No. S181004
(Court of Appeal No. B199571)
(Los Angeles County Superior Court No. BC341569)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WYNONA HARRIS,
Plaintiff and Respondent,

v.

CITY OF SANTA MONICA,
Defendant and Appellant.

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT WYNONA HARRIS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Pursuant to California Rule of Court 8.520, California Employment Lawyers Association respectfully requests permission to file an *amicus* brief in support of Plaintiff and Respondent Wynona Harris. This brief is timely, as it is filed within thirty days after the last reply brief was filed.

STATEMENT OF INTEREST

This case presents the question whether this Court should adopt a new affirmative defense, specific to employment discrimination claims arising under the California Fair Employment and Housing Act (hereinafter "FEHA"), that would permit employers to escape liability for proven acts of discrimination if they can convince a jury that they "would have made the same decision anyway."

The California Employment Lawyers Association ("CELA") is an organization of 1,000 attorneys who represent plaintiffs in discrimination and employment cases. CELA members regularly try cases under the current statutory framework in accordance with existing judicial and administrative precedent, and have a unique perspective on how FEHA is interpreted and applied at the trial court level. CELA has a strong interest in the development of law in this area.

PURPOSE OF THE PROPOSED BRIEF

The proposed brief will assist the Court in deciding this matter.

Both Title VII and FEHA now recognize that multiple motives may exist for a given adverse action: When a plaintiff proves that the protected status had *a* causal influence on the decision to take adverse

action, the existence of other, nondiscriminatory motives will not disturb a finding of liability under either statute.

In the case before this Court, Defendant and Appellant City of Santa Monica proposes adding to FEHA an outdated "same decision" liability defense, also known as the "mixed motive" defense, that was first articulated by the United States Supreme Court in *Price Waterhouse v. Hopkins*, (1989) 490 U.S. 228. The defense was subsequently overturned by Congress, when it enacted the 1991 Civil Rights Act amendments to Title VII.

In its proposed brief, CELA argues that there is no good reason for this Court to alter FEHA's well-established causation standard, much less to adopt a defense that has proven difficult to apply in the federal arena, and is no longer valid under Title VII.

California's statutory framework, requiring a "causal nexus" between protected status and adverse action, has a simplicity and clarity that is well-suited to jury trials. The applicable jury instructions are straightforward, and they appeal to the jury's commonsense understanding as to whether the plaintiff's protected status had a meaningful causal influence on the decision.

Given the great variety of workplace decision-making structures, and the many ways in which discrimination may manifest within a workplace setting, California has wisely chosen to interpret the language of FEHA to cast a wide net, leaving it to the discretion of the jury to judge whether prohibited discrimination had a causal influence on the outcome. By contrast, a burden-shifting "mixed motive" defense encourages after-the-fact rationalizations for discriminatory conduct, thereby undermining enforcement of a statute intended to protect Californians' fundamental right to a workplace free of discrimination.

Accordingly, CELA respectfully requests permission to file the proposed brief.

DATED: February 10, 2011

Respectfully submitted,

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QUESTION PRESENTED

Does the "mixed motive" defense apply to employment discrimination claims under the Fair Employment and Housing Act?

INTRODUCTION

This case presents the question whether this Court should adopt a new affirmative defense, specific to employment discrimination claims arising under the California Fair Employment and Housing Act (hereinafter "FEHA"), that would permit employers to escape liability for proven acts of discrimination if they can convince a jury that they "would have made the same decision anyway." The answer should be an emphatic, "no."

While FEHA and Title VII share the same causal language, the words "because of" in Government Code Section 12940(a) have always been interpreted to encompass multiple motivations. In addition, while California and federal courts have experience applying the *McDonnell Douglas* burden-shifting construct to discrimination claims, California has always treated FEHA burden-shifting as a judicial function that tests the sufficiency of evidence, not as a vehicle suitable to fact-finding by a jury.

As a result, while post-*Price Waterhouse v. Hopkins* confusion and disarray reigns in the federal system, California's statutory framework has a simplicity and clarity that is well-suited to jury trials. Since FEHA is not "broken," there is no good reason to "fix" it by adopting a federal defense that threatens to undermine its enforcement.

ARGUMENT

I.

THE "MIXED MOTIVE" DEFENSE ADOPTED BY THE COURT BELOW SHOULD BE REJECTED BECAUSE IT CONFLICTS WITH THE FEHA'S CAUSATION STANDARD.

The Fair Employment and Housing Act, Government Code Sections 12900, *et seq.* (hereinafter "FEHA"), is a remedial statute articulating a fundamental civil right—"[t]he opportunity to seek, obtain and hold employment without discrimination ...." GOV'T CODE §12921. The Legislature has mandated that the statute "shall be construed liberally for the accomplishment of [its] purposes." GOV'T CODE §12993(a).

As this Court acknowledged almost a quarter of a century ago, in *Brown v. Superior Court*, (1984) 37 Cal. 3d 477, 485-86, the express purpose of the FEHA is the *elimination* of discrimination:

> The FEHA establishes a comprehensive scheme for combating employment discrimination. As a matter of public policy, the FEHA recognizes the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. ([GOV'T CODE] § 12920.) This court has declared that policy to be "fundamental."
>
> Moreover, the opportunity to be free from discriminatory practices in seeking, obtaining, and holding employment is a "civil right." (§ 12921.) Employment discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." (§ 12920.) *The express purpose of the FEHA is "to provide effective remedies which will eliminate such discriminatory practices." (Ibid.) In addition, the Legislature has directed that the FEHA is to*

> *be construed "liberally" so as to accomplish its purposes.* (*Brown*, 37 Cal. 3d at 485-86 (internal citations omitted; emphasis added))

California's existing "causal nexus" standard, as applied by the judicial and administrative bodies charged with its enforcement, and the trial court below, is central to fulfilling this Legislative purpose.

Defendant and Appellant City of Santa Monica (hereinafter "the City") urges this Court to affirm the lower court's decision adopting a "mixed motive" defense to liability under FEHA upon a showing that defendant would have made the same decision anyway.[1] The City argues that a "mixed motive" defense is necessary to establish "meaningful" causation under FEHA. City's Answer Brief on the Merits ("AB") at 11. But this Court does not write upon a blank slate. The City's argument should be rejected, because it is inconsistent with prior judicial and administrative interpretation of Government Code Section 12940(a).

Government Code Section 12940(a) provides:

> It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

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[1]The court below ruled in the City's favor, holding that refusal to give a "mixed motive" defense instruction was reversible error: "The [trial] court's instructions permitted Harris to prevail by showing her pregnancy led to her termination, even if other factors contributed to it.... [T]he instructions as given did not provide the city with a complete defense if the jury found the city would have terminated Harris anyway for performance reasons even if she had not been pregnant. The court's refusal to instruct the jury with BAJI No. 12.26 therefore prejudiced the city." *Harris v. City of Santa Monica*, (2010) 181 Cal. App. 4th 1094, 1102.

> (a) For an employer, *because of* the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment. (*Id.* (emphasis added))

For over a quarter of a century, California courts and the Fair Employment and Housing Commission have consistently interpreted the words "because of" to encompass actions premised upon multiple motives, and to require only that plaintiff prove "a causal connection" between the protected status and the adverse action for liability to attach:

> While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a "causal connection" between the employee's protected status and the adverse employment decision. (*Mixon v. Fair Employment & Housing Comm'n*, (1987) 192 Cal. App. 3d 1306, 1319)

See also Clark v. Claremont Univ. Ctr. Grad. Sch., (1992) 6 Cal. App. 4th 639, 665 (employee need not show he would have been rejected or discharged solely on the basis of his race, without regard to alleged deficiencies).

In *DFEH v. Church's Fried Chicken, Inc.*, (1990) FEHC Dec. No. 90-11, 1990 WL 312878, the Fair Employment and Housing Commission issued a precedential decision *explicitly* rejecting the causation paradigm and affirmative defense now urged by the City before this Court:

> Respondent will be found liable if we determine that his conduct constitutes discrimination under the Act. *No affirmative defense is available to excuse or justify discrimination of this kind.*

* * * *

> *It need not be shown that [the employee's] race was the sole or even the dominant cause of his adverse treatment.* Intentional discrimination is established if [his] race was at least one of the factors that influenced respondent to act against him. (FEHC Dec. No. 90-11 at 7, 1990 WL 312878, at *8 (emphasis added))

Contrary to the City's representation, this does not mean that the burden can be met by "any degree of discrimination even so slight that it would not have made a difference in the outcome." AB at 12. The relevant jury instruction, which was given in this case, required the jury to find that the City's knowledge of Harris' pregnancy was a motivating reason sufficient to "move[...] the will and induce action" CACI 2500.13.[2] This language does not, under any stretch of the imagination, create "hair trigger liability," as the City suggests. AB at 40. Rather, finding that plaintiff's protected status "moved the will" and "induced action," is simply another way of saying that it made a difference in the outcome.

The evidence supporting liability in this case was *not* limited to mere knowledge of plaintiff's pregnancy. It included temporal proximity between the City's learning of plaintiff's pregnancy and taking adverse action, accompanied by evidence that: (1) prior to the disclosure of her pregnancy, plaintiff's evaluations indicated that she had been progressing well during her probationary period; (2) there were extenuating circumstances surrounding her second "miss out"; and (3) defense witnesses gave inconsistent testimony as to both the City's retention standards for probationary employees, and the reasons for plaintiff's termination.

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[2]The jury was also instructed with CACI 2500, which sets forth the elements of a disparate treatment claim, including the requirement that plaintiff's protected status be a "motivating reason" for the adverse action.

Thus, there is no merit to the City's complaints that "The CACI jury instructions given by the trial court did not require that Harris prove meaningful causation," or that "essentially, the jury need[ed] only [to] find whether any improper discrimination was present *no matter how slight or even relevant.*" AB at 11, 12 (emphasis added). Even the court below acknowledged that there was substantial evidence to support the jury's verdict for Harris. *Harris v. City of Santa Monica*, (2010) 181 Cal. App. 4th 1094, 1105.

The City complains that the effect of the trial court's instructions was to direct the jury to find against the City "if the jury believed that the City took Harris's pregnancy into consideration at all, regardless of whatever other factors likely *contributed* to the City's decision." AB at 18. But since this is precisely what FEHA precedent requires, it is apparent that the City's real dispute is not with the trial court's jury instructions, but with the law. *See* discussion of *Mixon v. Fair Employment & Housing Comm'n* and *DFEH v. Church's Fried Chicken, Inc.*, at 4-5, above.

As Justice Brennan wrote in *Price Waterhouse v. Hopkins*, (1989) 490 U.S. 228, 237, "The specification of the standard of causation ... is a decision about the kind of conduct that violates the statute." The California Legislature *clearly* intended a "no tolerance" approach to discrimination. In *DFEH v. Church's Fried Chicken, supra*, the Fair Employment and Housing Commission drew a straight line connection between the Legislature's intent and its causation standard:

> The fundamental purpose of FEHA is to protect and safeguard the civil right to seek, obtain and hold employment "free from discrimination." To implement this purpose, *the only conceivable interpretation of the Act is one that deems discriminatory all conduct that is caused in any part by its victim's race or other prohibited basis of discrimination.* Any other standard would inevitably require us to blink at the very conduct the Act was plainly intended to remedy and prevent. (*Church's Fried Chicken, Inc.*, FEHC Dec. No. 90-11 at 9, 1990 WL 312878, at *11

(emphasis added; citations and internal quotation marks omitted))

This Court should be wary of any change to FEHA's causation standard that will make it more difficult to prove the existence a "causal connection," given the great variety of workplace decision-making structures that exist, and the many ways in which discrimination may manifest within a workplace setting. *See, e.g., Reeves v. Safeway Stores, Inc.*, (2004) 121 Cal. App. 4th 95, 108 (multi-step disciplinary process: causal connection may be established where supervisor who initiates investigation acts with retaliatory animus); *Clark v. Claremont Univ. Ctr.*, (1992) 6 Cal. App. 4th 639, at 665-66 (multilevel tenure review: plaintiff "need not prove intentional discrimination at every stage of the review process"). Narrowing the definition of causation will serve only to limit the range of discrimination that may be remedied under FEHA.

There is nothing wrong with the jury instructions given in this case. They were straightforward, and they appealed to the jury's commonsense understanding as to whether the plaintiff's protected status had a meaningful causal influence on the decision. Neither the instructions nor the law require "fixing." By contrast, the "mixed motive" defense proposed by the City would create a "zone of tolerance" for discrimination in the workplace—a result that is antithetical to both the letter and the spirit of FEHA.

II.

ADOPTION OF A FEDERAL "MIXED MOTIVE" DEFENSE WILL INTRODUCE UNNECESSARY CONFUSION INTO A WELL-FUNCTIONING STATE SYSTEM.

Ever since the United States Supreme Court issued its fractured opinion in *Price Waterhouse v. Hopkins*, (1989) 490 U.S. 228, the "motivating factor/same decision" framework has proven difficult to apply. From the type of evidence required to obtain a burden-shifting "motivating factor" instruction (*Desert Palace, Inc. v. Costa*, (2003) 539 U.S. 90), to the choice of the relevant burden of persuasion (*Gross v.*

FBL Financial Services., Inc., (2009) __ U.S. __, 129 S. Ct. 2343), to the standard's application in the multi-actor decision-making context (*Staub v. Proctor Hospital*, (pending) U.S. Docket No. 09-400), the *Price Waterhouse* causation paradigm has created confusion and conflict among the lower federal courts.

The United States Supreme Court has expressed increasing dissatisfaction with its burden-shifting "motivating factor/same decision" framework. After granting certiorari in *Gross v. FBL Financial Services, supra*, to decide whether "direct evidence" of age discrimination is required to shift the burden of persuasion to the defendant in cases brought under the Age Discrimination in Employment Act, the Court changed course mid-stream, and flatly refused to apply the *Price Waterhouse* causation framework. Writing for the majority in a 5-4 opinion, Justice Thomas explained,

> "it has become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework.... Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims." (*Id.* at 2352)

Unfortunately, the Court also "threw out the baby with the bathwater" by eliminating "motivating factor" liability entirely for claims arising under the ADEA. Now the only way to prevail on a disparate treatment federal age discrimination claim is for plaintiff to prove, by a preponderance of the evidence, that age was *the* "but for" cause of the adverse action. *Id.*

By allowing different standards of causation for different federal discrimination statutes, the *Gross* decision provides yet another reason why this Court should reject a "mixed motive" defense to FEHA. California's FEHA covers all "protected bases"—race, religious creed, color, national origin, ancestry, physical disability, mental disability,

medical condition, marital status, sex, age, or sexual orientation—in a single statute. While the United States Supreme Court may choose to adopt different causation paradigms for age discrimination under the ADEA and for sex discrimination under Title VII, that is not an option for this Court.

Having different causation standards for sex and age places an impossible burden on plaintiffs in FEHA cases involving more than one protected status (*e.g.*, "sex plus age"). A plaintiff claiming that "older women" were targeted for layoff on account of their dual status would have to convince a jury of contradictory propositions—both that sex was "a motivating factor" *and* that age was *the* "but for" reason (which it could not be if sex played a role in the decision-making)." It will also create administrative and judicial confusion as to what precedent applies to other FEHA-protected bases that are covered by federal statutes other than Title VII (*e.g.*, mental and physical disability).

To avoid these unnecessary difficulties, *amicus* CELA requests this Court to reaffirm California's existing causation standard, overrule the decision below, and free the lower courts from the specter of this judicially created nightmare.

III.

THE PROPOSED "MIXED MOTIVE" DEFENSE SHOULD BE REJECTED BECAUSE IT IS MORE SWEEPING THAN ITS TITLE VII COUNTERPART AND IT IS EASILY ABUSED.

The "mixed motive" defense proposed by the City is far more sweeping than the one currently permitted by Title VII. When Congress enacted the Civil Rights Act of 1991, it added statutory language to Title VII providing for both "motivating factor" liability and a "same action"

defense. *See* 42 U.S.C. §§2000e-2(m), 2000e-5(g)(2)(B).[3] However, Title VII's "same action" defense applies *only* to "motivating factor" liability cases, and serves *only* as a limitation on damages. By contrast, the City intends its "mixed motive" defense to apply to every FEHA disparate treatment case, and, if proven, to provide a complete defense to liability.

In addition, the language of the "mixed motive" jury instruction proposed by the City (BAJI 12.26) turns the burden of proof in FEHA disparate treatment cases on its head:

> "If you find that the employer's action ... was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision."

By its very terms, the instruction requires the jury to have first found that the plaintiff met her burden of persuasion that pregnancy was *a* motivating reason for the defendant's action, which is all that is

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[3]42 U.S.C. §2000e-2(m) [703(m)] provides for "motivating factor" liability: "Except as otherwise provided ..., an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

42 U.S.C. §2000e-5(g)(2)(B) provides for a "same action" limitation on damages: "On a claim in which an individual proves a violation under section 703(m) [*42 USCS § 2000e-2(m)*] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court ... shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."

necessary for liability under FEHA. (*See* discussion of *Mixon v. Fair Employment & Housing Comm'n* and *DFEH v. Church's Fried Chicken, supra*, at 4-5.) Yet under this instruction, the employer need only prove by a preponderance of the evidence that it *could* have taken the action entirely for a legitimate reason to prevail at trial.

The net effect of this burden shifting is to heighten the *employee's* burden of proof to establish more than the law requires. To counter a "mixed motive" defense, the employee must persuade the jury that the protected status was a reason so central to the employer's decision-making that the adverse action *would not have been taken without it.*

If adopted by this Court, the "mixed motive" defense will profoundly change the law. A change of this magnitude will have a far-reaching effect on every stage of the litigation of employment discrimination cases brought under FEHA. *See, e.g., Caldwell v. Paramount Unified Sch. Dist.*, (1995) 41 Cal. App. 4th 189.

In *Caldwell*, a school superintendent brought an action against his school district after it elected not to renew his contract, alleging disparate treatment on the basis of race and age in violation of FEHA (among other claims). The trial court instructed the jury on both the FEHA claim, using "motivating factor" language virtually identical to that given by the trial court below,[4] and on the *McDonnell Douglas* three-stage burden of proof. After the jury returned a verdict in favor of the

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[4]"Under the California Fair Employment and Housing Act, FEHA, it is [an] unlawful employment practice for an employer to make any adverse employment decision against an employee when the employee's race [or age] is a motivating factor in the decision. [¶] To prove that race or age was a motivating factor, plaintiff need not prove that age or race was the sole reason or the determinative reason for the decision, but rather only that it was one of the reasons. [¶] A motivating factor is a factor which is an idea or belief which moves the will and induces action." *Id.* at 199 (citation and internal quotation marks omitted).

defendant, the trial court granted plaintiff's motion for a new trial, which was vacated by the court of appeal.

The appellate court reviewed the application of *McDonnell-Douglas'* burden-shifting framework to FEHA cases during the life cycle of an employment discrimination lawsuit, from initial pleading through dispositive motions and trial, and concluded that burden-shifting jury instructions improperly blur the line between the function of the judge (to weigh the sufficiency of the evidence), and the jury (to find the facts). It criticized the trial court for instructing the jury with the *McDonnell Douglas* proof paradigm, calling it "an analytical tool" for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the fact-finding process:

> "By the time that the case is submitted to the jury, ... the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, *leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court.*"
>
> * * * *
>
> In short, if and when the case is submitted to the jury, the construct of the shifting burdens "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race- or age-neutral reasons for the employment decision. Because *the only issue properly put to the jury here on the issue of employment discrimination was whether the District's decision to not renew Caldwell's contract was motivated by age or race*, the shifting burdens of proof were irrelevant to the jury deliberations." (*Caldwell*, 41 Cal. App. 4th at 204 (emphasis added))

The court's reasoning in *Caldwell* is equally applicable to the case before this Court. Introducing a burden-shifting "mixed motive" defense

at the end of Harris' trial, would have created confusion, and distracted the jury from its proper task, *i.e.*, deciding on the basis of all the evidence presented whether or not there was a causal connection between the plaintiff's pregnancy and the City's decision to terminate her.

Finally, this Court should not adopt a "mixed motive" defense to FEHA because it is easily abused. The instruction encourages construction of "after the fact" justifications to cover up illegal conduct, and invites strategic gamesmanship at trial. It enables defendants to present the case that no discrimination occurred, secure in the knowledge that, after all the evidence is in, the instruction affords them "a second bite at the apple"—a post-trial instruction that, even if discrimination did occur, the jury must nonetheless find in defendants' favor if there is evidence that they would have made the same decision anyway.

This scenario is deeply prejudicial to plaintiffs, who bear the ultimate burden of proof, yet who may be been deprived of a meaningful opportunity to rebut a defense that is not presented at trial.

CONCLUSION

For all of the above reasons, this Court should not apply a "mixed motive" defense to employment discrimination claims under the Fair Employment and Housing Act. The defense represents a retreat from full commitment to the Legislative goal of elimination of discrimination. Its application to FEHA claims will upend well established California law, create confusion in the lower courts, and provide an unfair advantage to defendants at trial.

The fundamental right of California citizens to "seek, obtain and hold employment without discrimination" is too important to be undermined in this way.

DATED: February 10, 2011

Respectfully submitted,

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DAVID J. DUCHROW

By: /S/
CHARLOTTE E. FISHMAN

Attorneys for *Amicus Curiae*
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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c), I certify that this Brief of *Amicus Curiae* California Employment Lawyers Association In Support Of Plaintiff And Respondent contains 3,437 words, not including the Tables of Contents and Authorities, this Certificate, the caption page, signature blocks, or attachments.

DATED: February 10, 2011

Respectfully submitted,

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By: */S/*
CHARLOTTE E. FISHMAN

Attorneys for *Amicus Curiae*
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DECLARATION OF SERVICE

I declare that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above entitled action. My business address is 100 Pine Street, 33rd Floor, San Francisco, California 94111. I am a citizen of the United States and am employed in the City and County of San Francisco. On , I served the following documents:

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT WYNONA HARRIS upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

FOR COLLECTION VIA HAND DELIVERY:

Original & 13 Copies

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 10, 2011, at San Francisco, California.

PHILIP LAYZER