In the

Supreme Court of California

LORING "WINN" WILLIAMS,

Plaintiff and Appellant,

vs.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,

Defendant and Respondent,

After a Decision by the Fourth Appellate District, Division Two, Case No. E055755
San Bernardino County Superior Court, Case No. CIVRS801732

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; PROPOSED AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT CVIFD

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TABLE OF CONTENTS

Page

APPLICATION FOR PERMISSION TO FILE AMICI BRIEF 1

I. DESCRIPTION OF AMICI AND STATEMENTS OF INTEREST 2

A. The League of California Cities 2

B. The California State Association of Counties 2

C. The California Special Districts Association 2

D. The California Association of Sanitation Agencies 3

E. The Fire Districts Association of California 3

F. The Association of California Water Agencies 4

II. AMICI AND THEIR MEMBER ORGANIZATIONS EMPLOY THOUSANDS OF CALIFORNIANS AND WILL BE IMPACTED IF THIS COURT APPLIES THE CHRISTIANSBURG RATIONALE TO ORDINARY LITIGATION COSTS 4

[PROPOSED] AMICI CURIAE BRIEF 1

I. INTRODUCTION 1

II. PUBLIC AGENCIES PAY MILLIONS OF DOLLARS EACH YEAR IN ORDINARY COSTS, AND THOSE COSTS SHOULD BE RECOVERABLE WHEN AGENCIES PREVAIL IN FEHA CASES 2

III. CONCLUSION 5

TABLE OF AUTHORITIES

Page(s)

Cases

Christiansburg Garment Co. v. Equal Employment Opportunity Commission
(1978) 434 U.S. 412 .... 1, 4, 5, 2

Federal Statutes

42 U.S.C. 2000e (Title VII of the Civil Rights Act of 1964) 5

California Statutes

Code of Civ., Proc. § 1032 .... 2, 4, 5

Code of Civ., Proc. § 1033.5 .... 2, 4

Gov. Code, § 12900 (Fair Employment and Housing Act) .... *passim*

Rules of Court

Rules of Court, rule 8.520(f) 1

Other Authorities

California Dep't of Fair Employment and Housing, http://www.dfeh.ca.gov/res/docs/Statisitcs/Statistics%202013/12CasesFiledByBasesEmp.pdf (last visited April 29, 2014) 3

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APPLICATION FOR PERMISSION TO FILE AMICI BRIEF

The League of California Cities, California State Association of Counties, California Special Districts Association, California Association of Sanitation Agencies, Fire Districts Association of California, and Association of California Water Agencies, jointly apply to this Court under California Rules of Court, rule 8.520, subdivision (f), for permission to file an amici curiae brief in the above-referenced case. This proposed brief, below, is in support of Defendant and Respondent Chino Valley Independent Fire District ("CVIFD"). Amici agree with CVIFD that the *Christiansburg* standard, or a similar standard requiring proof of frivolousness or unreasonableness as a prerequisite to collecting ordinary costs, should not be applied to prevailing defendants under FEHA. Prevailing defendants should not have to choose between foregoing recovery of out-of-pocket costs or spending thousands of dollars to prove an unsuccessful plaintiff's claim was frivolous. That is particularly true for public agencies who must often fund litigation defense, including ordinary costs, from their general funds. The proposed Amici Curiae Brief is intended to assist this Court by explaining the potential financial impact this case will have on thousands of public entities across California if those entities are forced to bear their own ordinary litigation costs in all but the most extraordinary cases.

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I.

DESCRIPTION OF AMICI AND STATEMENTS OF INTEREST[1]

A. The League of California Cities

The League of California Cities ("League") is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Legal Advocacy Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having statewide significance for municipalities.

B. The California State Association of Counties

The California State Association of Counties ("CSAC") is a nonprofit corporation. The CSAC membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

C. The California Special Districts Association

The California Special Districts Association ("CSDA") is a nonprofit association representing over 800 special districts throughout California. The member special districts provide a wide variety of public

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[1] No party to the pending appeal, or counsel for any party to the appeal, authored this brief, in whole or in part, or contributed any money to fund its preparation or submission. Counsel for Amici has represented CVIFD in other matters, but has not provided legal services or counsel in this case.

services to both suburban and rural communities, including fire suppression, parks and recreation, water treatment and distribution, sewage collection and treatment, security and police protection, airport services, harbor and port services, cemeteries, libraries, and mosquito and vector control. All of these special districts have been formed after a determination that the services to be provided are necessary to the local community. Many member districts are funded wholly, or in part, with property tax and thus have limited funds to provide important public services to the public. Member districts employ thousands of people in permanent, seasonal, part-time and full-time positions.

D. The California Association of Sanitation Agencies

The California Association of Sanitation Agencies ("CASA") is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of 110 local public agencies throughout the state, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy, and biosolids management services to millions of California residents, businesses, industries and institutions. CASA member agencies employ thousands of public employees in a wide range of office, field, technical, and professional positions.

E. The Fire Districts Association of California

The Fire Districts Association of California ("FDAC") is a nonprofit association representing 127 fire protection districts throughout California. The member districts provide a wide variety of fire protection services, including fire suppression services, emergency medical services, hazardous material response services, medical transport, ambulance services, and

rescue services. All of these fire protection districts were formed after a determination that the services to be provided were necessary for the protection of local communities. Fire protection districts are funded primarily with property taxes and often have very limited funds to provide vital lifesaving public services. To carry out these lifesaving public services, member districts employ thousands of people in permanent, seasonal, part-time, full-time, and volunteer positions.

F. The Association of California Water Agencies

The Association of California Water Agencies ("ACWA"), organized in 1910, is a California nonprofit public benefit corporation. ACWA is comprised of over 450 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the State, monitors litigation and has determined that this case involves issues of significance to ACWA's member agencies.

II.

AMICI AND THEIR MEMBER ORGANIZATIONS EMPLOY THOUSANDS OF CALIFORNIANS AND WILL BE IMPACTED IF THIS COURT APPLIES THE *CHRISTIANSBURG* RATIONALE TO ORDINARY LITIGATION COSTS

The question before this Court is: whether a prevailing defendant in an action under the Fair Employment and Housing Act ("FEHA") (Gov. Code, § 12900 et seq.) is required to show that the plaintiff's claim was frivolous, unreasonable, or groundless in order to recover ordinary litigation costs? Essentially, Plaintiff and Appellant Williams argues that *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412, an employment case concerning an

award of attorney's fees under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), precludes California courts from awarding ordinary litigation costs as a matter of right, under Code of Civil Procedure section 1032, to prevailing defendants under FEHA, absent a showing that a plaintiff's claim was frivolous, unreasonable, or groundless.

Amici agree with Defendant and Respondent CVIFD that *Christiansburg* should not be applied to ordinary costs awarded to prevailing defendants under FEHA. Amici, who collectively employ, or represent agencies that employ, thousands of California workers, write specifically to alert this Court to the significant cost public agencies will bear if this Court precludes prevailing defendants from routine recovery of ordinary litigation costs. As explained in the proposed Amici Curiae Brief, below, by placing a heightened burden on prevailing defendants this Court would, because of the difficulty and added expense of demonstrating frivolousness, shift ordinary litigation costs from unsuccessful plaintiffs to public agencies funded by taxpayers. This Court would also encourage additional litigation by plaintiffs who might be incentivized to pursue claims that arguably lack merit. As a practical matter, under all but the most extraordinary circumstances, those plaintiffs, who are typically represented by attorneys working on contingency, will not be responsible for paying even ordinary costs and may therefore be less likely to carefully consider the merits of their claims before deciding to file suit.

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For those reasons, and for all those reasons articulated below, the League, CSAC, CSDA, CASA, FDAC, and ACWA request permission to file the below Amici Curiae Brief.

Respectfully submitted,

Dated: May 1, 2014 BEST BEST & KRIEGER LLP

By: ______________________

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Agencies

[PROPOSED] AMICI CURIAE BRIEF

I.

INTRODUCTION

Amici, collectively, represent the interests of over two thousand public agencies across California. Those agencies are largely funded by taxpayers to carry out important public services that ensure the health, safety, and welfare of all Californians. Local public agencies provide Californians with police and fire protection, safe drinking water, sewer services, airport services, ambulance and rescue services, safe and navigable streets, libraries, public parks, and a panoply of other important services. But, the money to provide these services is not unlimited, which is why the instant case is of great concern to public agencies.

By placing a heightened burden on prevailing defendants to justify entitlement to ordinary litigation costs, as Plaintiff and Appellant Williams requests, this Court would essentially shift the burden of ordinary litigation costs from unsuccessful plaintiffs to defendants, many of which are public agencies. Public agencies employ tens of thousands, if not hundreds of thousands, of workers and are routinely defendants in FEHA cases. As a practical matter, proving frivolousness is very difficult and very costly, even where litigation is obviously meritless; many courts are extremely reluctant to find a plaintiff's claim to be frivolous absent significant amounts of proof and lengthy briefing on the matter. The added cost to public agencies of proving frivolousness will be significant and will come at the expense of other important programs. The cost to prove frivolousness may be so significant that it will, in most cases, outweigh the value of ordinary litigation costs. In other words, most public agencies will be dissuaded from seeking to recover their ordinary costs even where they have prevailed, and even where the litigation was meritless. Plaintiffs, on

the other hand, will be incentivized to pursue claims that arguably lack merit, knowing that under all but the most extraordinary circumstances they will not be responsible for paying even ordinary costs. FEHA did not intend that result, as explained in CVIFD's Answering Brief. This Court should reject Williams's position, and should hold that prevailing defendants are entitled to collect their ordinary litigation costs as a matter of right under FEHA and Code of Civil Procedure sections 1032 and 1033.5.

II.

PUBLIC AGENCIES PAY MILLIONS OF DOLLARS EACH YEAR IN ORDINARY COSTS, AND THOSE COSTS SHOULD BE RECOVERABLE WHEN AGENCIES PREVAIL IN FEHA CASES

In the instant appeal, CVIFD, as prevailing defendant, sought nearly $10,000 in ordinary costs, which included, among other things, the cost of filing, serving, and preparing briefs and motions, and the costs associated with three depositions. That amount is not unusually high, even though CVIFD was only awarded $5,368 of the costs it sought. In fact in many FEHA cases, particularly those that go to trial, ordinary costs far exceed $10,000.

Considering the number of public entities in the State, and the number of FEHA suits involving public employees, the collective value of ordinary costs is immense, particularly considering that if this Court adopts the *Christiansburg* rationale the cost will be borne by taxpayers in all but the most extraordinary cases where the frivolousness of a plaintiff's claims can be proven. How immense? As a start, there are 482 cities in California, and according to the State Controller's Office, each city employs, on average, 610 people (California State Controller's Office, *Gov't Compensation in California*, http://publicpay.ca.gov/Reports/Cities/

Cities.aspx (last visited April 29, 2014)), for a total of approximately 294,020 employees. If only one percent of those employees, or 2,940, filed a FEHA lawsuit, and the average amount of ordinary costs per lawsuit was $10,000, the collective cost to cities would be $29,402,000. Even assuming plaintiffs prevailed in 50% of those cases, the collective cost to cities that prevailed in the remaining 50% of those cases would be $14,701,000. That is a significant amount of money by any account, and even more significant when it must be paid from a city's general fund in lieu of paying for important public services.

That rough approximation does not account for the ordinary costs borne by the many hundreds of water agencies, special districts, counties, and other public entities represented by the Amici in this case. CSAC members include all 58 California counties, CSDA represents over 800 special districts, CASA is comprised of 110 local public agencies, FDAC represents 127 fire protection districts, and ACWA represents over 450 water agencies. Those agencies collectively employ many thousands of people that are potential FEHA plaintiffs. The notion that there would be thousands of FEHA plaintiffs is not an exaggeration, in fact there were nearly 20,000 employment cases filed with the California Department of Fair Employment and Housing in 2012 alone. (California Dep't of Fair Employment and Housing, http://www.dfeh.ca.gov/res/docs/Statisitcs/Statistics%202013/12CasesFiledByBasesEmp.pdf (last visited April 29, 2014).)

Public agencies should not be solely responsible for bearing the costs associated with the thousands of unsuccessful FEHA lawsuits brought against them each year. But if this Court adopts Williams's position, it will, as a practical matter, be shifting all of the risk of litigation from plaintiffs to defendants, who will have limited ability to recuperate even a portion of their out-of-pocket costs. Forcing prevailing defendants to prove

frivolousness to recover ordinary costs is, in most cases, a poison pill. If the briefing in this case is any indication, the cost of fighting over a cost bill often exceeds the amount of costs sought. That would certainly be the case if prevailing defendants were saddled with an enhanced burden to prove that a plaintiff's case was frivolous, unreasonable, or groundless. And for public entities, the money they spend in litigation is money that they cannot spend on valuable public services, making the cost-benefit analysis a significant factor in determining litigation strategy.

The calculus involved is straightforward: should city A spend $5,000 demonstrating a plaintiff's case was frivolous so it can recover $10,000 in litigation costs, or should it spend that $5,000 on repairing a heavily traveled street or providing additional police services to combat increased crime? Looking at the math it is undeniable that the added cost to public agencies of proving frivolousness will be significant and will either come at the expense of other important programs, or will effectively force public agencies to concede their costs. And that same math will incentivize plaintiffs to pursue claims that arguably lack merit, knowing that under all but the most extraordinary circumstances they will not be responsible for paying even ordinary costs. That is, plaintiffs will have a potential upside to litigation and no potential downside whatsoever.

Williams appears to argue that holding unsuccessful plaintiffs responsible for ordinary costs will have a chilling effect on litigation. But in almost all cases prevailing parties are entitled to recover their costs (Code Civ. Proc. §§ 1032, 1033.5), and that has not had any chilling effect on the nearly 1 million plaintiffs who filed civil suits during fiscal year 2011-2012. (Judicial Council of California, 2013 Court Statistics Report, Statewide Caseload Trends 2002-2003 through 2011-2012, p. 72, http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf (last visited April 29, 2014).) Holding unsuccessful plaintiffs responsible for

ordinary costs will not prevent meritorious claims from being filed, it will only ensure that successful defendants recover their out-of-pocket costs. And in the case of public entities, those costs add up quickly.

III.

CONCLUSION

Amici support Defendant and Respondent CVIFD, and urge this Court to hold that FEHA does not impose a heightened requirement on prevailing defendants seeking to recover their ordinary costs. Although ordinary costs may seem insignificant when viewed on a case-by-case basis, as explained above, they are truly significant when viewed as a collective burden imposed on public agencies and the State's taxpayers. The many millions of dollars in ordinary costs incurred each year by public agencies defending FEHA suits should not have to be conceded as a matter of course. Like prevailing defendants in most contexts, prevailing defendants in FEHA cases should be entitled to claim their ordinary costs as a matter of right.

Dated: May 1, 2014 BEST BEST & KRIEGER LLP

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CERTIFICATE OF WORD COUNT

The text of this combined Application and Proposed Amici Curiae Brief consists of 2,335 words as counted by the Microsoft Word 2010 word-processing program used to generate said document.

Dated: May 1, 2014

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