider a number of issues related to the validity of a mandatory employment arbitration agreement, i.e., an agreement by an employee to arbitrate wrongful termination or employment discrimination claims rather than filing suit [***3] in court, which an employer imposes on a prospective or current employee as a condition of employment. The employees in this case claim that employees may not be compelled to arbitrate antidiscrimination claims brought under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) We conclude that such claims are in fact arbitrable *if* the arbitration permits an employee to vindicate his or her statutory rights. As explained, in order for [*91] such vindication to occur, the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration.

The employees further claim that several provisions of the arbitration agreement are unconscionable, both because they fail to meet these minimum requirements and because the arbitration agreement is not bilateral. We conclude that the agreement possesses a damages limitation that is contrary to public policy, and that it is unconscionably unilateral.

Finally, the employees contend that the presence of these unconscionable [***4] provisions renders the entire arbitration agreement unenforceable. The employer argues that even if some of the provisions are unconscionable or contrary to public policy, the proper remedy is to strike or restrict those clauses pursuant to Civil Code section 1670.5, and to enforce the rest of the arbitration agreement. The trial court chose the employees' preferred solution of refusing to enforce the arbitration agreement, but the Court of Appeal sided with the employer and enforced the agreement minus the one provision it found unconscionable. We conclude, for reasons explained below, that the arbitration agreement is unenforceable and that therefore the Court of Appeal's judgment must be reversed.

I. STATEMENT OF FACTS AND PROCEDURAL ISSUES

Marybeth Armendariz and Dolores Olague-Rodgers (hereafter the employees) filed a complaint for wrongful termination against their former employer, Foundation Health Psychcare Services, Inc. (hereafter the employer). The complaint and certain documents filed in support of the employer's petition to compel arbitration provide us with the basic factual background of this case. In July and August of 1995, the [***5] employer hired the employees in the "Provider Relations Group" and they

were later given supervisory positions with annual salaries of \$ 38,000. [**675] On June 20, 1996, they were informed that their positions were "being eliminated" and that they were "being terminated." During their year of employment, they claim that their supervisors and coworkers engaged in sexually based harassment and discrimination. The employees alleged that they were "terminated ... because of their perceived and/or actual sexual orientation (heterosexual)."

Both employees had filled out and signed employment application forms, which included an arbitration clause pertaining to any future claim of wrongful termination. Later, they executed a separate employment arbitration agreement, containing the same arbitration clause. The clause states in [*92] full: "I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good [***6] faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at section 1280 et seq. or any successor or replacement statutes. I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief."

The employees' complaint against the employer alleges a cause of action for violation of the FEHA ⁿ¹ and three additional causes of action for wrongful termination based on tort and contract theories of recovery. The complaint sought general damages, punitive damages, injunctive relief, and the recovery of attorney fees and costs of suit.

ⁿ¹ Same-sex harassment has been held to be unlawful under the FEHA. (*Mogilefsky v. Superior Court* (1993) 20 Cal. App. 4th 1409, 1418.)

[***7]

The employer countered by filing a motion for an order to compel arbitration pursuant to Code of Civil

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Procedure section 1281.2. The parties submitted declarations in support of, and in opposition to, the motion. Relying on *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138, the trial court denied the motion on the ground that the arbitration provision in question was an unconscionable contract. The trial court first found that the arbitration agreement was an "adhesion contract." It also found that several of the provisions of the contract are "so one-sided as to 'shock the conscience.'" In particular, it singled out the fact that only employees who file claims against an employer are required to arbitrate their claims, but not vice versa. Second, the agreement limits damages to back pay, precluding damages available for statutory antidiscrimination claims and tort damages, such as punitive damages. The trial court also mentioned the supposed lack of discovery under the arbitration agreement. It concluded: "Given the overall unfairness of the provision," this was not an appropriate case for striking the unlawful provisions of the [***8] arbitration agreement; instead it invalidated the entire agreement.

[*93] After the employer filed a timely appeal, the Court of Appeal reversed. The court concluded that the contract was indeed one of adhesion and that the damages provision was unconscionable and contrary to public policy. But for reasons elaborated below, the Court of Appeal held, contrary to the trial court, that the rest of the arbitration agreement should be enforced. It also determined that because the agreement incorporated the California Arbitration Act (CAA), adequate discovery, pursuant to Code of Civil Procedure section 1283.05, was available.

We granted review.

II. DISCUSSION

A. Arbitrability of FEHA Claims

The employees urge us to adopt the conclusion of the United States Court of Appeals for the Ninth Circuit in *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F.3d 1182 (*Duffield*), which held that the Civil Rights Act of 1991 (Pub.L. No. 102-166 (Nov. 21, 1991) 105 Stat. 1071, hereafter sometimes the 1991 Act) prohibits the enforcement of mandatory employment agreements to arbitrate claims under Title VII of the Civil Rights Act [***9] of 1964, or equivalent state antidiscrimination statutes, such as the FEHA. *Duffield* involved a securities broker who sought to litigate Title VII and FEHA claims against her employer after alleged sexual discrimination and harassment, and who was subject to a mandatory arbitration agreement. The starting point for the *Duffield* court is the fact that the 1991 Act "was primarily designed to 'override'

hostile Supreme Court decisions in order to make discrimination claims easier both to bring and to prove in federal courts" (*Duffield, supra*, 144 F.3d at 1189.) It is against this background that the court examined section 118 of the 1991 Act, which provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." (Pub.L. 102-166, § 118, reprinted in notes foll. 42 U.S.C. § 1981.) The *Duffield* court found the language "where appropriate and to the extent authorized by law" to be indicative of a congressional intent to outlaw compulsory arbitration [***10] of employee civil rights claims, despite the apparently pro-arbitration thrust of section 118. The court reasoned as follows: The term "where appropriate," must be considered in the context of the statute as a whole, which provided "for a vast strengthening of employees' rights" (*Duffield, supra*, 144 F.3d at p. 1191); "Where appropriate," as used in the Act, would appear to mean [*94] where arbitration furthers the purpose and objective of the Act -- by affording victims of discrimination an opportunity to present their claims in an alternative forum, a forum that they find desirable -- not by forcing an unwanted forum upon them." (*Id.* at p. 1194, italics omitted.)

Likewise, the *Duffield* court explained the phrase "to the extent authorized by law" in context: "As the Supreme Court has stated, we should 'examine initially' the statute 'with an eye toward determining Congress' perception of the law that it was shaping or reshaping.' [Citation.] The overwhelming weight of the law at the time Congress drafted section 118, and it was reported out of the House Education and Labor Committee, was to the effect that compulsory agreements to arbitrate Title VII claims [***11] were unenforceable. In other words, such agreements were not 'authorized by law.' To the contrary, the law at that time prohibited employers from compelling employees to arbitrate Title VII claims pursuant to collective bargaining agreements, 'in large part' because of the Court's recognition of the critical role that Congress envisioned for the independent federal judiciary in advancing Title VII's societal goal. (See *McDonald v. West Branch* (1984) 466 U.S. [284], 289, 104 S. Ct. 1799, 80 L. Ed. 2d 302; [*Alexander v. Gardner-Denver* [(1974)] 415 U.S. [36], 56." n2 (*Duffield, supra*, 144 F.3d at p. 1194, italics omitted.) This reading of the statute is especially supported by the legislative history, particularly the report of the House Committee on Education and Labor (the House report), which stated of the bill that was to become the 1991 Act: "The Committee emphasizes ... that the use of alternative dispute mechanisms is ... [**677] intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the committee believes that

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any agreement to submit disputed issues to arbitration, whether in the context of collective bargaining [***12] or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.* This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*.... The Committee does not intend this section to be used [*95] to preclude rights and remedies that would otherwise be available.' H.R.Rep. No. 40(I) at 97." (*Duffield, supra*, 144 F.3d at p. 1195, italics added by the *Duffield* court.)

n2 *Alexander v. Gardner-Denver, supra*, 415 U.S. 36 (*Gardner-Denver*), to which the *Duffield* court referred was summarized thus by the United States Supreme Court: "In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing a Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights." (*Gilmer v. Interstate/Johnson Lane Corporation* (1991) 500 U.S. 20, 33-34, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (*Gilmer*).) *McDonald v. West Branch, supra*, 466 U.S. 284, involved a similar statutory claim submitted to arbitration pursuant to a collective bargaining agreement, with a similar holding.

[***13]

Finally, the *Duffield* court reasoned that if the 1991 Act precluded the enforcement of mandatory employment arbitration agreements with respect to Title VII claims, the employee's FEHA claims must also be exempted from mandatory arbitration. Because " 'parallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme,' FEHA claims are arbitrable to the same extent as Title VII claims." (*Duffield, supra*, 144 F.3d at 1187, fn. 3.) In support of this proposition, the *Duffield* court cited *Kremer v. Chemical Const. Corp.* (1982) 456 U.S. 461, 477-478, 72 L. Ed. 2d 262, 102 S. Ct. 1883 which held that because state antidiscrimination laws were intended by Congress to be part of the federal antidiscrimination enforcement scheme, a judgment under New York's anti-employment discrimination statute precludes parties from relitigating the same issues in a Title VII action.

As the employer points out, the Ninth Circuit stands alone in its interpretation of the 1991 Act. (See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith* (1st Cir. 1999) 170 F.3d 1, 10 [specifically considering and rejecting *Duffield's* [***14] analysis]; *Seus v. John Nuveen & Co., Inc.* (3d Cir. 1998) 146 F.3d 175, 183 (*Seus*) [same]; *Koveleskie v. SBC Capital Markets, Inc.* (7th Cir. 1999) 167 F.3d 361, 365 [same].)

Aside from the fact that *Duffield* is a minority of one, we find its reasoning unpersuasive. First and foremost, it is difficult to believe that Congress would have chosen to ban mandatory employment arbitration by means of a clause that encourages the use of arbitration and has no explicit prohibitory language, when it could have simply and straightforwardly proscribed mandatory employment arbitration of Title VII claims. Second, the *Duffield* court's analysis of the phrase "to the extent authorized by law" would perhaps be credible but for the fact that, as the court acknowledged (*Duffield, supra*, 144 F.3d at 1189), the United States Supreme Court decided *Gilmer, supra*, 500 U.S. 20, shortly before the passage of the 1991 Act. *Gilmer* modified the *Gardner-Denver* decision referred to in the congressional legislative history quoted above. *Gilmer* held that an Age Discrimination in Employment Act (ADEA) claim was arbitrable under a pre-employment [***15] arbitration agreement between the plaintiff, a securities broker, and the New York Stock Exchange, with which he was required by his employer to register. The *Gilmer* court, in distinguishing its decision from the *Gardner-Denver* line of cases, did not rely on the fact that the latter was a Title VII [*96] case. Rather, the court emphasized that *Gardner-Denver* and its progeny were collective bargaining cases, and that there was "an important concern [for] the tension between collective representation and individual statutory rights" that was not present outside the collective bargaining context. (*Gilmer, supra*, 500 U.S. at p. 35.) The court also noted that the scope of the collective bargaining agreements in the *Gardner-Denver* line of cases did not seem to encompass the arbitration of statutory claims, and that those cases "were not decided under the FAA [Federal Arbitration Act], which ... reflects a 'liberal federal policy favoring arbitration agreements.'" (*Ibid.*)

The *Gilmer* court did not decide whether employment contracts are generally subject to the FAA, as explained below, nor definitively rule on whether Title VII claims were arbitrable. [***16] But at the very least, it was not at all clear at the time the 1991 Act was enacted that mandatory arbitration of Title VII claims (outside of the collective bargaining [***678] context) was prohibited according to judicial interpretation of Title VII, and in fact the contrary appeared to be more

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likely the case. The fact that the authors of the House report may have believed that section 118 of the 1991 Act was intended to incorporate a broad reading of the *Gardner-Denver* line of cases to preclude mandatory employment arbitration agreements of all types does not negate the fact that at the time Congress passed the 1991 Act, *Gilmer* was the law. Congress must be presumed to have been aware of *Gilmer* when it used the phrase "to the extent authorized by law."

Nor can the phrase "where appropriate" bear the weight given to it by the *Duffield* court. There is no reason to suppose that Congress believed mandatory arbitration agreements of civil rights claims to be inappropriate, provided that arbitration gives claimants the full opportunity to pursue such claims. Although the *Gilmer* court acknowledged that federal statutes may provide exceptions to the rule of arbitrability found [***17] in the FAA, it held that "questions of arbitrability must be addressed with healthy regard for the federal policy favoring arbitration." (*Gilmer, supra*, 500 U.S. at p. 26.) We cannot discern in the general phrase "where appropriate and to the extent authorized by law" a specific congressional intent to ban mandatory employment arbitration agreements.

We therefore conclude that nothing in the 1991 Act prohibits mandatory employment arbitration agreements that encompass state and federal antidiscrimination claims.

B. The Applicability of the FAA and the CAA

The Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) incorporates a strong federal policy of enforcing arbitration agreements, including [*97] agreements to arbitrate statutory rights. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, 1074-1075, 988 P.2d 67 (*Broughton*), and cases cited therein.) The employees claim, however, that employment contracts are not subject to the FAA. Their position is based on a reading of section 1 of the FAA, which, in defining the term "commerce," provides that "nothing herein shall apply to contracts of employment of seamen, [***18] railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1.) The employees contend that the language "engaged in foreign or interstate commerce" was intended to apply to all employees within the reach of the FAA. That is, section 1 effectively excludes all employment contracts because employees not engaged in interstate commerce would be beyond the legislative power of Congress and therefore beyond the FAA. This is essentially the position of the Ninth Circuit in *Craft v. Campbell Soup Co.* (9th Cir. 1998) 161 F.3d 1199. The *Craft* court, after reviewing the legislative history of section 1 of the FAA,

and the academic literature, rejected the position of the majority of courts that the phrase "engaged in foreign or interstate commerce" signifies only those directly engaged in interstate commerce, such as workers involved in the transportation industry. (161 F.3d at pp. 1202-1205; see also Finkin, *Workers' Contracts Under the United States Arbitration Act: An Essay in Historical Clarification* (1996) 17 Berk. J. Emp. & Lab. L. 282.) Several courts have since disagreed [***19] with *Craft* and sided with what continues to be the majority rule. (See *Koveleskie v. SBC Capital Markets, Inc.*, *supra*, 167 F.3d at pp. 363-364, and cases cited therein.) n3

n3 *Gilmer* did not address the issue of the applicability of the FAA to employment contracts, instead finding that *Gilmer's* arbitration agreement was not contained in an employment contract but in his security broker's registration application with the New York Stock Exchange, which falls outside the literal terms of section 1 of the FAA. (*Gilmer, supra*, 500 U.S. at p. 25, fn. 2.) We note that the United States Supreme Court has recently granted a writ of certiorari in *Circuit City Stores, Inc. v. Adams* (9th Cir. 2000) 194 F.3d 1070, certiorari granted May 22, 2000, U.S. [120 S. Ct. 2004, 146 L. Ed. 2d 955], apparently to address this question.

Whether the FAA applies to employment contracts presents a substantial question, but one we need not decide here. California law, [***20] like federal law, favors enforcement of valid arbitration agreements. (*Broughton, supra*, 21 Cal. 4th at p. 1074.) As we have [**679] observed: "Two years after the FAA was enacted, this state adopted its first modern arbitration statute (Stats. 1927, ch. 225), declaring arbitration agreements to be irrevocable and enforceable in terms identical to those used in section 2 of the federal act, and since that time California courts and its Legislature have 'consistently reflected a friendly policy toward the arbitration process.' [Citation.] That policy was expanded and clarified in the current arbitration statute which was adopted [*98] in 1961 (Stats. 1961, ch. 461, § 2 et seq.), and it continues to be the policy of this state." (*Keating v. Superior Court* (1982) 31 Cal. 3d 584, 601-602, 183 Cal. Rptr. 360, 645 P.2d 1192, disapproved on other grounds *sub. nom. Southland Corp. v. Keating* (1984) 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852.) Thus, under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation[n4] of any contract. [***21] (9 U.S.C. § 2; see also, Code Civ. Proc., § 1281.) In other words, under

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California law, as under federal law, an arbitration agreement may only be invalidated for the same reasons as other contracts. Moreover, the CAA, unlike the FAA, contains no exemption for employment contracts. n5 Indeed, Code of Civil Procedure section 1280, subdivision (a), defines the term "agreement," for purposes of the CAA, as including "agreements between employers and employees or between their respective representatives."

n4 "As has been pointed out, the 'revocation of a contract' ... is something of a misnomer. 'Offers are "revoked." ... Contracts are extinguished by rescission.' " (*Engalla v. Permanente Medical Group* (1997) 15 Cal. 4th 951, 973, 938 P.2d 903 (*Engalla*).) We will refer throughout to the "rescission" or simply "voiding" of an arbitration agreement.

n5 Former Code of Civil Procedure section 1280 contained a provision exempting contracts pertaining to labor (Stats. 1927, ch. 225, § 1, p. 404), but this exemption was interpreted narrowly by courts and was omitted, pursuant to the California Law Revision Commission's recommendation, from the 1961 statute. (See Recommendation and Study Relating to Arbitration (Dec. 1960) 3 Cal. Law Revision Com. Rep. (1961) pp. G-32-G-34.)

[***22]

There is, of course, one major difference between the FAA and the CAA. The former generally preempts state legislation that would restrict the enforcement of arbitration agreements (see *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687-688, 116 S. Ct. 1652, 134 L. Ed. 2d 902), while the CAA obviously does not prevent our Legislature from selectively prohibiting arbitration in certain areas. But the statute in question in this case, the FEHA, contains no such prohibition. "The unsuitability of a statutory claim for arbitration turns on [legislative] intent, which can be discovered in the text of the statute in question, its legislative history or in an 'inherent conflict' between arbitration and the [statute's] underlying purposes." (*Broughton, supra*, 21 Cal. 4th at p. 1075, first bracketed text added, citing *Gilmer, supra*, 500 U.S. at p. 26.) We find nothing in the language or the legislative history of the FEHA that suggests it was intended to prohibit arbitration, and the employees cite us to none. To be sure, the FEHA provides critically important protections against discrimination. But the imperative to enforce such protections does not, as a general [***23] matter, "inherently conflict" with arbitration. Assuming an adequate arbitral forum, we

agree with the Supreme Court that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights [*99] afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (*Mitsubishi Motors*).) n6

n6 Nothing in this opinion, however, should be interpreted as implying that an arbitration agreement can restrict an employee's resort to the Department of Fair Employment and Housing, the administrative agency charged with prosecuting complaints made under the FEHA, or that the Department would be prevented from carrying out its statutory functions by an arbitration agreement to which it is not a party. (See *Gilmer, supra*, 500 U.S. at p. 28 [employment arbitration agreement does not preclude employee's complaint to the U.S. Equal Employment Opportunity Commission].)

[***24]

In short, even assuming that the FAA does not apply to employment contracts, our inquiry into the enforceability of the arbitration [**680] agreement at issue in this case entails the same inquiry under the CAA as the FAA: Are there reasons, based on general contract law principles, for refusing to enforce the present arbitration agreement? In the present case, the answer turns on whether and to what extent the arbitration agreement was unconscionable or contrary to public policy, questions to which we now turn. n7

n7 The employees also argue that the arbitration agreements did not clearly put them on notice that they would be required to arbitrate statutory as well as contractual claims, and that they therefore did not knowingly waive the litigation of such claims. They point to the fact that the arbitration agreement refers principally to arbitration of wrongful termination claims "in violation of any express or implied condition, term or covenant of employment," which appears to refer to contractual rights, and only makes mention of encompassing a termination "otherwise in violation of any of my rights." (See *ante*, 2000 Cal. LEXIS 6120, *6) The Ninth Circuit has held that an employee cannot be compelled to arbitrate a statutory antidiscrimination claim unless the arbitration agreement expressly puts the employees on

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notice that these claims are included. (*Renteria v. Prudential Insurance Co. of America* (9th Cir. 1997) 113 F.3d 1104.) Other courts have disagreed. (*Seus, supra*, 146 F.3d at p. 183-184 & fn. 2; *Patterson v. Tenet Healthcare Inc.* (8th Cir. 1997) 113 F.3d 832, 838.) The question whether the arbitration agreement was sufficient to permit the employees to knowingly waive the right to a jury trial was not one of the issues on which the employees petitioned for review and is tangential to the principal claims on which we granted review. We decline to decide this issue. (See Cal. Rules of Court, rule 28 (e)(2) ["Only the issues set forth in the petition [for review] and answer or fairly included in them need be considered by the court"].)

[***25]

C. Arbitration of FEHA Claims

The United States Supreme Court's dictum that a party in agreeing to arbitrate a statutory claim, "does not forgo the substantive rights afforded by the statute but only submits to their resolution in an arbitral ... forum" (*Mitsubishi Motors Corp., supra*, 473 U.S. at p. 628) is as much prescriptive as it is descriptive. That is, it sets a standard by which arbitration agreements and practices are to be measured, and disallows forms [*100] of arbitration that in fact compel claimants to forfeit certain substantive statutory rights.

Of course, certain statutory rights can be waived. (*Bickel v. City of Piedmont* (1997) 16 Cal. 4th 1040, 1048-1049, 946 P.2d 427, abrogated with regard to its construction of the Permit Streamlining Act [Stat. 1998, ch. 283, § 5].) But arbitration agreements that encompass *unwaivable* statutory rights must be subject to particular scrutiny. This unwaivability derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility [***26] for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." "Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced." (*In re Marriage of Fell* (1997) 55 Cal. App. 4th 1058, 1065.) Second, Civil Code section 3513 states, "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (See *In re Marriage of Fell, supra*, 55 Cal. App. 4th at p. 1064; *Bickel v. City of Piedmont, supra*, 16

Cal. 4th at pp. 1048-1049 [rights under statute may be waived by agreement when public benefit is incidental to the legislation's primary purpose].)

There is no question that the statutory rights established by the FEHA are "for a public reason." "The broad goal of the FEHA is set forth at [Government Code] section 12920, which states in pertinent part: 'It is hereby declared as the public policy of this [***27] state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex or age.' " (*Rojo v. Kliger* (1990) 52 Cal. 3d 65, 72-73, 276 Cal. Rptr. 130, 801 P.2d 373.) As we stated in *Rojo*: "The public policy against [**681] sex discrimination and sexual harassment in employment, moreover, is plainly one that 'inures to the benefit of the public at large rather than to a particular employer or employee.' [Citation.] No extensive discussion is needed to establish the fundamental public interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are all demeaned." (*Id.* at p. 90, italics omitted; see also *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 897, 941 P.2d 1157 [recognizing that the FEHA's age discrimination provisions similarly incorporate fundamental public policy].) It is indisputable that an employment contract that required employees to waive their rights under the FEHA [***28] [*101] to redress sexual harassment or discrimination would be contrary to public policy and unlawful.

In light of these principles, it is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA. We suggested as much in our recent discussion of rights derived from the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), which the Legislature had declared to be unwaivable. In determining that the attorney fees and cost-shifting provisions provided by that statute, which advanced the statute's goals, should be implicitly incorporated into the arbitration agreement at issue, we stated that parties agreeing to arbitrate statutory claims must be deemed to "consent to abide by the substantive and remedial provisions of the statute. [Citation.] Otherwise, a party would not be able to fully 'vindicate [his or her] statutory cause of action in the arbitral forum.' " (*Broughton, supra*, 21 Cal. 4th at p. 1087, quoting *Gilmer, supra*, 500 U.S. at pp. 27-28.)

The employees argue that arbitration contains a number of shortcomings that will prevent the vindication of their rights [***29] under the FEHA. In determining whether arbitration is considered an adequate forum for securing an employee's rights under FEHA, we begin with the extensive discussion of this question in *Cole v.*

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Burns Intern. Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465 (*Cole*), in the context of Title VII claims. In that case, the employee, a security guard, filed Title VII claims against his former employer alleging racial discrimination and harassment. He had signed an arbitration form committing himself to arbitrate such claims.

The court began its analysis by acknowledging the difficulties inherent in arbitrating employees' statutory rights, difficulties not present in arbitrating disputes arising from employee rights under collective bargaining agreements. "The reasons for this hesitation to extend arbitral jurisprudence from the collective bargaining context are well-founded. The fundamental distinction between contractual rights, which are created, defined, and subject to modification by the same private parties participating in arbitration, and statutory rights, which are created, defined, and subject to modification only by Congress and the courts, suggests the need for [***30] a public, rather than private, mechanism of enforcement for statutory rights." (*Cole, supra*, 105 F.3d at p. 1476.) Although *Gilmer, supra*, 500 U.S. 20, as discussed above, had held that statutory employment rights outside of the collective bargaining context are arbitrable, the *Cole* court recognized that *Gilmer*, both explicitly and implicitly, placed limits on the arbitration of such rights. "Obviously, *Gilmer* cannot be read as holding that an arbitration agreement [*102] is enforceable no matter what rights it waives or what burdens it imposes. [Citation.] Such a holding would be fundamentally at odds with our understanding of the rights accorded to persons protected by public statutes like the ADEA and Title VII. The beneficiaries of public statutes are entitled to the rights and protections provided by the law." (*Cole*, 105 F.3d at p. 1482.)

The *Cole* court noted that "in *Gilmer*, the employee raised four challenges to arbitration under the New York Stock Exchange Rules, claiming that arbitration impermissibly diminished his ability to effectively vindicate his statutory rights. First, *Gilmer* challenged the impartiality of the arbitrators. [***31] [Citation.] The Court rejected this challenge, finding that the NYSE Rules themselves provide protection against biased arbitrators [**682] and that judicial review under the FAA would allow the courts to set aside any decision in which there 'was evident partiality or corruption in the arbitrators.' [Citation.] Second, *Gilmer* objected that the limited discovery allowed in arbitration would unfairly hamper his ability to prove discrimination. [Citation.] Again, the Court rejected this claim, pointing out that the NYSE Rules provided for discovery and that agreements to arbitrate are desirable precisely because they trade the procedures of the federal courts for the simplicity, informality, and expedition of arbitration. [Citation.]

Third, *Gilmer* objected that, because arbitrators do not always issue written awards, public knowledge of discrimination, appellate review, and the development of the law would be undermined by arbitration of his statutory claims. [Citation.] This claim too was rejected because, in fact, the NYSE Rules require that arbitration awards be in writing and allow public access to awards. [Citation.] Finally, *Gilmer's* objection that arbitration did not provide [***32] for equitable relief was rejected because the NYSE Rules did not restrict the types of relief available." (*Cole, supra*, 105 F.3d at pp. 1481-1482.)

Based on *Gilmer, supra*, 500 U.S. 20, and on the basic principle of nonwaivability of statutory civil rights in the workplace, the *Cole* court formulated five minimum requirements for the lawful arbitration of such rights pursuant to a mandatory employment arbitration agreement. Such an arbitration agreement is lawful if it "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. Thus, an employee who is made to use arbitration as a condition of employment 'effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" (*Cole, supra*, 105 F.3d at p. 1482, italics omitted.)

[*103] Except for the neutral-arbitrator requirement, which we have held is essential to ensuring [***33] the integrity of the arbitration process (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal. 3d 807, 825, 171 Cal. Rptr. 604, 623 P.2d 165 (*Scissor-Tail*), and is not at issue in this case, the employees claim that the present arbitration agreement fails to measure up to the *Cole* requirements enumerated above. We consider below the validity of those requirements and whether they are met by the employer's arbitration agreement. n8

n8 We emphasize at the outset that our general endorsement of the *Cole* requirements occurs in the particular context of mandatory employment arbitration agreements, in order to ensure that such agreements are not used as a means of effectively curtailing an employee's FEHA rights. These requirements would generally not apply in situations in which an employer and an employee knowingly and voluntarily enter into an arbitration agreement after a dispute has arisen. In those cases, employees are free to determine what trade-offs between arbitral efficiency and formal procedural

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protections best safeguard their statutory rights. Absent such freely negotiated agreements, it is for the courts to ensure that the arbitration forum imposed on an employee is sufficient to vindicate his or her rights under the FEHA.

employer's interpretation, the final sentence -- "I understand that I shall not be entitled to any other remedy" -- makes clear that the damages limitation was all-encompassing. We conclude this damages limitation is contrary to public policy and unlawful.

[***34]

1. Limitation of Remedies

The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed. We suggested as much in *Broughton* when we held that an agreement to arbitrate a statutory claim implicitly incorporates "the substantive and remedial provisions of the statute" so that parties to the arbitration would be able to vindicate their "statutory cause of action in the arbitral forum." (*Broughton*, *supra*, 21 Cal. 4th at p. 1087.) Similarly, in *Graham Oil Co. v. Arco Products Co.* (9th Cir. 1995) 43 F.3d 1244 (*Graham Oil*), the court refused to enforce an arbitration agreement between a petroleum franchiser and franchisee that did not allow for the punitive damages and attorney fees remedies available under the Petroleum Marketing Practices Act, because both of these remedies are "important to the effectuation of the PMPA's policies." (43 F.3d at p. 1248.)

As stated, the arbitration agreement in this case provides in part: "I and Employer [**683] further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions [***35] or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief." (See ante, 2000 Cal. LEXIS 6120, *6.) The employees claim that the agreement compels them to arbitrate statutory claims without affording the full range of statutory remedies, including punitive damages and attorneys fees to a prevailing plaintiff, available under [*104] the FEHA. (See *Commodore Home Systems Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr. 270, 649 P.2d 912; Gov. Code, § 12965, subd. (b).)

The employer does not contest that the damages limitation would be unlawful if applied to statutory claims, but instead contends that the limitation applies only to contract claims, pointing to the language in the penultimate sentence that refers to "my exclusive remedy for violation of the terms, conditions or covenants of employment" Both the trial court and the Court of Appeal correctly rejected this interpretation. [***36] While the above quoted language is susceptible to the

2. Adequate Discovery

The employees argue that employers typically have in their possession many of the documents relevant for bringing an employment discrimination case, as well as having in their employ many of the relevant witnesses. The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights. They cite a report by the Department of Labor's Commission on the Future of Worker-Management Relations, chaired by former Secretary of Labor John Dunlop and including employee and employer representatives, which concludes that "if private arbitration is to serve as a legitimate form of private enforcement of public employment law," it must among other things provide "a fair and simple method by which the employee can secure the necessary information to present his or her claim." (Com. on the Future [***37] of Worker-Management Relations, Reported Recommendations (1994) p. 31 (hereafter Dunlop Commission Report).) n9

n9 The Dunlop Commission Report, anticipating the safeguards prescribed by *Cole*, *supra*, 105 F.3d 1465, stated that "both employers and employees agree that if private arbitration is to serve as a legitimate form of private enforcement of public employment law, these systems must provide: [P] a neutral arbitrator who knows the laws in question and understands the concerns of the parties; [P] a fair and simple method by which the employee can secure the necessary information to present his or her claim; [P] a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees; [P] the right to independent representation if the employee wants it; [P] a range of remedies equal to those available through litigation; [P] a written opinion by the arbitrator explaining the rationale for the result; and [P] sufficient judicial review to ensure that the result is consistent with the governing laws." (Dunlop Com. Rep., *supra*, at p. 31.)

[***38]

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We agree that adequate discovery is indispensable for the vindication of FEHA claims. The employer does not dispute the point, but contends that the [*105] arbitration agreement at issue in this case does provide for adequate discovery by incorporating by reference all the rules set forth in the CAA. Adequate provisions for discovery are set forth in the CAA at Code of Civil Procedure section 1283.05, subdivision (a). **n10**

n10 Code of Civil Procedure section 1283.05, subdivision (a), states: "To the extent provided in Section 1283.1 depositions may be taken and discovery obtained in arbitration proceedings as follows: [P] (a) After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of, and Article 3 (commencing with Section 2016) of Chapter 3 of, Title 3 of Part 4 of this code, as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section." Subdivision (e) states that depositions may only be taken with the approval of the arbitrator.

[***39]

[**684] The employees point out that the provisions of Code of Civil Procedure section 1283.05 are only "conclusively deemed to be incorporated into" (Code Civ. Proc., § 1283.1) an agreement to arbitrate under section 1283.1 if the dispute arises "out of ... any injury to, or death of, a person caused by the wrongful act or neglect of another" (*id.*), and argues that this language does not apply to FEHA claims. They further argue that because adequate discovery is not guaranteed under the arbitration agreement, FEHA claims should not be deemed arbitrable.

We note that one Court of Appeal case has held that a FEHA sexual harassment claim is considered an "injury to ... a person" within the meaning of Code of Civil Procedure section 1283.1, subdivision (a). (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 1005, disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644,

664, 863 P.2d 179; but see *Holmes v. General Dynamics Corp.* (1993) 17 Cal. App. 4th 1418, 1436-1437 [contractual wrongful termination [***40] action held not to be a "personal injury" within the meaning of Civ. Code, § 3291].) The scope of this provision is not before us. But even assuming that the claim in this case is not the sort of injury encompassed by section 1283.1, subdivision (a), subdivision (b) of that section permits parties to agree to incorporate section 1283.05. We infer from subdivision (b), and from the fundamentally contractual nature of arbitration itself (see (*Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 831, 982 P.2d 229), that parties incorporating the CAA into their arbitration agreement are also permitted to agree to something *less than* the full panoply of discovery provided in section 1283.05. We further infer [*106] that when parties agree to arbitrate statutory claims, they also implicitly agree, absent express language to the contrary, to such procedures as are necessary to vindicate that claim. (See *Broughton, supra*, 21 Cal. 4th at pp. 1086-1087.) As discussed above, it is undisputed that some discovery is often necessary for vindicating a FEHA claim. Accordingly, whether or not the employees in this case are entitled to the full [***41] range of discovery provided in Code of Civil Procedure section 1283.05, they are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review pursuant to Code of Civil Procedure section 1286.2. **n11**

n11 We recognize, of course, that a limitation on discovery is one important component of the "simplicity, informality and expedition of arbitration." (*Gilmer, supra*, 500 U.S. at p. 31.) The arbitrator and reviewing court must balance this desirable simplicity with the requirements of the FEHA in determining the appropriate discovery, absent more specific statutory or contractual provisions.

Therefore, although the employees are correct that they are entitled to sufficient discovery as a means of vindicating their sexual discrimination claims, we hold that the employer, by agreeing [***42] to arbitrate the FEHA claim, has already impliedly consented to such discovery. Therefore, lack of discovery is not grounds for holding a FEHA claim inarbitrable.

3. Written Arbitration Award and Judicial Review

The employees argue that lack of judicial review of arbitration awards makes the vindication of FEHA rights

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in arbitration illusory. They point to *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 832 P.2d 899 (*Moncharsh*), in which we held that an arbitration award may not be vacated for errors of law on the face of the decision, even if these errors would cause substantial injustice. (*Moncharsh*, *supra*, 3 Cal. 4th at pp. 27-28.) Arbitration, they argue, cannot be an adequate means of resolving a FEHA [**685] claim if the arbitrator is essentially free to disregard the law.

As the United States Supreme Court has stated: "Although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue. (*Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 232, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (*McMahon*).) In [***43] *Moncharsh*, we acknowledged that judicial review may be appropriate when "granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights." (*Moncharsh*, *supra*, 3 Cal. 4th at p. 32; see also *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal. 4th 269, 276-277, 914 P.2d 193.)

[*107] We are not faced in this case with a petition to confirm an arbitration award, and therefore have no occasion to articulate precisely what standard of judicial review is "sufficient to ensure that arbitrators comply with the requirements of [a] statute." (*McMahon*, *supra*, 482 U.S. at p. 232.) All we hold today is that in order for such judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based. While such written findings and conclusions are not required under the CAA (Code Civ. Proc., § 1283.4; *Baldwin Co. v. Rainey Construction Co.* (1991) 229 Cal. App. 3d 1053, 1058, fn. 3, 280 Cal. Rptr. 499), [***44] nothing in the present arbitration agreement precludes such written findings, and to the extent it applies to FEHA claims the agreement must be interpreted to provide for such findings. In all other respects, the employees' claim that they are unable to vindicate their FEHA rights because of inadequate judicial review of an arbitration award is premature. (See *Broughton*, *supra*, 21 Cal. 4th at p. 1086.)

4. Employee Not to Pay Unreasonable Costs and Arbitration Fees

The employees point to the fact that the agreement is governed by Code of Civil Procedure section 1284.2, which provides that "each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or imposed by the neutral arbitrator."

They argue that requiring them to share the often substantial costs of arbitrators and arbitration effectively prevents them from vindicating their FEHA rights.

In considering the employees claim, we start with the extensive discussion of this issue in *Cole*, *supra*, 105 F.3d at pages 1483-1485. The *Cole* court held [***45] that it was unlawful to require an employee who is the subject of a mandatory employment arbitration agreement to have to pay the costs of arbitration. The issue in that case was an arbitration agreement that was to be governed by the rules of the American Arbitration Association (AAA). Under these rules, the court noted that the employee may well be obliged to pay arbitrators' fees ranging from \$ 500 to \$ 1,000 per day or more, a \$ 500 filing fee, and administrative fees of \$ 150 per day, in addition to room rental and court reporter fees. (*Cole*, *supra*, 105 F.3d at p. 1484 & fn. 12.) The court's reasons for requiring employer-financed arbitration are worth quoting at length:

"In *Gilmer* [*supra*, 500 U.S. 20], the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator [*108] assigned to hear their statutory claims. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her [***46] or his case. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.

[**686] "There is no doubt that parties appearing in federal court may be required to assume the cost of filing fees and other administrative expenses, so any reasonable costs of this sort that accompany arbitration are not problematic. However, if an employee like *Cole* is required to pay arbitrators' fees ranging from \$ 500 to \$ 1,000 per day or more, ... in addition to administrative and attorney's fees, is it likely that he will be able to pursue his statutory claims? We think not. (See David W. Ewing, *Justice On The Job: Resolving Grievances in the Nonunion Workplace* (Harvard Business School Press 1989) at 291 (quoting corporate director of industrial relations at Northrop explaining why Northrop pays arbitrators' fees: 'We bear the cost of the arbitration for the very practical reason that most of the [***47] employees who seek arbitration of their grievances simply couldn't afford it if we did not.'). There is no indication in AAA's rules that an arbitrator's fees may be reduced or waived in cases of financial hardship. These

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fees would be prohibitively expensive for an employee like Cole, especially after being fired from his job, and it is unacceptable to require Cole to pay arbitrators' fees, because such fees are unlike anything that he would have to pay to pursue his statutory claims in court.

"Arbitration will occur in this case only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue his claims in court without having to pay for the services of a judge. In such a circumstance -- where arbitration has been imposed by the employer and occurs only at the option of the employer -- arbitrators' fees should be borne solely by the employer." (*Cole, supra*, 105 F.3d at pp. 1484-1485, fns. and italics omitted.)

The Tenth and Eleventh Circuit Courts of Appeal have adopted a position on arbitration fees for statutory employment claims essentially in accord with *Cole*. (*Shankle v. B-G Maintenance Management of Colorado, Inc.* (10th Cir. 1999) 163 F.3d 1230, 1234-1235; [***48] *Paladino v. Avnet Computer Technologies, Inc.* (11th Cir. 1998) 134 F.3d 1054, 1062 (conc. opn. of Cox, J., joined by Tjoflat, J.).) In *Shankle*, the court estimated that the employee would have to pay between \$ 1875 and \$ 5,000 in forum costs to resolve his claim. As the court stated: "Mr. Shankle could not afford such a fee, and it is unlikely other similarly situated employees could either. The Agreement thus placed Mr. Shankle between the proverbial rock and a hard place -- it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum. [Citation.] Essentially, B-G Maintenance required Mr. Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws." (*Shankle, supra*, 163 F.3d at pp. 1234-1235.)

Although we have not addressed this issue, we quoted *Cole, supra*, 105 F.3d 1465, on this precise point in *California Teachers Assn. v. State of Cal.* (1999) 20 Cal. 4th 327, 355, 975 P.2d 622 [***49] (*California Teachers Assn.*). We considered in that case whether it was constitutionally permissible to statutorily require a teacher who loses an administrative challenge to his dismissal to pay one-half of the administrative law judge's fees. As we stated: "Although the court's conclusion in *Cole* did not rest upon the requirements of procedural due process, the court was required to consider whether arbitration served as a reasonable substitute for a judicial forum. If employees in the private sector cannot be compelled to pay the cost of private arbitrators when seeking to vindicate statutory

rights in the arbitral forum, then certainly public employees seeking to vindicate constitutionally based interests in an official quasi-judicial forum cannot be required to compensate the state for the cost of the administrative law judge. As in *Cole*, such fees would be unlike anything teachers would have to pay to protect their constitutional interests in court." (*Id.* at p. 356.) Our holding in *California Teachers Assn.* serves to confirm the principle inherent in *Cole* that statutory or constitutional rights may be transgressed as much by the imposition [***50] of undue costs as by outright denial.

[**687] The employer argues that at least two federal circuit courts of appeals have not followed what it terms *Cole's* "preemptive approach" to the question of arbitration costs. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, *supra*, 170 F.3d 1 (*Rosenberg*), the court considered a challenge to an arbitration agreement encompassing Title VII claims, in which the New York Stock Exchange (NYSE) rules of arbitration were similar to those approved in *Gilmer*. Amici curiae for the employee argued that the NYSE [*110] arbitration procedures were inadequate for Title VII claims because the arbitrators often refused to award statutory attorney fees and because of the possibility of charging forum fees as high as \$ 3,000 per day. The court noted that it was not "the usual situation that a Plaintiff is asked to bear forum fees" under the NYSE arbitration system, and that under NYSE rules "it is standard practice ... for employers to pay all of the arbitrators' fees." (*Rosenberg, supra*, 170 F.3d at p. 16.) The court further concluded that if "unreasonable" fees were imposed on the employees, this issue could [***51] be raised in a reviewing court after arbitration was completed. (*Ibid.*; accord, *Koveleskie v. SBC Capital Markets, Inc.*, *supra*, 167 F.3d 361, 366; see also *Williams v. Cigna Financial Advisors Inc.* (5th Cir. 1999) 197 F.3d 752.)

The approaches of the courts in *Cole, supra*, 105 F.3d 1465, and *Rosenberg, supra*, 170 F.3d 1, are, for the most part, reconcilable. In *Rosenberg*, the arbitration system in question generally did not impose forum fees, and under those circumstances it was reasonable to conclude that imposition of costs that were inconsistent with statutory protections could be corrected through judicial review. We disagree with the employer that *Rosenberg* should be broadly interpreted to mean that the question of whether an employee is charged excessive forum fees should be decided only after arbitration has been completed. As we held in *California Teachers Assn.*, it is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process. (*California Teachers Assn., supra*, 20 Cal. 4th at [***52] pp. 357-358.) So with the arbitration of statutory claims; if it is possible that the employee will

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be charged substantial forum costs, it is an insufficient judicial response to hold that he or she *may* be able to cancel these costs at the end of the process through judicial review. Such a system still poses a significant risk that employees will have to bear large costs to vindicate their statutory right against workplace discrimination, and therefore chills the exercise of that right. Because we conclude the imposition of substantial forum fees is contrary to public policy, and is therefore grounds for invalidating or "revoking" an arbitration agreement and denying a petition to compel arbitration under Code of Civil Procedure sections 1281 and 1281.2, we hold that the cost issues should be resolved not at the judicial review stage but when a court is petitioned to compel arbitration.

Accordingly, consistent with the majority of jurisdictions to consider this issue, we conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally [***53] require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to [*111] bring the action in court. This rule will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer.

Three principal objections have been raised to imposing the forum costs of arbitration on the employer. The first is that such a system will compromise the neutrality of the arbitrator. (*Cole, supra*, 105 F.3d at p. 1485.) As the *Cole* court recognized, however, it is not the fact that the employer may pay an arbitrator that is most likely to induce bias, but rather the fact that the employer is a "repeat player" in the arbitration system who is more likely to be a source of business for the arbitrator. (*Ibid.*) Furthermore, as the *Cole* court recognized, there are sufficient institutional safeguards, such as scrutiny by the plaintiff's bar and appointing agencies [**688] like the AAA, to protect against corrupt arbitrators. (*Ibid.*)

The second objection is that although employees may have large forum [***54] costs, the cost of arbitration is generally smaller than litigation, so that the employee will realize a net benefit from arbitration. Although it is true that the costs of arbitration is on average smaller than that of litigation, it is also true that amount awarded is on average smaller as well. (See Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L.Rev. 33, 60-61 (Schwartz).) The payment of large, fixed, forum costs, especially in the face of expected meager awards, serves as a significant deterrent to the pursuit of FEHA claims.

To be sure, it would be ideal to devise a method by which the employee is put in exactly the same position in arbitration, costwise, as he or she would be in litigation. But the factors going into that calculus refuse to admit ready quantification. Turning a motion to compel arbitration into a mini-trial on the comparative costs and benefits of arbitration and litigation for a particular employee would not only be burdensome on the trial court and the parties, but would likely yield speculative answers. Nor would there be an advantage to apportioning [***55] arbitration costs at the conclusion of the arbitration rather than at the outset. Without clearly articulated guidelines, such a postarbitration apportionment would create a sense of risk and uncertainty among employees that could discourage the arbitration of meritorious claims.

Moreover, the above rule is fair, inasmuch as it places the cost of arbitration on the party that imposes it. Unlike the employee, the employer is [*112] in a position to perform a cost/benefit calculus and decide whether arbitration is, overall, the most economical forum. Nor would this rule necessarily present an employer with a choice between paying all the forum costs of arbitration or forgoing arbitration altogether and defending itself in court. There is a third alternative. Because this proposed rule would only apply to mandatory, predispute employment arbitration agreements, and because in many instances arbitration will be considered an efficient means of resolving a dispute both for the employer and the employee, the employer seeking to avoid both payment of all forum costs and litigation can attempt to negotiate postdispute arbitration agreements with its aggrieved employees.

The third objection to requiring [***56] the employer to shoulder most of the costs of arbitration is that it appears contrary to statute. As noted, Code of Civil Procedure section 1284.2 provides that unless the arbitration agreement provides otherwise, each party to the arbitration must pay his or her pro rata share of arbitration costs. But section 1284.2 is a default provision, and the agreement to arbitrate a statutory claim is implicitly an agreement to abide by the substantive remedial provisions of the statute. (*Broughton, supra*, 21 Cal. 4th at pp. 1086-1087.) As noted, FEHA rights are unwaivable. Furthermore, under the FEHA, private civil actions by employees are the primary means of enforcing employees' rights to be free of unlawful discrimination, once the Department of Fair Employment and Housing determines it will not file a complaint against the employer. (Gov. Code, § 12965, subd. (b).) The statute further provides that "the superior, municipal, and justice courts of the State of California shall have jurisdiction of such actions." (*Ibid.*) While we do not interpret this language providing access to courts

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as precluding arbitration [***57] of FEHA claims, or even the imposition of mandatory employment arbitration agreements, we do construe it as providing further support for the above stated principle that any such arbitration must be an adequate substitute for litigation. We do not believe the FEHA contemplates that employees may be compelled to resolve their antidiscrimination claims in a forum in which they must pay for what is the equivalent of the judge's time and the rental of the courtroom.

Moreover, at the time the arbitration statute was enacted in 1927, and revised and reenacted in 1961, statutory employment antidiscrimination claims were virtually nonexistent. There is little reason to believe [**689] that the Legislature that passed section 1284.2 contemplated a situation in which the intended beneficiary of such an antidiscrimination statute would be compelled to pay large arbitration costs as a condition of pursuing an antidiscrimination claim. Thus, we construe the FEHA as implicitly prohibiting such costs, a prohibition which the default provisions of [*113] section 1284.2 do not displace. (See *Broughton, supra*, 21 Cal. 4th at p. 1087.)

We therefore hold that a mandatory employment arbitration [***58] agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration. Accordingly, we interpret the arbitration agreement in the present case as providing, consistent with the above, that the employer must bear the arbitration forum costs. The absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement. (See *Cole, supra*, 105 F.3d at pp. 1485-1486.)

D. Unconscionability of the Arbitration Agreement

1. General Principles of Unconscionability

In the previous section of this opinion, we focused on the minimum requirements for the arbitration of unwaivable statutory claims. In this section, we will consider objections to arbitration that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the type of claim being arbitrated. These objections fall under the rubric of "unconscionability."

We explained the judicially created doctrine of unconscionability in *Scissor-Tail, supra*, 28 Cal. 3d 807. Unconscionability [***59] analysis begins with an inquiry into whether the contract is one of adhesion. (*Scissor-Tail*, 28 Cal. 3d at pp. 817-819.) "The term

[contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781.) If the contract is adhesive, the court must then determine whether "other factors are present which, under established legal rules -- legislative or judicial -- operate to render it [unenforceable]." (*Scissor-Tail*, 28 Cal. 3d at p. 820, fn. omitted.) "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second -- a principle of equity applicable to all contracts generally -- is that a contract or provision, even if consistent with the reasonable expectations of the parties, will [***60] be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'" (*Ibid.*) Subsequent cases have referred to both the "reasonable expectations" and the "oppressive" limitations as being aspects of unconscionability. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 486-487, 186 Cal. Rptr. 114 (*A & M Produce Co.*)).

[*114] In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. (*Perdue v. Crocker National Bank* (1985) 38 Cal. 3d 913, 925, 216 Cal. Rptr. 345, 702 P.2d 503.) As section 1670.5, subdivision (a) states: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Because unconscionability is a reason for refusing to enforce contracts generally, it is also a [***61] valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which, as noted, provides that arbitration agreements are "valid, [**690] irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (19 U.S.C. § 2), recognized that "generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements" (*Doctor's Associates, Inc. v. Casarotto, supra*, 517 U.S. 681, 687, italics added.)

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As explained in *A & M Produce Co.*, *supra*, 135 Cal. App. 3d 473, "unconscionability has both a 'procedural' and a 'substantive' element," the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results. (*Id.* at pp. 486-487.) "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce [***62] a contract or clause under the doctrine of unconscionability." (*Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal. App. 4th at p. 1533 (*Stirlen*).) But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." (15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227; see also *A & M Produce Co.*, *supra*, 135 Cal. App. 3d at p. 487.) In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

2. Unconscionability and Mandatory Employment Arbitration

Applying the above principles to this case, we first determine whether the arbitration agreement is adhesive. There is little dispute that it [*115] is. It was imposed on employees as a condition of employment and there was no opportunity to negotiate.

Moreover, in the case of preemployment arbitration contracts, the economic pressure exerted [***63] by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement. While arbitration may have its advantages in terms of greater expedition, informality, and lower cost, it also has, from the employee's point of view, potential disadvantages: waiver of a right to a jury trial, limited discovery, and limited judicial review. Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a "repeat player" in the arbitration system. (Bingham, *Employment Arbitration: The Repeat Player Effect* (1997) 1 Employee Rts. & Employment Policy J. 189; Schwartz, *supra*, 1997 Wis. L.Rev. at pp. 60-61.) It is perhaps for this reason that it is almost invariably the employer who seeks to compel arbitration. (See Schwartz, *supra*, 1997 Wis. L.Rev. at pp. 60-63.)

Arbitration is favored in this state as a voluntary [***64] means of resolving disputes, and this voluntariness has been its bedrock justification. As we stated recently: "Policies favoring the efficiency of private arbitration as a means of dispute resolution must sometimes yield to its fundamentally contractual nature, and to the attendant requirement that arbitration shall proceed as the parties themselves have agreed." (*Vandenberg v. Superior Court*, *supra*, 21 Cal. 4th at p. 831, italics omitted.) Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement. "Private arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration, however, may also become an instrument of injustice imposed on a 'take it or leave it' basis. The courts must distinguish the former [**691] from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness." (*Engalla*, *supra*, 15 Cal. 4th at p. 989 (conc. opn. [***65] of Kennard, J.)) With this in mind, we turn to the employees' specific unconscionability claims.

Aside from FEHA issues discussed in the previous part of this opinion, the employees contend that the agreement is substantively unconscionable because it requires only employees to arbitrate their wrongful termination [*116] claims against the employer, but does not require the employer to arbitrate claims it may have against the employees. In asserting that this lack of mutuality is unconscionable, they rely primarily on the opinion of the Court of Appeal in *Stirlen*, *supra*, 51 Cal. App. 4th 1519. The employee in that case was hired as a vice president and chief financial officer; his employment contract provided for arbitration " 'in the event there is any dispute arising out of [the employee's] employment with the Company,' " including "the termination of that employment." (*Stirlen*, *supra*, 51 Cal. App. 4th at p. 1528.) The agreement specifically excluded certain types of disputes from the scope of arbitration, including those relating to the protection of the employer's intellectual and other property and the enforcement of a post-employment covenant not to compete, [***66] which were to be litigated in state or federal court. (*Ibid.*) The employee was to waive the right to challenge the jurisdiction of such a court. (*Ibid.*) The arbitration agreement further provided that the damages available would be limited to " 'the amount of actual damages for breach of contract, less any proper offset for mitigation of such damages.' " (*Stirlen*, 51 Cal. App. 4th at p. 1529.) When an arbitration claim was filed, payments of any salary or benefits were to cease "

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'without penalty to the Company,' " pending the outcome of the arbitration. (*Stirlen*, 51 Cal. App. 4th at p. 1528.)

The *Stirlen* court concluded that the agreement was one of adhesion, even though the employee in question was a high-level executive, because of the lack of opportunity to negotiate. (*Stirlen*, *supra*, 51 Cal. App. 4th at pp. 1533-1534.) The court then concluded that the arbitration agreement was substantively unconscionable. (*Stirlen*, 51 Cal. App. 4th at p. 1541.) The court relied in part on *Saika v. Gold* (1996) 49 Cal. App. 4th 1074 (*Saika*), in which the court had refused to enforce a provision in an arbitration agreement between a doctor and a patient that would allow [***67] a "trial de novo" if the arbitrator's award was \$ 25,000 or greater. The *Saika* court reasoned that such a clause was tantamount to making arbitration binding when the patient lost the arbitration but not binding if the patient won a significant money judgment. (*Saika*, *supra*, 49 Cal. App. 4th at pp. 1079-1080.) *Stirlen* concluded that the Supercuts agreement lacked even the "modicum of bilaterality" that was present in *Saika*. (*Stirlen*, *supra*, 51 Cal. App. 4th at p. 1541.) The employee pursuing claims against the employer had to bear not only with the inherent shortcomings of arbitration -- limited discovery, limited judicial review, limited procedural protections -- but also significant damage limitations imposed by the arbitration agreement. (*Stirlen*, 51 Cal. App. 4th at pp. 1537-1540.) The employer, on the other hand, in pursuing its claims, was not subject to these disadvantageous limitations and had written into the agreement special advantages, such as a waiver of jurisdictional objections by the employee if sued by the employer. (*Stirlen*, 51 Cal. App. 4th at pp. 1541-1542.)

[*117] The *Stirlen* court did not hold that all lack of mutuality in a contract of adhesion was invalid. "We agree a contract [***68] can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable. [Citation.] However, unless the 'business realities' that create the special need for such an advantage are explained in the contract itself, which is not the case here, it must be factually established." (*Stirlen*, *supra*, 51 Cal. App. 4th at p. 1536.) The *Stirlen* court found no "business reality" to justify the lack of mutuality, concluding that the terms of the arbitration [***69] clause were ""so extreme as to appear unconscionable according to the mores and business practices of the time and place."" (*Stirlen*, 51 Cal. App. 4th at p. 1542.)

The court in *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal. App. 4th 1322 (*Kinney*), came to the same conclusion with respect to an arbitration agreement to compel the employee, but not the employer, to submit claims to arbitration. As the *Kinney* court stated: "Faced

with the issue of whether a unilateral obligation to arbitrate is unconscionable, we conclude that it is. The party who is required to submit his or her claims to [***69] arbitration [forgoes] the right, otherwise guaranteed by the federal and state Constitutions, to have those claims tried before a jury. (U.S. Const., Amend. VII; Cal. Const., art. I, § 16.) Further, except in extraordinary circumstances, that party has no avenue of review for an adverse decision, even if that decision is based on an error of fact or law that appears on the face of the ruling and results in substantial injustice to that party. [Citation.] By contrast, the party requiring the other to waive these rights retains all of the benefits and protections the right to a judicial forum provides. Given the basic and substantial nature of the rights at issue, we find that the unilateral obligation to arbitrate is itself so one-sided as to be substantively unconscionable." (*Kinney*, *supra*, 70 Cal. App. 4th at p. 1332.) The court also found that certain terms of the arbitration agreement -- limits to discovery and caps on compensatory and punitive damages -- "heightened" its unconscionability. (*Ibid.*)

We conclude that *Stirlen* and *Kinney* are correct in requiring this "modicum of bilaterality" in an arbitration agreement. Given the disadvantages that may exist [***70] for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on "business realities." As has been recognized " 'unconscionability turns not only on a "one-sided" result, [*118] but also on an absence of "justification" for it.' " (*A & M Produce Co.*, *supra*, 135 Cal. App. 3d at p. 487.) If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose. (See *Engalla*, *supra*, 15 Cal. 4th at p. 976.)

The employer cites a number of cases that have held that a lack of mutuality in an arbitration agreement does not render the contract illusory as long as the employer agrees to be bound by [***71] the arbitration of employment disputes. (*Michalski v. Circuit City Stores* (7th Cir. 1999) 177 F.3d 634; *Johnson v. Circuit City Stores* (4th Cir. 1998) 148 F.3d 373, 378.) We agree that such lack of mutuality does not render the contract illusory, i.e., lacking in mutual consideration. We conclude, rather, that in the context of an arbitration agreement imposed by the employer on the employee,

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such a one-sided term is unconscionable. Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, *Stirlen* and *Kinney* are correct that the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself.

A contrary conclusion was reached by the Alabama Supreme Court in *Ex Parte McNaughton* (Ala. 1998) 728 So. 2d 592, 598-599. In that case, the employer required the employee to submit claims to arbitration, but expressly reserved for itself a choice of the arbitral or judicial forum. Two justices of the Alabama Supreme Court had stated in *Northcom, Ltd. v. James* (Ala. 1997) 694 So. 2d 1329, 1338, [***72] that such arrangement would be invalid under Alabama's "mutuality of remedy" doctrine as well as the doctrine of unconscionability. The *McNaughton* court repudiated that view. It criticized the *Northcom* dictum as singling out arbitration [**693] for disfavor: "Although the doctrine of unconscionability/mutuality of remedy purportedly could apply in the nonarbitration context, as suggested in the main opinion in *Northcom*, it directly depends on arbitration for its application: 'The element of unconscionability in the context of an arbitration clause is supplied by the fact that, by agreeing to arbitrate, a party waives his right to "a remedy by due process of law" ... and his "right of trial by jury"....' *Northcom*, 694 So. 2d at 1338-39 (citations omitted). [Citation.] ('While paying lip-service to the notion that [the doctrine of unconscionability/mutuality of remedy] "is equally true as to any unconscionable term of a contract of adhesion," ... the [lead opinion in *Northcom*] relies on the uniqueness of the concept of [*119] arbitration under Alabama law to support the [doctrine].') At bottom, this approach assigns a suspect status to arbitration agreements. [***73] Doing so flies in the face of *Doctor's Associates*, 517 U.S. at 687, 116 S. Ct. 1652, where the Supreme Court of the United States explicitly stated that 'courts may not ... invalidate arbitration agreements under state laws applicable only to arbitration provisions.' (Emphasis omitted.) Accordingly, we expressly reject the *Northcom* dictum regarding the doctrine of unconscionability/mutuality of remedy." (*McNaughton*, *supra*, 728 So. 2d at pp. 598-599, bracketed text in internal quote added in *McNaughton*.)

We disagree that enforcing "a modicum of bilaterality" in arbitration agreements singles out arbitration for suspect status. The *Stirlen* court correctly rejected a similar criticism: "Some California courts have been [loath] to apply the doctrine of unconscionability articulated in *Scissor-Tail*, *supra*, 28 Cal. 3d 807 to arbitration agreements subject to the FAA on the ground that the opinion in that case 'weaves together principles

of adhesion contracts and state statutes governing the neutrality of arbitrators,' and the United States Supreme Court has taught 'that a court may not rely upon anything that is unique to an agreement to arbitrate [***74] when assessing unconscionability of an agreement governed by the FAA.' (*Heily v. Superior Court* (1988) 202 Cal. App. 3d 255, 260 [248 Cal. Rptr. 673].) However, while the form of unconscionability involved in *Scissor-Tail* related to arbitration -- the nonneutrality of the arbitrator -- the fundamental principles set forth by the Supreme Court in that case relate to unconscionability in general, not simply to arbitration agreements." (*Stirlen*, *supra*, 51 Cal. App. 4th at p. 1551.)

We agree with the *Stirlen* court that the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context. One such form is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. The application of this principle to arbitration does not disfavor arbitration. It is no disparagement of arbitration to acknowledge that it has, as noted, both advantages and disadvantages. The perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law [***75] and less likely than arbitrators to "split the difference" between the two sides, thereby lowering damages awards for plaintiffs. (See Haig, *Corporate Counsel's Guide: Development Report on Cost-Effective Management of Corporate Litigation* (July 1999) 610 PLI/Lit. 177, 186-187 ["a company that believes it has a strong legal and factual position may want to avoid arbitration, with its tendency to 'split the difference,' in favor of a judicial forum where it may be more likely to win a clear-cut victory"]; see also Schwartz, *supra*, 1997 [120] Wisc. L.Rev. at pp. 64-65.) An employer may accordingly consider courts to be a forum superior to arbitration when it comes to vindicating its own contractual and statutory rights, or may consider it advantageous to have a choice of arbitration or litigation when determining how best to pursue a claim against an employee. It does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense. On the contrary, a unilateral arbitration agreement imposed by the employer without [***76] reasonable justification reflects the very mis [***694] trust of arbitration that has been repudiated by the United States Supreme Court in *Doctors' Associates, Inc. v. Casarotto*, *supra*, 517 U.S. 681, and other cases. We emphasize that if an employer does have reasonable justification for the arrangement -- i.e., a justification grounded in something other than the employer's desire to maximize its advantage based on the perceived

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superiority of the judicial forum -- such an agreement would not be unconscionable. Without such justification, we must assume that it is.

Applying these principles to the present case, we note the arbitration agreement was limited in scope to employee claims regarding wrongful termination. Although it did not expressly authorize litigation of the employer's claims against the employee, as was the case in *Stirlen* and *Kinney*, such was the clear implication of the agreement. Obviously, the lack of mutuality can be manifested as much by what the agreement does not provide as by what it does. (Cf. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1205, 1212-1213 [employee arbitration clause in personnel ***77] handbook found not to be unconscionable where it pertains to "any dispute arising from your employment"].)

This is not to say that an arbitration clause must mandate the arbitration of all claims between employer and employee in order to avoid invalidation on grounds of unconscionability. Indeed, as the employer points out, the present arbitration agreement does not require arbitration of all conceivable claims that an employee might have against an employer, only wrongful termination claims. But an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. The arbitration agreement in this case lacks mutuality in this sense because it requires the arbitration of employee--but not employer--claims arising out of a wrongful termination. An employee terminated for stealing trade secrets, for example, must arbitrate his or her wrongful termination claim under the agreement while the employer has no corresponding obligation to arbitrate its trade secrets claim against the employee. [***78]

[*121] The unconscionable one-sidedness of the arbitration agreement is compounded in this case by the fact that it does not permit the full recovery of damages for employees, while placing no such restriction on the employer. Even if the limitation on FEHA damages is severed as contrary to public policy, the arbitration clause in the present case still does not permit full recovery of ordinary contract damages. The arbitration agreement specifies that damages are to be limited to the amount of back pay lost up until the time of arbitration. This provision excludes damages for prospective future earnings, so-called "front pay," a common and often substantial component of contractual damages in a wrongful termination case. (See *Wilcox*, Cal. Employment Law (1999) § 60.08 [3][b] and [2][b][iii].) The employer, on the other hand, is bound by no

comparable limitation should it pursue a claim against its employees.

The employer in this case, as well as the Court of Appeal, claim the lack of mutuality was based on the realities of the employees' place in the organizational hierarchy. As the Court of Appeal stated: "We ... observe that the wording of the agreement most likely resulted [***79] from the employees' position within the organization and may reflect the fact that the parties did not foresee the possibility of any dispute arising from employment that was not initiated by the employee. Plaintiffs were lower-level supervisory employees, without the sort of access to proprietary information or control over corporate finances that might lead to an employer suit against them."

The fact that it is unlikely an employer will bring claims against a particular type of employee is not, ultimately, a justification for a unilateral arbitration agreement. It provides no reason for categorically exempting employer claims, however rare, from mandatory arbitration. Although an employer may be able, in a future case, to justify a unilateral arbitration agreement, the employer in the present case has not done so.

[**695] E. Severability of Unconscionable Provisions

The employees contend that the presence of various unconscionable provisions or provisions contrary to public policy leads to the conclusion that the arbitration agreement as a whole cannot be enforced. The employer contends that, insofar as there are unconscionable provisions, they should be severed and the rest [***80] of the agreement enforced.

As noted, Civil Code section 1670.5, subdivision (a) provides that "if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without [*122] the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Comment 2 of the Legislative Committee Comment on section 1670.5, incorporating the comments from the Uniform Commercial Code, states: "Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results." (Legis. Com.

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com., reprinted at 9 West's Ann. Civ. Code (1985 ed.) at p. 494 (Legislative Committee comment.)

Thus, the statute appears to give a trial court some discretion as to whether to sever or restrict [***81] the unconscionable provision or whether to refuse to enforce the entire agreement. But it also appears to contemplate the latter course only when an agreement is "permeated" by unconscionability. We could discover no published cases in California that address directly the question of when a trial court abuses its discretion by refusing to enforce an entire agreement, as the trial court did in this case, nor precisely what it means for an agreement to be "permeated" by unconscionability. But there is a good deal of statutory and case law discussing the related question of when it is proper to sever *illegal* contract terms -- a subject to which we will now turn.

Civil Code section 1598 states that "where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." Section 1599 states that "where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." In *Keene v. Harling* (1964) 61 Cal. 2d 318, 320-321, 38 Cal. Rptr. 513, 392 P.2d 273 [***82] (*Keene*), we elaborated on those provisions: "Whether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties. If the contract is divisible, the first part may stand, although the latter is illegal. [Citations.] It has long been the rule in this state that 'When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the ... law ... [divides] according to common reason; and having made that void that is against law, lets the rest stand.' " (See also *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal. 4th 119, 137-139, 949 P.2d 1 (*Birbrower*) [holding severable legal from illegal portions of attorney fee agreement].)

[*123] In *Keene*, the plaintiffs contended that a transaction to buy coin-operated machines should be voided in its entirety because a small number of those machines were illegal "bingo-type" pinball machines." (*Keene, supra*, 61 Cal. 2d at p. 320, 38 Cal. Rptr. 513, 392 P.2d 273.) Instead, we held that because [***83] the value of the illegal machines could be quantified, the legal and illegal consideration could be apportioned and the latter severed from the contract. (*Keene*, 61 Cal. 2d at pp. 322-323.)

This was applied in *Werner v. Knoll* (1948) 89 Cal. App. 2d 474, 476-477, 201 P.2d 45, to hold that the valid portion of an exculpatory damages provision in a landlord-tenant contract should be severed from the part that [**696] was invalid under Civil Code section 1668, and separately enforced. So, too, overbroad covenants not to compete may be restricted temporally and geographically. (See *General Paint Corp. v. Seymour* (1932) 124 Cal. App. 611, 614-615, 12 P.2d 990.) In out-of-state cases in jurisdictions in which covenants not to compete are more accepted legally, n12 such restrictions are common. (See, e.g., *Central Adjustment Bureau v. Ingram* (Tenn. 1984) 678 S.W.2d 28, 37; *Karlin v. Weinberg* (N.J. 1978) 77 N.J. 408, 390 A.2d 1161.)

n12 Such covenants are largely illegal in this state. (Bus. & Prof. Code, § 16600.)

[***84]

The *Keene* court also cited several examples in which the illegality was not severable. (See *Keene, supra*, 61 Cal. 2d at pp. 321-322.) In *Mill and Lumber Co. v. Hayes* (1888) 76 Cal. 387, 18 P. 391, the defendant agreed to sell the plaintiff two million feet of lumber at a certain price and to refrain from selling to any other buyer. The court, in invalidating the agreement, stated: "The very essence and mainspring of the agreement -- the illegal object -- 'was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured,' etc. [P] This being the inducement to the agreement, and the *sole object* in view, it cannot be separated and leave any subject-matter capable of enforcement. ... [P] ... [P] The good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action." (*Id.* at p. 393.) Similarly, in *Teachout v. Bogy* (1917) 175 Cal. 481, 166 P. 319, [***85] the court voided a contract for purchase of a lease, a liquor license, and the sale of a quantity of alcoholic beverages because sale of the license was both an integral part of the transaction and illegal. (*Id.* at p. 488.)

Two reasons for severing or restricting illegal terms rather than voiding the entire contract appear implicit in case law. The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement -- particularly when there has been [*124] full or partial performance of the contract. (See *Keene, supra*, 61 Cal. 2d at pp. 320-321; *Birbrower, supra*, 17 Cal. 4th at pp. 137-139; *Saika*,

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supra, 49 Cal. App. 4th at p. 1082 [enforcing arbitration agreement already performed, while severing illegal trial de novo clause].) Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. (See e.g., *Warner v. Knoll*, *supra*, 89 Cal. App. 2d at pp. 476-477; *General Paint Corp. v. Seymour*, *supra*, 124 Cal. App. at pp. 614-615.) The overarching [***86] inquiry is whether "the interests of justice ... would be furthered" by severance. (*Beynon v. Garden Grove Medical Group* (1980) 100 Cal. App. 3d 698, 713, 161 Cal. Rptr. 146.) Moreover, courts must have the *capacity* to cure the unlawful contract through severance or restriction of the offending clause, which, as discussed below, is not invariably the case.

The basic principles of severability that emerge from Civil Code section 1599 and the case law of illegal contracts appear fully applicable to the doctrine of unconscionability. Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate. That Civil Code section 1670.5 follows this basic model is suggested by the legislative committee comment quoted above, which talks in terms of contracts not being enforced if "permeated" by [***87] unconscionability, and of clauses being severed if "so tainted or ... contrary to the essential purpose of the agreement." (Leg. Com. com., *supra*, at p. 494.)

In this case, two factors weigh against severance of the unlawful provisions. First, the arbitration agreement contains more [**697] than one unlawful provision; it has both an unlawful damages provision and an unconscionably unilateral arbitration clause. Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. In other words, given the multiple unlawful provisions, the trial court did not abuse its discretion in concluding that the arbitration agreement is permeated by an unlawful purpose. (See *Graham Oil*, *supra*, 43 F.3d at p. 1248.) n13

n13 We need not decide whether the unlawful damages provision in this arbitration agreement, by itself, would be sufficient to warrant a court's refusal to enforce that agreement. We note, however, that in the

analogous case of overly broad covenants not to compete, courts have tended to invalidate rather than restrict such covenants when it appears they were drafted in bad faith, i.e., with a knowledge of their illegality. (See e.g., *Data Management, Inc. v. Greene* (Alaska 1988) 757 P.2d 62, 64-65; see also Farnsworth on Contracts (2d ed. 1988) § 5.8, p. 86, fn. 23, and cases cited therein.) The reason for this rule is that if such bad faith restrictive covenants are enforced, then "employers are encouraged to overreach; if the covenant is overbroad then the court will redraft it for them." (*Data Management, Inc. v. Greene*, *supra*, 757 P.2d at p. 65.) This reasoning applies with equal force to arbitration agreements that limit damages to be obtained from challenging the violation of unwaivable statutory rights. An employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter. In that sense, the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme, and severance would be disfavored unless it were for some other reason in the interests of justice. (See *Keene*, *supra*, 61 Cal. 2d at pp. 321-322.) The refusal to enforce such a clause is also consistent with the rule that a party may waive its right to arbitration through bad faith or willful misconduct. (*Engalla*, *supra*, 15 Cal. 4th at p. 983.) Because we resolve this case on other grounds, we need not decide whether the state of the law with respect to damages limitations was sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that this damages clause was drafted in bad faith.

[***88]

Second, in the case of the agreement's lack of mutuality, such permeation is indicated by the fact that there is no single provision a court can strike or [*125] restrict in order to remove the unconscionable taint from the agreement. Rather, the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. Civil Code section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute. Code of Civil Procedure section 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful. Nor do courts

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have any such power under their inherent, limited authority to reform contracts. (See *Kolani v. Gluska* (1998) 64 Cal. App. 4th 402, 407-408 [power to reform limited to instances in which parties make mistakes, not to correct illegal provisions]; see also *Getty v. Getty* (1986) 187 Cal. App. 3d 1159, 1178-1179, 232 Cal. Rptr. 603.) Because a court is unable to cure this unconscionability through severance or restriction, and is not permitted to cure it through reformation [***89] and augmentation, it must void the entire agreement. (See *Stirlen, supra*, 51 Cal. App. 4th at p. 1552.)

Moreover, whether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness "can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it." (*Stirlen, supra*, 51 Cal. App. 4th at pp. 1535-1536, fn. omitted.)

The approach described above is consistent with our holding in *Scissor-Tail, supra*, 28 Cal. 3d at page 831. In that case, we found an arbitration [*126] agreement to be unconscionable because the agreement provided for an arbitrator likely to be biased in favor of the party [**698] imposing the agreement. (*Ibid.*) We nonetheless recognized that "the parties have indeed agreed to arbitrate" and that there is a "strong public policy of this state [***90] in favor of resolving disputes by arbitration." (*Ibid.*) The court found a way out of this dilemma through the CAA, specifically Code of Civil Procedure section 1281.6, which provides in part: "If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." Citing this provision, the court stated: "We therefore conclude that upon remand the trial court should afford the parties a reasonable opportunity to agree on a suitable arbitrator and, failing such agreement, the court should on petition of either party appoint the arbitrator." (*Scissor-Tail, supra*, 28 Cal. 3d at p. 831.) Other cases, both before and after *Scissor-Tail*, have also held that the part of an [***91] arbitration clause providing for a less-than-neutral arbitration forum is severable from the rest

of the clause. (See *Lewis v. Merrill Lynch, Pierce, Fenner & Smith* (1986) 183 Cal. App. 3d 1097, 1107, 228 Cal. Rptr. 345; *Richards v. Merrill Lynch, Pierce, Fenner & Smith* (1976) 64 Cal. App. 3d 899, 906, 135 Cal. Rptr. 26.)

Thus, in *Scissor-Tail* and the other cases cited above, the arbitration statute itself gave the court the power to reform an arbitration agreement with respect to the method of selecting arbitrators. There is no comparable provision in the arbitration statute that permits courts to reform an unconscionably one-sided agreement.

We further note that *Scissor-Tail* did not construe Civil Code section 1670.5, because the actions in the trial court in that case predated the enactment of that statute. (See *Scissor-Tail, supra*, 28 Cal. 3d at p. 816.) Civil Code section 1670.5 makes clear what *Scissor-Tail* may have left ambiguous: that an arbitration agreement permeated by unconscionability, or one that contains unconscionable aspects that cannot be cured by [***92] severance, restriction, or duly authorized reformation, should not be enforced. Furthermore, although we have spoken of a "strong public policy of this state in favor of resolving disputes by arbitration" (*Scissor-Tail, supra*, 28 Cal. 3d at p. 831), Code of Civil Procedure section 1281 makes clear that an arbitration agreement is to be rescinded on the same grounds as other contracts or [*127] contract terms. In this respect, arbitration agreements are neither favored nor disfavored, but simply placed on an equal footing with other contracts.

The employer also points to two cases in which unconscionably one-sided provisions in arbitration agreements were severed and the agreement enforced. *Saika, supra*, 49 Cal. App. 4th 1074, as discussed, involved an arbitration agreement with a provision that would make the arbitration nonbinding if the arbitration award were \$ 25,000 or greater. In *Benyon v. Garden Grove Medical Group, supra*, 100 Cal. App. 3d 698, 712-713, a provision of the arbitration agreement gave one party, but not the other, the option of rejecting the arbitrator's decision. The courts in both instances concluded, in [***93] *Saika* implicitly, in *Benyon* explicitly, that the offending clause was severable from the rest of the arbitration agreement.

The provisions in these two cases are different from the one-sided arbitration provision at issue in this case in at least two important respects. First, the one-sidedness in the above two cases were confined to single provisions regarding the rights of the parties after an arbitration award was made, not a provision affecting the scope of the arbitration. As such, the unconscionability could be cured by severing the unlawful provisions. Second, in both cases, the arguments against severance were made

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by the party that had imposed the unconscionable provision in order to prevent enforcement of an arbitration award against them, and the failure to sever [**699] would have had the effect of accomplishing the precise unlawful purpose of that provision the invalidation of the arbitration award. As discussed, courts will generally sever illegal provisions and enforce a contract when nonenforcement will lead to an undeserved benefit or detriment to one of the parties that would not further the interests of justice. (See *Benyon, supra*, 100 Cal. App. 3d at p. 713.) [***94] In *Benyon* and *Saika*, the interests of justice would obviously not have been furthered by nonenforcement. The same considerations are not found in the present case.

III. DISPOSITION

The judgment of the Court of Appeal upholding the employer's petition to compel arbitration is reversed, and the cause is remanded to the Court of Appeal with directions to affirm the judgment of the trial court.

MOSK, J.

WE CONCUR:

GEORGE, C. J.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CONCURBY:
BROWN

CONCUR:

CONCURRING OPINION BY BROWN, J.

Although I agree with most of the majority's reasoning, I write separately on the issue of apportioning arbitral costs. The majority takes the simple approach: where the employer imposes mandatory [128] arbitration and the employee asserts a statutory claim, the employer must bear all costs "unique to arbitration." (Maj. opn., *ante*, 2000 Cal. LEXIS 6120, *58.) Simplicity, however, is not a proxy for correctness. As explained below, I do not believe that the possible imposition of arbitration forum costs automatically undermines an employee's statutory rights. Accordingly, I see no reason to adopt the majority's preemptive approach. Instead, the [***95] issue of apportionment is better left to the arbitrator, and any problems with the

arbitrator's decision should be resolved at the judicial review stage.

In adopting the bright-line approach advocated by *Cole v. Burns Intern. Security Services* (D.C. Cir. 1997) 323 U.S. App. D.C. 133, 105 F.3d 1465, 1484-1485 (*Cole*), the majority argues that the mere risk that an employee may have to bear certain arbitral costs necessarily "chills the exercise" of her statutory rights. (Maj. opn., *ante*, 2000 Cal. LEXIS 6120, *52.) Thus, arbitration is not a reasonable substitute for a court if arbitral costs, such as the arbitrator's fees, may be imposed on the employee. (See *Cole, supra*, 105 F.3d at p. 1484.) The majority, however, assumes too much. "Arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court." (*Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1st Cir. 1999) 170 F.3d 1, 16 (*Rosenberg*); see also *Koveleskie v. SBC Capital Markets, Inc.* (7th Cir. 1999) 167 F.3d 361, 366 (*Koveleskie*).) Because employees may incur fewer costs and attorney fees in arbitration [***96] than in court, the potential imposition of arbitration forum costs does not automatically render the arbitral forum more expensive than--and therefore inferior to--the judicial forum. (See *Arakawa v. Japan Network Group* (S.D.N.Y. 1999) 56 F. Supp. 2d 349, 354 (*Arakawa*).)

The majority's approach also ignores the unique circumstances of each case. Not all arbitrations are costly, and not all employees are unable to afford the unique costs of arbitration. Thus, the imposition of some arbitral costs does not deter or discourage employees from pursuing their statutory claims *in every case*. (See, e.g., *Williams v. Cigna Financial Advisors Inc.* (5th Cir. 1999) 197 F.3d 752, 764-765 (*Williams*) [compelling arbitration because the employee did not show that he was unable to pay the arbitral costs or that these costs would deter him from pursuing his claims]; *McCaskill v. SCI Management Corp.* 2000 U.S. Dist. LEXIS 10317, *13 (N.D. Ill. June 22, 2000, No. 00 C 1543) 2000 WL 875396 at p. *3 (*McCaskill*) [compelling arbitration because there was no evidence that the costs of arbitration would be prohibitively expensive for the employee]; *Cline v. H.E. Butt Grocery Co.* (S.D. Tex. 1999) 79 F. Supp. 2d 730, 733 [***97] (*Cline*) [compelling arbitration because there was no evidence that the employee would have to pay any costs or that the employee could not afford to do so].) Indeed, the uniqueness of each case [129] makes it impossible for any court to "conclude that the payment of fees will constitute a barrier to the vindication of ... statutory rights" without knowing the exact amount the employee [***700] must pay. (*Arakawa, supra*, 56 F. Supp. 2d at p. 355.)

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Accordingly, I would reject the majority's approach and follow the approach suggested by courts in several other jurisdictions. (See, e.g., *Rosenberg, supra*, 170 F.3d at p. 16; *McCaskill, supra*, 2000 U.S. Dist. LEXIS 10317, *13, 2000 WL 875396 at p. *3; *Cline, supra*, 79 F. Supp. 2d at p. 733; *Arakawa, supra*, 56 F. Supp. 2d at pp. 354-355; see also *Williams, supra*, 197 F.3d at pp. 765-766.) As long as the mandatory arbitration agreement does not require the employee to front the arbitration forum costs or to pay a certain share of these costs, apportionment should be left to the arbitrator. When apportioning costs, the arbitrator should consider the magnitude of the costs unique to arbitration, the ability of the employee to [***98] pay a share of these costs, and the overall expense of the arbitration as compared to a court proceeding. Ultimately, any apportionment should ensure that the costs imposed on the employee, if known at the onset of litigation, would *not* have deterred her from enforcing her statutory rights or stopped her from effectively vindicating these rights. (See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 637, 87 L. Ed. 2d 444, 105 S. Ct. 3346

["So long as the prospective litigant effectively may vindicate [her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."]; *Arakawa, supra*, 56 F. Supp. 2d at p. 355.)

If the employee feels that the arbitrator's apportionment of costs is unreasonable, then she can raise the issue during judicial review of the arbitration award. (See *Rosenberg, supra*, 170 F.3d at p. 16 [judicial review is sufficient to guard against the imposition of unreasonable fees]; *Koveleskie, supra*, 167 F.3d at p. 366 [same].) I believe such an approach is preferable because it accounts for the particular [***99] circumstances of each case without sacrificing the employee's statutory rights.

BROWN, J.

I CONCUR:

CHIN, J.