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CA. GOV’T CODE §11135: 
A CHALLENGE TO CONTEMPORARY STATE-FUNDED DISCRIMINATION

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Abstract

Racially disproportionate outcomes persist in our schools, hospitals, courts, and neighborhoods. While some of these disparities stem from historical inequalities, socio-economic differences, and individual behavior, considerable racial disparities persist, even after holding these factors constant. These disparities are particularly troubling because they are attributable to the unconscious biases embedded in the policies and practices of our public institutions and represent the most pernicious form of contemporary discrimination. This article argues that unlike other disparities, these “super disparities,” can and must be legally redressed. While federal redress for state-funded disparate impacts has been largely foreclosed after Alexander v. Sandoval, California Government Code §11135 provides a unique and promising state solution. This state law analog to Title IV of the 1964 Civil Rights Act, prohibits intentional, as well as unintentional discrimination, in all state-funded activities. Given the opportunity, state and federal courts should interpret §11135 broadly and consistent with clear legislative intent. Courts should, not only, affirm the private right of action to raise disparate impact challenges, but apply the stringent “business necessity” standard in all cases. Only by requiring state-funded institutions to justify discriminatory policies with a showing of “business necessity” will policymaker commit the necessary time and resources to ensure rational and unbiased decision-making.

Introduction

On January 20, 2009, we witnessed the inauguration of America’s first African-American president. In living rooms, classrooms, and halls throughout the country, Americans hugged each other and cried. For some, the tears were a

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recognition of the difficult road we’ve walked to address the most blatant forms of discrimination. For others, the tears embodied a renewed sense of hope that a discrimination-free America is possible and near. The reality remains, however, that a young African-American, Latino, Southeast Asian, or Pacific Islander child born in America today is still more likely to receive an inferior education, suffer more severe punishments for his mistakes, live closer to environmental hazards, and have access to fewer quality medical treatments than his similarly situated white counterparts.\(^3\)

Intertwined with our nation’s history, the roots of these disparities run deep. Decades, and in some cases centuries, of disenfranchisement, slavery, indentured servitude, colonialism, and discriminatory policies, have certainly helped to create these inequities. However, particularly troubling is that these racial disparities in healthcare, education, criminal justice, and environmental health exist even after holding constant other socio-economic factors, such as income, education, and individual conduct.\(^4\) They are – for lack of a better term – super disparities. Super disparities are outcome disparities that are above and beyond what we would expect from historical inequalities, and are attributable to the way in which our hospitals, schools, courts, and other esteemed institutions operate.\(^5\) Super disparities represent the contemporary face of discrimination.

While some super disparities can be traced to intentional bigotry, most cannot. More often, super disparities result from individuals making decisions based on what cognitive scientists call heuristics – or mental shortcuts. During the course of our daily lives we are often confronted with choices that require split-second decisions. In order to make these time-pressured decisions, we rely on patterns we’ve observed through past experiences and we employ them as stereotypes. We take what little information we know about the situation, whether it be factual or fictitious, and we jump to a corresponding conclusion. Numerous studies confirm that mental shortcuts, though inherently laced with unconscious biases, are not only natural but also necessary for us to keep up with the demands of our modern life.\(^6\) In making policy decisions, then, cognitive heuristics allow for the influence of bias. Even the most well-intentioned policies can reflect harmful unconscious bias.

Regardless of their cause, super disparities are deeply antithetical to our hope of a discrimination-free nation. Unfortunately, the legal avenues for challenging these disparities are largely foreclosed in the federal arena. During the past three decades, the Supreme Court has interpreted Constitutional protections and federal civil rights statutes narrowly to limit their application to intentional discrimination.\(^7\) As a result, plaintiffs lack adequate federal means to address the type of well-intentioned policies that, despite being facially neutral, still create racial disparities. In contrast to the limitations under federal law, the California legislature has provided redress for discriminatory disparities under California

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\(^3\) See infra Part I.A.
\(^4\) See infra Part I.A.
\(^5\) See infra Part I.B.
\(^6\) See infra Part I.B.
\(^7\) See infra Part II.
Government Code §11135 and its regulations. This state law analog to Title VI prohibits intentional discrimination, as well as disparate impact discrimination in state-funded programs and activities. While federal courts have repeatedly recognized the private right of action to bring disparate impact claims under §11135, state courts have not yet had the opportunity to do so. This article argues that given the opportunity, courts should not only recognize §11135’s explicit private right of action, but also construe the statute broadly to adequately protect individuals from contemporary forms of state-funded discrimination.

Part I of this article describes some of the persistent super disparities that trouble our nation, and explores their possible causes. Part II outlines the normative arguments for protecting disparate impact causes of action as redress for super disparities. Part III analyzes the legislative history and legal background of California Government Code §11135 and concludes that the California state legislature intended an expansive interpretation of §11135. Finally, part IV argues that while the federal courts have properly recognized §11135’s private right of action in their recent decision in Darensburg v. Metropolitan Transportation Commission, they have failed to apply the appropriate “business necessity” standard in complex decision making processes. In adopting a lower standard, the court risks destroying the state statute’s ultimate utility in confronting contemporary forms of state-funded discrimination.

I. Super Disparities Continue to Plague Our Nation

A. Evidence of Persistent Super Disparities

In recent years, researchers, governmental agencies and institutions have turned their attention to the persistence of super disparities in all facets of American life. For our purposes, super disparities are those disparities that impose significant disproportionate harms on particular groups, are attributable to the policies and practices of an institution, and are not solely the result of historical inequalities.

\[8\] California Government Code §11135 states: “(a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.” CAL. GOV’T CODE §11135 (2007). Section 11135’s regulations not only prohibit intentional discrimination but prohibit practices that “utilize criteria or methods of administration that have the purpose or effect of subjecting a person to discrimination.” CAL. CODE REGS. Tit. 22, §98101(i)(1).

\[9\] Title VI of the 1964 Civil Rights Act states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. §2000d.

\[10\] See infra Part III.


Super disparities in our public institutions have significant impact on the lives of many Americans. They represent the most pernicious forms of contemporary discrimination. In schools, African-American and Latino children with similar prior achievement as white classmates are disproportionately placed in lower-track classes that provide inferior learning opportunities. Additionally, non-white students in our public schools are often punished more frequently and with harsher consequences for the same disciplinary infractions when compared to their white peers. In the juvenile justice system, African-American youth also receive more severe sentences than white youth who commit similar crimes and have similar criminal histories. In addition, non-white youth are more frequently detained, transferred to adult court, and incarcerated than their white peers. Unfortunately, these racially disparate trends continue through all stages of the adult criminal justice system from arrest to sentencing to re-entry into the community.

Pertaining to health care, studies show that consistently poorer health outcomes among non-white communities are, at least in part, a result of poorer diagnosis, lower quality of care, and limited treatment methods made available to patients solely because of their race. Regardless of insurance status, income, age, and severity of conditions, non-white patients are less likely to receive appropriate cardiac medications, undergo bypass surgery, or obtain kidney dialysis or transplants.

Other studies show that African-American welfare recipients who depend on governmental services to get on their feet have less access to education and childcare services than their white counterparts, making it more difficult for them to transition off of government assistance. Additionally, state agencies remove African-American children from their homes and families at disproportionate rates compared to similarly situated white children. Child maltreatment rates are similar between African-American and whites, yet African-American children are

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16 George S. Bridges & Sara Steen, Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms, 63 AM. SOC. REV. 554, 562-64 (1998). In response to rising concerns over disproportionate minority confinement in the juvenile justice system, Congress amended the Juvenile Justice and Delinquency Act in 1992 to require states receiving federal funding to identify whether racial disparities existed, assess the cause of these disparities, and develop intervention strategies to combat the problem. Id.
19 Id.
reported to Child Protective Services more often, are twice as likely to be investigated if reported, and 36% more likely to be removed from their homes.\textsuperscript{22}

Once in foster care, non-white children receive fewer services, experience more transience, have less contact with case workers, stay in the system longer, and are less likely to be adopted or reunited with their families.\textsuperscript{23}

Finally, city planning decisions locate hazardous waste sites in predominantly nonwhite communities more often than in predominantly white communities, even when controlling for differences in income.\textsuperscript{24} Non-white percentages are nearly twice as high in toxic waste host neighborhoods than in non-host neighborhoods.\textsuperscript{25} As evidenced by these troubling statistics, it is a matter of fact, that disturbing super disparities continue to persist in education, medical care, incarceration and punishment, social services, and environmental health.

\textbf{B. The Causes of Super Disparities}

A complex web of historical inequalities, socio-economic differences, behaviors, and institutional policies and practices contributes to the myriad of disparities in contemporary America. This “network” influence makes it nearly impossible to sort out adequate legal redress; guilty parties are hard to define and causation is hard to prove. Super disparities, however, are distinguishable because they are products of institutional policies and processes. Their existence can be traced to two forms of institutional action or inaction and, consequently, legal redress can effectively narrow these disparities by requiring institutions to pay more careful attention to decision making processes in the first instance, or by requiring institutions to reduce unfettered discretion and improve personnel training in the second.\textsuperscript{26}

In the first form of super disparity, a seemingly neutral and discrete institutional policy magnifies existing disparities in the allocation of benefits and burdens. For example, a regional transit authority’s budgetary decision to fund new suburban rail projects over maintaining bus lines creates a disproportionate burden on urban low-income and minority transit riders that depend on local bus routes for access to jobs, schools, medical care, and other necessities.\textsuperscript{27} These policy decisions often take place in complex-decision making environments where policymakers must weigh competing goals, interests, and constraints.


\textsuperscript{26}See generally Ian F. Haney Lopez, \textit{Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination}, 109 YALE L.J. 1717, 1811 (describing two forms of institutional racism – path racism, which he defines as directed racial status-enforcement and script racism, which he defines as undirected racial status-enforcement).

\textsuperscript{27}See the facts in \textit{Darensburg v. Metropolitan Transportation Commission}, 611 F.Supp.2d 994 (N.D. Cal. 2009).
Ample research in different organizational settings shows that implicit biases, predictable errors in judgment, and improper influences of power distort these complex decisions and may often lead to discriminatory outcomes. Requiring policymakers to show that an otherwise discriminatory policy is justified by an overriding legitimate business necessity and has no less discriminatory alternative encourages careful decision-making by our public officials.

In the second form, a neutral and diffuse institutional policy (or often, lack of policy) creates super disparities when important allocation decisions are left to unfettered individual discretion. Cognitive psychology informs us that the human use of heuristics ensures that our decision-making process is inherently biased. When decision-makers hold similar biases, however, disproportionate harm falls upon distinct and discernible groups.

For example, unfettered discretion among medical professionals creates super disparities in health. Medical professionals are faced with a broad range of diagnostic and therapeutic choices, and are constrained only by vague insurance coverage standards that reimburse all “medically necessary” procedures. As objective as it may sound, even “necessary” is a subjective standard. Physicians have enormous impact on their patient’s ultimate prognosis. However, their subjective perception of the patient – including assumptions about their living conditions, drug habits, family support, honesty, ability to adhere to treatment recommendations, and intelligence – inevitably influence the range of medical procedures they offer patients and the tenacity in which they advocate for the patient within the medical bureaucracy. Physicians’ individual cultural experiences, knowledge, and biases affect their subjective perceptions, as well as their ability to empathize and communicate well with patients. As a result, minority patients often experience alarmingly unequal outcomes.

Moreover, physicians, acting under severe time constraints, regularly rely on heuristics, or mental shortcuts, to diagnose and treat. Medical schools train physicians to consider the overall prevalence and severity of a disease and the expected treatment benefits for the particular social group to which the patient

See infra Part IV.C.


Gregg Bloche, Race and Discretion in American Medicine, 1 YALE J. OF HEALTH POL’Y L. & ETHICS 95, 100 (Spring 2001). Bloche explains that the clinical uncertainty surrounding the efficacy of many medical procedures creates wide discretion. Likewise, contractual and statutory provisions that typically mandate financial coverage for all “medically necessary” treatment, unless they are “investigational” or “experimental,” leave much to physician subjectivity. Id. at 107. Due to an excess demand for medical services and multiple internal queues for those patients seeking services, the advocacy of the physician is crucial to obtaining care. Id.

See Ana I. Balsa, Naomi Seiler, Thomas G. McGuire & M. Gregg Bloche, Clinical Uncertainty and Healthcare Disparities, 29 AM. J.L. & MED. 203, 207, 209 (2003). Studies show that the average outpatient doctor’s visit lasts only twenty minutes. Id.
The more a particular diagnosis and treatment are used for a certain social group, the more they appear logical and rational. However, if heuristics rely on inaccurate or stereotypical information, they may become self-fulfilling.

Not surprisingly, uncertainty and discretion are not limited to medical decision-making. Decisions on how to discipline students, rehabilitate young offenders, respond to emergencies, investigate crimes, protect children from abuse, and many other government services, involve both uncertainty and discretion. In the same manner that unintentional biases find their way into medical decision-making, institutions that permit unfettered discretion create super disparities. While an examination of a policymaker’s unconscious cognition may yield opaque and inflexible results, an inquiry into whether institutional policies have allowed for blatant super disparities is both possible and necessary.

II. Lack of Federal Redress for Super Disparities

A. Federal Courts Require Intent: Closing Our Eyes to Contemporary Discrimination

Beginning in 1976 with Washington v. Davis, the United States Supreme Court has turned its discerning eye away from recognizing contemporary forms of discrimination. In Washington v. Davis, the Court upheld the use of a facially neutral employment test that produced racially disproportionate outcomes. The Court concluded that disparate impact, absent evidence of intent to discriminate, was not sufficient to prove an Equal Protection violation.

Similarly, in 2001, the Supreme Court in Alexander v. Sandoval held that no private right of action existed to enforce the disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. Plaintiffs claimed that an Alabama Department of Public Safety’s official policy to administer driver’s license examinations in English only had the effect of discriminating against non-English applicants based on their national origin. Rather than deciding the case on its merits, the Court defined the issue narrowly and decided only whether a private right of action existed. The Court reasoned that while §601 of Title VI provided a direct private right of action to enforce its provisions, it only forbade intentional discrimination, and therefore did not provide a private

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33 Id.
34 Id. at 212.
37 Id. at 245.
38 Id.
40 Id. at 298.
41 Id. at 279.
42 Id.
right of action for disparate impact claims. The Court concluded that because §602’s disparate impact regulations prohibited unintentional conduct not forbidden under §601, Congress had not intended a private right of action to enforce disparate impact regulations promulgated under §602. Without an explicit right of action provided by Congress, the Court refused to extend one. 

Sandoval effectively ended plaintiffs’ right to bring disparate impact discrimination challenges to state-funded programs and activities.

B. Social and Political Implications for a Post-Sandoval America

The persistence of super disparities without effective federal redress is deeply unsettling for a number of reasons. First, state-funded super disparities cause considerable harm to the individual. Individuals suffer unjustified losses of liberty, restricted educational opportunities, unhealthy environmental hazards in their neighborhoods, removal of children from their homes, poorer health outcomes and even death. Moreover, these harms are unnecessary and unjustified because similarly situated white individuals are not suffering the same levels of harm.

Whether we view the statistics as unjustified advantages for whites or unfair disadvantages for nonwhites, the results are the same. Individuals are receiving benefits or suffering burdens because of patterns or perceptions related to their race or other immutable characteristics. In these instances, ostensibly neutral, unbiased decision-makers are not, in fact, making individualized determinations based on individual circumstances. For these reasons, super disparities fly in the face of our basic commitment to individual freedom and fairness.

Second, public institutions that wield such enormous power over individual lives have a duty to make thoughtful, well-informed decisions that properly weigh disproportionate racial harms against competing social interests. The power of the state to remove children from their homes comes with a duty to ensure that this power is not exercised in a discriminatory manner. Additionally, the creation of super disparities through the use of public funds places a broader

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43 Id. at 281 (citing Alexander v. Choate, 469 U.S. 287, 293 (1985)(stating that Title VI only governs cases involving intentional discrimination)).
44 Id. at 289-91.
45 Id. at 286-87.
46 See supra Part I.A.
47 Id. See also BARBARA J. FLAIG, WAS BLIND BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW 49 (1998)(citing numerous studies indicating that whites receive more favorable treatment than blacks in many decisions, including but not limited to, hiring, mortgage lending, psychiatric diagnoses, arrest, imprisonment, and capital sentencing).
48 See Flagg, supra note 47, at 49 (noting that many studies describe disproportionate racial impacts as negative outcomes for non-whites rather than positive results for whites).
49 See supra Part I.B. See also Lopez, supra note Error! Bookmark not defined., at 1842 (suggesting that “government inflicts such harms on minorities—matters of life and death, health and welfare—not fortuitously, but partially because of their minority status.”)
50 See Olatunde, supra note 15, at 378 (“Given the power of these public institutions to dispense resources, structure opportunity, mete out punishments, and otherwise shape lives, they have a duty to undertake their decisions with care, with the consciousness that their practices might have differential impacts on already disadvantaged communities.”)
duty on society to ensure that taxpayer dollars are not funding discriminatory impacts that we would otherwise find abhorrent.

Finally, super disparities often occur within trusted relationships between the individual and the state. Super disparities result from policies and practices that take place in our city halls, public school classrooms, hospitals, social service agencies, and police stations. Individuals entrust publicly funded institutions with such important duties as their children’s education, their health, the safety of their streets, and the maintenance of their neighborhoods. Without such trust, the social contract unravels – parents devalue their children’s adherence to school rules, patients fail to follow medical advice, neighbors choose not to report crimes, and people disregard public spaces. The proper functioning of our institutions depends on the trust we have in them. Super disparities deeply erode this trust.

C. Why Legal Redress is Necessary to Address Super Disparities

Unfortunately, market forces and well-intentioned actors, alone, will not and have not prevented super disparities. This is particularly true of state-funded institutions because they operate functional monopolies over their services. Consumers of public services are unable to “vote with their feet” and seek services elsewhere. For example, market forces fail to correct super disparities produced in public schools because, in most districts, children are assigned to schools based on their residence.

Moreover, market forces often prevent well-intentioned administrators from taking appropriate corrective action because the solution to institutionally created super disparities requires sustained and intensive organizational reform. These reforms may include ways to reduce individual biases, such as trainings. Alternatively, reforms may seek to reduce structural discretion altogether by developing common criteria or standards for decision-making, instituting policies that involve larger numbers of decision-makers at important discretionary moments, and requiring a record of deliberation when discretion is exercised. Not only are these reforms potentially costly, they require administrators to take on considerable short-term costs in exchange for long-term benefits. Absent considerable external pressures, well-intentioned administrators have trouble mustering and sustaining the political will to make these necessary institutional reforms.

However, legal challenges can effectively catalyze reform. Litigation destabilizes entrenched self-interests, disrupts tendencies towards the status quo, and reconfigures power dynamics that are often barriers to more efficient and

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51 See supra Part I.A.
52 See Tristen K. Green, Targeting Workplace Context: Title VII as a Tool for Institutional Reform, 72 FORDHAM L. REV. 659, 672 (discussing market failures to correct discriminatory institutional practices in an employment context).
54 See Green, supra note 52 (noting that the immediate costs of evaluating institutional practices and implementing change deters current executives from taking corrective action).
effective government action. Legal challenges can also focus public attention on super disparities and help institutions examine their own actions and seek better and less discriminatory solutions. Without legal redress, state-funded super disparities will continue to cause considerable and unnecessary harm to individuals and threaten the legitimacy and efficacy of some of our most important institutions.

III. State Legislature Intended Broad Relief Under §11135

California’s anti-discrimination statute, California Government Code §11135, provides a potentially powerful tool to address super disparities in California. Section 11135 and its regulations prohibit state-funded discrimination, both intentional and unintentional. Over three decades of legislative history reveals that the California legislature intended to provide broad relief under §11135 and a private right of action to enforce it even in the face of state court attempts to narrow the statute’s construction.

A. Origins of California’s Anti-Discrimination Statute

In 1977, the California legislature enacted a state law analog to the federal Title VI of the 1964 Civil Rights Act, prohibiting discrimination in state-funded agencies and programs. The California legislature proclaimed: “No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under any program or activity that is funded directly by the state, or receives any financial assistance from the state.” This legislation, codified as California Government Code §11135-11139.5, authorized the Secretary of the Health and Welfare Agency to issue regulations defining the parties protected by §11135 and what practices were to be deemed discriminatory. The final regulations, California Administrative Code Title 22, §98101, were issued in 1980 and defined discrimination to include not only

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55 See generally Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1015, 1074-80 (contending that litigation can effectively destabilize entrenched institutions that have systematically failed to meet its obligations and respond to traditional forces of political correction).

56 Id; See e.g., Darenburg v. Metropolitan Transportation Commission, 611 F.Supp.2d 994, 999-1000 (N.D. Cal. 2009)(The Court notes that “this lawsuit may had some salutary impact on causing [defendants] to refine [their] policies.).

57 See Darenburg, 611 F.Supp.2d 994 at 1041 (noting that §11135 is an analogous statute to Title VI). Also compare CAL. GOV’T CODE §11135 (1977), and 42 U.S.C. §2000d. Title VI of the 1964 Civil Rights Act (stating that “ No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).


60 California Government Code §11139.5 states: “The Secretary of the Health and Welfare Agency, with the advice and concurrence of the Fair Employment and Housing Commission, shall establish standards for determining which persons are protected by this article and standards for determining what practices are discriminatory.”
intentional discrimination, but also practices that result in disparate impacts.\textsuperscript{61} The regulations prohibit practices that “utilize criteria or methods of administration that have the purpose or effect of subjecting a person to discrimination.”\textsuperscript{62}

Section 11135’s final regulations also incorporated by reference the stringent “business necessity” standard to rebut a \textit{prima facie} case of disparate impact discrimination, evidencing the legislature’s intent to provide considerable protections against discrimination. Section 11135’s regulations incorporate by reference the definitions and prohibitions contained in the Fair Employment and Housing Act’s (FEHA) implementing regulations, stating that FEHA’s definitions and prohibitions would control in the event of any conflicts between the two provisions.\textsuperscript{63} FEHA defines the appropriate rebuttal burden to be the “business necessity” standard, which requires defendants to prove that the challenged practice is necessary for safe and efficient operation of the business, is related to the stated business purpose, and cannot be replaced by an equally effective but less discriminatory alternative to rebut a finding of disparate impact discrimination.\textsuperscript{64}

\textbf{B. The Legislature Continues to Broaden the Scope of §11135}

During the two decades following §11135’s enactment, state courts questioned whether §11135 provided a private right of action and attempted to narrowly define the programs and activities covered under the statute. During this same period of time, the California legislature amended §§11135-11139.5 on multiple occasions to ensure a broad construction of the statute and to correct state court interpretations of §11135 that the legislature deemed too narrow. The legislature expanded both the statute’s coverage and relief in at least eight instances, making the legislative intent enormously clear.

First, in response to \textit{Arriaga v. Loma Linda University},\textsuperscript{65} where a state court found no private right of action under §11135, the legislature passed A.B. 1670, the Civil Rights Amendments of 1999.\textsuperscript{66} The amendment inserted into §11139 an explicit private right of action to enforce the provisions and regulations

\textsuperscript{61} Final regulations were not issued until June 1980, after a suit was filed against the Secretary for delay. See Westside Community for Independent Living v. Obledo, 33 Cal.3d 348, 657 P.2d 365 (Cal. 1983)(deciding that attorneys fees were improper for the attorney who brought suit against the Secretary of Health and Welfare Agency for failing to issue final regulations implementing §11135 because the attorney failed to show that his/her actions resulted in the relief obtained – namely, expediting the process).

\textsuperscript{62} \textsc{cal. code regs.} tit. 22, §98101(i)(1).

\textsuperscript{63} \textsc{cal. code regs.} tit. 22, §98400.

\textsuperscript{64} \textit{Id.} California Administrative Code Title 2, §7286.7(b) states: “Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove… that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact.” \textit{Id.}


\textsuperscript{66} 1999 Cal. Stat. c. 591 (A.B. 1670), §3.
of the article. Additionally, the legislature mandated that “this article shall not be interpreted in a manner that would frustrate its purpose.” For the following decade, only one state court opinion citing §11135 was published, mentioning §11135 in passing.

In 2001, the legislature amended the statute again to add that this private right of action for equitable relief was “independent of any other rights and remedies.” The 2001 amendment’s purpose was to clarify that plaintiffs need not exhaust administrative remedies before filing suit under §11135. The Assembly Floor Analysis explains: “This bill clarifies that a victim of unlawful discrimination in programs or activities funded by the state need not pursue administrative or other remedies prior to, or instead of, bringing an action for equitable relief, nor would any victim be required to elect one remedy.”

Second, as a part of the 2001 amendments, the legislature broadened the scope of §11135 to include programs or activities that are “conducted, operated, or administered by the state or by any state agency.” The 2001 amendment was intended to require the state and state agencies to comply with the same nondiscriminatory obligations as other recipients of state funds. Thus, the legislature defined the programs, activities, and entities that would be subject to the statute broadly and with the intent to be inclusive.

The legislature continued to broaden the scope of §11135 to include discrimination against a range of protected classes. In 2002, the state legislature amended §11135 to include race and national origin. Four years later, the state legislature added “sexual orientation” as a protected class and inserted subsection (f) that prohibits discrimination based on even the perception that a person has any of the characteristics associated with a protected class.

As a result of the California Civil Rights Amendments of 1999 that explicitly provided a private right of action to enforce §11135’s provisions and regulations, the US Supreme Court decision in Alexander v. Sandoval, and a growing awareness of §11135’s potential, many more §11135 claims began to appear in California state courts by 2002. However, most §11135 claims that reached the courts did not raise an explicit disparate impact theory, thus state courts did not have the opportunity to definitively find a private right of action for

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67 Id. The California Civil Rights Amendments of 1999 stated: “This bill would make these provisions and regulations thereunder enforceable by a civil action for equitable relief.” Id. California Government Code §11139 was amended to read: “This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief.” CAL. GOV’T CODE §11139 (1999).
69 Pensinger v. Bowsmith, Inc., 60 Cal. App. 4th 709, 70 Cal. Rptr. 2d 531 (Cal. App. 5 Dist. 1998)(mentioning that §11135, like FEHA, was amended to define “disability” in a manner consistent with the ADA).
71 Assembly Floor Analysis, 8/30/01.
73 Assembly Floor Analysis, 8/30/01.
76 532 U.S. 275 (2001)(holding that no private right of action existed to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964).
disparate impact claims under §11135.77 In a few cases, disparate impact arguments were raised by *amici curiae* and not by the parties themselves. In these cases, state courts have assumed that disparate impact claims are cognizable under §11135.78

In 2005, state courts heard their first explicit disparate impact case in *Garcia v. California State University*.79 In *Garcia*, the Second District Court of Appeals faced an explicit disparate impact racial discrimination claim against California Polytechnic State University’s admissions criteria.80 Plaintiffs alleged that the university’s admissions criteria, which relied on SAT I and ACT scores and gave preference to applicants from the surrounding geographical area, had a discriminatory effect on Latino applicants.81 In the Respondent’s Brief, defendants argued that disparate impact claims, in the absence of discriminatory intent, were not intended under §11135.82 The Second District Court of Appeals chose not to address the disparate impact issue.83


78 In 2002, the Third District Court of Appeals in *Fry v. Saenz* decided that the Department of Social Services’ policy of discontinuing CalWORKS benefits to children who turned 18 without having graduated high school unlawfully discriminated against disabled children who required more time to complete high school. 120 Cal. Rptr. 2d 30 (Cal. Ct. App. 2002). Although no disparate impact claim was explicitly presented, the court concluded that the high school completion policy discriminated against the disabled and the policy was not essential for the purpose of the CalWORKS program. *Id.* at 35–37. In 2007, the Third District Court of Appeals in *Vaira v. W.C.A.B.* noted that although organizations submitting amicus briefs (Public Advocates, American Association of Retired Persons, American Civil Liberties Union of Northern California and Equal Rights Advocates) argued that reducing disability compensation based on osteoporosis had a disparate impact on women, this argument was not a part of the plaintiff’s litigation theory and thus the court lacked evidence to make a disparate impact finding. No. C054948, 2007 WL 4227253, (Cal. Ct. App. 2007). The court concluded that even if there was disparate impact on women, calculating in pre-existing conditions into disability calculations for worker’s compensation was not discrimination. *Id.* at *8.

79 *See* Respondent’s Brief, 2005 WL 1123998, at *12, Garcia v. Board of Trustees of the California State University, No. B178329, 32 Cal. Rptr. 3d 724 (Cal. Ct. App. 2005) *(depublished).* Additionally, defendants argued that “there are strong societal reasons for disfavoring disparate ‘effect’ claims,” and provide as illustration, that the impact in this case was not created by the tests or geographic service area, but by the “underlying socio-economic factors which the university does not control.” *Id.* at *33.

Rather than decide the case on its merits, the court held that California State Universities did not conduct a “program or activity” for the purpose of §11135.84 The court explained its holding: “In amending section 11135, the Legislature drafted plans that call for a shower in the living room. We cannot remove the shower, but we can cap the water pipe to prevent damage to the furniture.”85 In response to what the court believed to be an “anomalous” and “disquieting” amendment that would subject California State Universities to private disparate discriminatory impact suits, the court held that California State Universities were not subject to §11135 and urged the legislature to “remove the shower.”86

In response, the legislature passed A.B. 1742, inserting an additional sentence into the original §11135 language to explicitly include California State Universities.87 Section 40 of the bill explained: “it is the intent of the Legislature in amending Section 11135 of the Government Code to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in Garcia v. California State University.”88 The Garcia opinion was subsequently ordered de-published.

Finally, many state court decisions construing §11135 were not officially published or have been subsequently de-published as a result of legislative action, leaving little precedent of value.89 In the absence of stronger state court precedent, state courts should interpret §11135 consistent with the unambiguous legislative intent that §11135 provide robust protections against state-funded discrimination and the private right of action to enforce it.

IV. Recent Federal Court Interpretation Weakens §11135 Protections

In recent decisions, federal courts have properly recognized §11135’s private right of action in disparate impact claims. However, in Darensburg v. Metropolitan Transportation Commission,90 the Federal District Court for the Northern District of California failed to hold defendants to the more stringent “business necessity” standard, and instead adopted a lower “substantial legitimate justification” standard in complex decision making processes. In doing so, the court robs §11135 of its potential to address the super disparities that arise

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84 Id.
85 Id.
86 Id.
87 2005 Cal. Stat. c. 706 (A.B. 1742), §20. After numerous amendments to clarify and expand the protective provisions of the statute, California Government Code §11135 now reads: “(a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly be the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.” CAL. GOV’T CODE §11135 (2007).
89 See infra Part III.C.4.
precisely in the complex decision making environments so typical of government and large public institutions.

A. Federal Courts Properly Recognize §11135’s Explicit Private Right of Action

In Committee Concerning Community Improvement v. City of Modesto, plaintiffs claimed that over the last fifty years, the City of Modesto had grown steadily by annexing certain predominantly white residential developments but continuing to leave many predominantly Latino neighborhoods unincorporated. Plaintiffs asserted that as a result, the residents of these neighborhoods were left without sidewalks, proper sewage, or effective law enforcement. Local decisions regarding annexation and funding, plaintiffs alleged, had disproportionately harmed Latinos.

In Committee Concerning Community Improvement, the Federal District Court for the Eastern District of California followed existing federal law and dismissed the plaintiff’s federal §1983 and Title VI claims for failure to show discriminatory intent and declined to grant supplemental jurisdiction over the state §11135 claim, dismissing it without prejudice. In explaining its decision, the court acknowledged that “intentional discrimination is not required for proof of a §11135 claim, which may be proved by disparate impact,” and reasoned that although the state and federal claims arise from the same set of operative facts, the proof for a disparate impact state claim would be entirely different from the federal claim. Additionally, the court stated that the determination of whether the plaintiff’s disparate impact evidence provided sufficient proof to succeed under §11135 will be guided by state law.

In Darensburg v. Metropolitan Transportation Commission, minority public transportation riders alleged that the Metropolitan Transportation Commission (MTC) consistently under-funded AC Transit, a Bay Area bus line with high minority ridership, in comparison to other transit systems like BART, with lower minority ridership. Plaintiffs contended that the MTC’s funding decisions resulted in racial disparities in mobility that gave rise to economic and quality of life injuries.

In Darensburg, the Federal District Court for the Northern District of California held that a disparate impact private right of action is available under §11135. The court explained that the lack of a disparate impact private right of

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93 Id.
94 Id.
95 Committee Concerning Community Improvement, 2007 WL 2408495, at *8.
96 Id.
97 Id.
100 Id.
101 Darensburg, 611 F.Supp.2d at 1041-42.
action under Title VI in federal discrimination cases did not apply to state claims arising under §11135.\textsuperscript{102} The California disparate impact statute is distinguishable because the statutory scheme, provided in §11139, expressly provides a private right of action to enforce §11135 and its regulations.\textsuperscript{103} California Government Code §11139 states: “This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief.”\textsuperscript{104} Thus, on summary judgment, the \textit{Darensburg} court explained that the “reasoning in \textit{Sandoval} is not applicable to private enforcement of California’s disparate impact regulations.”\textsuperscript{105} The court granted defendant’s motion for summary judgment with respect to the Title VI intentional discrimination but denied the motion with respect to the disparate impact claim brought under §11135, finding triable issues of fact.\textsuperscript{106}

\textbf{B. The \textit{Darensburg} Court Adopts a Lower Burden of Proof for Defendants}

At trial, the \textit{Darensburg} court found that plaintiffs succeeded in establishing that the MTC’s process for determining which transportation projects to fund in their strategic long-range plan constituted a \textit{prima facie} case of disparate impact discrimination.\textsuperscript{107} The standard for meeting this burden under §11135 required the plaintiffs to show: (1) the occurrence of certain outwardly neutral practices; and (2) a significantly adverse or disproportionate impact on minorities produced by the defendant’s facially neutral acts or practices.\textsuperscript{108} After finding that the plaintiff met their burden with respect to defendant’s long-range strategic plan, the burden shifted to the MTC to justify its actions.\textsuperscript{109} The parties, however, had a fundamental disagreement about the nature of the MTC’s burden.

Plaintiffs argued that MTC must demonstrate a strict business or transportation necessity through empirical validation studies, citing landmark disparate impact cases involving employment discrimination.\textsuperscript{110} MTC responded by asserting that it need only show a substantial legitimate justification for its actions in order to carry its burden, relying on lower court cases from other jurisdictions that arose in the transportation context.\textsuperscript{111}

After weighing both arguments on the appropriate standard, the court adopted a substantial legitimate justification test from a transportation case in the

\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} CAL. GOV’T CODE §11139.
\textsuperscript{105} \textit{Darensburg}, 2008 WL 3915349 (N.D. Cal. Aug. 21, 2008), at 14. The court refers to \textit{Alexander v. Sandoval}, 532 U.S. 275, 280-81 (2001), in which the Supreme Court finds no private right of action to enforce disparate impact regulations promulgated under Title VI.
\textsuperscript{106} Id. at *23-24.
\textsuperscript{107} Id. at 1044. However, the court found that MTC’s apportionment of committed and uncommitted funds did not. \textit{Id.} at 1051.
\textsuperscript{108} Id. at 1042 (citing \textit{Gamble v. City of Escondido}, 104 F.3d 300, 306 (9th Cir. 1997))
\textsuperscript{111} Id. at 1051 (citing \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971); \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405 (1975).
\textsuperscript{111} Id.
The court explained that this standard was appropriate here because the MTC was responsible for making complex policy and budgetary decisions that involved a number of operators, with overlapping service populations. Additionally, the MTC had to make these decisions within a complex web of statutory, regulatory and administrative constraints and competing policy goals. However, the court rejected the lower standard of “legitimate nondiscriminatory reasons” which had been used in several lower court cases, and stated that requiring a higher substantial legitimate justification would provide protection against “illegal discrimination masquerading as a neutral policy.”

Ultimately, the court concluded that the MTC needed to show a substantial legitimate justification for its conduct supported by persuasive evidence, and was not required to conduct statistical studies. As a result, the MTC was found to have met this less stringent standard by demonstrating that the funding decisions were based on existing constraints and legitimate goals and that their decisions improved interconnectivity and convenience for all transit riders. The burden then shifted back to the plaintiffs to show an equally effective alternative to the MTC’s current practices. The Darensburg court held that plaintiffs failed to show that an equally effective but less discriminatory alternative existed by a preponderance of the evidence. Thus, injunctive relief was denied.

In November 2009, the plaintiffs in Darensburg filed an appeal to the Ninth Circuit Court of Appeals arguing that the lower court erred by departing from the “business necessity” standard required by state regulations and that complex and competing goals do not justify the use of a lower standard. In adopting a lower burden of proof for defendants in complex decision-making processes, the Darensburg court weakens the anti-discrimination protections of §11135 and shields large-scale institutional decisions, which often involve complex and competing interests and affect a large number of people, from close scrutiny.

C. A More Stringent Standard is Necessary, Especially in Complex Decisions

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112 Id. at 1053 (distinguishing Darensburg from Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and adopting the standard articulated by the Second Circuit in New York Urban League v. State of New York, 71 F.3d 1031 (2d Cir. 1995)).
113 Id.
114 Id.
115 Id. at 1054.
116 Id.
117 Id. at 1057-58.
118 Id. at 1060.
119 Id. at 1061.
120 The following section is taken substantially verbatim from the amicus curiae brief filed in support of appellants in the Darensburg appeal to the United States Court of Appeals for the Ninth Circuit. Brief of Amicus Curiae of the Impact Fund, Equal Justice Society et al. in Support of Plaintiff-Appellants and In Support of Reversal at 20, Darensburg v. Metropolitan Transportation Commission, No 09-15878 (9th Cir. Nov. 23, 2009). This section was originally written by Danfeng Soto-Vigil Koon and the attorneys of record have granted permission to include it here.
Contrary to the opinion of the Daresburg court that complex decision-making processes justify the use of a lower rebuttal burden for disparate impact claims, decades of social science research in psychology, sociology, and political science indicate that complex decision-making processes are particularly susceptible to implicit biases, errors in judgment, and improper influences of power. However, these biases can be mitigated or prevented by careful attention to process. A rigorous standard of justification encourages policymakers to commit the necessary time and resources to ensure rational and less biased decision-making processes. Thus, holding defendants to the more stringent “business necessity” standard in decisions with discriminatory impact is not only a proper but necessary measure to ensure thoughtful and nondiscriminatory policymaking.

Research indicates that when making complex decisions, decision-makers are rarely able to take all relevant information into account.121 Instead, decision-makers cope with overwhelming complexities by applying socially developed theories or mental scripts to fill in missing information and reconcile discrepancies.122 These mental shortcuts include stereotypes, typologies of attitudes such as political or religious affiliation, and general rules of thumb that allow decision-makers to make future predictions based on a small, and often non-representative, sample of past experiences.123 One documented bias arises when decision-makers assess the probability of an event by the ease with which it comes to mind.124 For example, decision-makers tend to overstate the probability of events or truths of ideas that consistently appear in the news, are often repeated, or are simpler to understand.125 As a result of this bias, the concerns and experiences of minorities, as well as less popular ideas, will not ring as true to decision-makers for whom these experiences or ideas are unfamiliar.

Considerable research on implicit bias also shows that individuals unconsciously associate groups with particular attributes, and these implicit biases can produce discriminatory behavior that diverges from a person’s stated or explicit beliefs.126 When policy-makers make decisions under time constraints, use unclear standards and criteria for judging between alternatives, and have inadequate access to information, unbounded discretion permits personal implicit biases to distort decision-making processes.127 Conversely, rational processes that utilize consistent objective measures and provide decision-makers with information reduce discretion and minimize the impact of personal biases.128

Moreover, studies on group decision-making behavior demonstrate how group dynamics in complex decision environments lead to additional biases and

121 JAMES G. MARCH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN 8 (1994).
122 Id. at 11.
123 Id.
126 See supra note 29 and accompanying text.
127 See supra notes 29-35 and accompanying text.
128 Greenwald & Krieger, supra note 29.
errors in judgment. In group decision-making processes, the desire and pressure to be loyal to the group and conform to the majority can lead to a deterioration of mental efficiency, reality testing, and moral judgment in its members. This phenomenon is described as “groupthink,” and can significantly distort the decision-making process. For instance, case studies have found that groups function with “groupthink” limit their discussions to only a few alternative courses of action, fail to reexamine decisions even after they learn of risks and drawbacks they had not originally considered, spend little or no time discussing whether discarded alternatives have any merit or feasibility, and make little or no attempt to obtain information from experts. While members pay positive attention to facts and opinions that support their preferred policy, they tend to ignore facts and opinions that do not.

Studies show that organizations that follow more rational procedures for decision-making formulate efficient decisions that are more narrowly tailored to address the problem at hand. In one study, researchers found that decision processes that involved more extensive information gathering and use of quantitative analytic techniques resulted in more effective decisions. To reduce “groupthink,” decision processes must include a wider range of policy alternatives, opinions and challenges by outside experts, a careful examination of doubts and opposing opinions, and statistical analysis on risk and consequences.

Finally, complex decision processes are particularly susceptible to distortions due to power and politics because inconsistent goals and uncertainties about consequences make rational decision-making difficult. Complex decisions require judgment and compromise on who should be benefited and who should be burdened. Unfortunately, power influences whose interests prevail and politics shape how compromises are reached. Research in multiple organizational settings documents that decision-makers make decisions based on considerations of power rather than what is best for the organization. Often, entities that are able to bring in more resources to an organization are favored over those that cannot, even when this practice exacerbates existing

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130 Id.
131 Id.
135 Id. at 454.
inequalities.\textsuperscript{137} These power distortions in the decision-making process lead to inefficiency and inequity.\textsuperscript{138}

Ideally, policy-makers faced with complex policy decisions should carefully weigh alternatives by applying objective criteria and accurate measures of how alternative policies will meet their goals. Social science research shows that, absent explicit requirements, such steps are often not taken. Validation research, which links means to ends, is indispensable to responsible decision-making.\textsuperscript{139} Where a policy has an adverse impact upon a protected class, an empirically-based justification for the policy is in fact necessary and central to reducing or eliminating unnecessary discriminatory impact. Only a rigorous standard that requires defendants to show both an overriding legitimate business purpose, and that the challenged practice effectively fulfills the business purpose, will create a level of accountability that reduces the biases, errors in judgment, and improper influences of power inherent in complex decision making. Requiring defendants to meet the stringent business necessity standard forces decision-makers to consider the interests of less powerful groups and acts as a check against powerful majorities.

\textbf{V. Conclusion}

Unfortunately, the institutions that we trust to raise our children, protect our families, provide for our basic necessities, and care for us when we are ill, produce harmful super disparities. Moreover, these contemporary super disparities are not necessarily products of intentional ill will or bigotry but often the result of implicit biases and errors in judgment that exist in our institutions’ decision-making processes. Laws, such as California’s §11135, preserve our ability to challenge obvious institutional super disparities and to require powerful public agencies to make thoughtful decisions.

The persistence of super disparities in so many aspects of American life questions not only our self-perception but also our future. Super disparities impose significant and unjustified harms on individuals. Moreover, these often predictable and readily observable disparities erode public trust in our state-funded programs and detrimentally impact their function. In recent years, researchers, governmental agencies, and institutions themselves, have sounded the alarm bell. However, without effective legal enforcement, market forces fail to produce the necessary incentives for institutional change.

While no federal private right of action to challenge disparate impact discrimination by state-funded programs exists, §11135 provides a potentially powerful tool to address super disparities in California. California has a long history of providing individuals with greater civil rights, consumer protections, and environmental conservation laws than those available under federal law.\textsuperscript{140}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} Salancik & Pfeffer, \textit{supra} at 470.
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} Herbert A. Simon, \textit{Administrative Behavior: A Study of Decision Making Process in Administrative Organizations} 189 (1961).
\item \textsuperscript{140} For example, the California Supreme Court struck down California’s anti-miscegenation statute two decades before the U.S. Supreme Court reached the same conclusion. \textit{See} Perez v. Sharp, 32 Cal. 2d 711, 731 (Cal. 1948). The California Supreme Court also has long recognized gender as a
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Section 11135 provides an opportunity for California to lead the nation once again in addressing contemporary forms of discrimination and the resulting super disparities in our public institutions. However, a private right of action to enforce disparate impact prohibitions and a stringent rebuttal burden are both essential to maintaining §11135’s potency and to helping us move towards a truly discrimination-free nation.

suspect classification requiring strict scrutiny while federal courts apply only an intermediate standard to gender discrimination claims. See Sail’er Inn v. Kirby, 5 Cal. 3d 1, 16-20 (Cal. 1971). In the area of consumer protection, California state courts have also led the nation. The California courts were the first to adopt strict products liability, see Malia S. Lee, Comment, The Strict Products Liability Sleeper in Hawai‘i: Toward Exclusion of the “Unreasonably Dangerous” Standard, 26 U. Haw. L. Rev. 143, 148 (2004)(citing Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963)), and developed the “market share liability” theory that allowed consumers to recover in cases where proof of individual causation was impractical. Andrew R. Klein, Causation and Uncertainty: Making Connections in a Time of Change, JURIMETRICS J. 5, 16 (2008)(citing Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980).