

Case No. A165726

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

**ELIZABETH SUE PETERSON, MARILYN CLARK, AND
MANJARI KANT, on behalf of themselves and all others similarly
situated,**
Plaintiffs and Appellants,

v.

ORACLE AMERICA, INC.
Defendant and Respondent.

Superior Court of the State of California,
County of San Mateo, Department 23,
Honorable V. Raymond Swope
Case No. 17-CIV-02669

**APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI
CURIAE IMPACT FUND, EQUAL RIGHTS ADVOCATES, ACLU
OF NORTHERN CALIFORNIA, A BETTER BALANCE,
CALIFORNIA WOMEN'S LAW CENTER, CENTER FOR
WORKLIFE LAW, INSTITUTE FOR WOMEN'S POLICY
RESEARCH, LEGAL AID AT WORK, NATIONAL BLACK
WORKER CENTER, NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION, NATIONAL ORGANIZATION FOR WOMEN
FOUNDATION, PUBLIC COUNSEL, PUBLIC JUSTICE CENTER,
SERVICE EMPLOYEES INTERNATIONAL UNION CALIFORNIA
STATE COUNCIL, WOMEN'S EMPLOYMENT RIGHTS CLINIC,
WOMEN EMPLOYED, AND WORKSAFE
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

Pursuant to California Rules of Court, rule 8.200(c), the Impact Fund respectfully requests permission to file an amici curiae brief in support of Plaintiff-Appellants Elizabeth Sue Peterson, et al. The proposed brief is lodged concurrently with this application.¹

The Impact Fund and its fellow amici are public interest organizations committed to preventing, combating, and redressing sex discrimination and other civil rights violations. Many amici litigate cases under the Fair Employment and Housing Act, the Equal Pay Act, and other anti-discrimination statutes, and are experienced in class action litigation. Class actions are essential vehicles for the litigation of claims that involve systemic workplace discrimination. Clarifying the scope of manageability assessments by trial courts is important to amici, who regularly advocate on behalf of employees who have experienced equal pay and other civil rights violations and for whom class action lawsuits are often the only meaningful way to effectively redress discriminatory practices. This effectuates the public policy of the state of California both from a procedural and rights-based perspective.

¹ Pursuant to California Rules of Court, rule 8.200(c)(3), amici curiae certify that no party or party counsel authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity contributed money that was intended to fund the preparation or submission of the brief.

STATEMENTS OF INTEREST OF PROPOSED AMICI

The **Impact Fund** is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in major civil rights cases brought under federal, state, and local laws, including cases challenging employment discrimination; unequal treatment of people of color, people with disabilities, and LGBTQ people; and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women, girls and people of all gender identities. Since its founding in 1974, ERA has litigated numerous class actions and other high-impact cases on issues of gender discrimination and civil rights brought under federal, state, and local laws. ERA cosponsored the California Fair Pay Act (Lab. Code, § 1197.5), along with subsequent legislation amending the state's Equal Pay Act. ERA has appeared as *amicus curiae* in numerous cases involving the interpretation of

equal pay and other anti-discrimination laws, including serving as amicus counsel in *Rizo v. Yovino* (9th Cir. 2020) 950 F.3d 1217.

The American Civil Liberties Union (ACLU) of Northern California is a regional affiliate of the national ACLU. The American Civil Liberties Union (“ACLU”) is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The ACLU and its affiliates share a longstanding commitment to gender equity and gender justice, including issues of economic and pay equity.

A Better Balance uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. On our free and confidential helpline, we regularly hear from workers across the country, including California workers, who have been underpaid because of their gender. We have advocated for legislation to improve pay parity and pay transparency, and we continue to act in support of workers who seek to join forces to collectively redress discriminatory pay practices.

The California Women’s Law Center (“CWLC”) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. Since its inception in 1989, CWLC has placed a particular emphasis on eradicating all forms of discrimination against women, with a

focus on advocating for the rights of low-income women. CWLC is dedicated to the fight to end practices contributing to the gender wage gap and women in poverty.

The Center for WorkLife Law at the University of California Law, San Francisco, is a research and advocacy organization that advances gender and racial equity in the workplace and education through law-based strategies.

The Institute for Women's Policy Research (IWPR) is a leading national economic and public policy think tank founded in 1987 that builds evidence to shape policies that grow women's power and influence, close inequality gaps, and improve the economic well-being of families. The gender wage gap is a major contributing factor to poverty and inequality. Women of color face particularly substantial wage gaps in California. IWPR's research documents the role of gender and racial/ethnic discrimination in women's lower earnings. IWPR's research finds that if women's hourly earnings rose to the level of similarly qualified men's, poverty rates among families with working women would be reduced by half.

Legal Aid at Work is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. Legal Aid at Work has represented low-wage clients in cases involving a broad range of

issues, including gender-based equal pay claims and discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid at Work has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an amicus curiae capacity. Legal Aid at Work's interest in preserving the protections afforded to employees by this country's antidiscrimination laws is longstanding.

The **National Black Worker Center** ("NBWC") is the go-to source for insight into the discrimination that Black workers – employed, underemployed and unemployed – face and the solutions we seek to end anti-Blackness in the workplace. NBWC launched in 2012 in response to the two-dimensional job crisis that Black workers face: the crisis of unemployment, and the crisis of low-wage and low-quality work. In addition to the National Black Worker Center there are currently 12 local Black Worker Centers across the country. There are Black worker centers located in Los Angeles, San Diego, Inland Empire, and the Bay Area. We are committed to ending anti-Black racism and discrimination in the workplace. Equal pay is a priority issue area for NBWC. Inequity in pay based on race and gender is an issue that greatly harms our base, Black working-class people and Black women. NBWC focuses on mobilizing Black workers and providing them with the resources necessary to take on systems of worker oppression, including industries and policies that have

benefitted from our exploitation for generations. Through our experience in organizing and advocacy, we understand many of the challenges workers face, including denial of the most basic work benefits and protections such as equal pay. We draw upon this deep experience in signing on as an amicus party.

Founded in 1985, the **National Employment Lawyers Association** (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has many members who practice in the state of California and represent California workers, giving NELA an interest in the case at hand.

The **National Organization for Women (NOW) Foundation** is a 501 (c) (3) entity of the National Organization for Women and is dedicated to advocating for women's equal rights through education and litigation. NOW is the nation's oldest and largest grassroots feminist activist

membership organization. NOW Foundation focuses on a range of issues, including economic justice, pay equity, sex-based discrimination and equal opportunity in education and athletics, among others. Since our founding, we have advocated for equal pay, worked against sex-based pay discrimination, and stood for the ability of a class of affected employees to be represented in litigation.

Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as to amplifying the power of our clients through comprehensive legal advocacy. Advancing equality for women and investing in their futures strengthens the well-being of entire communities. The Audrey Irmas Project for Women and Girls' Rights was founded in 2017 to build on Public Counsel's longstanding efforts to secure equal justice and opportunity for women, girls, and gender expansive persons. Public Counsel represents individual clients in employment discrimination and gender equity matters and supports community-led efforts to transform unjust systems through policy advocacy and litigation in and beyond Los Angeles to secure equal opportunity for women, girls, and gender expansive persons.

The **Public Justice Center (PJC)**, a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to combating discrimination, including in the workplace. It also seeks to preserve access to courts for indigent and disadvantaged

persons through protection against erosion of e.g., class actions and private attorney general enforcement of rights. The PJC has an interest in this case because it represents one of the many ways that employers and other defendants in civil rights cases seek to weaken the class action as a critical enforcement tool for low-wage workers and others who cannot individually afford counsel for their legal disputes.

The **Service Employees International Union California State Council (“SEIU California”)** is comprised of local unions of the Service Employees International Union that represent more than 700,000 California workers throughout California. SEIU California’s mission is to secure economic fairness for working people and create an equitable, just, and prosperous California. SEIU California and its affiliated local unions pursue these objectives through many means including litigation and have brought claims to challenge workplace discrimination and unlawful, unfair, or fraudulent business practices in numerous cases over the years.

The **Women’s Employment Rights Clinic (WERC)** of Golden Gate University School of Law is an on campus clinical education program focused on the employment rights of low-wage workers. WERC faculty and law students provide free legal services, including advice, counseling, and representation of workers in a variety of employment-related matters. WERC regularly assists low-wage workers with claims of unpaid wages, discrimination, harassment, and retaliation, engages in policy advocacy and

provides technical assistance to workers' centers and other workers' organizations. For over 30 years, WERC has remained steadfast in its commitment to eliminating workplace discrimination for low wage workers and recognizes that without class action as a vehicle for their claims, many low wage workers, including those with workplace discrimination claims like the class members in this case, would be left without representation.

The mission of **Women Employed** is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed strongly believes that pay inequity is one of the main barriers to achieving equal opportunity and economic justice for women in the workplace and that class actions are an indispensable tool for eradicating illegal, company-wide employment discrimination.

Worksafe is a non-profit organization that advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund. We engage in California state-wide policy advocacy as well as advocacy on a national level to ensure protective laws for workers. Millions of low-wage and

immigrant workers often toil long hours in harsh and hazardous work environments in California. These same workers often face employment and labor violations such as discrimination which is rampant. Worksafe has an interest in the outcome of this case because we advocate for the workplace rights of low wage vulnerable workers and many times issues of discrimination are interwoven with poor health and safety conditions for those workers. Furthermore, class action lawsuits are relied upon by low income workers who may be unable to seek individual relief due to financial barriers. Class action lawsuits can be more cost effective for all class members and ensure employer's illegal acts have consequences. Class action lawsuits also protect future employees from being subjected to unlawful employment practices. The result can be a safer and fairer workplace for all employees. As such Worksafe has an interest in the outcome of this case as we strongly advocate for safe and equitable workplaces for all employees.

Dated: November 16, 2023

/s/ Byron Goldstein
Byron Goldstein

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I. INTRODUCTION

Women working full-time in California earn just \$0.89 for every dollar paid to a man.² Although California law has long prohibited gender-based pay discrimination, the gender wage gap is not a vestige of the past. Pervasive gender-based pay disparities persist across industries and occupations and perpetuate economic insecurity for women and families across the state and throughout the country.

California's commitment to ending workplace discrimination and pay inequity cannot be realized unless it can be meaningfully enforced through the Fair Employment and Housing Act ("FEHA") and the California Equal Pay Act ("EPA"), critical statutes prohibiting wage discrimination. For many women, class action litigation is the only meaningful enforcement mechanism available to them, whether they cannot afford counsel, fear retaliation as the lone voice speaking out against a current employer, or cannot justify spending thousands litigating over hundreds. Given the asymmetrical power dynamics, it is no surprise that employers seek to divide employees and create barriers to relief.

The California Supreme Court has repeatedly affirmed that public policy favors the use of class actions. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 (*Sav-On*)). And class actions to enforce

² National Women's Law Center, The Wage Gap, State by State for Women Overall (October 15, 2023) <<https://nwlc.org/resource/wage-gap-state-women-overall/>> (as of November 15, 2023).

EPA and FEHA target the gender wage gap and the specific employment practices that allow the gender wage gap to persist. In this case, Plaintiffs Elizabeth Sue Petersen, *et al.*, on behalf of 3,100 women, (“Plaintiffs”) challenged a practice prohibited by FEHA and the EPA—Defendant Oracle America (“Oracle”) pays female employees in California less than men in similar jobs or substantially similar jobs. Oracle uses women’s prior salaries, which are generally reflective of the longstanding and pervasive gender wage gap, as a mechanism to depress their wages. The California Legislature has already found that this specific practice perpetuates the gender wage gap, making it illegal as of 2018. Oracle nonetheless continues to perpetuate the disparities caused by its use of this illegal benchmark.

In light of Oracle’s systemic discrimination, Plaintiffs challenged this unlawful practice as a class action. And the trial court initially got it right. It granted class certification on Plaintiffs’ claims regarding Oracle’s pervasive discriminatory practices, finding that Plaintiffs had submitted substantial common evidence for all the elements of their UCL, FEHA and EPA claims, as well as Oracle’s affirmative defenses. However, about two years later, the trial court erroneously granted Oracle’s second motion to decertify the class based solely on concerns about “manageability” that cannot be reconciled with settled principles of class action law or common sense.

Appellants persuasively argue that the trial court’s decertification order must be reversed because the court erred in its manageability analysis. Amici write separately to explain how claims challenging salary-setting practices under FEHA and wage disparities under the EPA are fundamentally well-suited for class treatment because both address group-based discrimination. A disparate impact claim under FEHA prohibits facially neutral employment practices that have a disproportionately adverse impact on women, and the EPA prohibits employers from paying women less than men for substantially similar work. Rather than seeking to implement available tools for effective case management, the court merely threw up its hands. If allowed to stand, collective enforcement of these critical anti-discrimination statutes will be put in serious jeopardy.

II. ARGUMENT

A. Class Actions are Critical Vehicles for Eliminating Workplace Discrimination and Closing the Gender Wage Gap.

1. FEHA and the EPA are remedial statutes enacted to remedy workplace discrimination in California.

The California Supreme Court has emphasized that employees have the right to be free of workplace discrimination on account of sex. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 90.) Gender-based pay disparities violate FEHA (Gov. Code, § 12900) and the EPA (Lab. Code, § 1197.5).

The Legislature has repeatedly expanded FEHA to broaden the scope of its protections, covering many avenues of public and private

employment. (Gov. Code, § 12940.)³ The basic, underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination on account of sex or gender, among other protected characteristics.⁴ (Gov. Code, § 12920; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 582–583.) FEHA’s ambitious goals aim to provide effective remedies that will eliminate insidious forms of discrimination suffered by women and minorities in the workplace. (Gov. Code, § 12920.) For example, gender-based discrimination was declared “a serious and widespread problem that ... destroys careers, and prevents employees and businesses from functioning at their highest levels.” (Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 196 (2003-2004 Reg. Sess.) Mar. 19, 2003, pp. A-B.)

The EPA was originally enacted nearly 75 years ago to remedy wage discrimination against women in the workplace and has since been amended to further address and remedy this discrimination. (Legis. Counsel’s Dig., Sen. Bill No. 358 (2015-2016 Reg. Sess.), ch. 546.); See *Bass v. Great Western Savings & Loan Assn.* (1976) 58 Cal.App.3d 770, 772.)⁵ As the Legislature found just eight years ago, the need for remedial

³ FEHA was recodified in 1980 (Stats. 1980, ch. 992, § 4, p. 3140 et seq.)

⁴ FEHA has steadily expanded to encompass 18 different protected characteristics. (Gov. Code, § 12900.)

⁵ The EPA was virtually identical to the federal Equal Pay Act of 1963 (29 U.S.C. § 206(d)) before the January 1, 2016 amendment.

measures remains overwhelming. The Legislature found the gender wage gap in California “extends across almost all occupations,” “is far worse for women of color,” and causes a “significant impact on the economic security and welfare of millions of working women and their families.” (Legis. Counsel’s Dig., Sen. Bill No. 358 (2015-2016 Reg. Sess.), ch. 546.) Today, pervasive gender-based pay disparities continue to harm women in California and throughout the United States. In 2022, women working full-time, year-round in the United States were typically paid 84 cents to every dollar earned by men.⁶ This gap is even worse for women of color, with Black women working full-time year round earning 69 cents to every dollar earned by their white, non-Hispanic male counterparts,⁷ American Indian and Native Alaskan women earning 59 cents,⁸ and Latinas earning just 57 cents⁹ to the dollar. These numbers indicate pervasive wage inequity still requires robust legal protections like the EPA, which is designed to “lessen

⁶ U.S. Bureau of Labor Statistics, “Table A-2. Usual Weekly Earnings of Employed Full-Time Wage and Salary Workers by Intermediate Occupation, Sex, Race, and Hispanic or Latino Ethnicity and Non-Hispanic Ethnicity, Annual Average 2022,” (Washington, DC: U.S. Bureau of Labor Statistics, 2023, unpublished).

⁷ Ariane Hegewisch and Cristy Mendoza, *Gender and Racial Wage Gaps Marginally Improve in 2022 but Pay Equity Still Decades Away*. Factsheet. IWPR C519. (Washington, DC: Institute for Women’s Policy Research, 2023), <https://iwpr.org/wp-content/uploads/2023/09/2023-National-Wage-Gap-September-Factsheet-FINAL.pdf>

⁸ See IPUMS Version 11.0 dataset (Minneapolis, MN: IPUMS, 2023), <https://www.ipums.org/cps/>.

⁹ Hegewisch and Mendoza *supra*..

the gap in earnings between men and women.” (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37.)

2. **FEHA and the EPA are well-suited for class treatment because both statutes are designed to address group-based disparities.**

a. **Disparate impact claims under FEHA rely on common evidence to challenge workplace discrimination.**

Disparate impact claims are group-based by nature because they are a vehicle for addressing the discriminatory impact of facially neutral policies on a particular group, such as women.¹⁰ An employer violates FEHA if it has a facially neutral policy that has a disparate impact on employees of one gender. (*Stender v. Lucky Stores, Inc.* (N.D.Cal. 1992) 803 F.Supp. 259, 325; *Foroudi v. Aerospace Corp.* (2020) 57 Cal.App.5th 992, 1004 [explaining a prima facie disparate impact claim involves facially neutral practices that fall more harshly on one group].)

The inquiry into a group experience makes disparate impact claims well-suited to the class action device because both disparate impact claims and class actions rely on common group experiences to determine liability. (*Sav-On, supra*, 34 Cal.4th at p. 340; *Stockwell v. City and County of San Francisco* (9th Cir. 2014) 749 F.3d 1107, 1115 [disparate impact analysis is

¹⁰ *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431-432 [holding Title VII proscribes “practices that are fair in form, but discriminatory in operation” and therefore “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability”].

generally used in a class action, but in whatever procedural mechanism it is alleged the party asserting it must demonstrate a statistical disparity affecting members of the protected group].) This is because disparate impact analysis addresses the consequences of employment practices, rather than the motivation of the employer. (*Stockwell v. City and County of San Francisco, supra*, 749 F.3d at p. 1115 & fn. 4, quoting *Griggs v. Duke Power Co., supra*, 401 U.S. at p. 432.) It is well established that “discriminatory consequences are perceptible only in the aggregate ... and require statistical evidence.” (*Ibid.*)

Similarly, in a disparate impact case, the Defendant also relies on common evidence to present affirmative defenses. If plaintiffs meet their burden, the “burden ... shifts to the employer to demonstrate that the practice is a business necessity, which is valid and job-related.” (*Stender v. Lucky Stores, Inc., supra*, 803 F.Supp. at p. 325.) In a class action, courts have recognized that business necessity and job-related affirmative defenses are also common questions under Rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.). (See, e.g., *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (7th Cir. 2012) 672 F.3d 482, 489 [whether the employer’s practice has an adverse impact and “whether it nonetheless

is justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination”].)¹¹

Common evidence is thus an essential element of disparate impact litigation under FEHA on both sides of the aisle. For this reason, class actions are critical vehicles for revealing systemic workplace discrimination and uncovering the patterns and practices that sustain the gender wage gap.

b. The EPA is well-suited for the use of common evidence to challenge pay disparities.

Similarly, the use of common evidence is critical to California’s EPA. The EPA places the initial burden on plaintiffs to prove women are paid less than men for substantially similar work. (Lab. Code, § 1197.5.) Just like in a FEHA disparate impact case, the EPA does not require proving discriminatory intent for the identified pay disparity. (*Ibid.*) Moreover, the EPA does not require plaintiffs to show an employment practice has caused pay disparities. (*Ibid.*) Instead, if plaintiffs meet their initial burden, an employer must justify pay disparities under one of four affirmative defenses. (Lab. Code, § 1197.5, subds. (a) & (b).)

Under this remedial statute, Plaintiffs’ prima facie burden is flexible and broad. For instance plaintiffs can meet their burden by identifying just one comparator. (*Allen v. Staples*, (2022) 84 Cal.App.5th 188, 194.) Or,

¹¹ *Chen-Oster v. Goldman, Sachs & Co.* (S.D.N.Y. 2018) 325 F.R.D. 55, 82 [“Whether the challenged processes are job related or consistent with business necessity is a question of generalized proof”].

plaintiffs can present common proof that women as a group were paid less on average than men as a group. (See *Hein v. Oregon College of Education* (9th Cir. 1983) 718 F.2d 910, 916-917 [finding under the federal EPA an appropriate comparison is with “the average of wages paid to all employees of the opposite sex” because, *inter alia*, this is “in harmony with the language of the Equal Pay Act, which requires comparison to ‘employees’ of the opposite sex. The Act speaks of employees only in the plural”]. The EPA’s plain language states that the relevant comparison under the EPA is between “any of its employees” (i.e., women) and “employees of the opposite sex” (i.e., men). (Lab. Code, § 1197.5, subd. (a).) The use of the plural “employees,” means an appropriate comparison is between women as a group and men as a group. (See *Hein v. Oregon College of Education*, *supra*, 718 F.2d 910 at p. 916) Likewise, the inclusion of “any” compels a broad interpretation because California courts have repeatedly held the use of “any” means the legislature intended the statute to apply broadly. (See, e.g., *Kurz v. Syrus Systems, LLC* (2013) 221 Cal.App.4th 748, 762 [collecting cases]; *CD Investment Co. v. California Ins. Guarantee Assn.* (2000) 84 Cal.App.4th 1410, 1421, modified on denial of reh’g (Dec. 27, 2000) [“‘any’ means ... ‘unlimited in amount, quantity, or number ...’”] (internal bracket and citation omitted).

Regarding the “substantially similar” work element of a plaintiff’s prima facie case, EPA has always rejected a narrow view because it was

originally intended to include across-job comparisons. (See Legis. Counsel’s Dig., Sen. Bill No. 358 (2015-2016 Reg. Sess.), ch. 546.,§ 1(c) [finding EPA was enacted in 1949 to “redress the segregation of women into historically undervalued occupations”].) In applying the “substantially similar work” element, courts have focused on “the overall job,” rather than its component parts. (See *Freyd v. University of Oregon* (9th Cir. 2021) 990 F.3d 1211, 1220 [“[I]t is the overall job, not its individual segments, that must form the basis of comparison in assessing the comparability of occupations [citation]”]; *Brobst v. Columbus Servs. Int’l* (3d Cir. 1985) 761 F.2d 148, 158 [“[It] will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared *over a full work cycle*”] (emphasis in original) (quoting 29 C.F.R. § 800.119 (1984)).¹² The EPA employs this broad approach to root out the persistent wage disparities women continue to face in the workplace.

The determination of whether work is “substantially similar” is, likewise, well-suited for common proof. Under the EPA, “substantially similar” means the skill, effort, and responsibility required for the jobs. (Former Lab. Code § 1197.5, amended by Stats.2015, c. 546 (S.B.358), § 2, eff. Jan. 1, 2016.). [“jobs the performance of which requires equal skill, effort, and responsibility”; Lab. Code § 1197.5 [“substantially similar work,

¹² The current version of this EPA regulation, which likewise requires looking at the jobs “over a full work cycle, is now at 29 C.F.R. § 1620.24.

when viewed as a composite of skill, effort, and responsibility”].)

Employers regularly focus on the required skill, effort, and responsibility when evaluating jobs under their job classification systems. Indeed, the U.S. Supreme Court held that the meaning of skill, effort, and responsibility under the federal Equal Pay Act, on which the California EPA was modeled, can be, and has been, reflected in employers’ bona fide job classification systems. (*Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 200-01.) This is precisely the type of evidence the California Supreme Court finds well-suited for class certification. (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 27 (Duran) [“Job requirements and employer expectations of how duties are to be performed may often be established by evidence relating to a group as a whole [citation]].)

An employer’s defense under the EPA, both before and after the 2016 amendments, must also rely upon common proof.¹³ The first three

¹³ EPA was amended in January 2016. (Cal. Lab. Code § 1197.5 (2015). Of the many amendments strengthening the law, this 2016 amendment explicitly requires employers raising the bona fide factor defense to explain the entire pay disparity. While the pre-2016 version of EPA does not contain explicitly include this language about the entire disparity, it still required employers to prove bona fide factors explain the entire differential for three reasons. First, before 2016, the bona fide factor defense provided that the factors identified explain the “differential.” (Lab. Code. 1197.5(a) (2015). Second, because an affirmative defense, it required the employer to prove facts that establish no cause of action remains. (*Walsh v. West Valley Mission Community College. Dist.* (1998) 66 Cal.App.4th 1532, 1542. And, if a disparity remains unjustified, a cause of action remains. Third, numerous courts required employers to explain the entire differential for the bona fide factor defense under the federal Equal Pay Act, which is virtually identical to the pre-2016 version of the California Equal Pay Act. See e.g., *Gosa v. Bryce Hospital* (11th Cir. 1986) 780 F.2d 917, 919 [affirming award because the employer was “unable to prove that the entire

defenses require evidence of a “system.” (Lab. Code § 1197.5(a)(1)(A)-(C).)¹⁴ The fourth affirmative defense under both the pre and post-2016 EPA requires employers to rely upon a “bona fide factor other sex.” (Lab. Code § 1197.5(a)(1)(D)), which is limited to job-related factors. T The pre-2016 version’s “bona fide factor” language mirrors the language of the federal Equal Pay Act which is “limited to job-related factors. (*Rizo v. Yovino, supra*, 950 F.3d at p. 1224.) The 2016 EPA amendments reaffirmed this “bona fide” factor is limited to “job-related” factors because the Legislature explicitly added “job-related” to the bona fide factor defense. (Lab. Code § 1197.5(a)(1)(D).). Evidence concerning job-related requirements, as the California Supreme Court has recognized, is often common. (*Duran, supra*, 59 Cal.4th at 27.)

3. **Class actions raising disparate impact claims and the EPA claims often rely upon statistical evidence.**

In a disparate impact class action, plaintiffs and defendants alike rely on statistical analyses to demonstrate the presence or absence of discrimination, and review of this evidence by the trier of fact advances the resolution of class claims. (*Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1428.) Plaintiffs litigating class actions use statistical evidence to

wage disparity was attributable to factors other than sex.”].

¹⁴ These three defenses are: “seniority system;” “merit system;” and “system that measures earnings by quantity or quality of production.” (*Id.*).

prove their prima facie case and establish liability. (*Hazelwood School District v. U.S.* (1977) 433 U.S. 299, 307-08.) At the liability phase, defendants can rebut statistical evidence in numerous manageable ways, including by showing that statistics are flawed, demonstrating that the disparities presented are not statistically significant, or presenting their own contradicting statistical analysis showing the presence of no discrimination. (*Penk v. Oregon State Board of Higher Education* (9th Cir. 1987) 816 F.2d 458, 464 [listing available rebuttal evidence].)

In EPA cases, only through statistical evidence can plaintiffs demonstrate those systematic pay disparities that cause the persistent depression of women's pay. By contrast, if EPA claims are brought individually, systemic disparities will remain unaddressed because statistical evidence will rarely be feasible. This is because the sample sizes may be too small to present aggregate data regarding a single plaintiff. (See *Watson v Fort Worth Bank & Trust* (1988) 487 U.S. 977, 1000.) Further limiting the likelihood that an individual plaintiff could effectively develop statistical evidence is the fact that many employers group their employees into numerous job categories limiting statistical evidence to a particular job category, as one appellate court explained:

would not only be silly, it would be pernicious: the plethora of job categories ... in many other white collar organizations suggests that adopting [this] approach ... could well preclude the effective use of statistics [because] generating a large enough numerical base from which to draw statistically

significant conclusions is likely in case after case to prove impossible or prohibitively onerous.

(*Cook v. Boorstin* (D.C. Cir. 1985) 763 F.2d 1462, 1468-69.) [citations omitted].)

Moreover, the “substantial upfront costs of litigating a complex discrimination case against a multi-national corporate defendant” means “few potential class members could afford to undertake individual litigation.” (*Buchanan v. Tata Consultancy Services, Ltd.* (N.D. Cal., Dec. 27, 2017, No. 15-cv-01696-YGR) 2017 WL 6611653, at *22, citation omitted.) Consequently, few class members would have any meaningful redress against the employer in an individual suit. (*Ibid.*)

B. Concerns About Trial Manageability Do Not Warrant Decertification of a Class Action When All Prerequisites Are Established.

1. California courts have an express public policy encouraging the use of class actions.

California independently favors class action litigation when appropriate. Nearly two decades ago, the California Supreme Court recognized this state has “a public policy which encourages the use of the class action device.” (*Sav-On, supra*, 34 Cal.4th at p. 340.) The state’s strong endorsement of the class action mechanism “rests on considerations of necessity and convenience” and was “adopted to prevent a failure of justice.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704 (*Daar*), citation omitted.) When the contested issues in the litigation are common,

the *Sav-On* court noted, “[i]t would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues.” (*Sav-On, supra*, 34 Cal.4th at p. 340, citation omitted.) The Court further recognized the importance of certifying employment claims, which “are to be construed so as to promote employee protection.” (*Sav-On, supra*, 34 Cal. 4th at p. 340).¹⁵

2. **Manageability is not an independent requirement for class certification under California law.**

California’s long-standing statutory authorization for class actions is concise and broad:

when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

(Code Civ. Proc. § 382.)¹⁶

To determine when such consolidation is appropriate, California state courts have articulated specific requirements for class certification. Class certification requires proof (1) of a sufficiently numerous,

¹⁵ Public policy requires liberal construction of FEHA and the EPA. *See* Cal. Gov’t Code § 12993 (“The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part.”); *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 189 (“Because statutes governing employment conditions tend to have remedial purposes, we ‘liberally construe’ them ‘to favor the protection of employees.’”) (collecting cases).

¹⁶ The California Rules of Court rules 3.760 through 3.771 provide additional instructions as to the administration of class actions; *See also City of San Jose v. Superior Court* (1974) 12 Cal.3d 447; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429; *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069.

ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. (See Code Civ. Proc. § 382; *Sav-On, supra*, 34 Cal.4th at p. 326.) The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.¹⁷ (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470).

Manageability is not an independent requirement for class certification under California law. Instead, manageability is one of the multiple considerations that may be weighed by a court to determine if a class action is superior to other methods of resolving the dispute. (See *Duran, supra*, 59 Cal.4th at p. 29.) Put another way, manageability is only relevant where it impedes a proposed class's ability to meet the enumerated requirements for class certification. (See e.g. *Osborne v. Subaru of*

¹⁷ The California approach is loosely analogous to the federal prerequisites to class actions under Rule 23(a), which requires (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. In the absence of state law, California courts often look to Federal Rule of Civil Procedure 23 on class actions and the federal cases interpreting this rule for guidance. (*Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 301 n.7; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821 (*Vasquez*) ["In the event of a hiatus, rule 23 of the Federal Rules of Civil Procedure prescribes procedural devices which a trial court may find useful."]; *Daar, supra*, 67 Cal.2d at p. 709.)

America, Inc. (1988) 198 Cal.App.3d 646, 653; *Klay v. Humana, Inc.* (11th Cir. 2004) 382 F.3d 1241, 1272 [“[W]here a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions.”].). In implementing the state’s public policy favoring class actions, the Supreme Court has directed California’s trial courts to be “procedurally innovative” in managing class actions, further demonstrating its preference for class action certification even in the face of manageability concerns. (*Sav-On, supra*, 34 Cal.4th at p. 339.)

Instead of following this precedent, the trial court here required plaintiffs to affirmatively demonstrate manageability through the submission of a separate trial plan and found the plan lacking. By decertifying the *Jewett* class solely upon manageability grounds, the trial court effectively read an additional requirement into the class certification analysis, and placed an undue burden on the plaintiffs that is not contemplated by the rules governing class actions.

3. **The trial court has an obligation to consider the innovative procedural tools available to certify a manageable class.**

All complex civil litigation requires active judicial case management. (Cal. Rules of Court, rule 3.10(a).) To accomplish this undertaking, trial court judges must utilize the broad and inherent power of the court to control matters before them, which includes adopting

appropriate procedures to manage the distinct needs of each case. (Cal. Code Civ. Proc. § 128; *First State Insurance Co. v. Superior Court* (2000) 79 Cal.App.4th 324, 334.)¹⁸ In the class action context, the California Rules of Court specifically empower trial courts to “make orders that ... [f]acilitate the management of class actions through consolidation, severance, coordination, bifurcation, intervention, or joinder” or “[a]ddress similar procedural matters.” (Cal. Rules of Court, rule 3.767(a)(4)-(5).) For this reason, the inquiry into the manageability of a class action cannot be severed from the trial court’s “obligation to consider. . . innovative procedural tools proposed by a party to certify a manageable class.” (*Sav-On, supra*, 34 Cal.4th at pp. 339-40, citation omitted).

The trial court improperly rested its decertification order exclusively on a perceived lack of manageability, and also failed to meaningfully consider all practical solutions to maintain the class action. (See Appellants’ Opening Brief (hereafter “AOB”) p. 34.) Courts across the country, including the Ninth Circuit, have discouraged dismissing class actions on manageability grounds alone.¹⁹ (See, e.g., *In re Live Concert*

¹⁸ Furthermore, courts have inherent equity, supervisory, and administrative powers (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 635.) as well as inherent power to control litigation before them. (*Western Steel & Ship Repair, Inc. v. RMI, Inc.* (1986) 176 Cal.App.3d 1108, 1116-1117.) Inherent powers of the court are derived from the state Constitution and are not confined by or dependent on statute. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267)

¹⁹ See e.g. *Yaffe v. Powers*, (1st Cir. 1972) 454 F.2d 1362, 1365, abrogated on other grounds by, *Gardner v. Westinghouse Broadcasting Co.* (1978)

Antitrust Litigation (C.D.Cal. 2007) 247 F.R.D. 98, 148; *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 978 [“refusing to certify on manageability grounds alone should be the last resort. [citation]”].)

Instead, manageability concerns should and can be addressed through the many procedural tools at the court’s disposal.

a. A variety of options are available to a trial court for managing class actions.

Numerous tools are available to courts to manage class action litigation proceedings, ease the burden on the judiciary, and facilitate resolution of procedural and substantive issues. (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App. 3d, 1341, 1354 (*B.W.I.*)). For instance, bifurcated trials, creation of subclasses, and issue classes may be employed to simplify the proceedings. (*Ibid.*). A court may utilize these procedural options at the request of a party or on its own motion.²⁰ In this

437 U.S. 478 [“for a court to refuse to certify a class on the basis of speculation as to the merits of the cause or because of vaguely-perceived management problems is counter to the policy which originally led to the rule, and more especially, to its thoughtful revision, and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise.”]; *In re Visa Check/MasterMoney Antitrust Litigation* (2nd Cir. 2001) 280 F.3d 124, 140 [the “failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and ‘should be the exception rather than the rule.’ [citation]”]; *Carnegie v. Household International, Inc.* (7th Cir. 2004) 376 F.3d 656, 661 (“[A] class action has to be unwieldy indeed before it can be pronounced an inferior alternative ...”); *Buford v. H & R Block, Inc.* (S.D. Ga. 1996) 168 F.R.D. 340, 363, *aff’d*, 117 F.3d 1433 (11th Cir. 1997) (“There exists a strong presumption against denying class certification for management reasons.”); See also 2 Newberg and Rubenstein on Class Actions § 4:72 (6th ed.) [collecting cases]

²⁰ See Four factor test—Manageability—Methods of handling—Court-initiated management techniques, 2 Newberg and Rubenstein on Class Actions § 4:80 (6th ed.) [a court ought to consider whether any

case, there is no evidence that the court sufficiently considered these management strategies.

Bifurcated Proceedings. It is well settled that the presence of individual damage issues cannot bar class certification. (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1221, as modified on denial of reh’g (Oct. 6, 2016); *B.W.I., supra*, 191 Cal.App.3d at pp. 1341, 1354, citing *Anthony v. General Motors Corp.* (1973) 33 Cal.App.3d, 699.) To the extent that trial courts are concerned about managing individual damage determinations, bifurcation allows them to make class-wide liability determinations before any consideration of individual relief. (See *Nicodemus, supra*, 3 Cal.App.5th at p. 1221 [“[I]n most circumstances a court can devise remedial procedures which channel the individual [damage] determinations that need to be made through existing forums. [Citation].”] A bifurcated trial, subclasses, and other methods may be employed to simplify the proceedings.”] (*B.W.I., supra*, 191 Cal.App.3d at p. 1354.)).²¹

Subclasses. Dividing classes into multiple subclasses for purposes of trial provides courts with the flexibility to isolate subsets of the class that

management tools might enable the case to proceed.])

²¹ California Rules of Court rule 3.767(a)(4) states “In the conduct of a class action, the court may make orders that [f]acilitate the management of class actions through consolidation, severance, coordination, bifurcation, intervention, or joinder.”

share common issues that may be more efficiently resolved independently of the rest of the class. *Vasquez, supra*, 4 Cal.3d 800 at p. 821 [“[I]t is possible that the court will find that efficiency would be promoted if the class were divided into subclasses. Subdivision (4)(B) of Rule 23 contemplates such a procedure.”].) ²² For example, in this case, Plaintiffs proposed creating a subclass for the UCL and EPA claim, which the trial court rejected without explanation. (AOB at pp. 55, 59).

Issue Certification. A trial court may also certify particular issues for class litigation, rather than the case as a whole. (Fed. Rules Civ. Proc. 23(c)(4); Manual for Complex Litig., *supra*, § 21.24.)²³ Even if the common questions do not predominate over the individual questions, such that class certification of the entire action is warranted, Rule 23 authorizes federal courts to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues. (*Valentino v. Carter–Wallace, Inc.* (9th Cir. 1996) 97 F.3d 1227, 1234.) As the Advisory Committee note to Rule 23(c)(4) explains, a court may certify a class to adjudicate liability issues on behalf of a defined class, even though those

²² California Rules of Court rule 3.765(b) states “A class may be divided into subclasses.” Similarly, Rule 23(c)(5) states: “When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.” Fed. R. Civ. P. 23(c)(5). A court may also create subclasses, each of which is treated as a class and subject to the same requirements as one. *Betts v. Reliable Collection Agency, Ltd.*, (9th Cir. 1981) 659 F.2d 1000, 1005.

²³ California Rules of Court rule 3.765(b) states “When appropriate, an action may be maintained as a class action limited to particular issues.”

class members may be later required to appear and prove damages individually.

The trial court's failure to meaningfully examine creative tools for managing class proceedings undermines the state's explicit public policy in favor of class actions. To make that promise real, courts must critically examine proposed class actions to determine how they can best be successfully tried and resolved on a class-wide basis, not how they can most readily be denied certification and relegated to individual lawsuits.

b. Innovative procedural tools are available to a trial court to preserve defendants' ability to present non-speculative affirmative defenses at trial.

The use of innovative procedural tools does not deprive the defendant of the ability to present their case. In *Duran v. U.S. Bank National Association*, the California Supreme Court held that “any trial must allow for the litigation of affirmative defenses, even in a class action case where the defense touches upon individual issues.” (*Duran, supra*, 59 Cal.4th at p. 33). *Duran* does not, however, stand for the proposition that defendants have the right to call hundreds of witnesses or litigate every affirmative defense against each individual class member. (See *Duran, supra*, 59 Cal.4th at p. 38; *Wesson v. Staples the Office Store* (2021) 68 Cal.App.5th 746, 771 [“Where methods of common proof afford the defendant a fair opportunity to litigate every available defense, courts may limit the presentation of individualized evidence that would be cumulative

or have little probative value”].) Nor does *Duran* put the burden of planning the presentation of a defendants’ affirmative defenses on the plaintiffs. (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 383, as modified on denial of reh’g (Dec. 3, 2014).)

A defendant must allege more than a mere speculative affirmative defense to defeat class certification. In its order decertifying the class, the trial court unquestionably accepted Oracle’s claim that its affirmative defenses to EPA claims required it to present testimony from each of the managers who allegedly made pay decisions for each of the 3,000 class members. (AOB p. 54) Yet Oracle did not even identify a single specific class member whose claims would be defeated by an individualized inquiry. (*See* AOB). A speculative affirmative defense does not defeat class certification. (*See e.g., Williams v. Apple, Inc.* (N.D. Cal. 2021) 338 F.R.D. 629, 648.) Unless a defendant can present evidence that an affirmative defense would require “non-speculative individualized inquiries,” it is “error to deny class certification based on that affirmative defense.” (*Ibid.*, quoting *True Health Chiropractic, Inc. v. McKesson Corp.* (9th Cir.2018) 896 F.3d 923, 931.)²⁴ This reliance on “speculation to

²⁴ *See also e.g., Bridging Communities Inc. v. Top Flite Financial Inc.* (6th Cir. 2016), 843 F.3d 1119, 1125 (same); *Waste Management Holdings, Inc. v. Mowbray* (1st Cir. 2000) 208 F.3d 288, 298 (“We are unwilling to fault a district court for not permitting arguments woven entirely out of gossamer strands of speculation and surmise to tip the decisional scales in a class certification ruling. [Citation.]”).

dictate the outcome of a class-certification decision afford[ed Oracle] wide latitude to inject frivolous issues to ... undermine a finding Duran of predominance.” *Bridging Communities Inc., supra*, 843 F.3d at p. 1126 (rejecting reliance on speculative affirmative defense because “[w]e hold that the mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3). [Citation.]”).

The *Duran* Court also explained that representative testimony, sampling, and other procedures employing statistical methodology may be appropriately used to adjudicate affirmative defenses. (*Duran, supra*, 59 Cal.4th at 33). As the plaintiffs here have described in detail, their claims under FEHA and the EPA rely heavily on class-wide statistical evidence. (AOB pp. 39 – 40, 54 – 55.)

Trial courts should not place the burden entirely upon plaintiffs to identify a viable way for defendants to litigate their own affirmative defenses, which runs counter to the principles of general civil litigation. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 (*Mathis*))²⁵ A defendant normally bears the burden of proof with respect to affirmative defenses. (*Id.* at p. 347). Rulings of this nature reward inaction and reinforce defendants’ failure to actively participate in and execute a

²⁵ See Cal. Code Civ. Proc. § 431.30(b); Fed. Rules Civ. Proc., rule 8(c)

litigation plan in class proceedings. The trial court did not explain why it departed from this principle in the present case.

c. Creating a trial plan requires active judicial involvement and contributions from both parties.

In California, plaintiffs may draft and submit a trial plan at the class certification stage to demonstrate: (1) how the matter is one of common or general interest under CCP § 382; and (2) that a class action is a superior method of adjudication because the case can proceed to trial in a manageable way. (*Lao v. H&M Hennes & Mauritz, L.P.* (N.D. Cal., Dec. 20, 2019, No. 5:16-CV-00333-EJD) 2019 WL 7312623, at *7 (*Lao*)) That said, while trial plans may be submitted, they are not required for class certification. (Cal. Rules of Court, rule 3.764(c)(3) [list of documents in support of a motion for class certification does not include a trial plan].) The Ninth Circuit has held that “[n]othing in the Advisory Committee Notes [to Rule 23] suggests grafting a requirement for a trial plan onto the rule.” (*Chamberlan v. Ford Motor Co.* (9th Cir. 2005) 402 F.3d 952, 961, fn. 4; see also *Lao, supra*, 2019 WL 7312623 at *7 [plaintiffs are not required to offer a trial plan to obtain class certification under Rule 23].) Nothing in section 382, the California Rules of Court, or Rule 23 permits a trial court to decertify a class solely because of the absence of a full and complete trial plan, where all requirements for class certification are met.

Although not a requirement, trial plans are useful tools for case management. At least one district court has observed that the most effective trial planning starts after class certification and usually after dispositive motions are adjudicated. (*Clark v. QG Printing II, LLC* (E.D. Cal., Apr. 26, 2023, No. 118CV00899AWIEPG) 2023 WL 2815733, at *8 (*Clark*); See also *In re ConAgra Foods, Inc.* (C.D. Cal. 2014) 302 F.R.D. 537, 580 [requiring a trial plan “sometime after” class certification].) This is likely because there is no way for the parties to know which claims and defenses are going to trial before class certification is resolved. The resolution of these threshold motions will focus the trial plan to produce a more accurate assessment of how to navigate a trial on the remaining claims.

Meaningful trial planning also necessitates defendants’ good faith participation (*Clark, supra*, 2023 WL 2815733 at *8), because defendants are responsible for presenting their own defenses at trial. (*Mathis, supra*, 11 Cal.App.4th at p. 347, fn.9.) Placing the trial plan entirely on plaintiffs’ shoulders at an unduly early stage of litigation (i.e., before dispositive motions) puts plaintiffs at a distinct disadvantage. This practice shifts full litigation responsibilities onto plaintiffs and absolves defendants from providing significant contributions to case management. This goes far beyond what is contemplated by section 382 and Rule 23.

If the parties cannot jointly agree to a trial plan, courts may order the parties to collaborate, which the trial court here also failed to do. (See, e.g.,

Alila-Katita v. U.S. Bank National Association (N.D. Cal., May 2, 2017, No. 16-CV-03950-JSW) 2017 WL 8948735, at *7. [ordering the parties to meet and confer on, among other things, a trial plan].)

Without active judicial involvement, plaintiffs must speculate as to how each affirmative defense will be presented and will likely have to assume that all defenses will be presented at trial. Yet defendants, of course, do not “have an unfettered right to present individualized evidence in support of a defense” (*Duran, supra*, 59 Cal. 4th at p. 34; see also *Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [the “proposition that the Due Process Clause guarantees the right to introduce *all relevant evidence* is simply indefensible”] (emphasis in original).)²⁶ Meaningful involvement from the court will facilitate a workable trial plan that appropriately allocates litigation responsibilities between counsel.

III. CONCLUSION

For the foregoing reasons, as well as those set forth by Appellants, Amici respectfully request that the Court reverse the trial court’s order decertifying Plaintiffs’ EPA and UCL claims and dismissing Plaintiffs’ PAGA claim.

²⁶ *Ibid.*. [“any number of familiar and unquestionably constitutional evidentiary rules also authorize the exclusion of relevant evidence,” including “by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”].

CERTIFICATE OF WORD COUNT

I, the undersigned appellate counsel, certify that this brief consists of 8,076 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(3), relying on the word count of the Microsoft Word computer program used to prepare the brief.

Dated: November 16, 2023

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PROOF OF SERVICE

I am a citizen of the United States, am over the age of 18 years, and not a party to the within entitled action. My business address is 155 Grand Avenue, Suite 900, Oakland, CA 94612. I declare that on the date hereof I served the following documents:

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By Electronic Service: By Filing via TrueFiling: I filed such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service pursuant to CRC 8.212(b)(1), (c) on the parties below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 16th day of November 2023, at Oakland, California.



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