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The Coming Collision: California's Disparate Impact Regime Is Vulnerable to an Equal Protection Challenge

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THE COMING COLLISION: CALIFORNIA’S DISPARATE IMPACT REGIME IS VULNERABLE TO AN EQUAL PROTECTION CHALLENGE

INTRODUCTION

For more than half a century, disparate impact liability has been a pillar of American employment discrimination law. Since the Supreme Court of the United States (SCOTUS) issued its landmark decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), employers have understood that facially neutral employment practices—selection tests, credential requirements, physical fitness standards—may violate federal and state anti-discrimination statutes if they disproportionately exclude members of a protected class and cannot be justified by business necessity. *See Griggs*, 401 U.S. at 431; *see also* 42 U.S.C. § 2000e-2(k) (2018). California’s Fair Employment and Housing Act (FEHA), Cal. Gov. Code §§ 12900–12996 (West 2024), has embraced this framework with enthusiasm, and California courts have consistently applied disparate impact analysis in ways that track and sometimes exceed federal precedent. *See, e.g., Guz v. Bechtel Nat’l, Inc.*, 24 Cal. 4th 317, 354 (2000).

But the constitutional ground beneath disparate impact is shifting—and shifting fast. Over the past three decades, SCOTUS has moved with increasing conviction toward a colorblind interpretation of the Fourteenth Amendment’s Equal Protection Clause. The trajectory is unmistakable: from *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995), which imposed strict scrutiny on all racial classifications, to *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 206–08 (2023), which dismantled race-conscious university admissions, to *Louisiana v. Callais*, 146 S. Ct. 1131, 1161–63 (2026), which struck down a redistricting plan as an impermissible racial

gerrymander, the SCOTUS has systematically closed the doors through which government actors once justified the use of race. And in *Ricci v. DeStefano*, 557 U.S. 557 (2009), Justice Scalia issued what may prove to be the most consequential concurrence of the modern era: a warning that the “war between disparate impact and equal protection” is coming, and that the SCOTUS will eventually have to choose a side. *Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring).

This *Working Paper* argues that the current SCOTUS jurisprudence has laid the doctrinal foundation for a successful constitutional challenge to FEHA’s disparate impact provisions—at least as applied to public employers. It traces the constitutional argument step by step, addresses the strongest counterarguments, and offers practical guidance for California defense litigators who may soon find themselves litigating at the frontier of equal protection law.

I. FEHA’s DISPARATE IMPACT FRAMEWORK: THE STATUTORY LANDSCAPE

A. The Statutory Basis

FEHA prohibits employment practices that have an adverse impact on persons in a protected class. Cal. Gov. Code § 12940(a). California courts have adopted the burden-shifting framework familiar from federal law. A plaintiff establishes a prima facie case of disparate impact by identifying a specific employment practice and demonstrating, typically through statistical evidence, that the practice causes a significant adverse effect on a protected group. The burden then shifts to the employer to demonstrate that the challenged practice is job-related and consistent with business necessity. *See City & Cnty. of San Francisco v. Fair Emp. & Hous. Comm’n*, 191 Cal. App. 3d 976, 987 (1987); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018). If the employer meets this burden, the plaintiff may still prevail by showing that a less discriminatory alternative exists and that the employer refused to adopt it. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2018).

B. FEHA and Title VII: Parallels and Divergences

California courts have long looked to Title VII precedent when interpreting FEHA's anti-discrimination provisions, and the disparate impact frameworks under the two statutes are broadly parallel. Both trace their intellectual lineage to *Griggs*, where SCOTUS held that Title VII prohibits facially neutral employment practices that disproportionately disqualify members of a protected class if they lack a demonstrable relationship to job performance. *Griggs*, 401 U.S. at 431. Both impose on the employer the burden of proving business necessity once a prima facie case is established. And both permit the plaintiff to show that less discriminatory alternatives were available. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Cal. Gov. Code § 12940(a).

There are, however, meaningful differences. FEHA's protections are in some respects broader than Title VII's: FEHA covers additional protected categories, applies to smaller employers (five or more employees, *see* Cal. Gov. Code § 12926(d)), and has been interpreted by California courts to provide greater substantive protection in certain contexts. *See Harris v. City of Santa Monica*, 56 Cal. 4th 203, 223 (2013). These differences matter because they mean that even if a federal court were to narrow or invalidate Title VII's disparate impact provisions, FEHA would likely continue to operate as an independent source of liability unless separately challenged under federal or state constitutional law.

C. The Codification Question

On the federal side, the Civil Rights Act of 1991 codified disparate impact liability at 42 U.S.C. § 2000e-2(k), overriding the SCOTUS's burden-shifting modifications in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute on other grounds as recognized in Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003). Although *Wards Cove* has been superseded by statute on its key burden-of-proof holdings, it continues to be cited for other analytical propositions. *See* Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (1991) (codified at 42 U.S.C. § 2000e-2(k)). The 1991 Act remains valid federal law and has not been subject to

a constitutional challenge that has reached the SCOTUS. FEHA’s disparate impact provisions, for their part, are creatures of the California Legislature and derive their authority from state law—but they remain subject to the constraints of the federal Constitution when applied by state actors. *See* U.S. Const. amend. XIV, § 1.

II. THE CONSTITUTIONAL ARGUMENT: BUILDING THE CASE STEP BY STEP

A. The Anti-Classification Principle and Strict Scrutiny

The constitutional challenge to disparate impact rests on a simple but powerful premise: disparate impact liability, as a practical matter, compels employers to engage in race-conscious decision-making, and such race-consciousness constitutes a racial classification subject to strict scrutiny under the Equal Protection Clause. *See Adarand*, 515 U.S. at 227.

The logic proceeds as follows. An employer facing a disparate impact claim knows that its facially neutral practice—a written examination, a physical fitness test, an educational credential requirement—has produced outcomes that differ by race. To avoid liability, the employer must either abandon the practice, modify it to reduce the racial disparity, or adopt an alternative that produces less disparate results. Each of these responses requires the employer to evaluate and act upon the racial composition of outcomes. The employer is, in effect, compelled to make decisions “because of” race. And once government compels race-conscious action, the Equal Protection Clause demands strict scrutiny: the government must demonstrate that its use of race serves a compelling interest and is narrowly tailored to achieve that interest. *See id.*; *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

This analytical structure follows directly from the SCOTUS’s most recent and most emphatic pronouncements on racial classifications. In *Students for Fair Admissions*, 600 U.S. at 206–08, the SCOTUS held that race-conscious admissions

programs at Harvard and the University of North Carolina violated the Equal Protection Clause, rejecting the argument that racial diversity constitutes a compelling governmental interest sufficient to sustain strict scrutiny. The majority emphasized that the Equal Protection Clause applies to individuals, not groups, and that “‘racial balancing’ is ‘patently unconstitutional.’” *Id.* at 223 (quoting *Fisher v. Univ. of Tex. at Aus.*, 570 U.S. 297, 311 (2013)). While the SCOTUS’s holding was limited to college admissions, its reasoning—particularly its categorical rejection of race-based outcome management—has obvious implications for any statutory regime that ties legal liability to racial outcomes.

B. Justice Scalia’s *Ricci* Concurrence: The Road Map

The most direct articulation of the constitutional challenge to disparate impacts analysis appears in Justice Scalia’s concurrence in *Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring). In *Ricci*, the City of New Haven discarded the results of a firefighter promotion examination after learning that the results would disproportionately favor white candidates. *Id.* at 562–63. The SCOTUS held that the city’s decision violated Title VII’s prohibition on disparate treatment because there was no “strong basis in evidence” to believe that the examination results would have subjected the city to disparate impact liability. *Id.* at 585.

Justice Scalia joined the majority but wrote separately to address the deeper constitutional question that the majority declined to reach. He observed that Title VII’s disparate impact provisions “place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.” *Id.* at 594 (Scalia, J., concurring). He warned that the SCOTUS would eventually have to confront “whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution’s guarantee of equal protection[.]” *Id.* (Scalia, J., concurring).

Justice Scalia’s concurrence identifies the precise mechanism by which disparate impact liability may violate the Equal Protection Clause—by compelling what would otherwise constitute intentional racial discrimination. If an employer modifies a selection procedure specifically to change the racial composition of outcomes, the employer has engaged in race-conscious decision-making. And if the government—through a statute like Title VII or FEHA—compels that race-conscious decision-making by imposing liability for race-neutral practices that produce disfavored statistical patterns, then the government itself has effectively mandated a racial classification. *See id.* at 594–96 (Scalia, J., concurring).

C. Justice Thomas’ Jurisprudence: The Colorblind Constitution

Justice Thomas’ opus of constitutional writing supplies a broad constitutional framework within which the challenge to disparate impact becomes not merely plausible but, on the current SCOTUS’s terms, analytically compelled. Over three decades, Justice Thomas has argued—in concurrences in *Adarand*, 515 U.S. at 240–41 and *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748–82 (2007), in Justice Rehnquist’s dissent that he joined *Grutter*, 539 U.S. at 378–87, in his dissenting opinion in *Allen v. Milligan*, 599 U.S. 1, 45–91 (2023), and in his concurrence in *Students for Fair Admissions*, 600 U.S. at 231–87—that the Fourteenth Amendment embodies a principle of *absolute colorblindness*. On this view, the Equal Protection Clause forbids the government from treating persons differently based on race, regardless of whether the classification is intended to burden or benefit any group. In other words, racism is always unconstitutional regardless what motivates the racial action.

What was once a minority position has become, in significant respects, the operative framework of the current SCOTUS. The *Students for Fair Admissions* majority adopted a categorical prohibition on race-conscious admissions—a result that vindicated the *Grutter* dissent two decades later. And in *Callais*, the SCOTUS

struck down a redistricting plan as an impermissible racial gerrymander, reaffirming that racial classifications in the allocation of political power violate the Equal Protection Clause absent narrow tailoring to a compelling interest. *See Callais*, 146 S. Ct. at 1161–63; *Shaw v. Reno*, 509 U.S. 630, 649 (1993). The redistricting context is instructive: just as the government may not sort voters into districts on the basis of race, an employer subject to FEHA may not be compelled to sort employees or applicants on the basis of race to avoid statutory liability.

D. The Doctrinal Trajectory: From Admissions to Employment

The arc of the SCOTUS’s race jurisprudence since 1991 points in one direction. *Adarand* established that all racial classifications are subject to strict scrutiny. *See Adarand*, 515 U.S. at 240–41 *Grutter* created a narrow exception for race-conscious university admissions, which *Students for Fair Admissions* eliminated. *Compare Grutter*, 539 U.S. at 326–343 with *Students for Fair Admissions*, 600 U.S. at 206–08, 230. *Ricci* established that an employer may not engage in race-conscious action to avoid disparate impact liability absent a strong basis in evidence. *Ricci*, 557 U.S. at 585. *Callais* reaffirmed that the Equal Protection Clause prohibits the government from subordinating race-neutral principles to racial objectives. *Callais*, 146 S. Ct. at 1153. And throughout this period, the Court has moved from tolerating race-consciousness under narrow conditions to rejecting it categorically.

Disparate impact liability is the last major doctrinal structure that requires government actors and regulated private parties to engage in race-conscious decision-making. The constitutional logic that dismantled race-conscious admissions, race-conscious redistricting, and race-conscious test invalidation applies with equal force to a statutory regime that imposes liability based on the racial composition of employment outcomes.

III. COUNTERARGUMENTS AND RESPONSES

A. “Disparate Impact Serves a Compelling Governmental Interest”

The strongest defense of disparate impact liability is that it serves the compelling governmental interest in eliminating employment discrimination. On this view, facially neutral practices that produce racially disparate outcomes are often proxies for historical discrimination—credential requirements adopted during the Jim Crow era, selection tests validated against biased criteria—and disparate impact liability is the mechanism by which such embedded discrimination is rooted out. *See Griggs*, 401 U.S. at 430–31.

This argument has force, but it faces two significant obstacles. First, the *Students for Fair Admissions* majority rejected the proposition that racial diversity—or, by extension, the elimination of racial disparities—constitutes a sufficiently concrete and measurable interest to survive strict scrutiny. The SCOTUS demanded that any interest justifying a racial classification be “sufficiently focused” to permit judicial review, and it found that the diversity interest failed this test. *Students for Fair Admissions*, 600 U.S. at 230. An interest in eliminating statistical disparities in employment outcomes, standing alone, is subject to the same critique.

Second, even if eliminating discrimination qualifies as a compelling interest, the disparate impact framework is not narrowly tailored to achieve it. Disparate impact liability attaches to any practice producing a statistical disparity, regardless of whether the disparity results from past discrimination, current bias, or entirely non-discriminatory factors such as differential qualifications, geographic distribution, or voluntary career preferences. A regime that sweeps so broadly—imposing liability without requiring any showing of discriminatory intent or historical connection—cannot satisfy the narrow tailoring requirement. *See Callais*, 146 S. Ct. at 1153, 1161; *cf. Students for Fair Admissions*, 600 U.S. at 214–15.

B. “Disparate Impact Liability Does Not Involve a Racial Classification”

A second counterargument contends that disparate impact liability does not impose a racial classification at all: it merely prohibits unjustified employment barriers, and any employer can comply simply by ensuring that its practices are job-related and consistent with business necessity. On this reading, the statute is race-neutral because it does not require employers to adopt racial quotas or preferences—only to justify their selection criteria.

This argument understates the practical operation of the statute. As Justice Scalia observed in *Ricci*, an employer subject to disparate impact liability must monitor the racial composition of its workforce, evaluate whether its practices produce statistically significant racial disparities, and modify or abandon practices that do—even when those practices are facially neutral and adopted in good faith. *See Ricci*, 557 U.S. at 594 (Scalia, J., concurring). The employer’s decisions are, at every stage, driven by racial outcomes. Whether this is labeled a “classification” or an “effects test,” the functional reality is that the employer is compelled to make decisions on the basis of race. *Id.* at 595.

C. “Congress Has the Power to Enforce the Fourteenth Amendment Through Disparate Impact Legislation”

A third argument invokes Congress’ enforcement power under Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), *superseded on other grounds by statute as stated in Ramirez v. Collier*, 595 U.S. 411 (2022), the SCOTUS held that Section 5 legislation must exhibit “congruence and proportionality” between the constitutional injury to be prevented and the means adopted to that end. *Id.* at 520. Defenders of disparate impact may argue that the Civil Rights Act of 1991 satisfies this test because it is a proportional response to the documented history of employment discrimination.

This argument is formidable, but it has a significant limitation: it applies only to Title VII, which is federal legislation enacted under Congress' enumerated powers. FEHA is a state statute. It derives no authority from Section 5 of the Fourteenth Amendment. The California Legislature's power to impose disparate impact liability is constrained by the Equal Protection Clause and is not amplified by Section 5. This distinction means that even if Title VII's disparate impact provisions survive a Section 5 analysis, FEHA's provisions remain independently vulnerable to an equal protection challenge.

D. “Disparate Impact Liability Is a Permissible Remedial Measure for Past Discrimination”

A fourth and increasingly invoked counterargument contends that race-conscious compliance with disparate impact liability—and FEHA's disparate impact regime more generally—should be sustained as a “remedial measure” designed to redress the lingering effects of past or historical discrimination. The argument has a respectable doctrinal pedigree. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–10 (1978) (opinion of Powell, J.), and again in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion), the SCOTUS recognized that remedying identified prior discrimination by a particular governmental actor may, in narrow circumstances, qualify as a compelling interest sufficient to justify a race-conscious response. Defenders of FEHA's disparate impact framework contend that the statute, by pressuring public employers to dismantle facially neutral practices that perpetuate the residual effects of historical exclusion, is best understood as a remedial scheme of precisely this kind.

Whatever vitality this argument once possessed, it cannot survive the SCOTUS's decision in *Students for Fair Admissions*, 600 U.S. 181. The *Students for Fair Admissions* majority reaffirmed and sharpened a limitation that has been latent in the SCOTUS's equal protection jurisprudence for nearly half a century: a

generalized interest in remedying “societal discrimination”—discrimination that is broad, diffuse, and not traceable to specific, identified acts of intentional discrimination by the governmental actor seeking to use race—is not a compelling interest and cannot justify a racial classification. *See id.* at 209–10, 226–27; *see also Wygant*, 476 U.S. at 276 (plurality opinion) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497, 505–06 (1989). The *Students for Fair Admissions* majority rejected each proffered interest—including interests framed in remedial or compensatory terms—as insufficiently “coherent” and insufficiently “measurable” to permit meaningful judicial review under strict scrutiny. *Students for Fair Admissions*, 600 U.S. at 214, 216–17, 226–27; *see Callais*, 146 S. Ct. at 1153.

That reasoning is fatal to the remedial defense of FEHA’s disparate impact provisions. A statutory regime that imposes liability on every public employer in California whenever a facially neutral practice produces a statistical disparity is not tailored to remedy any specific, identified act of intentional discrimination. It operates instead as a generalized response to assumed, diffuse, society-wide patterns of past disadvantage—the very kind of justification that *Students for Fair Admissions*, *Croson*, and *Wygant* hold insufficient. *See Croson*, 488 U.S. at 498–99; *Wygant*, 476 U.S. at 274–76 (plurality opinion). To the extent the remedial justification ever supplied a constitutional safe harbor for race-conscious decision-making, *Students for Fair Admissions* has narrowed it to the vanishing point.

The remedial argument is especially weak as applied to California. Under *Croson*, a governmental body invoking the remedial interest must point to a “strong basis in evidence” of prior intentional discrimination by *that* governmental body in the very sphere being regulated; generalized assertions of historical or societal discrimination will not do. *Croson*, 488 U.S. at 500–06; *see also Sharw v. Hunt*, 517 U.S. 899, 909–10 (1996) (“[A]n effort to alleviate the effects of societal

discrimination is not a compelling interest.”); *Parents Involved*, 551 U.S. at 720–21. Plaintiffs cannot make that showing in the public-employment context relevant here. Unlike jurisdictions with documented histories of de jure exclusion of racial minorities from public employment—enforced by statute, ordinance, or official policy—California has no comparable record of state-sponsored, intentional racial discrimination by its public employers in the modern administrative era that could supply the predicate findings *Croson* demands. See *Croson*, 488 U.S. at 504–06; *Coral Constr. Co. v. King County*, 941 F.2d 910, 916–18 (9th Cir. 1991), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019). Absent a specific, contemporaneous finding of prior intentional discrimination by the particular public employer being regulated, the remedial justification is unavailable as a matter of binding precedent. *Croson*, 488 U.S. at 504–06.

The point is not that California is constitutionally barred from ever remedying identified discrimination by one of its public employers; it plainly is not. See *Croson*, 488 U.S. at 509. The point is that FEHA’s disparate impact framework operates without any such predicate. It imposes race-conscious compliance obligations on every public employer in the State, irrespective of whether that employer has ever been found to have engaged in intentional discrimination, and irrespective of whether the challenged practice bears any traceable connection to identified prior unlawful conduct. A remedial justification cannot be retrofitted to a statute that demands no remedial findings.

In short, the remedial-measures argument cannot rescue FEHA’s disparate impact provisions from the constitutional difficulty identified in Parts III and IV.A–C above. *Students for Fair Admissions* has foreclosed reliance on diffuse, society-wide remedial justifications, and *Croson* forecloses reliance on jurisdiction-specific remedial justifications absent particularized findings of prior intentional

discrimination that California has not made and, on the present record, cannot make. The argument should be rejected.

IV. LITIGATION STRATEGY: BRINGING THE CHALLENGE IN CALIFORNIA

A. Identifying the Right Vehicle

Not every FEHA disparate impact case presents an attractive vehicle for a constitutional challenge. The strongest cases will share several characteristics:

The defendant should be a public employer. The Equal Protection Clause constrains only state action, and a challenge to FEHA's disparate impact provisions as applied to a public employer—a city, county, state agency, or public university—presents the cleanest constitutional question. A challenge involving a private employer would require the additional step of arguing that FEHA itself constitutes state action compelling an unconstitutional racial classification, which adds doctrinal complexity.

The challenged practice should be demonstrably job-related and facially neutral. The constitutional argument is most powerful when the employer can show that the practice at issue—an entrance examination, a physical fitness standard, a credential requirement—was adopted for legitimate, non-discriminatory reasons and validated against objective criteria. A case in which the employer's practice is pretextual or poorly justified will not present the constitutional question in its sharpest form.

The disparate impact should arise from non-discriminatory factors. The strongest vehicle is one in which the statistical disparity results from factors unrelated to discrimination—differential qualifications, voluntary self-selection, geographic patterns—rather than from embedded bias. This undermines the argument that disparate impact liability is merely a tool for rooting out hidden intentional discrimination.

B. Preserving the Constitutional Issue

Defense counsel must raise the constitutional challenge at the earliest opportunity and in the most precise terms. The argument should be framed as an as-applied challenge to FEHA's disparate impact provisions: that the statute, as applied to compel the defendant to modify or abandon a race-neutral, job-related employment practice solely because of its racial effects, violates the Equal Protection Clause by mandating a racial classification subject to strict scrutiny.

The challenge should be raised in a motion for summary judgment or, at minimum, in a pretrial motion in limine. If the trial court rejects the challenge, counsel should obtain a definitive ruling and preserve the issue for appeal. The issue would proceed through the Court of Appeal and, potentially, to the California Supreme Court and then to the SCOTUS. Because the challenge raises a federal constitutional question, it could also be removed to federal court if initially filed in state court or raised as a defense in a federal action.

C. The Federal Path

An alternative strategy is to litigate the challenge in federal court from the outset. A public employer subject to a FEHA disparate impact claim could file a declaratory judgment action in federal district court, seeking a declaration that FEHA's disparate impact provisions violate the Equal Protection Clause as applied. This path offers the advantage of direct access to the Ninth Circuit—and, ultimately, the Supreme Court—without the detour through the California state court system. The Ninth Circuit's treatment of the issue would likely generate significant attention, regardless of outcome, and a circuit split would increase the likelihood of Supreme Court review.

CONCLUSION: THE GATHERING STORM

The question is no longer whether the constitutionality of disparate impact liability will be tested. It is when, and in what case.

The doctrinal pieces are in place. *Students for Fair Admissions* has established that the Equal Protection Clause forbids race-conscious outcome management. *Students for Fair Admissions*, 600 U.S. at 206–08. *Ricci* has identified the specific mechanism by which disparate impact liability compels race-conscious action. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). *Callais* has reaffirmed that the government may not subordinate race-neutral principles to racial objectives. *Callais*, 146 S. Ct. at 1153. And Justice Thomas’ three decades of jurisprudence—from *Adarand* to *Students for Fair Admissions*—has provided the intellectual architecture for a colorblind Constitution that leaves no room for statutory regimes premised on racial proportionality.

California’s FEHA presents a particularly inviting target. As a state statute, it lacks the Section 5 enforcement-power defense available to Title VII. California’s public employers—cities, counties, school districts, state agencies—are directly subject to the Fourteenth Amendment. And FEHA’s broad application and aggressive enforcement by the Department of Civil Rights (formerly the Department of Fair Employment and Housing) ensure a steady supply of cases in which the constitutional question can be squarely presented.

For California defense litigators, the practical implications are immediate. Every FEHA disparate impact case against a public employer now presents a potential constitutional vehicle. Defense counsel should begin incorporating equal protection arguments into their litigation strategies, preserving the issue for appellate review, and preparing for the possibility that the next major development

in the SCOTUS's race jurisprudence may originate not in a university admissions office or a legislative redistricting chamber, but in a California employment courtroom.

The collision that Justice Scalia predicted in *Ricci*—the war between disparate impact and the Equal Protection Clause—is no longer a distant hypothetical. For those of us who practice in this space, the time is now.

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